1997, A.L. No. 41

IN THE HIGH COURT OF HONG KONG
COURT OF FIRST INSTANCE

BETWEEN

LONG QUOC TUONG AND OTHERS Applicants

and

THE DIRECTOR OF IMMMIGRATION 1st Respondent

THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE 2nd Respondent

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Before: The Hon. Mr. Justice Keith in Court

Dates of Hearing: 11th & 12th August 1997

Date of Handing Down of Judgment: 29th September 1997

J U D G M E N T

INTRODUCTION

The applicants are ethnic Chinese. They used to live in Vietnam. However, they fled from Vietnam cause of the treatment of ethnic Chinese in

Vietnam in the aftermath of the Sino-Vietnamese war. They settled in China in . They claim that in China they were not accorded rights analogous to those enjoy by Chinese citizens. As a result, they fled to Hong Kong. They have been in detention in Hong Kong even since. In this application for habeas corpus, they seek their release from detention.

This is not the only set of proceedings in which most of the applicants have been involved. On their arrival in Hong Kong, they were not recognised with person to whom part 3A of the Immigration Ordinance (Cap. 115) applied. Accordingly, their requests pursuant to Section 13A(1) of the Immigration Ordinance for permission to remain in Hong Kong as refugees and did their resettlement elsewhere were not considered. A number of the applicants sought challenge the refusal of the Director of Immigration to consider their requests for permission to remain in Hong Kong as refugees. Those claims were dismissed by the High Court (*Nguyen Tuan Cuong v. The Director of Immigration* [1995] 3 HKC 373) and by the Court of Appeal ((1996) 6 HKPLR 62), but they were eventually allowed by the Privy Council ((1996) 7 HKPLR 19). Accordingly, their requests for permission to remain in Hong Kong as refugees are currently being considered, but their case is as the result of the ruling of the Privy Council, their detention has become unlawful. All references in this judgment to section of an ordinance

are references to sections of the Immigration Ordinance, unless otherwise stated, and all references to "the Director" are references to the Director of Immigration.

THE CURRENT PROCEEDINGS

There are 119 applicants in all. At an early stage in the proceedings, it was recognised that it would not be possible to consider individually the cases of all of them. 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 decisions in the cases of those applicants to be as reliable

AN ALTERNATIVE ARGUMENT

Ms. Li advanced an alternative argument relating to the applicants in category (i), based on the fact that the Director is seeking to return the applicants to a country, i.e. China, which it is alleged they have been offered a durable solution and protection, despite the fact that since 1st of July Hong Kong has been part of that country. International Refugee Law, she claims,

does not recognised the concept of asylum or protection being offered by one part of a country but not by another part of it.

Since I have decided that the six applicants detention is unlawful on other grounds, I do not need to address this interesting argument. In any event, if it has any merit at all, it can be advanced on the application for judicial review directly challenges of the illegality of the removal orders which have been made against the applicants.

THE APPLICANT IN CATEGORY (III)

Diep Minh-Quang (A117) is the only one of the seven applicants in category (iii). He arrived in Hong Kong in May 1996. He claimed on his arrival he was treated that he was one of the illegal immigrants who climbed distantly come to Hong Kong in large number from China. The respondents, however, claimed that he was discovered on his arrival to have lived in Vietnam before setting in China, and that he was therefore treated as an ECVII. It is not necessary from me to resolve this conflict evidence, because it is common ground that he is an ECVII. Accordingly, part 3A of the Immigration Ordinance supply to him, and in view of the majority decision of the Privy Council in Nguyen Tuan Cuong, he should be treated as

having requested permission to remain in Hong Kong as a refugee planning his resettlement elsewhere.

Their requests had never been considered. Would it had been considered and adjudicated upon by now if it had been appreciated when he arrived that what he was entitled to? I think it probably would have been, but I think it equally likely that

(a) If he had been found to be a refugee from Vietnam in China (as or other ECVIIs have recently been found to be), the country to which his resettlement would have been ordered would have been China.

(b) He would not have been repatriated to China by now, because he would have been an applicant in the judicial review proceedings for which leave has recently been given.

He would therefore still have been in detention now.

However, that is not quite the end of the matter. When A117 arriving Hong Kong, he was dealt with in the way in which ECVIIs had been

dealt with before the summer of 1993. In other words, he was refused commission to land in Hong Kong under Section 11(1), and then order for his removal from Hong Kong was made under Section 18(1)(a). He was then detained under Section 32(1)(a) planing his removal from Hong Kong. When it was appreciated that he would not be moved from Hong Kong within two months of his arrival in Hong Kong, an order for his removal was made under Sections 19(1)(b)(i) and 19(1)(b)(ii). That triggered the Director's power to authorise A117's detention under Section 32(3a) pending his removal from Hong Kong.

However, A117's detention under Section 32(1)(a) and subsequently under Section 32(3a) was unlawful. They both pre-supposed that lawful orders for A117's removal from Hong Kong had been made. In fact, the order made for his removal had not been lawfully made: Since he had been entitled to have his request or permission to remain in Hong Kong as a refugee pending his resettlement elsewhere considered under part 3a of the Immigration Ordinance, no order for his removal could have been made until it had been considered. The power of detention which should have been used in his case was the first of Section 13d(1). Accordingly, because he is currently detained under a power which has not been lawfully triggered, his current detention is unlawful, and I order his immediate release from

detention. I should add but at present I see no reason why he should not been re-detained, as soon as the Director authorised his detention under the first of Section 13d(1).

CONCLUSION

I cannot leave this case without expressing my considerable sympathy for the predicament which Director has faced over the years. It is undoubtedly the case for the applicant circumstances posted legal issues the judgments of the various judges in the High Court, the Court of Appeal and the Privy Council in *Nguyen Tuan Cuong* review a variety of different approaches. Even in the Privy Council, there was a strong decenting judgment from two of the judges. It is not suggested that the Director failed to take reasonable steps to inform himself, when the issue relating to the ECVII first arose, about what their rights and law were. Nor can the Director fairly be criticised for taking a course of action which, would the advantage of, and with the knowledge of the ultimate decision of majority of the Privy Council, is now known to have been flawed. However, as the Director, I am sure, appreciate, none of these effects of question which I have had to decide. The fact of the matter is that the Privy Council decided that the applicants were entitled to have their request for permission to

remain in Hong Kong as refugee considered, and that had not been properly done until this year.

Accordingly, for the reasons I have given, I declared that the continue detention of the seven applicants is unlawful, and I have ordered their immediate release from detention. As far as the remaining 112 applicants are concerned, the parties will need time to consider the impact of this judgment on their cases, and I leave it to the parties to decide whether and when their cases should be brought to the court's attention again. Finally, at present I see no reason why court should not follow the event. I do not think that the 2nd respondent should be liable for costs, since he is only a party to the proceedings as a result the order made by the Director. Accordingly, the order *nisi* which I made as to costs is that the Director of Immigration pays to the applicants their costs for these proceedings, to be taxed under the Legal Aid Regulations if not agreed.

(Brian Keith)
Judge of the Court of First Instance

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

Mr. Daniel Mitchell, S.C. & Mr. Anthony K.K. Chan, instructed by the Department of Justice, for the Respondents