

CASE DETAILS

PALLAVI

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 642 of 2023)

SEPTEMBER 01, 2023

[S. RAVINDRA BHAT AND ARAVIND KUMAR, JJ.]

HEADNOTES

Issue for consideration: The petitioner-foreign national, challenges the rejection of candidature to a Post graduate medical seat when she was allowed to appear in the NEET mains as Overseas Citizen of India Card cardholder, wherein she participated in the mock rounds and was allotted PG in Paediatrics in AIIMS, however, just before the first round of counselling she was informed that she would be treated as an Indian national and not as a foreign national.

Education/Educational institutions – Medical education – Admission to post graduate courses – Foreign national holding an Overseas Citizen of India Card-OCI Card appeared in the written exam participated in the mock rounds and was offered PG in Paediatrics in AIIMS – However, just before the first round of counselling, rejection of her candidature to a PG medical seat by changing her status from foreign national to Indian national on basis of the Notification, withdrawing the privileges conferred upon OCI Card holders regarding their parity with Indian nationals for appearing in NEET exams – Legality:

Held: Petitioner's eligibility to claim the benefit of OCI card holder cannot be denied – Rejection of her candidature not supported in law – Notification dated 04.03.2021 operated arbitrarily because it indicated non-application of mind in not saving accrued rights; and the application of proviso to Clause 4 (ii) of the notification was held to have no nexus with the objects sought to be achieved – When the right conferred was withdrawn and altered, in the process leading to such change, it should demonstrate application of mind, nexus to the object of such withdrawal or modification

and any such decision had to be free of arbitrariness – Notification saved from the vice of non-application of mind and was in fact retroactive – It was in these circumstances it was held that only those persons who obtained OCI Cards after 04.03.2021 were rendered ineligible in terms of the notification – Thus, the issuance of direction to consider the petitioner in remaining counselling rounds by AIIMS and all participating institutions for PG Medical seats – Citizenship Act, 1955 – s. 7A to D. [Paras 14-17]

LIST OF CITATIONS AND OTHER REFERENCES

Anushka Rengunthwar & Ors. v. Union of India & Ors. 2023 SCC Online SC 102 – relied on.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 642 of 2023.

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

Appearances:

Vinay Navare, Sr. Adv., Shivendra Singh, Bikram Dwivedi, Raghav Gupta, Puneett Singhal, Vikhyat Oberoi, Dr. Mukul Nath Verma, Gharote Anurag A, Advs. for the Petitioner.

Atul Kumar, Ms. Sweety Singh, Ms. Archana Kumari, Rahul Pandey, Gaurav Sharma, Dhawal Mohan, Prateek Bhatia, Paranjay Tripathi, Ms. Ruchi Kohli, Ameya Vikrama Thanvi, Bhuvan Kapoor, Aman Sharma, Ms. Shagun Thakur, Praveen Gautam, G. S. Makkar, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

S. RAVINDRA BHAT, J.

1. The petitioner has approached this Court seeking relief under Article 32 of the Constitution aggrieved by the rejection of candidature

to a Post Graduate medical seat; the respondent rejected her application after she was allowed to appear in the written examination and the results were declared for the NEET (PG) and the INI-CET/2023 (hereafter called “NEET” collectively).

2. The All India Institute of Medical Sciences(AIIMS), the Nodal Agency for the NEET test/examination, called for applications from eligible candidates by publishing a prospectus for NEET process on 07.03.2023. The petitioner applied and was issued the examination admit card on 01.05.2023. She participated and appeared in the NEET examination on 07.05.2023. The petitioner holds an Overseas Citizen of India card (hereafter called the “OCI card holder”). She is a U.S. National and was born on 22.02.1999.

3. The prospectus published by the respondents stipulated the eligibility conditions which indicated that the candidate should possess a Medical or Dental Degree and must have completed the required period of 12 months training and should possess a certificate of grading system from the concerned universities/institutions to determine the value of grading in percentage and the minimum marks in aggregate in MBBS/BDS professional examinations was to be 55% aggregate or equivalent. In addition, for Foreign Nationals, No Objection Certificate was also deemed essential. This was to be issued by the Ministry of External Affairs, Government of India. The stipulation for OCI candidates and the relevant requirements for admission into PG courses for Indian Nationals as well as sponsored and Foreign Nationals, reads as follows:

“Overseas Citizen of India (OCI): Overseas Citizen of India candidates can apply against Foreign National Seats. OCI candidates are not required to obtain NOC, however must upload the scan copy of OCI card on or before date(s) mentioned in Important Dates Section of Prospectus Part-A.

Section V: Seats available for admission into postgraduate courses for July 2023 Session of various INIs

The seats available for admission into postgraduate courses in participating INIs for July 2023 session are of two types

1. Seats available for all Indian Nationals (excluding sponsored & Foreign National seats)

A consolidated list of seats available for admission into postgraduate courses in participating INIs for July 2023 session of various INIs will be prepared and published by Examination section, AIIMS, New Delhi on the basis of official information received from respective INIs. The INI-wise list received from various INIs shall be accessible from Seats Available Tab of the INI-CET portal. These lists are subjected to change as per the decision of respective INIs and shall be updated as per information received by the Examination Section, AIIMS, New Delhi. The list of seats available shall not be changed after the declaration of the results. The updated consolidated list of available postgraduate seats for seat allocation (INI-wise and specialty-wise) for July 2023 session shall be published before the declaration of results.

2. Seats available for Sponsored & Foreign National

The list of INI-wise and Specialty-wise available seats for Sponsored & Foreign Nationals will be accessible through Seats Available Tab on or before starting of “completion of application” as per mentioned in the “Important dates Tab”.

4. The petitioner's application listed her as the OCI candidate, and she appeared in the examination in that capacity; the results declared on 13.05.2023 showed that she had secured 96.73 percentile, and her overall rank was 1902. It is asserted that this list also recognized her in OCI category. Her roll number was mentioned in the provisionally qualified list of candidates published on 13.05.2023.

5. The communication dated 25.05.2023¹ provided information for the first and second round of online seat allocation by institution and subject wise. The AIIMS issued a schedule for online seat allocation for admission to PG courses (Notice No. 97/2023) on 10.06.2023. On the same day, the petitioner was informed that she would be treated as a Foreign National as

1 No. F. AIIMS/EXAM.SEC. /4-5/(INI-CET-PG-June-2023)/2023.

she had disclosed her status to be as OCI Candidate². She was informed that the mock round of application process had begun on 11.06.2023 and would end on 13.06.2023.

6. On 15.06.2023, the result of online mock round was announced. The petitioner was allotted the ‘pediatrics’ discipline in AIIMS. This is evident from the announcement of online mock seat allocation before the first round published on 15.06.2023. In light of these developments, suddenly on 19.06.2023, she was informed that, she would no longer be treated as OCI candidate, but would be considered in the category of “Indian National”. This was published by virtue of a public notice No. 119/2023; an e-mail communication was received by the petitioner to that effect on 19.06.2023 itself.

7. As the first-round of counselling was about to commence on 23.06.2023, the petitioner was informed and alleges that she had no choice but to opt for status of an Indian National which she did, under protest and participated in the first counselling round. Therefore, she approached this Court immediately thereafter, on 21.06.2023, contending that despite completion of entire process and there being no error or mistake on her part, the change of her status had reduced the chances of her securing admission in the PG Medical Course considerably. It is contended by her that the change of status presumably on the basis of a Central Government notification dated 04.03.2021 is unfair given that she has in all senses of the term burnt or foreclosed her options.

8. It is contended that for all practical purposes, from the year 2005 and especially her higher education trajectory made her eligible for admission as a foreign national having an OCI card. The apparent decision of AIIMS to treat the petitioner as Indian national is unfair and arbitrary.

9. It is contended by Mr. Vinay Navare, Ld. Senior Counsel, on behalf of the petitioner that the basis for this change of stand appears to be the Ministry of Home Affairs Notification dated 04.03.2021³, under the head (Parity with Non-Resident Indians in the matter of admission to NEET)

2 (The eligibility criteria for candidates holding OCI Card was dated 10.06.2023).

3 Issued under Section 7B of the Citizenship Act, 1955.

indicated an exception that OCI card holder are ineligible for admissions to seats exclusively reserved for Indian citizens.

10. Mr. Navare argued that the notification was the subject matter of a judgment of this court in *Anushka Rengunthwar & Ors. V. Union of India & Ors*⁴. It was submitted that this court recognized that the Central government could issue the notification of the kind which it did on 04.03.2021 in regard to the matters, enumerated or provided for. Yet at the same time, the Court categorically ruled that retrospective effect could not be given to that notification and that despite it seemingly on its application it did have an element of retroactive application. The court ruled that the OCI card holder status meant that persons like petitioner are treated as overseas citizens of India and Sections 7A to 7D of the Citizenship Act, 1955, (hereafter “the 1955 Act”) enacted the procedure for their registration and cancellation, keeping in mind that the earlier notification dated 11.04.2005, 05.01.2007 and 05.01.2009 had enabled such OCI cardholders to apply for educational institutions in India and the state could not deny them such benefits abruptly. It was emphasized that the Court, therefore, declared that the operation of notification which provided for supersession of earlier notifications and clause 4 (ii) and its proviso and explanation could operate only prospectively in respect of OCI Card holder who have secured admission consequently on 04.03.2021. It was submitted that in the present case the OCI card was issued to the petitioner prior to that date, i.e., on 02.11.2015.

11. Mr. Atul Kumar, learned counsel relied upon the notification dated 04.03.2021 and submitted that this Court in Anushka(supra) clearly held that it had prospective effect. This meant that for all subsequent years i.e., after 2021-22, the notification was applicable. It was contended that in any event since the petitioner was born much prior to 04.03.2021, the application of the notification (04.03.2021) operated with effect from the date of the judgment i.e., 03.02.2023.

12. AIIMS finds fault with the petitioner for not disclosing that she was an OCI Card holder prior to 04.03.2021, which had to be viewed as a special factor regard upon had to the law declared in Anushka (supra).

4 2023 SCC Online SC 102.

Analysis and Conclusions

13. The judgment in *Anushka (supra)* analyzed the position with respect to various provisions of the Foreigners Act, 1946 and the Citizenship Act, 1955, especially Sections 7A to 7D and the notifications prior to the one in question, i.e., dated 11.04.2005, 05.01.2007 and 05.01.2009 which also were issued under Section 7B of the 1955 Act. Each of the notifications had declared that OCI Card holder are to be treated and granted status at par with Non Resident Indians (NRIs) and Indian Nationals, including appearing in All India Pre-medical Test and all such other tests to render them eligible for admission pursuant to provisions of the relevant Act.

The notification dated 04.03.2021 pertinently states as follows:

"MINISTRY OF HOME AFFAIRSNOTIFICATION

New Delhi, the 4th March, 2021

"S.O. 1050(E) – In exercise of the powers conferred by sub-section (1) of section 7B of the Citizenship Act, 1955 (57 of 1955) and in supersession of the notification of the Government of India in the Ministry of Home Affairs published in the Official Gazette vide number S.O. 542(E), dated the 11th April, 2005 and the notifications of the Government of India in the erstwhile Ministry of Overseas Indian Affairs published in the Official Gazette vide numbers S.O. 12(E), dated the 5th January, 2007 and S.O. 36(E), dated the 5th January, 2009, except as respect things done or omitted to be done before such supersession, the Central Government hereby specifies the following rights to which an Overseas Citizen of India Cardholder (hereinafter referred to as the OCI cardholder) shall be entitled, with effect from the date of publication of this notification in the Official Gazette, namely:-

(4) parity with Non-Resident Indians in the matter of: -

(ii) appearing for the all India entrance tests such as National Eligibility cum Entrance Test, Joint Entrance Examination (Mains), Joint Entrance Examination (Advanced) or such other tests to make them eligible for admission only against any Non-Resident Indian seat or any supernumerary seat;

Provided that the OCI cardholder shall not be eligible for admission against any seat reserved exclusively for Indian citizens.”

14. The facts in this case are not disputed; undoubtedly the petitioner was treated as a foreign national and allowed to appear in the NEET mains-as OCI cardholder; she even secured a fairly high rank. She was allowed to participate in the mock rounds of allocations which led to an indication that she would be offered PG in Paediatrics in AIIMS and just before the first round of counselling she was informed that her status would no longer be as a foreign national and that she would be treated as an Indian national.

15. A plain reading of the notification undoubtedly leads one to conclude that it withdraws the eligibility or privileges which had been hitherto conferred upon OCI Card holders regarding their parity with Indian nationals for appearing in All India examinations such as NEET. This meant that after the date of issuance of that notification, i.e. 04.03.2021, such OCI card holders could not claim the privilege of eligibility for admission in any competitive entrance examination “any seat reserved exclusively for Indian citizens” was an abrupt notifications all these notifications were somewhat softened by of the retroactive application facially was that all OCI Card holders who had planned their academic careers based upon pre-existing notifications dated 11.04.2005, 05.01.2007 and 05.01.2009 were held to be eligible to continue with that privilege in terms of the judgment in *Anushka* (supra). The relevant portions of the judgment in *Anushka* (supra) are extracted below:

“45. However, what is necessary to be taken note is that the right which was bestowed through the notification dated 11.04.2005 and 05.01.2009 insofar as the educational parity, including in the matter of appearing for the All-India Pre-Medical Test or such other tests to make them eligible for admission has been completely altered. Though the notification ex facie may not specify retrospective application, the effect of superseding the earlier notifications and the proviso introduced to clause 4(ii) would make the impugned notification dated 04.03.2021 ‘retroactive’ insofar as taking away the assured right based on which the petitioners and similarly placed persons have altered their position and have adjusted the life’s trajectory with the hope of furthering their career in professional education.

46. *The learned senior counsel for the petitioners would in that context contend that since sub-section (2) to Section 7B of Act, 1955 does not exclude the right under Article 14 of the Constitution, it is available to be invoked and such discrimination contemplated in the notification to exclude the OCI Cardholders should be struck down. Article 14 of the Constitution can be invoked and contend discrimination only when persons similarly placed are treated differently and in that view the OCI Cardholders being a class by themselves cannot claim parity with the Indian citizens, except for making an attempt to save the limited statutory right bestowed. To that extent certainly the fairness in the procedure adopted has a nexus with the object for which change is made and the application of mind by the Respondent No. 1, before issuing the impugned notification requires examination.*

47. *As noted, the right of the OCI Cardholders is a midway right in the absence of dual citizenship. When a statutory right was conferred and such right is being withdrawn through a notification, the process for withdrawal is required to demonstrate that the action taken is reasonable and has nexus to the purpose. It should not be arbitrary, without basis and exercise of such power cannot be exercised unmindful of consequences merely because it is a sovereign power. To examine this aspect, in addition to the contentions urged by the learned Additional Solicitor General we have also taken note of the objection statement filed with the writ petition. Though detailed contentions are urged with regard to the status of a citizen and the sovereign power of the State, as already noted, in these petitions the sovereign power has not been questioned but the manner in which it is exercised in the present circumstance is objected. The contention of learned Additional Solicitor General is that the intention from the beginning was to grant parity to OCI Cardholders only with NRIs. On that aspect as already noted above we have seen the nature of the benefit that had been extended to the petitioners and the similarly placed petitioners under the notifications of the year 2005, 2007 and 2009. The further contention insofar as equating the OCI Cardholders to compete only for the seats which are reserved for NRIs and to exclude the OCI Cardholders for admission against any seat reserved exclusively for the Indian citizens, across the board, even to the persons who were*

bestowed the right earlier, it is stated that the rationale is to protect the rights of the Indian citizens in such matters where State may give preference to its citizens vis-à-vis foreigners holding OCI Cards. It is further averred in the counter that number of seats available for medical and engineering courses in India are very limited and that it does not fully cater to the requirement of even the Indian citizens. It is therefore contended that the right to admission to such seats should primarily be available to the Indian citizens instead of foreigners, including OCI Cardholders.

48. *Except for the bare statement in the objection statement, there is no material with regard to the actual exercise undertaken to arrive at a conclusion that the participation of OCI Cardholders in the selection process has denied the opportunity of professional education to the Indian citizens. There are no details made available about the consideration made as to, over the years how many OCI cardholders have succeeded in getting a seat after competing in the selection process by which there was denial of seats to Indian Citizens though they were similar merit-wise.*

52. *Therefore it is evident that the object of providing the right in the year 2005 for issue of OCI cards was in response to the demand for dual citizenship and as such, as an alternative to dual citizenship which was not recognised, the OCI card benefit was extended. If in that light, the details of the first petitioner taken note hereinabove is analysed in that context, though the option of getting the petitioner No. 1 registered as a citizen under Section 4 of Act, 1955 by seeking citizenship by descent soon after her birth or even by registration of the citizenship as provided under Section 5 of Act, 1955, was available in the instant facts to her parents, when immediately after the birth of petitioner No. 1 the provision for issue of OCI cards was statutorily recognised and under the notification the right to education was also provided, the need for parents of petitioner No. 1 to make a choice to acquire the citizenship by descent or to renounce the citizenship of the foreign country and seek registration of the Citizenship of India did not arise to be made, since as an alternative to dual citizenship the*

benefit had been granted and was available to petitioner No. 1 and the entire future was planned on that basis and that situation continued till the year 2021.

53. *Further, as on the year 2021 when the impugned notification was issued the petitioner No. 1 was just about 18 years i.e., full age and even if at that stage, the petitioner was to renounce and seek for citizenship of India as provided under Section 5(1)(f)(g), the duration for such process would disentitle her the benefit of the entire education course from pre-school stage pursued by her in India and the benefit for appearing for the Pre-Medical Test which was available to her will be erased in one stroke. Neither would she get any special benefit in the country where she was born. Therefore in that circumstance when there was an assurance from a sovereign State to persons like that of the petitioner No. 1 in view of the right provided through the notification issued under Section 7B(1) of Act, 1955 and all 'things were done' by such Overseas Citizens of India to take benefit of it and when it was the stage of maturing into the benefit of competing for the seat, all 'such things done' should not have been undone and nullified with the issue of the impugned notification by superseding the earlier notifications so as to take away even the benefit that was held out to them.*

54. *Therefore, on the face of it the impugned notification not saving such accrued rights would indicate non application of mind and arbitrariness in the action. Further in such circumstance when the stated object was to make available more seats for the Indian Citizens and it is demonstrated that seats have remained vacant, the object for which such notification was issued even without saving the rights and excluding the petitioners and similarly placed OCI Cardholders with the other students is to be classified as one without nexus to the object. As taken note earlier during the course this order, the right which was granted to the OCI cardholders in parity with the NRIs was to appear for the Pre-Medical Entrance Test along with all other similar candidates i.e. the Indian citizens. In a situation where it has been demonstrated that the petitioner No. 1 being born in the year 2003, has been residing in India since 2006 and has received her education in India, such student who has pursued her education by having the*

same ‘advantages’ and ‘disadvantages’ like that of any other students who is a citizen of India, the participation in the Pre-Medical Entrance Test or such other Entrance Examination would be on an even keel and there is no greater advantage to the petitioner No. 1 merely because she was born in California, USA. Therefore, the right which had been conferred and existed had not affected Indian citizens so as to abruptly deny all such rights. The right was only to compete. It could have been regulated for the future, if it is the policy of the Sovereign State. No thought having gone into all these aspects is crystal clear from the manner in which it has been done.

55. *In the above circumstance, keeping in view, the object with which the Act, 1955 was amended so as to provide the benefit to Overseas Citizen of India and in that context when rights were given to the OCI cardholders through the notifications issued from time to time, based on which the OCI cardholders had adopted to the same and had done things so as to position themselves for the future, the right which had accrued in such process could not have been taken away in the present manner, which would act as a ‘retroactive’ notification. Therefore, though the notification ex-facie does not specify retrospective operation, since it retroactively destroys the rights which were available, it is to be ensured that such of those beneficiaries of the right should not be affected by such notification. Though the rule against retrospective construction is not applicable to statutes merely because a part of the requisite for its action is drawn from a time antecedent to its passing, in the instant case the rights were conferred under the notification and such rights are being affected by subsequent notification, which is detrimental and the same should be avoided to that extent and be allowed to operate without such retroactivity.*

56. *We note that it is not retrospective inasmuch as it does not affect the OCI Cardholders who have participated in the selection process, have secured a seat and are either undergoing or completed the MBBS course or such other professional course. However, it will act as retroactive action to deny the right to persons who had such right which is not sustainable to that extent. The goal post is shifted when the game is about to be over. Hence we are of the view that the retroactive*

operation resulting in retrospective consequences should be set aside and such adverse consequences is to be avoided.

57. *Therefore in the factual background of the issue involved, to sum up, it will have to be held that though the impugned notification dated 04.03.2021 is based on a policy and in the exercise of the statutory power of a Sovereign State, the provisions as contained therein shall apply prospectively only to persons who are born in a foreign country subsequent to 04.03.2021 i.e. the date of the notification and who seek for a registration as OCI cardholder from that date since at that juncture the parents would have a choice to either seek for citizenship by descent or to continue as a foreigner in the background of the subsisting policy of the Sovereign State.*

58. *In light of the above, it is held that the respondent No. 1 in furtherance of the policy of the Sovereign State has the power to pass appropriate notifications as contemplated under Section 7B(1) of the Citizenship Act, 1955, to confer or alter the rights as provided for therein. However, when a conferred right is withdrawn, modified or altered, the process leading thereto should demonstrate application of mind, nexus to the object of such withdrawal or modification and any such decision should be free of arbitrariness. In that background, the impugned notification dated 04.03.2021 though competent under Section 7B(1) of Act, 1955 suffers from the vice of non-application of mind and despite being prospective, is in fact 'retroactive' taking away the rights which were conferred also as a matter of policy of the Sovereign State.*

59. *Hence, the notification being sustainable prospectively, we hereby declare that the impugned portion of the notification which provides for supersession of the notifications dated 11.04.2005, 05.01.2007 and 05.01.2009 and the clause 4(ii), its proviso and Explanation (1) thereto shall operate prospectively in respect of OCI cardholders who have secured the same subsequent to 04.03.2021.*

60. *We further hold that the petitioners in all these cases and all other similarly placed OCI cardholders will be entitled to the rights and privileges which had been conferred on them earlier to the notification dated 04.03.2021 and could be availed by them notwithstanding*

the exclusion carved out in the notification dated 04.03.2021. The participation of the petitioners and similarly placed OCI cardholders in the selection process and the subsequent action based on the interim orders passed herein or elsewhere shall stand regularised.”

16. It is evident that the ruling held that notification (dated 04.03.2021) operated arbitrarily because firstly it indicated non-application of mind in not saving accrued rights. The application of proviso to Clause 4 (ii) of the notification of 04.03.2021 was held to have no nexus with the objects sought to be achieved. The court also held that those who are born prior to 2005 and residing in India had received their education in India and had pursued by having some advantages and disadvantages like other children who are citizens of India, and could not be denied their right to participate in NEET examinations or such similar examinations. It was also held that no additional advantage was granted to such class of people merely because they were born abroad and importantly, court took note of the amendment which introduced concession to OCI Card holders. Therefore, the Court concluded that when the right conferred was withdrawn and altered, in the process leading to such change, should demonstrate application of mind, nexus to the object of such withdrawal or modification and any such decision had to be free of arbitrariness. In the light of this conclusion, the court held that the notification saved from the vice of non-application of mind and was in fact retroactive. It was in these circumstances that the Court held that only those persons who obtained OCI Cards after 04.03.2021 were rendered ineligible in terms of the notification.

17. In the present case, although the OCI Card relied upon by the petitioner on 04.08.2022, the fact that she was in fact issued the OCI registration card first, on 02.11.2015. In such circumstances, the petitioner's eligibility to claim the benefit of OCI card holder in terms of the ruling in Anushka (*supra*) is undeniable. The rejection of her candidature at this stage, i.e. on 19.06.2023 is not supportable in law. She is consequently directed to be considered in remaining counselling rounds by the AIIMS and all participating institutions for PG Medical seats. It is clarified that the consideration would be regarding seats that are unfilled on the date of this judgment whether reserved for SC/ST/OBC or other categories and such as specially earmarked for Bhutanese candidates etc. if they can be filled

by other candidates, like her. Furthermore, this facility should be open to the petitioner as well as other candidates based upon the available records of those issued OCI cards prior to 04.03.2021 and who can participate in such counseling having regard to their performance in the NEET test, and their ranking.

18. The writ petition is allowed in the above terms and there is no order as to costs.

Headnotes prepared by:
Nidhi Jain

Writ petition allowed.