CACV000200/1997

Civil Appeal No. 200 of 1997

IN THE HIGH COURT OF THE HONG KONG

SPECIAL ADMINISTRATIVE REGION

THE COURT OF APPEAL

(On Appeal from High Court Administrative Law List No. 41 of 1997)

BETWEEN

LONG QUOC TUONG AND OTHERS	1st Plaintiff (1st Respondent)
and	
THE DIRECTOR OF IMMIGRATION	1st Respondent (1st Appellant)
THE SUPERINTENDENT OF HIGH ISLAND DETENTION CENTRE	2nd Respondent (2nd Appellant)

Coram: Hon Chan, CJHC

Date of Hearing: 14th October 1997

Date of Ruling: 14th October 1997

RULING

Hon Chan, CJHC:

This is an application made under O.59, r.10(9) and rule 13 of the Rules of the High Court by the Director of Immigration and the Superintendent of High Island Detention Centre who were the respondents in the Court below for a stay of the order of release made by Mr. Justice Keith on 9th October 1997.

The proceedings in the Court below involved 119 ethnic Chinese asylum seekers who had at one time lived in Vietnam but had gone to settle in China and subsequently came to Hong Kong. There was a long history leading to their action for writs of habeas corpus. For the present purpose I do not propose to go into such history.

The cases of 7 of these persons were selected to be heard and determined first. On 26th September, Mr. Justice Keith handed down a judgment in which he held that these 7 persons were unlawfully detained and should be released. There was no application for a stay of that order and these persons and their families were released. The explanation for not having made an application to stay the order was that the written judgment was handed down and not delivered in open court.

On 9th October 1997, the cases of the remaining 112 persons were brought up before the judge. I was told that the Government asked the learned judge not to deal with these other persons until after the determination of the intended appeal against the order of release in respect of the 7 persons. It was however conceded that there is no relevant difference between the cases of the 7 persons and the remaining 112 persons. In the event, the judge made a similar order releasing them as well.

The Government then applied to the judge for a stay of that order in respect of the 112 persons. The learned judge was not prepared to do that but ordered that the release order be stayed until 4:30 p.m. today for the Government to apply to a Justice of Appeal for a stay pursuant to O.59. This is the application.

One of the arguments before me was that there is no jurisdiction to grant a stay of an order of release pursuant to a *habeas corpus* application. For the present purpose, I do not want to rehearse the submissions on this point. Nor am I prepared to make a definite ruling on it. Suffice it to say that the argument against such a jurisdiction is not without substance. The new section 22A(9) and (10) of the High Court Ordinance provide:-

> "(9) When a person is brought before the High Court in accordance with a writ of habeas corpus, the Court must immediately inquire into the circumstances surrounding the detention of the person and must order the release of that

person from detention unless satisfied that the detention is lawful.

(10) If a person who has custody of a detained person appears before the Court in accordance with an order made under subsection (5)(b) but fails to satisfy the Court that the detention is lawful, the Court must order the detained person to be released from detention immediately."

The emphasis is on immediate release when the Court is not satisfied that a detention is lawful. There is of course an express right of appeal provided in section 24 for this type of proceedings. But there is no provision regarding a stay of an order of release. The only relevant provision regarding a stay is the general provision in O.59, r.13 which is couched in some what indirect and negative terms:-

"(1) Except so far as the court below or the Court of Appeal or a single judge may otherwise direct-

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no immediate act or proceeding shall be invalidated by an appeal,"

While Mr. Marshall, S.C. is right to say that if it is intended that there should be no power of stay, the legislation should have made it clear in section 22A. However, it is at least open to argue that O.59, r.13 has not conferred such a jurisdiction either and that in the light of the clear and emphatic wordings in section 22A, an express power to stay an order of release is necessary.

Whatever the arguments, in view of my present ruling, it is not necessary to decide on this point. I shall for the present purpose assume there is jurisdiction to grant a stay of the order of release.

The main argument put forward by Mr. Marshall for the Government is that the learned judge had wrongly regarded the equality of treatment as the predominant factor in the granting of a stay. It is submitted that the judge had changed his views since 1995 and departed from his own approach in the **Ly Duc** case.

In an affirmation made by Mr. Choy Ping Tai in support of the present application, it is pointed out and counsel submits that there is a strict policy of immigration control requiring the detention of those who are not to be settled temporarily or permanently in Hong Kong as refugees. It is said that there is a pending appeal both in respect of the 7 persons and the remaining 112 persons. The Court of Appeal may hold the release to be erroneous. Then finding the detention unlawful one day and finding it lawful a little later is contrary to any conception of good administration. It is submitted that such "yo yo" decisions would be detrimental to good administration and hence to the public interest.

With respect, I do not find these arguments sustainable.

As Ms Li, S.C. has submitted and the learned judge held, **Ly Duc** is clearly distinguishable from the present case. There the subsequent 21 applicants had not even commenced their action when the case of the 3 applicants were heard and determined. The judge could not assume in that case that their cases were indistinguishable from those in the test case. They were totally separate and different cases. In fact, the learned judge went as far as to say that some or all of the 21 cases might be indistinguishable from the case of the particular applicant whose application was refused. In the present case, the remaining 112 persons are in the same action as the 7 persons who were ordered to be released on 26 September. It is conceded that there is no relevant difference between them.

What is more, the Privy Council had held that all the 119 applicants were wrongly refused a screening. Most of them had now been screened as refugees.

The learned judge was therefore quite entitled to draw a distinction between the present case and the **Ly Duc** case.

Good administration is of course important. But it is always subject to the rule of law. The rule of law demands that a court order must be respected and obeyed. A detention which is held to be unlawful by a court of law cannot be continued in the name of good administration. If the ruling is wrong, it can be overruled. But until then, an order of the court must be enforced unless there are very good reasons for not carrying it into effect for the time being. It is not uncommon that a court decision is reversed on appeal and the decision of the Court of Appeal is reversed on further appeal. I cannot accept that this would be damaging to good administration and detrimental to the public interest. On the contrary, this is a vivid demonstration of the rule of law: that judges can make mistakes and be corrected on appeal. This is part of our system. So I cannot see that the so called "yo yo" effect can be a hurdle for not enforcing a court order without very good reasons. The Appellant has not put forth any other good reason for not enforcing the order of release in the present case.

We are dealing with individual liberty which is a basic right of paramount importance. If a person is unlawfully detained, even one minute is too much. What if the order is confirmed on appeal? Why then should he be detained for many more weeks pending the appeal? If his release is found to be wrong on appeal, he can be re-detained and there is power in the authorities to do so. Once it is conceded that there is no relevant difference between the 7 persons and the remaining 112 persons, the latter are equally entitled to release. Why are they not treated the same? The Government did not apply for a stay of the order in respect of the 7 persons. I do not accept the explanation for not doing so before their release. The threat that the Government can do it now and re-detain them is equally unacceptable. If it is done now, it would destroy the Government's own good administration argument.

It has not been suggested that if these persons are released and the judge's order is held to be wrong on appeal, there would be any difficulty in re-detaining these persons.

The Court "does not make a practice of depriving a successful litigant of the fruit of his litigation and locking up funds which prima facie is entitled pending an appeal". (See the Supreme Court Practice 1997, paragraph 59/13/1.) If this principle applies to property and funds, it is even more so to personal liberty.

With respect to Mr. Marshall's submissions, I cannot find any good reasons for granting a stay of the order of release. The application is therefore refused.

(P Chan)
Chief Judge, High Court

Representation:

Mr W.R. Marshall, SC and Miss Joyce Chan, of the Department of Justice, for the Appellants

Ms Gladys Li, SC. instructed by Messrs Pam Baker & Co., for the Respondents