

## Case Summary

### HKSAR v Lai Chee Ying (黎智英)

HCCP 727/2020 and HCCP 738/2020; [2020] HKCFI 3161;  
[2021] 1 HKC 331  
(Court of First Instance)

(Full text of the Court’s reasons for ruling in English at  
[https://legalref.judiciary.hk/lrs/cosunmmon/ju/ju\\_frame.jsp?DIS=132659&currpage=T](https://legalref.judiciary.hk/lrs/cosunmmon/ju/ju_frame.jsp?DIS=132659&currpage=T))

Before: Hon Alex Lee J

Date of Hearing and Ruling: 23 December 2020

Date of Reasons for Ruling: 29 December 2020

*Bail review under s. 9J of Criminal Procedure Ordinance (Cap. 221) – nature and seriousness of offences – offences under NSL serious in nature – weight of evidence – premature to form a view as investigation still on-going – pre-NSL conduct capable of forming background – flight risk could be ameliorated by suitably stringent conditions – undertaking by applicant and residence condition constituted sufficient grounds for belief that applicant would not commit acts endangering national security if granted bail – certificate of law seeking to appeal to CFA refused as a decision to refuse or grant bail being not final*

### Background

1. The Applicant was charged with: (a) one count of fraud, contrary to s. 16A of the Theft Ordinance (Cap. 210), in WKCC 4217/2020 (“the fraud case”); and (b) one count of collusion with a foreign country or with external elements to endanger national security, contrary to NSL 29(1)(4), in WKCC 4341/2020 (“the NSL case”).

2. In the fraud case, it was alleged that between 27 June 2016 and 22 May 2020, the Applicant together with two others defrauded the landlord

by concealing and making false representation about the use of the subject premises by a secretarial company called “Dico” for purposes not permitted under the lease made in May 1999 between the Hong Kong Science and Technology Parks Corporation as the landlord and Apple Daily Printing Ltd as the tenant.

3. In the NSL case, it was alleged that between 1 July 2020 and 1 December 2020, the Applicant requested a foreign country or an institution, organization or individual outside the mainland, Hong Kong, and Macao of the PRC, to impose sanctions or blockade, or engage in other hostile activities against the PRC or the HKSAR, which allegation was based on what he had allegedly said in articles published in Apple Daily, in interviews with overseas media and in Twitter posts.

4. The Applicant was refused bail by the Chief Magistrate in both cases. He applied to the CFI for bail review pursuant to s. 9J of the Criminal Procedure Ordinance (Cap. 221) and the two applications were heard together.

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

- NSL 29(1)(4) and 42(2)
- Criminal Procedure Ordinance (Cap. 221) (“CPO”), ss. 9G(1) and (2), and 9J
- Hong Kong Court of Final Appeal Ordinance (Cap. 484) (“HKCFAO”), ss. 31(b), 32 and 35(2)

5. In determining the bail applications, the Court examined three issues:

- (a) the nature and seriousness of the offences and the weight of the evidence;
- (b) the risk of the Applicant absconding; and
- (c) the risk of the Applicant committing offence whilst on bail.

#### **Summary of the Court’s rulings**

6. The Court applied the legal principles on bail review under s. 9J of the CPO which had been summarized in *HKSAR v Vu Thang Duong* [2015] 2 HKLRD 502 and *HKSAR v Wong Chi Fung* [2020] HKCFI 392. As regards bail applications for persons charged for offences under the NSL, the Court referred to the legal principles considered by the CFI in *Tong Ying Kit v HKSAR* [2020] HKCFI 2133 and *HKSAR v Tong Ying Kit* [2020] HKCFI 2196.\* (para.8)

***(a) Nature and seriousness of the offences and the weight of the evidence***

7. In opposing the application, the Respondent submitted that the two charges were serious and the evidence against the Applicant was “strong” and therefore substantial terms of imprisonment were likely in case of conviction. The Court stated that it would be premature to form any definite view under this head as the investigation was still on-going. (paras. 5(a) and 9)

8. The assessment of the Court was that the factors relied upon by the prosecution under this head did not weigh in their favour. (para. 20)

- *The fraud case*

- (a) The defence seemed to have an arguable case that the defendants did not owe a duty to disclose the relevant fact to the landlord. (para. 11)
- (b) Whether an allegedly false representation made by one of the co-accused was admissible against the Applicant remained to be seen. (para. 12)
- (c) There was evidence suggesting the absence of intention to conceal and this was in favour of the defence. (para. 13)
- (d) It seemed that the space occupied by Dico only constituted a small portion of the subject premises, and this was a matter which would need to be taken into account when it came to sentence. (para. 14)

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\* Editor’s note: Both CFI decisions have been overruled by the CFA in *HKSAR v Lai Chee Ying* [2021] HKCFA 3.

(e) The offence of fraud was one for which bail had been routinely granted. (para. 15)

- *The NSL case*

(a) Since any offences under the NSL would be serious in nature (or else there would not be different levels of minimum sentences stipulated in different articles of the NSL), the Court was prepared to assume that the alleged criminality of the Applicant, if proved, was on the high side. (para.16)

(b) Although what the Applicant had done before 1 July 2020 could not in law form the subject matter of the NSL charge, the Court accepted that the Applicant's words and conduct before that date were capable of forming the background in the light of which his subsequent conduct could be interpreted and his state of mind inferred. (para. 18)

(c) The substance of the NSL charge was that the Applicant had made a "request" which contravened NSL 29(1)(4). However, the two statements of the Applicant relied upon by the prosecution on their face appeared to be comments and criticisms rather than requests. For the purpose of the bail review, the defence's stance was on its face arguable. (para. 19)

**(b) Risk of the Applicant absconding**

9. The Respondent referred to s. 9G(1)(a) of the CPO and submitted that there were substantial grounds for believing that the Applicant would fail to surrender to custody as the court might appoint, relying on the following factors, among others: (paras. 5(b), 21, 25 and 26)

- (a) the Applicant was facing multiple criminal proceedings;
- (b) he had family and extensive business ties overseas;
- (c) he had financial resources at his disposal;
- (d) he owned two pleasure boats which could be used for leaving Hong Kong illegally;
- (e) a number of foreign countries had either terminated or suspended their mutual legal assistance and surrender of

fugitive offenders arrangements with the HKSAR, which would increase the difficulties of seeking the return of the Applicant should he leave Hong Kong;

- (f) various foreign countries had been exerting political pressure seeking the release of the Applicant;
- (g) there were recent incidents of people not answering bail.

10. Having looked at all the matters in the round, the Court was satisfied that the flight risk could be ameliorated so that it could become acceptable by imposing suitably stringent conditions. (para. 28)

- (a) The Applicant had hitherto complied with each and every condition of bail provided for by the courts. (para. 23)
- (b) The Applicant also had family and extensive business ties in Hong Kong and was a person rooted in Hong Kong. (para. 23)
- (c) The fact that the Applicant's application for permission to leave Hong Kong in relation to another matter as evidence of his intention to leave the jurisdiction did not carry much weight; there was no finding that he had the intention to leave Hong Kong in the sense of absconding. (para. 24)
- (d) Newspaper reports that various foreign countries had been exerting political pressure seeking the release of the Applicant would not strengthen the prosecution's case about the alleged "request" or their relevance generally. (para. 25)
- (e) Although there were recent incidents of people not answering bail, each case had to be decided on its own merits. The Respondent had not alleged that the Applicant had anything to do with the absconding of other people or that he had acted with them in concert. (para. 26)
- (f) The flight risk had to be balanced against factors in favour of the Applicant and also the conditions which he was prepared to accept for granting of bail. Apart from offering cash bail and cash sureties and other conventional terms like reporting condition and travel restriction, the Applicant had indicated that he was willing to be confined to his residence, if bail was granted. (para. 27)

***(c) Risk of the Applicant committing offence whilst on bail***

11. The Respondent submitted that there were substantial grounds for believing that the Applicant would commit an offence whilst on bail. The incident giving rise to DCCC 872/2020 (the Applicant charged with incitement to knowingly take part in an unauthorized assembly) and the present two offences occurred whilst he was on bail for other matters. As regards the NSL case, there were insufficient grounds for believing that the Applicant would not continue to commit acts endangering national security for the purpose of NSL 42(2). On the contrary, given the nature of the case, there were substantial grounds for believing that the Applicant would continue to commit such acts if bail was granted to him. (paras. 5(c) and (d), and 7)

12. The Court agreed that this factor was of particular importance to the NSL case, but held that NSL 42(2) was not a “no-bail” provision. It was possible to grant bail to a person charged with an NSL offence if there were sufficient grounds for the court to believe that he would not commit acts endangering national security for the future if bail was granted. (paras. 29-30)

13. But for the NSL offence, bail should be granted to the Applicant for the fraud case. Counsel for the Applicant proposed to address the Court’s concern of the re-offending risk by the Applicant undertaking not to engage in conduct which might reasonably be regarded as making a request in contravention of NSL 29(1)(4). The Court was satisfied that the proposed undertaking, coupled with the Applicant’s agreement to be confined to his residence during the whole of the bail period, provided sufficient grounds for it to believe that he would not commit acts endangering national security if bail was granted. (paras. 31 and 33)

***(d) Conclusion on the two bail applications***

14. Based on the above, the Court allowed the two applications and granted the Applicant bail for both cases on the following terms: (para. 35)

- (a) HK\$10 million cash (HK\$5 million for each case);
- (b) three cash sureties, each of HK\$100,000 (HK\$50,000 for each case);
- (c) not to leave Hong Kong;
- (d) surrender all travel documents;
- (e) report to Kowloon City Police Station on every Monday, Wednesday and Friday between 3 pm to 6 pm;
- (f) the Applicant was to be confined to his residence during the bail period save and except for the purposes of reporting bail and attending court proceedings;
- (g) the Applicant was not to engage directly or indirectly in conduct which might reasonably be regarded as requesting a foreign country or an institution, organization or individual outside the mainland, Hong Kong, and Macao of the PRC to impose sanction or blockade, or to engage in other hostile activities against the PRC and the HKSAR;
- (h) in particular, the Applicant should not:
  - (i) meet with any officials of a foreign government;
  - (ii) attend or host any interviews, television, radio or online programmes;
  - (iii) publish any articles in paper or in digital form; and
  - (iv) make any posts/comments/messages on social media platforms including but not limited to Twitter.

***(e) The Respondent's applications under the HKCFAO***

15. Immediately after the Court handed down the above ruling, the Respondent applied for:

- (a) a certificate of law seeking to appeal against that decision to the CFA under s. 32 of the HKCFAO (the question of law concerning the correct interpretation of NSL 42(2)); and
- (b) the Applicant to be detained under s. 35(2) of the HKCFAO pending the proposed appeal.

16. The Court refused both applications, holding that it did not have jurisdiction to grant the certificate of law because there could only be an appeal to the CFA from a “final decision” of the CFI: s. 31(b) of the HKCFAO, and a decision to refuse or grant bail was not final: *Dizon v HKSAR* (2009) 12 HKCFAR 960.<sup>†</sup> (paras. 36-39)

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<sup>†</sup> Editor’s note: For further developments, see *HKSAR v Lai Chee Ying* [2020] HKCFA 45 (the prosecution’s applications for leave to appeal to the CFA and for Lai to be held in custody pending determination of the appeal granted) and *HKSAR v Lai Chee Ying* [2021] HKCFA 3 (allowing the appeal and the Judge’s decision to grant bail set aside).