



Summary of Judicial Decision

HKSAR (“Appellant”) v LAI Chee-ying (“Respondent”) FACC 1/2021; [2021] HKCFA 3

Decision	: Appeal allowed; the decision to grant bail to the Respondent set aside
Date of Hearing	: 1 February 2021
Date of Judgment	: 9 February 2021

Background

1. Article 42(2) of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“**the NSL**”) provides, “No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.”
2. The Respondent was charged with one count of “collusion with a foreign country or with external elements to endanger national security” under Article 29(4) of the NSL. He was refused bail in the magistracy. Upon bail review in the Court of First Instance, bail was granted to the Respondent.
3. With leave granted by the Appeal Committee, the Appellant appealed against the decision to grant bail to the Respondent.

Issues in dispute

4. What is the proper construction of Article 42(2) of the NSL?

Department of Justice’s Summary of the Court’s rulings

(full text of Court of Final Appeal’s judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=133491&QS=%2B&TP=JU;

press summary issued by the Judiciary at

https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2021/FACC000001_2021_files/FACC000001_2021ES.htm)

5. The NSL was promulgated as a law of the HKSAR by the National People’s Congress (“**NPC**”) and the Standing Committee of the National People’s



Congress (“NPCSC”) in accordance with Article 18(2) and (3) of the Basic Law on the footing that safeguarding national security is a matter outside the limits of the HKSAR’s autonomy and within the purview of the Central Authorities, the Central People’s Government having an overarching responsibility for national security affairs relating to the HKSAR. The legislative acts of the NPC and the 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, are not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the International Covenant on Civil and Political Rights (“ICCPR”) as applied to Hong Kong. There is no room for holding the NSL or any of its provisions to be unconstitutional or incompatible with the Basic Law or with the ICCPR. (paragraphs 30-37)

6. Article 42(2) of the NSL excludes the presumption in favour of bail. The starting point is significantly different in that no bail shall be granted unless the judge has sufficient grounds for believing that the accused “will not continue to commit acts endangering national security”. Plainly, Article 42(2) of the NSL introduces a considerably more stringent threshold requirement: it is “no bail unless there are sufficient grounds to believe violation will not occur”. (paragraph 53(b))
7. In respect of the word “continue”, it must not be read as implying that the accused is to be treated as guilty of having committed acts endangering national security before trial, but only that the accused is alleged to have committed an offence or offences involving acts endangering national security and Article 42(2) of the NSL requires assurance that he or she will not commit acts of such a nature if bail is granted. (paragraph 53(c)(i))
8. In respect of “acts endangering national security”, it refers to acts of that nature capable of constituting an offence under the NSL or the laws of the HKSAR safeguarding national security. (paragraph 53(c)(ii))
9. Bail conditions can be considered by the court under Article 42(2) of the NSL. The court may decide that in all the circumstances, and having duly considered possible bail conditions, it does not have sufficient grounds for believing that the accused will not continue to commit acts



endangering national security and thus refuse bail. Whether any possible bail conditions would give the court dealing with the bail application “sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security” in any given case is a separate matter for assessment by the court. (paragraphs 55-63)

10. No burden of proof is engaged under both Article 42(2) of the NSL and Part IA of the Criminal Procedure Ordinance, Cap. 221 (“CPO”). The grant or refusal of bail under the laws does not involve the application of a burden of proof, so that there is no burden resting on either party, and no burden to be imposed on the prosecution. The rules as to the grant or refusal of bail by their nature involve a risk assessment as to the conduct of the accused in the future, an assessment that does not lend itself to strict proof at the bail hearing. In particular, the provisions of the CPO enable the prosecution to submit evidence which would be inadmissibly prejudicial at a trial where the prosecution has a strict burden of proof, including evidence that the accused had previously been charged with or convicted of another criminal offence. The statutory regime recognises these potentially prejudicial aspects of what the court may refer to in imposing restrictions on the reporting of bail proceedings. (paragraphs 64-69)
11. In applying the test under Article 42(2) of the NSL, the court must first decide whether it “has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security” applying the above principles. If, having taken into account all relevant material, the court concludes that it does not have sufficient grounds for believing that the accused will not continue to commit acts endangering national security, bail must be refused. (paragraph 70(d)-(e))
12. If, on the other hand, the court concludes that taking all relevant material into account, it does have such sufficient grounds, the court should proceed to consider all other matters relevant to the grant or refusal of bail under Part IA of the CPO, applying the presumption in favour of bail. This includes consideration of whether there are 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. Consideration should also be given to whether conditions aimed at securing that such violations will not occur ought to be imposed. (paragraph 70(f))

**Prosecutions Division
Department of Justice**

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