

HCCP 294/2021
[2021] HKCFI 2075

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

MISCELLANEOUS PROCEEDINGS (CRIMINAL) NO 294 OF 2021

BETWEEN

**HKSAR
Respondent**

and

**CHOW KA SHING (鄒家成)
Applicant**

Before: Hon Toh J in Chambers (Open to Public)

Date of Hearing: 22 June 2021

Date of Decision: 22 June 2021

Date of Reasons for Decision: 12 August 2021

REASONS FOR DECISION

1. This is an application for bail in relation to the Chief Magistrate's refusal of bail in relation to a charge of "Conspiracy to commit subversion" contrary to Article 22(3) of the National Security Law¹ ("NSL") and sections 159A and 159C of the Crimes Ordinance, Cap 200.
2. In brief, the assertion of the Respondent is that this was a massive and well-organised scheme by the Applicant and 46 others to achieve a common criminal purpose to undermine the "proper functioning of the Legislative Council so as to paralyse the operations of the HKSAR government, eventually compelling the Chief Executive of HKSAR to resign". The Respondent further submitted that despite the public statement of the Government that the "organization, planning or participating in the '35+' Primaries"² and the statement on the 14 July 2020 by the Liaison Office of the Central People's Government in HKSAR that the Primaries are illegal as having fallen foul of the NSL, the Applicant and others still carried on with their scheme.
3. It is submitted by the Respondent that had the Election not been postponed due to public health concerns, the conspiracy would have been carried out to fruition. If granted bail it is of concern that sufficient grounds exist for not believing that the Applicant will not continue to commit acts endangering national security.³

¹ The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, applied to the HKSAR on 30 June 2020.

² The "Primaries" might have subject to investigation, fallen foul of Articles 20, 22 and 29 of the NSL.

³ See Article 42(2) of the NSL.

4. The applicable principle as reiterated by the CFA judgment in *HKSAR v Lai Chee Ying*⁴ at paragraph 70(b) was:

“NSL 42(2) creates a specific exception to the HKSAR rules and principles governing the grant and refusal of bail, and imports a stringent threshold requirement for bail applications.”

5. The CFA judgment also elucidated that in applying NSL 42(2), the judge must first decide if there are sufficient grounds for believing that the suspect or defendant will not continue to commit acts endangering national security (“the prohibited acts”) and in doing so “the judge should consider everything that appears 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”.⁵

DISCUSSION

6. The Applicant was charged together with 46 other defendants, with one count of “Conspiracy to commit subversion”, contrary to Article 22(3) of the NSL, and sections 159A and 159C of the Crimes Ordinance, Cap 200.

7. The Applicant was refused bail by the learned Chief Magistrate on 4 March 2021, and he applied to this Court for bail.

8. Briefly, the assertion of the Respondent was that this was a massive and well-organized scheme by the Applicant and

⁴ FACC No.1 of 2021 ([2021] HKCFA 3)

⁵ See also HCCP 738/2020 ([2021] HKCFI 448)

others to achieve a common criminal purpose to undermine the “proper functioning of the Legislative Council so as to paralyse the operation of the HKSAR government, eventually compelling the Chief Executive of HKSAR to resign”.

9. The Respondent further submitted that despite the public statements of the government, that the “organization, planning or participating in the “35+” Primaries might have to fallen foul of Articles 20, 22 and 29 of the NSL”, and the statement on the 14 July 2020 by the Liaison Office of the Central Peoples’ Government in the HKSAR, that the Primaries were illegal as having fallen foul of the NSL, the Applicant and others still carried on with that scheme.

10. It is submitted by the Respondent that had the election not been postponed due to public health concerns, the conspiracy would have been carried out to fruition. That if granted bail, it is of concern that sufficient grounds existed for not believing that the Applicant will not continue to commit acts endangering national security.⁶

11. The relevant principle as reiterated by the CFA judgment in *HKSAR v Lai Chee Ying* at paragraph 70(b) was:

“NSL 42(2) creates a specific exception to the HKSAR rules and principles governing the grant and refusal of bail, and imports a stringent threshold requirement for bail applications.”

12. The CFA judgment also elucidated that in applying NSL 42(2), the Judge must first decide if there are sufficient

⁶ See Article 42(2) of the NSL.

grounds for believing that the suspect or defendant will not continue to commit acts endangering national security (“the prohibited acts”). In doing so, “the judge should consider everything that appears 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”.⁷

13. The Respondent opposed bail mainly on the ground that the Applicant had demonstrated a firm and persistent conviction and determination to act in furtherance of the impugned conspiracy, therefore, there is a real and substantial risk that the Applicant will continue to commit acts endangering national security if granted bail.

14. The offence is a serious, one carrying a maximum sentence of life imprisonment, and in the event of a conviction, heavy sentence would likely be imposed. Hence, there are substantial grounds for believing that the Applicant would fail to surrender to custody as the Court may appoint to stand trial and/or would commit further offence(s) while on bail.

15. The Applicant was represented on his bail application by Mr Cheung Yiu Leung, who proceeded with his bail application by initially trying to make a political speech on the freedom of expression. He was reminded by the Court that it was not a time for speechifying, but it was his duty to persuade this Court that his client, in order to pass the first

⁷ See also HCCP 738/2020 ([2021] HKCFI 448)

threshold, can satisfy the Court that he will not continue to commit acts against national security if bail is granted.

16. I feel it is incumbent upon me to add here that on a bail application, the interests of a particular client is more important than any political stance that counsel may hold, or might hold. And it never is helpful to his client to add any political consideration into the application. I therefore reminded Mr Cheung that he should concentrate on the matters which would help his client, for example, referring this Court to the many letters from his school, attesting to his perseverance as a student in attaining his nursing degree. The Applicant, coming from a simple family where his father had passed away, and wishing to fulfil his dream of becoming a nurse had tried his best and finally achieved his nursing degree with one more year to go in his studies.

17. It was fortunate that the Court had read the many letters which was sent to this Court in the Applicant's bundle and also the information gleaned from those letters was that, the Applicant's passion for nursing was due to the fact of his father's illness and that he had promised himself that he would become a nurse in order to help the sick in our community.

18. Mr Lo for the Respondent had argued that the Applicant had stood for the election in the 35+ Primaries, and on

9 June 2020 had made an online declaration, together with D7 and D26⁸, where in paragraph 1, it was said that:

“1. 我認同『五大訴求，缺一不可』。我會運用基本法賦予立法會的權力，包括否決財政預算案，迫使特首回應五大訴求，撤銷所有抗爭者控罪，令相關人士為警暴問責，並重啟政改達致雙普選。”

19. On 20 June 2020, the Applicant submitted his Primaries Nomination Form and on 30 June 2020, the Applicant attended an election forum for the New Territories East constituency⁹. During the forum the Applicant had said:

“我諗我今次參選嘅目的非常之旗幟鮮明，我就係要宣揚香港民族主義。因為要建立一個民族出嚟，我哋先能夠對抗到中華民族嘅入侵。”

Amongst other things, he said that:

“國安法就係一個 ... 惡法喇。”

20. Mr Lo submitted that while all the above maybe prior to his being elected, however, even after his election, he continued with spreading, audaciously, “false information and conspiracies such as those about the COVID testing, the PRC government was harvesting life organs or to obtain the DNA of Hong Kong people with a view to demolish social harmony and fostered mistrust”.¹⁰

21. The Applicant asserted in an interview with Epoch Times dated 15 October 2020¹¹, that the 12 persons that were

⁸ See paragraph 23 of Mr Lo's submission.

⁹ Refer to Video A.

¹⁰ See Video E.

¹¹ Refer to Video F.

fleeing Hong Kong and arrested when they were at sea were in fact set up by the PRC government. Mr Lo, therefore pointed out that the Applicant was vocal, outspoken, determined and resolute. Therefore, there is a substantial risk that the Applicant, given his background and political influence, may act through his intermediaries or in secret, to continue to commit acts endangering national security if granted bail.

22. The Applicant, on the other hand, gave an account of his background in his statement that he grew up in a grassroots family. He was a child when growing up of domestic violence, he witnessed violence being rained on his mother by his father, and suffered throughout the time when he was in school, helplessly watching his mother being physically abused. The violence came to a halt and over the years his father became frail and sickly, and he gave an account of his father's illness which resulted in his death. It was the experience of caring for his father that developed an interest in him to be a nurse. He studied hard and won scholarship to pay for his tutorial classes, and eventually he enrolled in University to study nursing. His nursing course must be finished in 7 years and he has already completed 5 years, and therefore, if bail was not granted to him, he will lose the opportunity to get his degree.

23. The Applicant had stated that he did not belong to any particular party and independently believed that what he was fighting for was to have Hong Kong recognised as a

minority ethnic group, which he believed was provided for under the PRC constitution. The Applicant stressed that he did not call for independence of Hong Kong from the PRC. He asserted that he was genuine in his belief what he was fighting for, which was to have Hong Kong recognised as a minority ethnic group, was not illegal under the NSL. Mr Cheung pointed out, that the Applicant had no political connection and taking into account all the matters including what he allegedly said in the videos produced by the Respondent, that the Applicant, with the bail conditions imposed and his background, would not continue to commit any offence under the NSL if bail was granted.

24. It is of course true that as late as August 2020 in an interview, the Applicant did broadcast his view on the harvesting of life organs or to obtain the DNA of Hong Kong people by the PRC government, etc. But it is also true that in all the videos produced, he did not directly advocate for international sanction against the PRC government or the HKSAR government. Although he did in his Facebook, prior to the election, did mention the sanction that had been imposed, and said it was “第一炮”¹², which could be interpreted as advocating or endorsing the sanctions or merely commenting on it. So I would give him the benefit of the doubt in that case.

¹² See Enclosure 12 of Respondent’s written submission.

25. Overall, I am satisfied that with the conditions that I have imposed for bail, that he will not continue to commit any offences under the NSL if bail is granted to him.

26. Having considered the second threshold under section 9G of Cap. 221, whether the Applicant would fail to surrender to custody or commit an offence while on bail, I am satisfied that with the conditions I have imposed he would not do so.

27. Therefore, bail was granted to him.

(Esther Toh)

Judge of the Court of First Instance
High Court

Mr Andy Lo, SPP and Ms Cherry Chong, PP of the Department of Justice, for the Respondent

Mr Cheung Yiu Leung and Ms Chow Hang Tung, instructed by Ho Tse Wai & Partners, for the Applicant