

Case Summary

HKSAR v Lai Chee Ying (黎智英)

FACC 1/2021; [2021] HKCFA 3; (2021) 24 HKCFAR 33
(Court of Final Appeal)

(Full text of the Court’s judgment in English at
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133491&QS=%2B&TP=JU&ILAN=en)

Before: Cheung CJ, Ribeiro and Fok PJJ, Chan and Stock NPJJ

Date of Hearing: 1 February 2021

Date of Judgment: 9 February 2021

Approach to construing the NSL – extent of the CFA’s powers of constitutional review in connection with provisions of the NSL – effect of NSL 42(2) on bail – specific exception from bail regime introducing more stringent threshold requirement – “sufficient grounds” question – relevant considerations

Background

1. The Respondent was charged with “collusion with a foreign country or with external elements to endanger national security”, contrary to NSL 29(1)(4). A judge granted him bail subject to undertakings and conditions. The prosecution sought the CFA’s ruling on the correct interpretation of NSL 42(2).

Major provision(s) and issue(s) under consideration

- NSL 4, 5, 41, 42 and 62
- Criminal Procedure Ordinance (Cap. 221) (“CPO”), ss. 9D and 9G.

2. The CFA discussed: (a) the approach to construing the NSL; (b) the extent of the CFA’s powers of constitutional review in connection with provisions of the NSL in general and NSL 42(2) in particular; (c) the construction of NSL 42(2); (d) the relevance of bail conditions to the “sufficient grounds” question under NSL 42(2); (e) whether the prosecution bore the burden of proof in establishing that bail should not be granted; and (f) the Judge’s decision to grant bail to the Respondent.

Summary of the Court’s rulings

(a) The approach to construing the NSL

3. NSL 42(2) should be construed in the light of the context and purpose of the NSL as a whole, taking into account the constitutional basis upon which the NSL was applied in the HKSAR. Given the special status of the NSL as a national law applied under BL 18 and the express reference in NSL 1 to that process, regard might properly be had to the Explanations and Decisions made in proceedings of the NPC and NPCSC regarding promulgation of the NSL as a law of the HKSAR as extrinsic materials relevant to the consideration of the context and purpose of the NSL. (paras. 8 and 11)

4. While the NSL was intended to operate in tandem with the laws of the HKSAR, seeking “convergence, compatibility and complementarity” with local laws, NSL 62 provided for possible inconsistencies, giving priority to NSL provisions in such cases. (para. 29)

(b) Extent of CFA’s powers of constitutional review

5. The promulgation of the NSL as a law of the HKSAR was done in accordance with BL 18(2) and (3) on the footing that safeguarding national security was a matter outside the limits of the HKSAR’s autonomy and within the purview of the Central Authorities and the CPG had an overarching responsibility for national security affairs relating to

the HKSAR. In the light of *Ng Ka Ling v Director of Immigration* (No. 2) (1999) 2 HKCFAR 141, the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provisions of the Basic Law and the procedure therein, were not subject to constitutional review by the CFA on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong. (paras. 32, 37, 42 and 70(a))

(c) Construction of NSL 42(2)

6. NSL 41 and 42 made it clear that in respect of offences of endangering national security, the laws of the HKSAR “shall apply to procedural matters”, including matters related to criminal investigation, prosecution, trial, and execution of penalty, as well as matters such as detention and time limit for trial. The rules governing bail in general therefore operated in national security cases subject to any specific changes effected by NSL 42(2) which were made to prevail by NSL 62. (para. 40)

7. NSL 42(2) was to be construed and applied with the guarantees of human rights and the rule of law values affirmed by NSL 4 and 5, as well as with the general procedural rules made applicable by NSL 41 and 42, read as a coherent whole. As far as possible, NSL 42(2) was to be given a meaning and effect compatible with those rights, freedoms and values. (paras. 42 and 70(c))

8. NSL 42 (2) created a specific exception to the HKSAR rules and principles governing the grant and refusal of bail, and imported a new and more stringent threshold requirement for bail applications. Under s. 9G(1) of the CPO, the rule was “grant bail unless there are substantial grounds to believe violation will occur” which embodied the presumption in favour of bail, while under NSL 42(2) it was “no bail unless there are sufficient grounds to believe violation will not occur”,

thus excluding the presumption of bail in the first instance. (paras. 53(b) and 70(b))

9. By using the word “continue”, NSL 42(2) recognised that the defendant was alleged to have committed offence(s) involving acts endangering national security, and required assurance that he would not commit acts of such a nature if bail was granted. It was difficult to envisage the accused committing acts endangering national security which would not amount to offences either under the NSL or under HKSAR law “[s]uch as the offences of treason, incitement to disaffection or sedition under Parts I and II of the Crimes Ordinance”. The phrase “acts endangering national security” should be construed as referring to acts of that nature capable of constituting an offence under the NSL or the laws of the HKSAR safeguarding national security. (paras. 53(c) (together with footnote 40) and 70(d)(ii))

(d) The relevance of bail conditions to the “sufficient grounds” question under NSL 42(2)

10. All bail decisions involved a risk assessment looking to the future. The court should not be confined to looking only at the evidence available at the time of the bail hearing and to exclude consideration of matters which might have a bearing on the accused’s likely conduct pending trial. (para. 57)

11. In applying NSL 42(2), the judge must first decide whether he had sufficient grounds for believing that the accused would not continue to commit acts endangering national security. In doing so, the judge should consider everything that appeared to the court to be relevant to making that decision, including the possible imposition of appropriate bail conditions and materials which would not be admissible as evidence at the trial. It might in particular cases be helpful to have regard to

factors such as those set out in s. 9G(2) of the CPO. (paras. 58, 60 and 70(d)(i))

12. If, having taken into account all relevant materials, the judge concluded that he did not have such sufficient grounds, bail must be refused. If, on the other hand, the judge concluded that he did have such sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail, applying the presumption in favour of bail. These included consideration of: (a) whether there were substantial grounds for believing that the accused would fail to surrender to custody, or commit an offence (not limited to national security offences) while on bail, or interfere with a witness or pervert or obstruct the course of justice; and (b) whether conditions aimed at securing that such violations would not occur ought to be imposed in accordance with ss. 9D(2) and 9G of the CPO. (para. 70(e) and (f))

(e) Whether the prosecution bore the burden of proof in establishing that bail should not be granted

13. The decision whether or not to grant bail involved a predictive and evaluative exercise. The judge should regard the NSL 42(2) “sufficient grounds” question as a matter for the court’s evaluation and judgment and not as involving the application of a burden of proof, so that there was no burden resting on either party. (paras. 67, 68 and 70(d)(iii))

(f) The Judge’s decision to grant bail to the Respondent

14. In granting bail to the Respondent, the Judge misconstrued NSL 42(2) and misapprehended the nature and effect of the threshold requirement created. He elided the NSL 42(2) question with the discretionary considerations set out in s. 9G of the CPO. His decision to grant the Respondent bail was set aside. (para. 80)