

HCAL000041/1997

1997 A.L. No. 41

IN THE HIGH COURT OF HONG KONG
COURT OF FIRST INSTANCE
ADMINISTRATIVE LAW LIST

BETWEEN

LONG QUOC TUONG and others	Applicants
and	
(1)THE DIRECTOR OF IMMIGRATION	Respondents
(2) THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	

Coram: The Hon. Mr. Justice Keith in Court

Date of Hearing: 9th October 1997

Date of Delivery of Judgment 9th October 1997

JUDGMENT

These proceedings relate to 119 ethnic Chinese asylum-seekers who had at one time ...(illegible) in Vietnam. On 26th September, I ordered that 7 of them be released

from detention. The remaining 112 Applicants now apply to be released from detention as well.

It is important, I think, to bear in mind the nature of the hearing which resulted in the release of the 7 Applicants. In the judgment which I handed down on 26th September, I said:

"At an early stage in the proceedings, it was recognised that it would not be possible to consider individually the cases of all [119 Applicants]. It was decided that the cases of a handful of the Applicants would be heard and determined first.

Those Applicants would be as representative as possible of any sub-groups which might exist amongst them, so as to enable the decision in the cases of those Applicants to be as reliable a guide as was possible to the likely outcome of the cases of the other Applicants."

The cases of the 7 original Applicants were therefore not test cases in any formal sense. By that, I mean that the decisions in their cases did not automatically decide what should happen to the other 112 Applicants. Of course, if there are no relevant differences between the cases of the 7 original Applicants and the remaining 112 Applicants, the remaining 112 Applicants should be released as well (subject to such impact as any proposed appeal might have). But it is, and always has been, open to the Respondents to contend that relevant differences do exist between the cases of the 7 original Applicants and the remaining 112 Applicants which would render the continued detention of the remaining 112 Applicants lawful.

However, it is not suggested by the Respondents that there are relevant differences between the cases of the 7 original Applicants and the 112 remaining Applicants. The reason why the Respondents are nevertheless reluctant to release the remaining 112 Applicants is because they intend to appeal against my ruling that the detention of the 7 original Applicants had become unlawful. If that appeal succeeds, and if the detention of the 7 original Applicants is found by the Court of Appeal to have been lawful, then the detention of the remaining 112 Applicants will have been unlawful as well. Since there is a possibility at the very least that the release of the 112 remaining Applicants in the meantime will have been on the erroneous premise that their detention had become unlawful, they should not be released pending the appeal. In that connection, Mr. William Marshall S.C. for the Respondents relied on my ruling in *Re Ly Duc* (HCMP 232/95), in which I said that the hearing of that case should not take place until the appeal from a case on which the legality of the Applicants' detention depended had been heard.

I cannot go along with this argument. If, as is common ground, there is no relevant difference between the cases of the 7 original Applicants and the 112 remaining Applicants, they are all entitled to be treated in the same way. Since the 7 original Applicants have been released from detention, so too should the remaining 112 Applicants. If the release of the 7 original Applicants had been stayed pending an appeal,

the position may have been different. But since their release from detention was not stayed, there is no basis for not releasing the 112 remaining Applicants now.

My ruling in *Re Ly Duc* is, I believe, distinguishable from this case, because in *Re Ly Duc* there was a substantial issue as to whether there were relevant differences between the 21 Applicants in that case and the 3 Applicants whose release from detention I had ordered in *Re Chung Tu Quan* [1995] 1 HKC 566, and it was likely that that issue would not have been resolved by the time an expedited appeal in *Re Chung Tu Quan* would have been heard.

I am, of course, conscious of the need for good administration, and how undesirable it is for persons who have been released from detention on one day to be returned to detention on the next because an appellate court takes a different view from the judge sitting at first instance. However, the liberty of the individual should not be sacrificed on the altar of administrative convenience, and I do not think that the possibility of the re-detention of the 112 Applicants as a result of a successful appeal in the case of the 7 original Applicants should deprive them of their liberty in the meantime. For these reasons, therefore, I order their immediate release from detention, subject to any application which Mr. Marshall may make for their release to be stayed for one reason or another.

(After further argument)

Mr. Marshall now applies for a stay on the order I have just made releasing the 112 remaining Applicants from detention as soon as is reasonably practicable. I am not prepared to grant a stay on the order until the appeal of the 7 original Applicants has taken place, because that would be inconsistent with the reasoning for ordering the release of the 112 remaining Applicants now. However, I am prepared to grant a stay on the order I have made today simply to enable the Respondents to apply to a Justice of Appeal for a stay on the order pursuant to Ord. 59 r. 10(9) of the Rules of the High Court. It is important that the Justice of Appeal has the benefit of the judgment I have delivered today. It is equally important that the application for the stay be made to the Justice of Appeal as soon as possible. In order to ensure that the matter is progressed speedily, the stay on the order which I have made today will expire at 4:30 p.m. on Tuesday 14th October, though I give the Respondents liberty to apply for further time should that be necessary.

(Brian Keith)

Judge of the Court of First Instance

Representation:

Ms. Gladys Li S.C., instructed by Messrs. Pam Baker & Co., for the Applicants.

Mr. William Marshall S.C. and Ms. Joyce Chan, of the Department of Justice, for the Respondents.