

Legal Opinion and Proposal to protect Pol (Abdulla)
and every child born on Thai soil from illegal immigrant parents
who had been permitted to temporarily reside on special basis
(A child born in Thailand, under the provision of Section 7 *bis para* I
of the Nationality Act, 1965 (2nd Amendment 1992))

3 August 2009

A joint academic work of

1. Stateless Watch for Research and Development of Thailand (SWIT)
2. Human Rights for Development Foundation (HRDF)
3. Bangkok Clinic for Rights and Legal Personality Legal Counseling (Bangkok Clinic Project)

Other network organization that supplied legal opinion and proposal:

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24. เครือข่ายนักกฎหมายสิทธิมนุษยชน
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1. Facts

Pol or Abdulla is a three year-old son of Mrs. Momo. Pol had been arrested while Momo was selling Roti at a farmer market in in Mueang District, Samutprakarn Province on 20 July 2009. Pol and Momo was sent to Suan Plu Immigration Detention Center.

Base on initial investigation, there was attempt to explain to the police that Mrs. Momo was a registered migrant worker and was permitted to reside temporarily in Thailand. Momo was later allowed to return home alone. Fearing to leave Pol behind alone at the detention center, Mrs. Momo opted to stay with Pol at the detention center.

Officers of Human Rights for Development Foundation (HRDF) had coordinated with Bangkok Clinic for Rights and Legal Personality Legal Counseling (Bangkok Clinic) and Stateless Watch for Research and Development Institute of Thailand (SWIT). Later the coordination with the Lawyer Society of Thailand was sought to petition the immigration bureau to suspend the deportation and release the child back to the family immediately (in reference to the letter issued by the Lawyer Society No. SorSorMor. 367/2552, date 27 July 2009.) The boy was later released from the immigration detention center on 28th July 2009. The release of the boy by immigration officers according to the petition was appreciated.

Pol and Mrs. Momo was detained at the immigration detention center for over seven days.

2. Legal personality of Pol or Abdulla and Mrs. Momo, his mother

2.1 Mrs. Momo, Pol's mother is a registered migrant worker, permitted to reside and work in Thailand temporarily (Personal Identification Number (PIN) 00-11010106902-2). She has subsequently renewed her work permit on 17 June 2009.

Legal Personality of Mrs. Momo, a registered migrant worker, is a temporarily resident permitted to reside and work in Thailand for one year, despite her previous illegal immigration status, according to the cabinet resolution dated 18 December 2007.¹

¹ The cabinet approved a proposal of the Ministry of Labour (MOL), based on the Chairperson, Migrant Workers Management Commission resolution in the 6/2007 meeting, dated 12 May 2007, on the management of illegal immigrant workers of Burmese, Laotian and Cambodian nationalities in 2008. The resolution allowed migrant workers that the work permits would expire on 28 February 2008, 14 March 2008 and 30 June 2008 (including children of migrant workers whose permit to be expired on 30 June 2008), to temporarily reside and work in the Kingdom, pending repatriation for not exceeding two years and not later than 28 February 2010. It also permitted illegal immigrant workers of Burmese, Laotian and Cambodian nationalities,

2.2 Pol or Abdulla was born in Thailand on 4 February 2006 at Samutprakarn hospital. He was issued a birth certificate for an alien permitted to reside in the Kingdom on special basis (Tor.Ror. 03).

Legal Personality of Pol or Abdulla, a child of a registered migrant worker, will have have Thai nationality even he was born in Thailand by virtue of Section 7 *bis para* I of the Nationality Act 1965 (2nd Amendment 1992). His legal personality and residency will be determined by an upcoming ministerial regulation, which would be enacted under Section 7 *bis para* III of the Nationality Act (4th Amendment 2008), stipulating that the regulation must consider [national] security principle along with human rights principles.

2.3 Pol is a case that reflected the policy for migrant workers that ignored a social reality that people crossing the border on foot to be migrant workers are human being. They have husbands, wives, children or grandchildren and families. The policy only allowed workers to have right to temporary residency, denying fact of life and the family, husbands, wives or children to live with migrant workers as families. On a certain year, the management of migrant workers allowed them to register accompanying members, with the same residency status as the workers, however, other years, the policy did not mention accompanying members.

The child or children of migrant workers, for example, Pol, maintain the residency right after a parent. Pol has the residency right after Mrs. Momo as an "accompanying family member, " because the mother was a registered migrant worker and she has renewed her work permit (under the cabinet resolution, dated 18 December 2007). For first-time registered migrant workers, their husbands, wives or children will not be counted as "accompanying family member," thus will not enjoy the residency right in the same manner of the registered migrant workers (according to the cabinet resolution, dated 9 December 2008 and 26 May 2009.¹¹)

who had reported and registered with Department of Provincial Administration (DOPA) (with Tor.Ror 38/1 identification documentation) to temporarily reside and work in the Kingdom, pending repatriation for not exceeding two years and not later than 28 February 2010. See also the cabinet resolution dated 18 December 2007 RE: Management of the Employment System for Alien Workers of Myanmar, Laotian and Cambodian nationalities 2008.

http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=214827&key_word=%E1%C3%A7%A7%D2%B9%B5%E8%D2%A7%B4%E9%D2%C7&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=

¹¹ The cabinet sees the following as appropriate: 1. Approve the nationality verification for migrant workers with Burmese nationality. Ministry of Labour, Ministry of Interior, Ministry of Foreign Affairs, Ministry of Public Health and the Police Headquarters (the Immigration Bureau) are jointly responsible for issuance of relevant notifications, regulations and orders under their authority and prepare for further actions proposed by Ministry of Labour; 2. For a preparation for new registration of illegal immigrant workers of Burmese, Laotian and Cambodian nationalities for illegal workers in Thailand (a person working without a work permit), exclusive of their children and accompanying members, temporarily reside in the Kingdom, pending for repatriation within 28 February 2010, in which related agencies are responsible for issuance of relevant notifications, regulations and orders under their authority and prepare the agencies ready for further actions, the Ministry of Labour must propose the issue again to the new cabinet, as the issue concerns the policy governing the number of alien workers to work legally in Thailand and requires a coordination with relevant foreign government. See also the cabinet resolution, dated 9 December 2008, RE: Nationality Verification of Illegal Immigrant Workers

An instability of the policies and an ignorant of the social reality caused confusion among operational level officials and the general public. In conclusion, it could be said that the policy denied and violated the fundamental human rights to have/ form a family and contributed to arrests and deportation of the child and children of migrant workers out of the Kingdom.

3. **Violation of international laws**

The arrest of Pol and other children and any action to forced the child out of the Kingdom from an accusation that the child is an illegal immigrant under Section 54 of the Immigration Act could be consider as a violation of human rights on the following ground.

4. A violation of an international criminal law principle and legally binding international human rights principle that “a person must not be inflicted with a criminal punishment unless one has committed an act which the law provides to be an offence,” (*nullum crimen, nulla poena sine lege.*)

The principle was underpinned by Article 11 of the 1948 Universal Declaration of Human Rights 1948, Article 9 and 15 of the 1966 International Covenant on Civil and Political Rights, which Thailand is legally bound to observe as a state party to the international laws. The above mentioned principle was also mentioned in Section 2 of the Penal Code.

Pol, along with other children sharing the same fact and status, was born in Thailand. They had not crossed the border on foot to the Kingdom. Moreover, the law also entrust the child or a minor under the same domicile, the care and supervision of a parent, or in this case, the mother, hence, the boy is not independent to make a willful

with Burmese Nationality and the New Batch of Illegal Immigrant Workers of Burmese, Laotian and Cambodian Nationalities Registration.

http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=217535&key_word=%E1%C3%A7%A7%D2%B9%B5%E8%D2%A7%B4%E9%D2%C7&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=

In the cabinet resolution, date 26 May 2009, RE: Registration of Illegal Immigrant Workers of Burmese, Laotian and Cambodian Nationalities. Out of the Permitted System, the cabinet had the following resolution: 1. Approve the measure for Illegal Immigrant Workers of Burmese, Laotian and Cambodian Nationalities Registration, who were out of the permitted system, as proposed in the 2/ 2009 resolution of Chairperson, Migrant Workers Management Commission date 27 April 2009, that the Ministry of Labour has proposed. For the part of “other enterprises proposed by the province as necessary,” the provinces will organize a meeting to determine the list at the earliest occasion and submit the list of enterprises for (MWMC). to approve before further implementation; 2. The registration of illegal immigrant workers aimed to allow existing illegal workers out of the permitted system who are illegally working in Thailand to be registered into the legal employment system. The registration could probably bring more [new] Illegal immigrants workers to apply for registration. The registration will not include children and accompanying members of migrant workers, which could induced other linked problems such as social problems, burdens to provide education and healthcare services, thus the Ministry of Labour is assigned to consult with related agencies for preparedness and careful operations in every aspects. See also, http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=220064&key_word=%E1%C3%A7%A7%D2%B9%B5%E8%D2%A7%B4%E9%D2%C7&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=

intention whether he would reside in the Kingdom or not. The residence of the boy in the Kingdom lack an element of an intention (Section 59 of the Penal Code), thus his action is not constitute the intention to violate the Immigration Law. When the fact could not be established that a person intentionally committed an act, in which the law provides to be an offence and the offence is not punishable, the person cannot be guilty and/ or punished.

Given the fact above, the arrest and action to deport the boy from the Kingdom, on the ground that the boy is an offender of the Immigration Act 1979, is an incorrect exercise of discretion and an application of the law, furthermore, the above action was not in compliance with to the law and constituted a breach of the law.

Additionally in other cases concerning children, an authority could not implement any action to deport a child out of the Kingdom because the child, under ten years of age, is exempted from a punishment for an offence deemed punishable by the law, under Section 73 of the Penal Code.

3.2 Violation of principle of lawful detention

We has observed that the immigration center's procedure to detain the boy, who enjoys the right to reside as an accompanying member of a migrant worker, could lead to a consideration, that the detention was against the principle of lawful detention under Article 7 and 9 of the **1948 Universal Declaration of Human Rights 1948, Article 9 and 26 of the 1966 International Covenant on Civil and Political Rights** along with Section 32 of the 2007 Constitution of Thailand.

In case any similar action occurs, it is possible to file an application the Court for an investigation whether the detention is lawful (*Habeas Corpus*), which is the right of an injured or a detained person, pursuant to the last paragraph of Section 32 of the Constitution and Section 90 of the Penal Procedure Code. The injured person may file an application to the Court against state agencies or officials. Consequently, it may lead to a situation that the government could be under criticism because of the failure to impose reasonable care, resulting in state agencies exercising sub-standard, unethical and immoral discretions.

4. Proposal for a prevention of problems

4.1 Even Thailand does not consider to grant the nationality to the child, the government can implement measures to ensure the right of the child will be protected by ensuring that Thailand and its officials must not arrest and deport and child out of the Kingdom.

4.2 Initially the Thai government should prevent the child from being stateless, by certifying the right to reside and residency. The measure could be done immediately by recording the name and personal record of the child in either Tor.Ror 38 Kor or Tor.Ror. 38/1, which are personal record database of people permitted to resign in the Kingdom on special basis (corresponding to facts and status of each child.) (Further more, the information would be crucial and useful for alien population management in Thailand). The above measure could be implemented by the following.

- (1) Interpret and expand the coverage of the Cabinet resolution, dated 26 May 2008 to include accompanying family members of migrant workers, so that the accompanying family members enjoy the right to

reside and resident status in the same manner as a registered migrant worker.

- (2) Enact a cabinet resolution to warrant the right to residency and resident status of the accompanying family members, as previously practiced (e.g. the cabinet resolution, dated 18 December 2007.)
- (3) Advocate the ministerial regulation issued under Section 7 bis para III. Of the Nationality Act to ensure that the child will not be deported from the Kingdom, the legal personality and residency of the child will be corresponding to those of the parents.

4.3 Prior, during and after an implementation of the above measures, under the international obligation as a state party to the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights and the Convention on the Rights of the Child (CRC), Thailand is legally bound to protect and promote children's through at least four principles of non-discrimination, the best interest of the child, child protection and the right to survival and to be developed to the fullest. The principles were also enshrined in the Constitution of Thailand Section 4 and Section 30. The Convention on the Rights of the Child was specially in adopted in domestic law in the Child Protection Act 2003, which the provisions of the law are corresponding to the CRC, such as the unfair non-discrimination and the best interest of the child principle (i.e. Section 22 and the Ministerial Regulation issued under Section 22, determining the guideline of practices for best interest of the child or unfair discrimination against the child 2006.)

Hence, every child must have fundamental rights protected, such as the right to receive birth documentation (birth certificate) for further reference of her/his legal personality/ nationality, the right to fundamental healthcare and/or health security (universal coverage) the right to education, etc. We would like to emphasize significant participation from other rights protection agencies such as the Rights and Liberties Protection Department, The Central of Attorney General for Child Protection and Central Family Institute, etc. to protect rights of every child born in Thailand.

5. We maintained that every state agency must exercise its administrative authority by adhering to the rule of law and the law under the principle of equality, particularly to children or other people that cannot exercise a protection and a defense of their own rights.

We and the network are hopeful that the Prime Minister, who supervises and monitors administrative section, will encourage and advocate a mechanism for fair and effective legal implementation for a better standard or a new norm to protect rights of the child. We thank you in advance for your understanding to the situation that these children are facing.

We request your kind attention, implementation of the proposal and a action for a concrete code of practices in this regard for the child, for public interest.
