Compilation

of court orders and judgements
RELEVANT TO THE PROTECTION OF REFUGEES IN INDIA

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Publication (2019)

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PART I

CASES – SUPREME COURT OF INDIA AND HIGH COURTS

This section covers some of the landmark cases decided by the Supreme Court of India and the various High Courts in relation to recognising the rights of refugees in the country. Irrespective of the fact that each case may fall under several subject matters, for an effortless understanding, the cases have been divided in the following categories based on their main ratio:

PART II
CASES – LOWER COURTS

This section covers some of the important lower court cases related to refugee protection in India. For an effortless understanding the cases have been divided on the basis of their subject matter in the following categories:

PART I

CASES – SUPREME COURT OF INDIA AND HIGH COURTS

I. NON-REFOULEMENT

A fundamental principle of international refugee regime is non-refoulement. It is enshrined in Article 33 of the 1951 Convention relating to Status of Refugees as following:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The principle of non-refoulement forms an indispensable protection under international human rights, refugee, humanitarian and customary international law. It has acquired the status of jus cogens, that is, a peremptory norm of international law from which no derogation is permitted. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.

The table below briefly summarises the orders / judgements in the cases in the Supreme Court of India and the various High Courts, which inter alia, focused on the principle non-refoulement in determining the rights of refugees in India, which is followed by the orders/judgements in the said cases.

Name of the case	Court and date of order	Summary of the order/ judgement
The Maiwand's Trust of Afghan Human Freedom Petitioners vs State of Punjab and ors.	Supreme Court of India 28 February 1986	The Court upon hearing the counsels ruled for issuance of notice to the Respondents and stayed the deportation of the detenues pending notice.
N.D. Pancholi vs State of Punjab and ors	Supreme Court of India 9 June 1988	The Court ruled for issuance of notice in the Writ Petition and the Application and stayed the deportation of the Iranian national mentioned in the petition.

Dr Malavika Karlekar vs Union of India and ors	Supreme Court of India 25 August 1992	The Supreme Court ordered that twenty one nationals of Myanmar who have applied for refugee status cannot be deported to Myanmar while the decision is pending with UNHCR.
P. Nedumaran & Anr vs Union of India & Anr	Madras High Court 27 August 1992	Issue of voluntary repatriation raised. Recognition and significant importance given to the role of UNHCR in ascertaining consent of the refugees for repatriation.
Gurunathan and ors vs The Government of India and ors	Madras High Court 22 March 1994	A petition was made to direct the government to stop the involuntary repatriation of Sri Lankan refugees to their native place. The Government of India gave an undertaking that Sri Lankan refugees would not be sent back to their native place against their will and that there would be no force used in the process. Considering that as a guarantee, the Court disposed of the petition.
Seyed Ata Mohammadi vs Union of India and ors	Bombay High Court A.D. 1458 OF 1994	This case involved a petition at the Bombay High Court for not deporting the petitioner to his native country, Iran. While the hearing was in progress, the petitioner was granted refugee status by UNHCR. On the basis of the refugee certificate, the Government of India stated that there was no question of deporting the petitioner to Iran and that he could travel to any country he desired. Thereby the case was disposed of.
Gurinder Singh and ors vs Union of India	Punjab and Haryana High Court 20 November 1994	The Court directed the respondent to not deport the petitioners until further orders were given.

Shah Ghazai and another vs Union of India and ors	Punjab and Haryana High Court 21 February 1997	This petition requested for quashing the deportation order and releasing the petitioners into the custody of the UNHCR, New Delhi. The Court directed the respondents to handover custody of the petitioners to the UNHCR.
Mst Khadija @ Kjudija and ors vs Union of India and ors	Madras High Court 4 December 1997	Petitioners, Afghan refugees, prayed for release from detention and non-deportation. The petitioners further submitted that they have approached the UNHCR for resettlement in a third country, due to which the Court stayed the deportation for a period of four weeks.
Ms. Lailoma Wafa vs Union of India and ors.	Delhi High Court 31 July 1998	The case pertained to the deportation of the petitioner which was stayed by the order of the Delhi High Court. The Court was informed that the request of the Petitioner for resettlement in Finland was accepted and the Assistant Foreigners Regional Registration Officer has granted the Petitioner permission to leave India on or before 05.08.1998. The Court disposed of all the pending applications and petitioner's deportation was extended.
Ktaer Abbas Habib Al Qutaifi vs Union of India & Ors	Gujarat High Court 1999 CRI.L.J. 919 12 October 1998	The petitioners were Iraqi refugees who sought directions for release from detention. Further the petitioners requested that instead of deporting them to Iraq, they may be handed over to UNHCR. On the basis of the principle of non-refoulement and on humanitarian grounds, the Court ordered in favour of the petitioners stating that they were not to be deported from India until a decision is taken and directed the authorities to consider the petitioner's case in right perspective from the humanitarian point of view.

Mr Anthony Omondi Osino vs FRRO	Bombay High Court 5 October 2005	The Court ordered the respondents (FRRO) not to deport the petitioner as he had filed an appeal to the UNHCR for reviewing his refugee status. The Court therefore, also directed the UNHCR to hear and dispose the appeal within a period of one month.
Saifullah Bajwa vs Union Of India And Ors	Delhi High Court 2 December 2010	The petitioners requested to direct the government to provide asylum as they had been persecuted in Pakistan and to release them into the custody of UNHCR. The court ordered that UNHCR be allowed to intervene, and in the meantime, directed the government not to deport the petitioners to their country of origin.
Sehba Meenai vs Union of India	Delhi High Court 15 March 2013	The Court issued release order in favour of an Afghan refugee who was housed at Nirmal Chhaya Jail Road, New Delhi. Further, held that it would be inhuman to deport the refugee if there is a grave threat to life and possibility of human rights violations.
Dongh Lian Kham & Anr vs Union of India & Anr	Delhi High Court 21 December 2015	Petition filed against deportation. The Court directed the respondent to hear the petitioner and consult UNHCR regarding deportation or third country resettlement options and thereafter also seek approval of the MHA (Foreigners Division) as prescribed under Clause 11 of the Internal Guidelines (Standard Operating Procedures 2011).
Shabir Ahmed & Ors vs State	J & K High Court 23 August 2016	The Court ordered that Petitioners would not be forcibly repatriated to Myanmar except in accordance with law while taking into account the refugee status granted by UNHCR.

Mohd. Firoz vs State of JK and ors	J & K High Court 21 November 2016	The petitioner's 15 year old niece (Ms. Parveen) was kidnapped from Myanmar to India and thereafter forcibly married. Ms. Parveen stated that she wishes to stay with the petitioner till arrangements could be made for her repatriation to Myanmar. The Court ordered handing her to the petitioner and also made the petitioner personally responsible for her care and protection.
Sameer Hamood Ahmed vs Union of India and Anr	Delhi High Court 12 May 2017	The Court ordered that on petitioner making an application for long-term visa, the respondents shall consider the same in accordance with law within a period of three months. Pending the consideration of the said application and, for a period of two weeks thereafter, no coercive steps shall be taken against the petitioner for deportation.
Abdur Sukur @ Adi Sukur & Anr. vs The State of West Bengal & ors	Calcutta High Court 24 December 2019	Court granted relief to a "Rohingya" couple facing deportation to Myanmar. It issued an order of injunction against deportation during the pendency of the writ petition. Court also held that relief is being granted'in order to uphold the spirit of humanity, if not the Fundamental Rights enshrined in the Constitution of India, which is the grundnorm of all Indian statutes.'

IN THE SUPREME COURT OF INDIA

The Mailwand's Trust of Afghan Human Freedom v. State of Punjab & Ors.

Writ Petition (Crl.) No. 125 and 126 of 1986 (for Prel. Hearing)

(With Application for Ex-Parte Stay /Direction)

Coram	: Hon'ble Mr. Justice O. Chinappa Reddy
	: Hon'ble Mr. Justice V. Khalid
Date	: 28.02.1986
For the Petitioners	: Mr. V.M. Tarkunde, Sr. Adv.
	: Mr. B.R. Agarwala and Miss Vijayalakshmi Menon, : Advs.

This Petitions were called on for hearing today. Upon hearing Counsel the court made the following.

ORDER

Issue notice on the Writ Petitions returnable within two weeks. The Detenues will not be Deported pending notice.

Sd/- Krishan Lal

Court Master

IN THE SUPREME COURT OF INDIA

N.D. Pancholi v. State of Punjab & Others

Writ Petition (Crl.) No.243 of 1988 (for Prel. Hearing)

(With application for ex parte stay)

Date : 09.06.1988

For the Petitioner : Mr. S.K. Bisaria, Adv

This Petitions were called on for hearing today. Upon hearing Counsel the court made the following.

ORDER

Issue Notice on the Writ Petition as well as on Stay Application returnable within four weeks from today. Pending Notices, the Iranian national mentioned in the petition shall not be deported from India.

Sd/- K.C. Sethi

Court Master

SUPREME COURT OF INDIA

Dr. Malavika Karlekar v. Union of India and Anr.

Writ Petition (Criminal No.) 583 of 1992

Coram	: Hon'ble the Chief Justice
	: Hon'ble Mr. Justice Yogeshwar Dayal
Date	: 25.09.1992
For the Petitioners	: Ms. Kamini Jaiswal

This petition was called on for hearing today. Upon hearing counsel the court made the following

ORDER

1. The writ petition is taken on board.
2. It is submitted by counsel that 21 persons whose names are mentioned in Annexure 'C' to the petition, a copy of which is taken on record, are likely to be deported from Andaman Islands to Burma tomorrow. We are informed that their applications for refugee status are pending determination. The authorities may check whether these statements are true and if they find that the said statements are true and that the refugee status claimed by them is pending determination and a prima facie case is made out for the grant of refugee status and further that these individuals pose no danger or threat to the security of the country, they may not be deported till question of their status can be determined.
3. We make it clear that if there is any other ground on which any or all of these persons are to be deported, this order will not affect the same and so also it will not affect any case where refugee status has been denied or not claimed at all.
4. The writ petition is disposed of. If any further relief is to be sought, it may be bought from the Calcutta High Court.

(Virender K. Sharma) (Mohd. Idris)

Court Master Court Master

This order be communicated telegraphically at the cost of the petitioner.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

P. Nedumaran and Anr v. The Union of India and Anr
W.M.P.NOS.17372, 17424, 18985 and 18086/92 in
W.P.NOS, 12298 and 12343/92

Coram : Hon'ble Mr. Justice Srinivasan

Date : 27.08.1992

1. Petitions praying that in the circumstances ted therein and in the respective affidavits filed with W.2, Nos, 12298 and 12343 of 1992 on the file of the High Court the High Court will be pleased to grant interim injunction restraining the respondents from repatriating the Refugees in Tamil Nadu (in W.M.P.No8,1'/372/92 and W.M.7.10.17424/92) pending W.p.Nos.12298 and 12343 of 1992 presented to this court under Article 226 of constitution of India to issue a writ of Mandamus

   i) directing the respondents to permit the UNHCR officials to check the voluntariness of the Refugees in being back to their Srilanka;

   ii) directing the respondents to permit the Refugees who do not want to be repartriated to continue their stay in camps in India;

   iii) directing the respondents to provide all the facilities to the Refugees as they are entitled to according to the International norms;

   iv) directing the respondents to pay the costs of the public Interest litigation Petition (in W.P.No.12298/92)

   i) directing the respondents to nominate the respective District Judges to verify' the voluntariness of the refugees in getting back to their country;

   ii) directing the and respondent to protect and extend all the facilities to the existing Srilankan Tamil Refugees in the State till they opt for their return to their country;

   iii) directing the respondents to permit the representatives of the United Nations High Commissioner for refugees to visit camps for Srilankan Tamils in Tamilnadu, and

   iv) directing the 2nd respondent to pay the costs of this public Interest litigation petition (in W.P.No. 12343/92)

W.M.P.NOS. 18085 and 18086/92: Presenter to this court to vacate the interim stays granted in and by the order of this court (i) dated 20.8.92 and made in W.M.F.No. 17372/92 (ii) dated 20.8.92 and made in W.M.1.10.17424792 / in W.P.no.12343/92

ORDER

These petitions coming on for hearing upon perusing the petitions and the respective affidavits filed in support of W.7.Nos.12298 and: 12343/92 and the counter affidavit filed thereto and the counter affidavits filed herein and the order of this court dated 20.8.92 in Wie.Nos.17372 and 17424/92 and upon hearing the arguments of Mr.K.Chandru for Mr.T.Kalaimani, Advocate for the petitioner in W.M.T.Nos. 17372 92 1992, and 17421/92 and 1st respondent in W.M.B.NO. - 18085/92 and 1st respondent in W.M.P.No. 18086/92 and of Mr. P. Narasimhan, senior Central Government Standing counsel on behalf of the 1st respondent in WMP. Nos.17372 and 17124/92 and 2nd respondent in WMT.NO.18085/92 and WMP. 18086/92 and of Mr. P. Sadasivan, special Government Pleader on behalf of the end respondent in WM.Nos.17372/92 and 17424/92 and petitioner in WMP. Nos. 18085/92 and 18086/92and having stood over for consideration till this day, the court made the following order:

The prayer of the writ petitioners in the first two writ miscellaneous petitions is for an injunction restraining the respondents from repatriating the refugees in Tamil Nadu till the disposal of the writ petitions. The prayer in the main writ petitions is almost the same excepting with regard to one prayer in W.F.No.12343 of 1992, - In the earlier writ petition, the prayer is for a direction to the respondents to permit United Nations High Commissioner for Refugees (UNHCR) officials to check the voluntariness of the refugees in going back to Srilanka, directing the respondents to the permit the ref u gees who do not want to be repatriated to continue their stay in camps in India, and directing the respondents to provide all facilities to the refugees as they are entitled according to international laws. The additional prayer in W.9.10.12343 of 1992 is to direct the respondents to nominate the respective District Judges to verify the voluntariness of the refugees to go back to their country.

2. I do not propose to consider the question of maintainability of the writ petitions at this stage and I proceed on the footing that the writ petitions are maintainable.

3. It is not in dispute that there has been an influx of refugees from Srilanka from August, 1989 and they have been given shelter and accommodation in various camps. As per the counter affidavit filed by the respondents 35, 894 families consisting of 1, 22,078 refugees arrived. from Srilanka out of which 32, 294 families consisting of

1,15,680 refugees were accommodated In 337 camps in 19 districts of Tamilnadu, except Madras and Nilgiris. It is also stated in the counter affidavit that the Srilankan Govemment has agreed to take back the willing refugees and they have furnished a list of assistance to be provider to the refugees on arrival in Srilanka.

4. The complaint of the petitioners in the writ petitions as well as in the interlocutory applications 18 that the respondents are repatriation refugees against their will and they are coercing the refugees to sign letters of consent. It is also alleged that the respondents are adopting certain in lawful methods in order to force the refugees to go back to Srilanka after executing letters of consent. In the writ petition filed by Mr. Nedumaran, it is stated as follows:

   "It is also stated that the repatriation had come to a halt with a hue and cry on the forcible repatriation in May, 1992. It was expected that India - would permit the UNHCR to check the voluntary nature among the refugees as it had announced earlier in public forum. But, it did not happen and again India has started to repatriated the refugees by both Air and Sea routes. The first batch of Air shifting was done in 3rd August, 1992 loading 130 passengers-refugees. It is stated that the refugees would be flown back on every Mondays and Thursdays. From 15th onwards, India would be sending the larger number of refugees by ships.....

   Though the centre had been saying that there was no force used to obtain voluntary statements, it was not cross checked by any independent agency such as UNHCR, The UNHCR officials are said to have contacted the Delhi officials in this regard. But, even before the checking India had starter to repatriate amidst protest from those homeless refugees. There would be no harm if the repatriation is delayed for some time to allow the UNHCR officials to check the voluntariness. A best example of the involuntariness can be cited from a newspaper report reported on 7th August, 1992 in the 'HINDU'. In the report, it is stated that one of the refugees was said to have escaped from the transit camp fearing identification by the Srilankan authorities. If the repatriation was voluntary as repeatedly emphasized by the respondents, there would not be a necessity for a refugee to slipaway from the camp. There would be many hopeless, innocent refugees unable to express their position for which the only solution would be that the: voluntariness shall be checked by an independent agency like "UNHCR"...

5. In the other writ petition piled filed by Dr. Ramadoss it is stated that several refugees have brought to his notice that they are forced to sign the so called voluntary consent statements and force is used

directly and indirectly by stoppage of rations, cabs roles, and curb on their movements. It is further alleged that politics is playing without considering the... humanitarian aspects and inmates of the refugee camps are being backed off to Srilanka without ascertaining their willingness.

The following statement is found in his affidavit:

"I state that I have received several letters and Telegrams from the refugee camps requesting my efforts to prevent the involuntary deportation. They are apprehending danger to life and liberty and they have expressed the same as if they are being sent to the Slaughter houses. We do not have any apprehension for those opting voluntarily for their return to Srilanka. This petition is only in respect of those who are being compeller to sign and forced to, go back to their country against their wishes and preferences."

6. The crux of the matter is found in the above "passage in the affidavit of Dr. Ramadoss. These two petitions are concerned only with the persons who are being repatriated against their willingness and the petitioners are not interested in persons who voluntarily wish to go back to Srilanka. Thus, the crucial question 18 whether the respondents have taken appropriate steps to ascertain the willingness of the refugees before repatriating them to Srilanka. Several documents have been filed by the petitioners in the typed sets comprising of certain newspaper reports and letters purporting to have been written by the refugees, It is not possible for the Court to ascertain the genuineness and reliability of these documents at this stage without any further materials. But, however, it is clear from the various Documents placed before the court that some of the refugees are not willing to go and some others are happy to go back to their country. In fact, one of the newspaper reports filed by Dr. Ramadoss, viz., frontline contains a report, a reading of which shows that all the refugees interviewed by the reporter except one declared that they report also quotes one of the refugees as saying that he was going back with full satisfaction. In the same report, another person, a lady, is said to have expressed her unwillingness and dissatisfaction in going back:

7. Reliance is placed on the reports as well as the letters to show that the Government, is adopting unfair means to force the refugees to go back to Srilanka and that some pamphlets containing objectionable language: are being circulated in the refugee camp. The respondents have denied the same. As at present, since there is no material to show that the Government had causer circulation of the said pamphlets. It is not possible to draw any inferences from the said pamphlet. Based on the records produced before me, it is seen that one section of the

refugees is willing to back to Srilanka and another section is not so willing. The question is what should be done at this stage.

8. In the counter affidavit the following Averments are set out. In paragraph 3 of the counter affidavit it is stated as follows:

"The willingness to go back to my Srilanka or otherwise were obtained in writing both in English and Tamil. As a result of discussion with the Government of Srilanka, the Government of India have decided to send back the willing Srilankan Tamil refugees to Srilanka. Nearly 30,000 refugees have expressed their written willingness bo than in English and Tamil to 30, back to Srilanka. Accordingly, the Governnment of India have arranged for the reverse flow of the willing refugees and charted the vessels M.V. Akbar and M. V. Ramanujan."

Thus, as on 15.5.92, 23, 126 willing refugees were repatriated back to Srilanka. Due to non-availability of either ship or aircraft the reverse flow has been temporarily suspended on 15,5.92. The Government of India have since placed one air craft for repatriating the willing refugees. The reverse flow has been recommenced from 3.8.92 (one trip on every Monday and Thursday). So far 777 willing refugees have been air lifted from Madras to Trincomaleo, Next air lifting will be on 24.8.92. 28.8.92 and 31.8.92 and the willing refugees are accommodated in two transit camps at Tambaram and they are ready to reach their land. If the repatriation is stopped there will be agitation in the Transit Camps."

In paragraph 4 it is stated as follow:

"Those representatives are satisfied during the interview with the refugees accommodated in the temporary transit camp that the repatriation of refugees is done on their own willingness and the UNHCR team have thus cleared for the repatriation, of the willing refugees. Mr. Fazhul Karim, Chief of Mission, UNHCR office and his representatives met the refugees at the Transit Camp near Meenambakkam Airport before their departure, out of 556 refugees ready to return, 42 refugees said that they would like to get back to Srilanka, but not now. They constituted 8%. Accordingly, they were not repatriated to Srilanka but sent back to various in Tamil Nadu. Similarly, another team of the UNHCR led by Ms. W.M. Lim interviewed about 250 families, out of 340 famillles at Mandapam Transit camp willing to go back to Srilanka."

It is learnt that all those interviewed wore willing to go back. Therefore, no force or any compulsion is thrusted on the refugees. All the refugees who are now staying in the transit camp, Madras are urging to send thon back to Srilanka immediately. It would be pertinent to mention here that certain willing refugees are threatening to resort to hunger strike/commit suicide if they are not sent back to Srilanka immediately. No pressure or coercion

is being attributed on the Srilankan refugees at any level as alleged by the writ petitioner. In fact, 8904 more refugees are still willing to go back to Srilanka. It may thus be seen that the willing refugees alone are being sent back to Srilanka."

9. It is repeated in the counter affidavit in several paragraphs that the willing refugees are alone sent back to Srilanka and not the others.

10. The fact that the representatives of UNHCR are camping here and interviewing the refugees to ascertain whether they are willing to go back to Srilanka is not in dispute. The main complaint made in the writ petition is that the Government is repatriating the refugees without ascertaining their consent. That loses its force once it is seen that the representatives of the world Organisation are present here to ascertain whether the refugees are willing to go back or not. The details furnished in the counter affidavit show that the representatives of UNHCR are ascertaining whether the refugees have given their consent voluntarily before they are actually repatriated. In fact, the averments in paragraph 4 of the counter affidavit show that even after coming to the transit camp 42 refugees out of a total of 556 refugees expressed their unwillingness to go back to Sri Lanka and they were retained here. The counter affidavit shows that even at their state the refugees are not permitted to express their willingness or otherwise to go back. The facts set out in the counter affidavit are enough to show that an outside agency is present to ascertain whether the refugees are voluntarily going back to their country.

11. Learned counsel for the petitioners submitted that the very fact that 42 persons out of 556 persons who are brought to the Transit Camps expressed their unwillingness at that stage throws considerable doubt as to the original consent said to have been given by them. According to learned counsel for the petitioners, there is no verification in the camps themselves whether the refugees are subjected to coercion and whether they are giving consent voluntarily or not. It is also 'stated by learned counsel for the petitioners that newspaper reports disclose that the consent is obtained only in English forms and not in Tamil forms. According to him most of the refugees do not understand English and they have been made to sign the consent forms. It is further contended that the respondents are adopting intimidation tactics to get the signatures of the refugee: by stopping supplies and other materials. The last arguments of learned counsel for the petitioners is that even in Srilanka these refugees are only going to be placed in refugee camps and they are not going to be sent back to their original places of abode and there is no purpose to send them back at this stage.

12. In so far as the consent of the refugees is concerned, when there is a world agency to ascertain whether the consent is voluntary or not, it is not for this court to consider whether the consent is voluntary or not. Nothing has been suggested as against the competence on impartiality of the representatives of the UNHCR in ascertaining the willingness of the refuges to go back. The allegation that it is only in the English forms the signatures of the refugees are obtained is not correct. Learned Special Government Pleader has produced the file containing the consent forms. Each person who signs the form has signed not only in the English form but also in the Tamil form. The willingness is obtained in both the forms. Hence, it is not correct to state that willingness is obtained only in the English form. The forms in which signatures have been obtained are produced before me. I do... not find anything to suspect the genuineness of the same at this stage. Apart from that, the Special Government Pleader has also produced the file containing the forms in which the refugees have expressed their unwillingness to go back. In those forms several refugees have refused to go back and their signatures have also been obtained in the forms expressing their unwillingness. Thus, the Government has adopted the proper procedure to ascertain whether the refugees are willing to go back. There is no substance in the argument that the fact that the refugees have refused to go back after coming to the transit camps shows that their consent was initially obtained by unfair means, after all, human mind is known to be fickle and it lay change due to various factors. It only shows that the refugees are given a chance even at the last stage to express their unwillingness and if they do so, they are retained here and sent back to their camps. This court cannot assume that the refugees who expressed refusal to go back after coming to the transit camps wore forced to give their consent earlier. The question whether the original consent was obtained by force or not is not very material Inasmuch as the voluntary nature of the consent is ascertained by the representatives of the UNHCR before the actual expatriation of the refugees.

13. There is nothing at present to show that intiation tactics are being adopted by the Government. The records produced by the petitioner show that the refugees are loving correspondence with the petitioners and other Organizations in the country and it is not as if the refugees are kept in a prison without any contact with the outside world. Mr Nedumaran has produced a copy of the letter addressed to the Director of Rehabilation Department said to have been written by certain refugees. He has also produced similar letters addressed to other persons including the Organisation for Rehabilitation of Eelam Refugees. Thus, the refugees are admittedly having contact with

prominent persons in the country. Hence, it cannot be said that the refugees are so helpless as to sign in the forms at the places indicated by the Government. The contention that refugees are going to be placed in a cap at Srilanka is not relevant. It is beyond the purview of this court, to enquire whether the Srilankan Government is acting in accordance with the norms proscribed by the United Nations Organisation in the matter of rehabilitation of refugees returning to that country.

14. The only question before me is whether the refugees are voluntarily going out of this country. If they have expressed willingness to go back, they cannot be stopped by the petitioners herein, is rightly pointed out by the petitioner in w.P.NO.12343 of 1972, these petitions are concerned only with the persons who are compelled to sign the forms forcibly to go out of this country against their will. As at present, there are no materials to show that persons who have expressed their unwillingness are compelled to go out of this country. I am satisfied by the records produced by the Special Government Pleader that the consent of the refugees is obtained in proper manner and only those refugees who have expressed their consent are being sent back and the voluntariness of consent is being verified by the representatives of the UNHCR.

15. It is not necessary for me at this stage to consider the questions raised under the provisions of the Foreigners Act by the learned Senior Counsel appearing for the Central Government and the answers given thereto by the petitioners' counsel. Even assuming that the Srilankan refugees can be expatriated without their consent, the respondents have not now raised a plea that refugees are not entitled to continue hers and they can be forcibly sent out. On the other hand, the only pion of the respondents is that the refugees who are sent out of this country ace only those who have expressed their willingness to go back.

16. Learned counsel for the petitioners submitted that it is better to depute the District Judge of each District to verify whether the consent is voluntary or not. It is not necessary as the representatives of the world organization arc verifying whether the consent is voluntary. The files produced by the Special Government Pleader relate to North Arcot and Dharmapuri Districts. Learned Special Government Pleader states that similar, files are available for all the other Districts, though they are not product a before me.

17. In the circumstances, I am of the view that no prima facie case has been made out for grant of injunction as the respondents are acting properly in accordance with international conventions. Consequently,

W.M.P.Nos.17372 and 17424 of 1992 are dismissed and interim orders are vacated. W.M.P Nos. 18085 and 18036 of 1992 are allowed.

18. After the conclusion of the dictation of the order, learned counsel for the petitioners submits that directions may be issued to the respondents to (1) translate this order in Tamil and circulate the same in the refugee camps and (2) issue a circular in Tamil to the refugees that they will not be expatriated unless they expressed their consent voluntarily. Learned Special Government Pleader agrees to do so. Hence, the second respondent is directed to 1) translate this order in Tamil and circulate it in the refugee camps and (2) to issue n circular in Tamil that the refugees will not be expatriated unless they express their willingness voluntarily. These directions shall be carried out on or before 14.9.1992. The Special Government Pleader shall file a report as to compliance with the above direction in this court on or before .. after furnishing copies of the report; translation of this order and the circular issued to counsel for the petitioners.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Gurunathan and others v. The Government of India and others

W. P. Nos. 6708 and 7916 of 1992

(Special Original Jurisdiction)

Coram : Hon'ble Mr. Justice Venkataswami

: Hon'ble Mr. Justice Jayasimha Babu.

Date : 22.03.1994

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of

1. Certiorari and Mandamus calling for the records of the third respondent in O. Mu, 728/92 dated 13.02.1992 arising out of the direction of the 4 respondent and quash the same and thereby directing the respondents to consider application of the petitioner for citizenship in India; and
2. Mandamus directing the respondents to grant citizenship to the petitioner's wife Ruvaidaumma, daughter Zaria, Fausul Inaya, Yasmin Sarama, Fazil Nihar, Thameema, second wife Umasal, sons Kaleel Rahman, Thameemul Ansari and arrange for the rehabilitation as per the Indo – Srilankan pacts and accords of 1964, 1974 and 1987 respectively.

These writ petitions coming on for hearing on this day, upon perusing the petitions and the respective affidavits filed in support thereof, the orders of the High Court dated 17.06.1992 and 17.02.1993, respectively and made herein and the counter affidavit filed in W. P. No, 6708/92 and the records relevant to the respective prayers aforesaid, and comprised in the return of the respondents in each of the petition to the writs made by the High Court and upon hearing the arguments of Mr. P. V. Bakthavatchalam Advocate for the petitioner in W. P. No, 6708/92 of Mr. A. C. Md. Saddeeq, the petitioner in W. P. No. 7916/92, of Mr. P. Narasimham, Senior Counsel, Government standing counsel on behalf of the 1 respondent in W. P. No, 6708/92 and on behalf of the respondent 1 and 2 in W. P. No. 7916/92 and of Mr. K. N. Srirangan, Government Advocate on behalf of the Respondents 2 to 4 in W. P. No. 6708/92 and on behalf of the respondents 3 to 6 in W. P.

No. 7916 /92, the Court made the following order:

ORDER

(The order of the Court was made by Venkataswami, J)

1. These two writ petitions relate to Sri Lanka refugees and they have come to this court on the apprehension that they will be forced to go their native place against their will.
2. In some cases, while passing interim orders, Srinivasan, J after hearing counsel on both sides, recorded an undertaking given on behalf of the Government of India to the effect that Shri Lanka refugees will not be sent back to their native place against their will and there will be no force in that process. Recording that statement, the writ miscellaneous petitions were ordered.
3. Learned counsel for the petitioners states that in view of the above undertaking already given on behalf of the Government of India and that being followed till date, no further orders are necessary in these cases, except reiterating the same undertaking.
4. Accordingly, we reiterate the undertaking already given on behalf of the Government of India and apart from that, no further orders are necessary, the writ petitions are disposed of accordingly. There will no order as to costs.

Sd/- Assistant Registrar (P)

Administrative Officer (Statistics)

IN THE HIGH COURT OF JUDICATURE, APPELLATE SIDE AT BOMBAY

Seyed Ata Mohamamdi v. Union of India and others

A.D.1458 OF 1994

CORAM : Hon'ble Mr. Justice G.D.Kamat

: Hon'ble Mr. Justice Vishnu Saha

This petition was instituted by the petitioner who is an Iranian National when he was sought to be deported by Government of India to Iran. He desired to go to Canada. In the meantime, he has been declared to be a refugee within the mandate of the office of the United Nations High Commissioner for Refugees. (A copy of the certificate dated 13th December in that behalf is produced).Once his status is accepted, a statement has been made on behalf of the Government of India by Standing Counsel Mr. R.M. Agarwal that there is no question of deporting the petitioner to Iran and the petitioner will be allowed to travel to whichever country he desires. In view of the fact that the petitioner had no valid visa to enter into India. The condition earlier imposed by this court for reporting by virtue of the order shall stand. In view of the status of the petitioner declared and in view of the statement made, nothing survives in the petition.

Certified copy expedited.

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Gurinder Singh and others v. Union of India

Crl. W.P. 871 of 1994.

Coram : Hon'ble Mr. Justice V.K. Jhanji

Date : 20.11.1994

For Petitioners : Ms. Sumbul Rizvi Khan, Advocate

: Mr. Ajay Sharda, Advocate

Notice to the respondent through Senior Standing Counsel for Union of India for 20.12.1994. Petitioners shall not be deported till further orders.

Sd/-V.K.Jhanji

Judge 20.11.1994

IN THE HIGH COURT OF PUNJAB AND HARYANA, CHANDIGARH

Criminal Writ Side

Shah Ghazai & Anr. v. Union of India & Ors.

Criminal Writ Petition No. 499 of 1996

Coram : The Hon'ble Mr. Justice S. S. Sudhalkar

Dated : 21.02.1997

For Petitioners : Mr. S. R. Khan, Advocate,

: Mr. Manju Chavani, Advocate

For the Respondents : Mr. Parminder Singh, AAG, Punjab

: Mr. D. D. Sharma, Advocate for Union of India

ORDER

1. Mr. Sharma has produced today in the court a copy of letter from the Ministry of External Affairs, IPA Division, written by the Under Secretary (IA). The same is taken on record.

2. Learned Counsel for the petitioners requests that as both Union of India and the Punjab Government have no objection if the custody of the petitioners is given to United Nations High Commissioner for Refugees (for short UNHCR), the custody of the petitioner be handed over to the UNHCR. Mr. Sharma, learned counsel for UOI and Mr. Parminder Singh, AAG, Punjab have no objection to this request.

3. Even considering letter of the Minister of External Affairs (supra), the submissions of learned counsel for the parties can be accepted. In view of the above reasons, the custody of the petitioners deserves to be given to the UNHCR, New Delhi. Respondent No. 2 and 3 shall direct the Superintendent Jail, Amritsar to handover the custody of the petitioners to UNHCR, New Delhi after communicating with the UNHCR. The communication with the UNHCR should be at the earliest. For the custody being handed over to the UNHCR, respondent No. 2 and 3 and the Superintendent Jail shall ensure proper escort of the petitioners.

4. It is clarified that since there is no letter from the UNHCR before this Court, if UNHCR refuses to take the custody of the petitioners, the petitioners be again taken to the Central Jail, Amritsar and this Court

be moved by respondent No. 2 and 3 for further directions in this matter.

5. This petition stands disposed of accordingly.

IN THE HIGH COURT OF DELHI AT NEW DELHI

Mst. Khadija v. Union of India & Ors.

CWP No.658 of 1997

Crl. W.P.No.658/97 & Crl.Ms.No.4855/97 and 6657/97

Coram	: Hon'ble Mr. Justice Y.K. Sabharwal
	: Hon'ble Mr. Justice A.K. Srivastava
Date	: 04.12.97
For Petitioner	: Mr. Deepak Kumar Thakur
For Respondent	: Mr. S.K. Aggarwal along with SI Heera Lal, : FRRO, New Delhi

1. The prayers in the writ petition, inter alia, are that the respondents be directed to release the petitioners from detention at the Beggars Home, Lampur, Delhi and be directed not to deport the petitioners to the country of their origin and be permitted to stay in India. The petitioners are refugees from Afghanistan.

2. While issuing notice to show cause to respondent on 12th September 1997, we restrained the respondent from repatriating the petitioners. The said order of stay has continued for last over three months. From the counter-affidavit filed by the respondents, it has, however, come to our notice that the petitioners were apprehended on 4th September, 1997 while they were trying to leave the country by using forged documents. It has been, inter alia, explained in the counter affidavit that keeping in view their illegal and undesirable activities their movements were restricted and they were kept at the place as aforesaid. Further, it has been explained that the principle of International norms and conventions could be exercised in favour of the refugees but not in favour of those found indulging in criminal / undesirable activities. In nutshell the stand of the respondents is that at present they may not have been deported but for their criminal activities and on account of the criminal activities it was decided to deport them in accordance with law. We find substance in this plea. The petitioners cannot be heard to say that despite their alleged criminal activities, they should be permitted to stay on in India. On these facts, we decline to come to the aid of petitioners in exercise of our writ jurisdiction under Article 226 of the Constitution of India and, therefore, the writ petition is dismissed.

3. The petitioners submit that they have approached United Nations High Commissioner for Refugees (UNHCR, New Delhi) seeking re-settlement in a third country. In that view, we stay the deportation of petitioners for a period of four weeks.

The writ petition and Crl.Ms. are disposed of, in the above terms. Copy of the order be given Dasti to counsel for the parties.

Sd/- Sd/-

Y.K. Sabharwal Judge A.K. Srivastava Judge

December 19, 1997

HIGH COURT OF DELHI AT NEW DELHI

Ms. Lailoma Wafa v. U.O.I. & Ors

Crl.M.3953/98 & Crl.M.2283/90 in Crl.W.312/98

Coram	: Hon'ble Mr. Devinder Gupta
	: Hon'ble Mr. N.G.Nandi
Date	: 31.07.1998
For petitioner	: Mr. D.K. Thakur
For respondents	: Mr. S.K. Aggarwal
	: Mr. Sarabjit Sharma

1. The writ petition stood disposed of by order dated 21.5.1998. While disposing of writ petition, petitioner's deportation was stayed for a period of six weeks, which period was later on extended by interim orders. It is now pointed out that the petitioner has been accepted for resettlement in Finland and on her prayer, permission has also been granted by the Assistant Foreigners Regional Registration Officer to leave India on or before 05.08.1998. In view of the subsequent development, no other or further direction deserves to be issued in the miscellaneous applications, which are pending except that the petitioner will be permitted to leave India on or before 05.08.1998 on the basis of the permit granted to her by Assistant Foreigners Regional Registration officer. Ordered accordingly.

2. The petitioner's deportation was extended subject to her furnishing a personal bond in the sum of Rs.20,000/- with one surety in the like amount to the satisfaction of Additional Chief Metropolitan Magistrate, New Delhi. Pursuant to the said directions it is stated that the petitioner furnished her personal bond and also furnished a surety, which was accepted by Additional Chief Metropolitan Magistrate, New Delhi. The personal bond as well as the surety in view of today's order stand discharged. The documents retained by Additional Chief Metropolitan Magistrate, New Delhi will be returned to the surety.

These applications stand disposed of.

Dasti. -Sd-

July 31, 1998 Devinder Gupta, J

N.G.Nandi, J

IN THE GUJARAT HIGH COURT

REPORTABLE

Ktaer Abbas Habib Al Qutaifi and Another v. Union of India and others

1999 CRI.L.J. 919

Coram : Hon'ble Mr. Justice N.N. Mathur

Date : 12.10.1993

ORDER

By way of this Special Civil Application under Article 226 of the Constitution of India, the petitioners

(1) Mr. Ktaer Abbas Habib Al Qutaifi and (2) Taer Al Mansoori, aged 16 and 17 years respectively (hereinafter referred to as 'the refugees' of Iraq Origin, seeks direction to release them from detention at the Joint Interrogation Centre, Bhuj, Dist. Kutch, State of Gujarat and instead of deporting them to Iraq, they may be handed over to United Nations High Commissioner for Refugees known as UNHCR on the basis of principle of 'non-refoulement'.

1. The "Humanitarian Jurisprudence "is now an International Creed in time of Peace and War. According to Jean Picket, an authority on Humanitarian Law, "It is based on two basic principles viz-necessity and humanity." The word humanitarian itself directs 'humanitarian touch' to the problem. Amnesty International report 1998 on Iraq has reported detention of hundreds of suspected Governmental opponents including the possible prisoners of conscience, without trial. It has also reported hundreds of execution, some of which may be extra judicial. The report has quoted Decree No.115 dated 25th August 1994 issued by the Government of Iraq, which stipulates, cutting off one auricle of one ear of a person in event of non-performance of military service, deserting from military service or shouldering or protecting anyone who has evaded or deserted from military services. The decree further stipulates that a horizontal line shall be tattooed on the forehead of person whose ear has been cut off. The petitioners who are Iraqi refugees do not wish to join the army because of their abhorrence for violence. Thus, they were left with no option but to flee from the country, as there was no scope of continuing to live there in a peaceful and free style. They had a fear of being persecuted. They like many others flee to India and some other countries. On their entrance

in India, they have been detained since 13th November 1997.It is their say that they are out of contact with their family, ever since they were detained. It is also stated that they are in fragile state of mind and one of them made an attempt to commit suicide by putting his hands in electric connection. An offence under Section 309 IPC was registered against him and he was let off, after a days imprisonment. They have been detained under the provisions of the Foreigners Act and it is threatened that they will be deported to Iraq. The petitioners do not want to return to Iraq as they have fear of being persecuted in their country. It is also stated that the petitioners have registered themselves as refugees with the UNHCR. The certificate dated 3rd March 1998 reads as follows:

"UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES"

This is to certify that Ktaer Abbass Habib Al Qutaili….a national of IRAQ is on the basis of available information considered to be a refugee within the mandate of the office of the United Nations High Commissioner for Refugees.

Any assistance to Ktaer Abbass Habib Al Qutaili ….during his stay in India would be greatly appreciated.

This certificate is valid for a period of one year.

Sumbul Rizvi Khan, Associate Protection Officer for UNHCR Chief of Mission

Identical certificate has been issued in case of second petitioner Taer Al Mansoori

REPLY:

2. A counter affidavit has been filed by Miss Usha Rani, Section Officer in Foreigners Division in the Ministry of Home Affairs, Government of India, at New Delhi. An objection has been taken with respect to the maintainability of the petition on the ground that the petitioners have no constitutional or fundamental rights to file the present petition as they have entered in the territory of Union of India without any valid travel documents. It is also submitted that the powers under the Foreigners Act, 1946 especially under Section 3(2)(c) and (d) has been entrusted to the State Government. This power includes the power to deportation, movements, residence of foreign nationals staying illegally in India. With respect to the condition in Iraq, it is stated that the present situation in Iraq is substantially improved and there is no war like situation. It is also stated that many such Iraqis are returning from India to Iraq. It is further stated that, in compliance of the directions of this Court dated 22nd May 1998 based on refugee

certificate issued by UNHCR, the petitioners have been handed over to UNHCR and they have been accorded extension up to 30th December 1998i.e till Iraqi Embassy, New Delhi issue necessary travel documents for the purpose of sending the present petitioners to Iraq. It is further stated that the petitioners cannot be given permanent status of Indian Citizen on account of several administrative exigencies and from the point of view of National Security, which cannot be disclosed before this Court on the ground of National Security.

Contentions:

3. It is contended by Mr. Bhushan Oza, learned counsel for the petitioners that the petitioners' though foreign nationals, their fundamental rights to life and liberty are guaranteed under Article 21 of the Constitution of India. Apart from that, this right is also guaranteed under Article 3 of the Universal Declaration of Human Rights, which is binding on India. Further, under Article 3 of the convention against torture, a state party to convention is prohibited to expel, return or extradite a person to another State, where there are substantial grounds for believing that he would be in danger of being subjected to torture. He place reliance upon the decision of the apex Court in case of PUCL vs UOI reported in (1997)3 SCC 433. He also relied on some unreported decisions of the various High Courts. It is further submitted that the Central Government has power to exempt an individual foreigner or a class or a description of foreigners from the application of Foreigners Act, as provided under Section 3-A of the Foreigners Act. It is submitted that India has given shelter to the refugees like Tibetians, Srilankans, Afghans and Chakmas. Learned counsel has also contended that Article 51 of the Constitution extends the principle of the rules of natural justice with regard to refugees being followed i.e. the refugees should not be expelled or forcibly returned in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened on account of various grounds such as membership of a particular social group or a political opinion. The principle of "Non-Refoulement" is the principle which prevents all such expulsion or forcible return of refugees and should be followed by the central Government in accordance with Article 51 of the Constitution. With reference to the improvement of the condition in Iraq, it is submitted that the same is not correct.

4. On the other hand, Mr. B.T. Rao, learned Additional Central Government Counsel submits that our country has not signed the treaties and conventions referred by the petitioners and as such the same are not binding. With respect to the powers of exemption under Section 3(A) of the Foreigners Act, it is submitted that the same applies only to the

citizens of Commonwealth countries. The petitioners are of Iraq origin and that country being not commonwealth country, the provision of section 3(A) of the Foreigners Act is not attracted. It is emphasized by the learned Additional Central Government counsel that the influx of refugees has become a serious problem to the country which is also threatening its security. So far as the fundamental rights are concerned, it is submitted that the foreign nationals have no fundamental right of residence in India. It is also submitted by Mr. B.T. Rao learned counsel that the powers under Section 3(2) has been delegated to the State Government. Thus, the appropriate action is required to be taken by the State Government. Mr. Rao has also disputed the genuineness of the photostat copy of the report of the UNHCR produced by the petitioners.

5. So far as the State Government is concerned, in spite of notice, it has exhibited unconcern attitude.

Refugees and UNO

6. Refugee problem is a global problem. A successive stream of humanitarian crises has high lightened the plight of the victim, as well as the threat that large-scale population movements pose to regional security, stability and prosperity. Host countries are reluctant to keep door open for refugees. Since 1947,some about 35-40 million people have moved across the border in the Indian sub Continent. India opened boundaries for Tibetians, Sri Lankans Chakamas, Afghans and others. The Government of India has seen the refugees' problem from a broader perspective, derived from its ancient cultural heritage. Reminding the Indian ethos and the humanitarian thrust, Buddha to Gandhi, Justice V.R. Krishna Iyer, has given message as Chairman, ICHLR, in these words:

"The Indian perception is informed by a profound regard for person-hood and a deep commitment to prevent suffering. Ancient India's cultural vision has recognised this veneration for the individual. The Manusmrithi deals elaborately with Dharma even amidst the clash of arms. The deeper springs of humanitarian law distinguished the people of India by the very fact that Dharma Yudha or the humanitarian regulation of warfare, is in the very blood of Indian history. Cosmic compassion and ecological empathy flow from the abundant reservoir of Buddha's teachings whose mission was the search for an end to human sorrow or Dukha. 'Emperor Ashoka' renounced war as he beheld slaughter in the battlefield. In the Mahabharta and Ramayana, the great epics of India, we find inviolable rules of ethics and kindness to be observed even by warring rulers in battlefields. One may conclude that the Indian Constitution in enacting fundamental duties in Article

51-A has cast on every citizen the duty to promote harmony among all the peoples of India, to have compassion for living creatures and to develop humanism and abjure violence. Thus, humanitarianism legality and concern for refugee status are writ large in the Indian ethos. Its noble tone and temper is in keeping with the Delhi Declaration signed by Rajiv Gandhi and Gorbachev (1989) expressing the finest spirit of India's composite cultural heritage as it advocates a Non- violent World Order and war-free global humanity.

7. On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal declaration of Human Rights. The declaration contained in all 30 Articles. The people of the United Nations reaffirmed their faith in fundamental human rights, the dignity and worth of the human person and in the equal rights of men. The member nations pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedom. Some of the relevant articles are extracted as follows:

Article 3:

Everyone has the right to life, liberty and security of person.

Article 5:

No one shall be subjected to torture or to cruel, in human or degrading treatment or punishment.

Article 6:

Everyone has the right to recognition everywhere as a person before the law.

Article 9:

No one shall be subjected to arbitrary arrest, detention or exile.

UNHCR:

8. Soon after coming into force United Nations Charter on December 10, 1948, the General Assembly of the UNO adopted and proclaimed universal declaration of human rights. By resolution of 3rd December 1949, United Nations General Assembly decided to establish a High Commissioner's office for Refugees. The Statute of the office of U.N. High Commissioner for Refugee was adopted by general assembly on 14th December 1950. The assembly also called upon the Governments to cooperate with the High Commissioner in performance of his functions concerning refugees falling under the competence of his office. In accordance with the statute the work of the High Commissioner is humanitarian and social and of an entirely

non political character. The High Commissioner reports annually to the General Assembly through the economic and social council. The office of the High Commissioner for Refugees has engaged in activities in countries of actual or potential return aimed at making effective the fundamental human rights of refugees to return to their own countries. They include the negotiation-often within tripartite frameworks involving countries of asylum, the country of origin and UNHCR office. They also include, monitoring the situation of returners on the ground, for the dual purpose of preventing discrimination or victimization and of providing objective information upon which remaining refugees and displaced persons can base their decision to return. UNHCR claims to have helped million of Refugees return home voluntarily. It also helps in the disintegration of the refugees back into their country, through small community based projects and income generating activities. In the host country, refugees are helped to become self reliant through training. In limited situations, UNHCR help refugees to resettle in third country. The role of UNHCR in the repatriation of Tamils to Sri Lanka from India has been mentioned in particular.

Implementation of International Humanitarian Treaties and Conventions by Courts in India:

9. There is no law in India which contain any specific provision obliging the State to enforce or implement the international treaties and conventions including the implementation of International Humanitarian Law (IHL). Amongst the domestic legislation, the only law that directly deals with the principle of IHL is the Geneva Convention Act, 1960.The main objectives of the Act is to implement the provisions of the 1949 Conventions relating to the punishment for grave breaches and prevent and punish the abuse of Red Cross in other emblems. The apex court in Rev. Mons. Sebastian Franciso Zavier Dos Remedious Monterio V.State of Goa reported in AIR 1970SC329:(1970CriLJ499) examined the scope of Geneva Conventions Act, 1960 and observed about the efficacy of the Act, thus (para 15)

"……the Act by itself does not give any special remedy. It does give indirect protection by providing for branches of Conventions. The Conventions are not made enforceable by the government against itself, nor does the Act give a cause of action to any party for the enforcement of the Conventions. Thus, there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population, but there is no right created in respect of protected persons which the Court has been asked to enforce."

10. However, constitution guarantees certain fundamental human rights to citizens as well as non-citizens. The preamble of the Constitution which declares the general purpose for which the several provisions of the Constitution have been made to, "assure the dignity of the individual "which is also the basic objective of the international humanitarian law. The Art 21 of the Constitution of India guarantees the right of life and the personal liberty. A person cannot be deprived of right of life and liberty, except according to the procedure established by law.

11. The Apex Court in case of National Human Rights Commission V. State of Arunachal Pradesh, reported in (1996)1SCC742: (AIR1996SC1234) held that the Indian Constitution confer certain rights on every human being, may be a citizen of this country or not, which includes the right of "life". A.M. Ahmedi, C.J. (as he then was), speaking for the Court, said, thus (para 20 of AIR);

    "We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise……"

    In the said case, National Human Rights Commission in a PIL under Article 32 of the Constitution sought to enforce rights under Article 21 of about 65,000 Chakmas. A large number of chakmas from erst while East Pakistan were displaced by Kaptai Hydal power project in 1964. They had taken shelter in Tripura and Assam. Since large number of refugees had taken shelter in Assam, the State Government expressed its inability to rehabilitate. As such, a discussion took place between the Government expressed its inability to rehabilitate. As such, a discussion took place between the Government of India and NEFA administration and it was decided to send some of the Chakmas for the purpose of resettlement to the territory of the present day Arunachal Pradesh. Now they have settled there and developed and established social, economic and religious ties. A group of Chakmas made representation for the grant of citizenship, but no decision was taken thereon. The relations between citizens of Arunachal and Chakmas deteriorated, as such they complained that they were subjected to repressive measures with a view to forcibly expel them. NHRC found prima facie case, to the extent that the State Government was working in coordination with a local organisation known as AAPSU with a view to expel Chakmas. The apex court

held that State Government was under constitutional and statutory obligation to protect the threatened groups. The court directed the State of Arunachal Pradesh to protect the life and liberty of Chakma refugees.

12. In Louis Deraedt V. Union of India, reported in (1991)3 SCC554: (AIR1991SC1886),the apex court held that the fundamental rights of the foreigners is confined to Article 21 for life and liberty and does not include right to reside and settle in this country as mentioned in Ar19(1)(e) which is applicable only to the citizens of this country. The court also referred to its earlier decision in case of Central Bank of India V. Ram Narain, AIR 1955 SC 36: (1955 CriLJ 152), wherein it is held that the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in India fettering this discretion.

    In the said case, petitioner Louis Deraedt, a foreign national was living in India since 1937 continuously except for a brief period when he had gone to Belgium in the year 1966 and 1973.On the commencement of the Indian constitution, the petitioner did not express his intention to stay in India permanently, but he continued to stay. In 1985, he was asked to leave the country. He applied for the citizenship which was declined. The court on facts held that he was not entitled to Indian Citizenship.

13. In People's Union for Civil Liberties v. Union of India reported in (1997)3 SCC433:(AIR 1997 SC 1203),a direction was sought to institute a judicial inquiry into the fake counter by Imphal police in which two persons were killed. A further direction was sought for compensation to the members of the deceased family. In pursuance of the Court's direction the District Judge conducted the inquiry and reported that there was no encounter and the deceased persons were shot dead by the police. The State took the plea that the Manipur is a disturbed area and there are several terrorist groups operating in the State. They are indulging in number of crimes affecting the public order and security of the State. It was also submitted that there have been regular encounters and exchange of fire between police and terrorists on number of occasions. A number of citizens have suffered at the hands of the terrorists and many people have been killed. The petitioners claiming compensation for the family of the deceased persons, placed reliance on Article9(5) of the International Covenant on Civilian Political Rights,1966,which reads as under:-

    "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

It raised an interesting question viz to what extent can the provisions of international covenants/conventions be read into domestic law. The Court referred to a decision of Australia Court, viz, Minister of Immigration and Ethnic Affairs v. Teoh (1995)Aus LJ43,wherein the Court held that provisions of international conventions to which Australia is a party, especially on which declares universal fundamental rights, may be used by the Courts as a legitimate guide in developing the common law. The apex court after referring the said Australian Case and its own decisions in Nilabari Behera (1993)2 SCC 746 :(1973 CriLJ2899) and D.K. Basu (1997)1SCC416: (1997CriLJ743),held that the provisions of covenant, which elucidate and go to effectuate the fundamental rights guaranteed under our Constitution can be relied upon by the Courts, as facets of those fundamental rights and hence, enforceable as such. The court accordingly awarded compensation to families of each of the deceased persons.

14. Learned counsel has also placed reliance on two unreported decisions of the Madras High court. In the case of P. Nedunara v. Union of India in writ petition No.6708/96 and No.7910/92 decided on 22nd March 1990.In both the cases, the controversy was with respect to deportation of certain Srilankan Refugees. It was contended in the said case that the refugees were disposed of on the basis of statement made by the counsel for Union of India that the Srilankan Refugees will not be sent back to their native place without their consent.

15. Learned counsel has also brought to my notice a unreported decision of Gauhati High Court in Civil Writ Petition No.1847/89.In the said case, the petitioner sought direction to allow him to go to Delhi to seek political asylum from the United Nations High Commissioner for Refugees. He also prayed that till he gets such certificate he may not be deported to Burma, where his life would not be in danger. During the pendency of the writ petition, the petitioner has registered as refugee. On the facts of the case, the Court directed to release the petitioner to enable him to make an attempt to obtain political asylum.

16. Learned counsel has relied upon another unreported decision of the Punjab & Haryana High Court in Writ Petition No.499/96 decided on 21st February 1997.in the said case, the foreigner national was given custody to the United Nations High Commissioner for Refugees, as it was not objected either by the learned counsel for the State Government or by the Union of India.

17. The unreported decisions referred to above indicates that Union or the State Government till now as a policy have not objected to give custody of registered refugees to UNHCR. Mr. Bhushan Oza, the learned counsel has also made it clear that the petitioners only seek

to bide their time in India till the situation in Iraq improves, thereby enabling them to return to their own country.

Principle of Non-Refoulement:

18. The principle of "Non-Refoulement "i.e. the principle of international law which requires that no state shall return a refugee in any manner to a country where his or her life or freedom may be in danger, is also embodied in Article 33(1) of the United Nations Convention on the Status of Refugees. Article 33 reads as under:-

"No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of social group or political opinion."

This principle prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects life and liberty of a human being irrespective of his nationality. It is encompassed in Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. All member nations of the United Nation including our country are expected to respect for international treaties and conventions concerning Humanitarian law. In fact, Article 51(c) of the constitution also cast a duty on the State to endeavour to "foster respect for international law and treaty obligations in the dealing of organised people with one another". It is apt to quote S. Goodwin Gill from his book on "The Refugees in International Law", thus,

> "The evidence relating to the meaning and scope of non-refoulement in its treaty since also amply supports the conclusion that today the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent."

Principle for Enforcement of Humanitarian Law:

19. From the conspectus of the aforesaid, following principle emerges in the matter of enforcement of Humanitarian Law:-

(1) The International Conventions and Treaties are not as such enforceable by the Government, nor they give cause of action to any party, there is an obligation on the Government to respect them.

(2) The power of the Government to expel a foreigner is absolute.

(3) Article 21 of the Constitution of India guarantees right of life on

Indian Soil to a non-citizen, as well, but not right to reside and settle in India.

(4) The international covenants and treaties which effectuate the fundamental rights guaranteed in our constitution can be relied upon by the Courts as facets of those fundamental rights and can be enforced as such.

(5) The work of the UNHCR being humanitarian, on certification of Refugees, FS the Government of India is under obligation to ensure that Refugees receive international protection until their problem is solved.

(6) The principle of 'non-refoulement' is encompassed in Article 21 of the Constitution of India and the protection is available, so long as the presence of the refugee is not prejudicial to the national security.

(7) In view of directives under Article 51(c) and Article 253, international law and treaty obligations are to be respected. The courts may apply those principles in domestic law, provided such principles are not inconsistent with domestic law.

(8) Where no construction of the domestic law is possible, Courts can give effect to international conventions and treaties by a harmonious construction.

20. In the instant case, the petitioners are refugees certified by UNHCR. Say of the petitioners that there life is in danger on return to their country, finds support from the report of the UNHCR which refers to Decree No 115 of 25th August 1994 issued by the Government of Iraq which stipulates that the auricle of one ear shall be cut off of any person evading to perform military service. The relevant part of the report is extracted as follows:-

Country Information/UNHCR/UNHCR Centre for Documentation and Research / Iraq / Background paper on Refugees and Asylum Seekers from Iraq (September 1996) / 4.Human Rights Situation / 4.3 General respect for Human Rights / Death Penalty.

Death Penalty:

The Special Rapporteur in past years noted the frequent use of the death penalty for such political offences as insulting the President or the Baath Party His February 1995 reports summarized several Revolutionary Command Council decrees that stipulate the death penalty for political and civil offences (U.N. Economic and Social Council, 15 February 1995, 12, 13).

> Decree No.115 of 25th August, 1994 stipulates that the auricle of one ear shall be cut off any person evading to perform military service, deserting from military service, or sheltering or protecting anyone who has evaded or deserted from military service. The auricle of the other ear shall be cut off in the case of a second offence involving any of the crimes mentioned above. A horizontal line shall be tattooed on the forehead of every person whose ear has been cut off. Furthermore, Decree no. 115 broadened the application of the death penalty. It stated that 'death by firing squad shall be the penalty for anyone who; (a) Has deserted from military service three times; (b) Had evaded military service and subsequently deserted twice; (c) Has three times protected or sheltered any deserted from or evader of military service (ibid.25). In March 1996, Saddam Hussein ordered an end to the practice of cutting off the ears of deserters and draft evaders. The decision may have been linked to parliamentary elections that month (The Guardian, 18 March 1996).According to the Swiss Federal Officer for Refugees, as far as it is known the Abolishment of ear amputations has not been officially adopted in the form of a decree and therefor, is not yet lawful."

While disputing the genuineness of the abovesaid document, learned additional central government counsel says that according to the report, the practice of cutting off ears has been stopped. The learned counsel has conveniently overlooked the next sentence in the report, where it is said that the decision may have been linked to parliamentary elections that month. In fact, the Central Government has not applied its mind to the problem. Only after direction was given by this Court to keep present in Court on the next date of hearing, a officer from the Home Department of the Government of India, a casual reply by a Junior officer of the rank of section officer has been filed. The Central Government has taken the stand that the decision is to be taken by the State Government as the power under Section3 (2)(c) and (d) of the Foreigners Act has been entrusted to the State Government. The State Government, though a party has adopted an attitude of "total unconcern". UNHCR in spite of tall claims, in the instant case, except issuing a refugee certificate, has done nothing. UNHCR is required to take up the problem with the Government of Iraq as well as Government of India. It is expected from the UNHCR to take more active interest to solve the problems of the petitioners Refugees, for which it exists. Thus, in absence of relevant material and consideration by the concerned authorities, the only direction which can be given in the present case is to ask the said authorities to consider the petitioner's case in right perspective from the humanitarian point of view.

21. Consequently, this special Civil application is allowed and the

respondents are directed to consider the petitioner's prayer in accordance with law, keeping in view law laid down in this judgement and take a decision by 31st December 1998. Petitioners shall not be deported from India till then. If the decision is taken against the petitioners, they will not be deported for a further period of 15 days from the date of communication of such decisions. A copy of this judgement be sent to Chief of Mission, United Nations High Commissioner for Refugees, 14, Jor Bagh, New Delhi 110003. Rule is made absolute to the aforesaid extent. No orders as to costs.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Anthony Omondi Osino v. FRRO

Criminal Writ Petition No. 2033 Of 2005

Criminal Appellate Jurisdiction

Coram	: Hon'ble Ms. Justice RANJANA DESAI
	: Hon'ble Mr. Justice ANOOP V. MOHTA
Dated	: 05.10.2005.
For petitioner	: Mr. Mihir Desai, Advocate
For respondent	: Mr. H. V. Mehta, Public Prosecutor for Union : of India.
	: Mr. Y. S. Shinde, A. P. P. for the State.

P. C.: Heard the learned counsel for the parties.

1. Our attention has been drawn by Mr. Mehta, the learned counsel appearing for the Union of India to a letter as dated 3/2/2005 addressed by the United Nations High Commissioner for Refugees to the Petitioner stating as follows:

   "In case you submit a written appeal request, your appeal request will be considered by our office, and, your case will be reviewed. You will receive a reply from the office notifying you with the decision related to your appeal request within 30 days of submission of your appeal request.

   Please note that decisions on appeal applications is primarily based on file review and that there is no automatic scheduling for appeal interview. You will be contacted for an appeal interview only if our office deems it a necessary requirement for your case review."

2. There is no dispute about the fact that the petitioner has, in fact, filed an appeal to the United Nations High Commissioner for Refugees. A copy of said appeal is annexed as Ex– E to the present petition. In the circumstances, in our opinion, the following order will meet the ends of justice.

O R D E R

The United Nations High Commissioner for Refugees is directed to hear and dispose of appeal filed by the petitioner, which is pending before it, dated 20/2/2005 within a period of one month from the date of receipt of this order by it. For the said period of one month and two weeks thereafter, the respondents shall not deport the petitioner. This order is passed without going into the merits of the petition.

The petition is deposed of in the afore-stated terms.

Sd/-

Section Officer

High Court Appellate Side True Copy #

(SMT. RANJANA DESAI, J). (ANOOP V. MOHTA).

IN THE HIGH COURT OF DELHI AT NEW DELHI

Saifullah Bajwa v. UOI and Ors

W.P.(CRL) 1470/2008

Coram : Hon'ble Chief Justice Mr. Justice Sanjiv Khanna

Date : 09.02.2011

ORDER

CRL. M.A. No. 1538/2011

Allowed, subject to all just exceptions. CM stands disposed of.

CRL. M.A. No. 1537/2011

1. This is an application for extension of the protective order by six weeks, which was granted vide order dated 2nd December, 2010 in WP (Crl.) No. 1470/2008. It is submitted by Ms. Poli Kataki, learned counsel for the petitioner that the Ministry of Home Affairs has permitted the UNHCR to interview the Pakistani nationals who have been lodged in Tihar Jail and they have completed the interview and the transcript of the interview was sent to Geneva Headquarters and, therefore, the prayer is for extension of time. Mr. A.S. Chandhiok, learned Additional Solicitor General submitted that the prayer for interview was granted and the Union of India is not a party to the decision making process and the whole thing is left to UNHCR keeping in view the order passed by this Court on earlier occasion.
2. Having heard learned counsel for the parties, we are inclined to extend the time for a further period of six weeks.
3. It is hereby made clear that any further application seeking extension of the protective order shall not be entertained. The application stands disposed of.

Order dasti under the signature of the Court Master.

Chief Justice

February 09, 2011 Sanjiv Khanna, J

IN THE HIGH COURT OF DELHI AT NEW DELHI

Saifullah Bajwa v. UOI and Ors

W.P.(CRL) 1470/2008

Coram : Hon'ble Chief Justice Mr. Justice Manmohan

Date : 02.12.2010

ORDER

1. Invoking the jurisdiction under Article 226 of the Constitution of India, the petitioners have prayed for following reliefs:-

   A. Issue a writ of mandamus or in the nature thereof or any other writ, order or directions quashing the order dated 28.01.2010 whereby the representation for grant of Asylum of the 65 detainees of Pakistani origin listed in Annexure A-1 has been rejected by the Respondents by a non-speaking, general order passed in violation of the principles of natural justice without giving any hearing to the Pakistani Nationals.

   B. Issue a writ of Certiorari or in the nature thereof or any other writ, order or directions directing the Respondents to reconsider the application for Asylum of the 65 detainees of Pakistani origin listed in Annexure A-1 after granting them an opportunity of personal hearing and pass a reasoned and speaking order after such hearing in order to enable the said persons to submit an appropriate representation against the said order passed therein, if so required; or in the alternative; Issue a writ of Mandamus or in the nature thereof or any other appropriate writ, order or direction, directing the Respondent No.1 to refer the applications for asylum of the 65 persons of Pakistani origin presently lodged in Tihar Jail, to UNHCR with a request to enable the said persons to obtain naturalisation in any willing third country.

   C. Issue a writ of mandamus or in the nature thereof or any other writ, order or directions restraining the Respondents from deporting the persons listed in Annexure-P1 and five children born in custody while detained by the respondent.

   D. Issue a writ of Certiorari or in the nature thereof or any other writ, order or directions directing the Respondents to release the 65 detainees of Pakistani origin listed in Annexure A-1 from detention at Tihar Jail and instead of deporting them to Pakistan,

direct the Respondents to hand them over to United Nations High Commissioner for Refugees known as UNHCR on the basis of principle of non-refoulement?

E. Pass such other and further orders as may be deemed fit and proper in the facts and circumstances of the present case?

2. Be it noted, on 17th December, 2008 while dealing with CM No.14764/2008, the following order came to be passed:-

The applicant has prayed in this application to implead United Nations High Commission for Refugees (UNHCR) as party respondent to the writ petition. The case of the applicant is that certain letters have been forwarded by the UNHCR wherein the issue of the petitioner has been taken up with the Central Government. Secondly, according to the petitioners in case the Indian Government is not inclined to grant asylum to them, the UNHCR can be approached for the purpose of naturalisation in any other country, which is prepared to grant them refugees status.

Notice be issued to the Union of India, returnable for 11th February, 2009. Prior to that an interim protection was granted.

When the matter was taken up today, Ms. Meenakshi Arora, learned counsel for the petitioner submitted that United Nations High Commission for Refugees (in short UNHCR?), has communicated to the petitioner vide E-mail dated 12th May, 2009 which we think it apt to reproduce as under:-

65 Pakistani members in Tihar Jail Tuesday, May 12, 2009 4:10 AM From: New Delhi India IINDNE@UNHCR.orgView Contact details

To

Delhi Center@yahoo.com Dear Ms. Parbhoo,

We would like to acknowledge receipt of letter and email dated 11 May, 2009 concerning the 65 MFI followers in Tihar Jail in New Delhi. Based on our discussion with you in the past and our advice to the MFI, please note that we continue to appreciate the timely information that your foundation has been sending UNHCR regarding the development in this case. As we have informed your foundation previously, while we will not be present at the hearing on 13 May 2009, please be assured that UNHCR continues to closely monitor these developments. As stated in our earlier communications and over the telephone, given the complex legal and diplomatic environment in which UN agencies operate in India. UNHCR will await the courts judgment on this issue.

As always, we assure you that UNHCR remains committed to its mandate. We will continue working with relevant government institutions to ensure respect for the principle of non-refoulement and the right to seek asylum? Thank you, (UNHCR New Delhi)

3. Ms. Meenakshi Arora, learned counsel for the petitioner has also invited our attention to the order passed in the High Court of Judicature at Bombay in Criminal Writ Petition No.2033 of 2005 wherein a letter was issued by the UNHCR and taking the same into account the Division Bench passed the following order:-

   "The United Nations High Commissioner for Refugees is directed to hear and dispose of appeal filed by the petitioner, which is pending before it, dated 20/2/2005 within a period of one month from the date of receipt of this order by it. For the said period of one month and two weeks thereafter, the residents shall not deport the petitioner. This order is passed without going into the merits of the petition."

4. In view of the aforesaid, we only request the United Nations High Commission for Refugees to take a decision within six weeks with regard to a representation to be submitted by the petitioners within a period of one week from today.

5. The protection order passed by this Court shall remain in force for a period of ten weeks. In the meantime, the petitioners shall not be deported to the country of their origin.

6. Needless to say, we have not addressed to any other issue which has been urged by the learned counsel for the parties.

The writ petition is accordingly disposed of without any order as to costs. Order dasti under signatures of Court Master.

Chief Justice

Manmohan, J

December 02, 2010

IN THE HIGH COURT OF DELHI AT NEW DELHI

Sehba Meenai v. Union of India

W.P. (Crl) 391/2013

Coram	: Hon'ble Mr. Justice Sanjiv Khanna
	: Hon'ble Mr. Justice Siddharth Mridul
Date	: 15.03.2013
For Petitioners	: Mr. Nilotpal Datta, Advocate with : Ms. Yanmi Phazang, Advocate
For Respondents	: Ms. Richa Kapoor, Advocate for UOI Mr. Pawan Sharma, Standing Counsel (Crl.) with Mr. Sahil Mongia, Ms. Priyanka Kapoor, Ms. Richa Sharma, Mr. Mohd. Adnan and Mr. Hemant Kumar, Advocates for FRRO.

ORDER

1. Ms. Richa Kapoor, Advocate for UOI seeks permission to file the status report. During the course of submission, Ms. Richa Kapoor has stated that Exit Orders dated 12.11.2012 and 28.02.2013 have been passed for deportation of Janighol to Afghanistan in case she insists on staying in India.

2. It is stated that Janighol had entered India on 24.12.2010 along with her husband Abdul Latif and three children on a single Passport on tourist Visa which was valid till 20.03.2011. Her husband Abdul Latif had submitted an application on 20.05.2012 to the Visa Facilitation Centre in the Ministry of Home Affairs seeking exit permission for himself and his family. Thereafter, Abdul Latif did not seek or ask for extension of Visa to continue with their stay in India and since then they have been staying illegally in India.

3. Ms. Richa Kapoor has stated that Janighol and her husband Abdul Latif had applied for refugee status to United Nations High Commissioner for Refugees (for short UNHCR) which was initially rejected vide letter/communication dated 22.05.2012. However, it transpires that Janighol had made a fresh application thereafter and vide letter/ communication dated 27.07.2012 she has been granted refugee status by UNHCR and refugee card has been issued to her which is valid till

26.07.2015. The original refugee card has been produced before us and after examining the same it has been returned to Janighol.

4. It transpires that Abdul Latif who is an Afghani national has got separated and has divorced Janighol. The said fact has been recorded in the letter/communication dated 10.10.2012 issued by the Embassy of Islamic Republic of Afghanistan. Janighol has been given custody of Saead, her youngest child and the two elder children namely Wahid and Omid were/are in the custody of Abdul Latif.

5. Thereafter, UNHCR has issued letter dated 19.10.2012 recording inter alia that refugee status of two children Wahid and Omir has been withdrawn with immediate effect at the request of Abdul Latif.

6. UNHCR vide communication dated 16.11.2012 written to the Deputy Secretary (F), Ministry of Home Affairs, New Delhi has opined that in case Janighol and her son Saead are forcibly returned/deported to Afghanistan, there would be risk of grave human rights violations. Janighol has made a request to the Ministry of Home Affairs that both of them should be allowed to remain in India.

7. It is pointed out to us that in case Janighol and her son Saead go back to Afghanistan, there is a possibility and threat that she would be killed because she has been divorced by her husband. The aforesaid contention/submission made by the petitioner (a social worker) has been reiterated and affirmed before us by Janighol herself. They rely on the communication dated 16.11.2012 written by UNHCR. This will be examined by the Ministry of Home Affairs. They may make their own enquiry and status report in this regard will be filed before this Court, if required and necessary in a sealed cover.

8. Our attention has been drawn to the policy dated 06.07.2012 in respect of Afghan nationals. Under Clause 2 of the said policy, extension may be permitted by the FRRO/FROs (Foreign Regional Registration Offices) up to one year for ethnic Afghan nationals. Moreover, the present case is unusual and has to be examined on its own peculiar facts as an individual case, irrespective of the Afghan policy. It will be inhumane and wrong to deport Janighol, if there is a grave threat to her life and possibility of human rights violations.

9. We expect and perceive that the Ministry of Home Affairs will take a humanitarian approach to deal with the problem in question. They have in other cases accommodated foreigners in our country when there is a threat of human rights violations outside India. We are informed that Janighol is presently housed at Nirmal Chhaya, Jail Road, New Delhi. On her furnishing a personal bond in the sum of Rs.10,000/- with one surety of the like amount to the satisfaction of the ACMM, she shall be

released. The FRRO can get in touch with Janighol on a mobile number which she will furnish to them along with the bail bond. Janighol who is present in Court states that she will be residing at House No.29, 3rd Floor, Bazaar Lane, Bhogal, New Delhi, which she has taken on rent.

10. Relist on 30.04.2013. Till the next date of hearing, Janighol and her son Saead will not be deported.

11. A copy of this order will be given dasti under signature of the Court Master to counsel for the parties.

IN THE HIGH COURT OF DELHI AT NEW DELHI

Sehba Meenai v. Union of India

W.P. (Crl) 391/2013

Coram	: Hon'ble Mr. Justice Sanjiv Khanna Hon'ble : Mr. Justice Siddharth Mridul
Date	: 12.03.2013
For Petitioners	: Through Mr. Nilotpal Datta, Advocate.
For Respondents	: Ms. Richa Kapoor, Advocate for UOI Mr. Pawan Sharma, Standing Counsel with Ms. Priyanka Kapoor, Advocate for the State along with Sub-Inspector Mahesh, FRRO.

ORDER

1. We have heard Mr. Pawan Sharma, Standing Counsel for the Government of National Capital Territory of Delhi. He states that the refugee has been on fast and has not taken food for last three days as she does not want to be deported to Afghanistan. He accepts the position that in case the refugee is deported to Afghanistan, she may be killed/murdered. He further states that long term visa are being granted to Afghan refugees.
2. Issue notice to respondent Nos. 1, 2 and 3.
3. Notice is accepted by Ms. Richa Kapoor, Advocate on behalf of respondent Nos. 1 and 2 and by Mr. Pawan Sharma, Standing Counsel on behalf of the respondent No. 3.
4. The refugee in question will be produced before the court on the next date of hearing in order to ascertain her wishes.
5. The respondent Nos. 1 and 2 will also examine the allegations made in the writ petition and take appropriate steps as per law.
6. Re-list on 15th March, 2013.

IN THE HIGH COURT OF DELHI AT NEW DELHI

Dongh Lian Kham and Anr v Union of India and Anr

WP(CRL) No.1884/2015

Crl.M.A No.12618/2015

Coram	: Hon'ble Mr. Justice Ashutosh Kumar
Date	: 21.12.2015
For petitioners	: Mr.Colin Gonsalves, Senior Advocate with Ms. Divya Sunder Rajan, Mr.Fazal Abdali and Ms.Divya Jyoti Jaipuria, Advocates.
For respondents	: Mr.Ajay Digpaul, CGSC with Ms.Rishika Katyal, Advocate.

Exemption allowed subject to just exemptions.

The Application is disposed of accordingly

1. Dongh Lian Kham and Zel Khan Mang, whose country of origin is Myanmar, have prayed for a direction to respondent No.2, Foreign Regional Registration Officer (hereinafter referred as FRRO) not to deport them or their family members to their country of origin. In the present Writ Petition, it has also been prayed that the respondents be directed to produce before the Court the request made by the Ministry of Home Affairs (hereinafter referred as MHA) for deportation of the petitioners and their family members to their country of origin and to quash the decision of the Ministry of Home Affairs on the issue. An additional prayer has been made by the petitioners for a direction to the respondents to consider sympathetically the application preferred by them for grant of long term VISA as per the guidelines of Ministry of Home Affairs.
2. During the course of hearing of this petition, the counter affidavit filed by respondent Nos.1 & 2 i.e. the Union of India and Foreign Regional Registration Officer clearly and amply reveal the decision of the authorities to deport the petitioners to their country of origin. As such, the prayer for a direction to produce before the Court the request made by Ministry of Home Affairs for deportation of the petitioners

to their country of origin and the decision of MHA on the issue is not pressed for.

3. The petitioners are citizens of the Republic of the Union of Myanmar who have been staying in India under long term VISA as mandate refugees since 2009 and 2011 respectively. Both the petitioners hail from the Ethnic Chin Community which is a minority in Myanmar. They fled from their country at different times and entered India as they apprehended retaliatory attack by the Military Junta in Myanmar. The petitioners also claim to be Christians and, therefore, part of minority religious community.

4. Petitioner No.1, Mr.Dongh Lian Kham was a pastor of the Church in his village who, on being suspected by the Burmese Army to be a sympathizer of Chin National Army (insurgents), left the country and fled to India with his family in the year 2009. He first stayed in Assam and thereafter approached United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), Delhi. Out of his many daughters, one was born in India. Similarly, petitioner No.2, Mr.Zel Khan Mang, a taxi driver, while driving his vehicle injured an army personnel. He was, therefore, suspected to be a member of the insurgents who deliberately injured an Army officer. He came to India in the year 2011 and contacted UNHCR in Delhi.

5. Both the petitioners have been issued certificates by the UNHCR recognizing them to be refugees who are required to be protected from forcible return to a country where they face threats to their life or freedom. Identity cards were also issued to the petitioners by the UNHCR. The identity card of petitioner No.1 is valid till 01.04.2017 whereas the identity card of petitioner No.2 is valid till 23.05.2017.

6. It has been submitted on behalf of the petitioners that because of their having been recognized by the UNHCR as refugees, long term VISA was granted by the respondents. The long term VISA which was granted to the petitioner No.1 expired on 04.01.2015 whereas the long term VISA of petitioner No.2 expired on 05.05.2012. Both the petitioners were promised by the UNHCR to assist them in getting their long term VISA extended. The petitioners have requested the respondents to extend their VISA.

7. However, while the request was pending before the authorities, the petitioners were made accused in a case under the Narcotic Drugs & Psychotropic Substances Act, 1985. They were found to be in possession of pseudoephedrine tablets. They were convicted vide judgment and order dated 24.11.2014 and were sentenced to undergo imprisonment for one year and seven months.

8. After the petitioners served their sentence in jail, they were detained in Sewa Sadan, Lampur, Narela, Delhi.

9. While the petitioners were detained in the Lampur Detention Centre as stated above, wife of petitioner No.1 filed a Writ Petition (Crl) No.1327/2015 seeking release of her husband. A Division Bench of this Court, taking note of the fact that according to the guidelines the entire process of deportation of a foreign national who has been granted refugee status is to be completed within six months and which six months had passed, directed for the release of petitioner No.1 but with a direction to the FRRO to ensure that the conditions laid down in the internal guidelines for deportation be strictly adhered to. The Division Bench was conscious of the fact that since the family of petitioner No.1 were having their long term VISAs alive, petitioner No.1 would not flee from the country leaving behind his family members. However, the petitioner No.1 was directed to report twice a week to the office of FRRO to ensure that he does not ran away. Pursuant to the above order passed by the Division Bench, petitioner No.1 was released on 18.08.2015 and relying on the aforesaid order of the Division Bench, petitioner No.2 also was released on 24.08.2015 from the detention centre.

10. The wife of petitioner No.1 thereafter moved another application namely Crl.M.A No.12342/2015 for modification of the order dated 06.08.2015, reference of which has been made in earlier paragraph seeking a direction to the respondents not to deport the petitioner No.1. However, such an application was withdrawn with the permission and liberty to move another substantial petition seeking the aforesaid relief.

11. Hence, the present petition.

12. Mr. Colin Gonsalves, learned Senior Advocate appearing on behalf of the petitioners submitted that the petitioners are mandate refugees and not economic migrants in India and, therefore, they have legitimate reasons for being persecuted in their home country because of their hailing from ethnic and religious minority community.

13. Thus a specific prayer was made on behalf of the petitioners that they be not repatriated to their country of origin as they are not posing any threat to national security and if deported, they would be subjected to inhuman treatment by the Junta Government in their country. It has been further submitted that UNHCR identifies persons as mandate refugees only after thorough investigation regarding the status of a refugee and in the past it has been a standard practice of the Union

of India to grant Asylum to the refugees who are certified by UNHCR. Mr.Colin Gonsalves, learned Senior Advocate submitted that though a foreign national does not have a Fundamental Right to settle in a different country but certain rights are provided to a foreign national also under the Constitution. He has referred to the observation of the Supreme Court in National Human Rights Commission vs. State of Arunachal Pradesh & Anr., (1996) 1 SCC 742 wherein it was held that the Constitution of India confers certain rights on every human being and certain other rights on citizens. No person could be deprived of his life or personal liberty except according to the procedure established by law. The State is bound to protect the life and liberty of every human being, be he a citizen or otherwise. A direction was given by the Supreme Court to the State to ensure the safety of 65,000 Chakma refugees in the light of "Quit India" threat notices served upon them by the All Arunachal Pradesh Students Union.

14. Mr. Gonsalves contends that a refugee's right of not being expelled from one state to another, especially to one where his or her life or liberty would be threatened is in accord with the principle of "non-refoulement". Non refoulement is accepted by the customary International Law and municipal law of nations and by now it has attained widespread international recognition.

15. Article 14 of the Universal Declaration of Human Rights, 1948 to which India is a signatory declares that everyone has a right to seek and enjoy in other countries, asylum from persecution and that such right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of United Nations.

16. Such rights of the refugees have been, recognized and accepted by the Convention Relating to the Status of Refugees, 1951, EU Resolution on Minimum Guarantees for Asylum Procedures, 1955, The International Covenant on Civil and Political Rights, 1966 and the UN Declaration on Territorial Asylum.

17. That the State shall endeavour to foster respect for international law and treaty obligations is a mandate of the Constitution of India. Article 51 of the Constitution of India which is one of the Directive Principles of State Policy clearly envisages that the State shall endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.

18. It was vehemently argued on behalf of the petitioners that there is no dispute and the fact stands admitted that the petitioners are not economic migrants and are being persecuted in their home country. Even today, they apprehend that in case they are deported to the country in their native region, they would be executed or be subjected to barbaric treatment. With respect to their having been prosecuted, convicted and sentenced for the offence under the NDPS Act, it has been submitted that the aforesaid conviction, by itself would not make them an enemy of the country and it would be absolutely incorrect to brand them as a danger to the nation. Under such circumstances, it has been prayed that the respondent authorities be directed not to deport them and consider sympathetically their application for extension of long term VISA.

19. On behalf of the respondent No.1 i.e. Union of India, it has been submitted that India is not a signatory to the 1951 UN Conventions on the status of refugees and the 1967 protocol. No national law has also been enacted till date regarding refugees and asylum seekers. Despite this, Indian Government has received accolades worldwide for their general policy of giving shelter to refugees.

20. It was not denied on behalf of the respondent No.1 that the petitioners were not granted long term VISA by them on the recommendation of UNHCR. However, the conviction of the petitioners is perceived as a threat to the security of the nation and their involvement in drugs also poses a threat to the social fabric. Because of the petitioners having involved themselves in a case under the NDPS Act, a conscious decision has been taken by the Government to deport them.

21. Section 3(2) (c) of the Foreigners Act, 1946 empowers the Central Government to deport foreigners from the country if they come to adverse notice or their presence in the country is considered to be against the national interests. The Foreigners Act, therefore, confers the power to expel foreigners from India and such power is absolute and unfettered and no interference could be made with respect to the subjective satisfaction of the Union regarding their decision to deport a foreign national. It has been contended on behalf of the Union of India that the mere fact that petitioners were granted refugee status by the UNHCR does not bestow upon them any right to stay in India.

22. The order of deportation is not a punishment but only a method for ensuring the return of a refugee to his own country if he has not complied with the conditions of his refugee status.

23. Respondent No.2/FRRO has also taken the same stand that the petitioners, by involving themselves in a case relating to NDPS Act,

have lost their right to stay as a refugee in this country.

24. Government of India, Ministry of Home Affairs (Foreigners Division) has set out a standard operating procedure to deal with foreign nationals who claim to be refugees. These standard operating procedures are in the nature of internal guidelines and, therefore, they are required to be followed. Few of those internal guidelines are relevant for the purposes of considering the request made in the petition. "(ix) it may be noted that economic immigrants i.e. foreigners who have arrived in India in search of economic opportunities, without any fear of persecution, WILL NOT be eligible for LTV. If such people are detected, the cases will be investigated promptly and the persons will be prosecuted under the Foreigners Act. (x) In cases where the foreign national is considered not fit for grant of LTV, a decision to this effect will be conveyed by MHA to the FRRO/FRO within a period of three months from the date of claim of the foreigner. The foreigner will be confined to a detention centre under the provisions of Foreigners Act. Steps will be initiated in such cases for deportation of the foreigner through diplomatic channels. (xi) In case it is decided that the case is not fit to warrant LTV or that LTV cannot be renewed, MHA will consider all possible alternatives including deportation to the home country and consultation with UNHCR for a third country option. (xii) In cases in which diplomatic channels do not yield concrete results within a period of six months, the foreign national, who is not considered fit for grant of LTV, will be released from detention centre subject to collection of biometric details, with conditions of local surety, good behaviour and monthly police reporting as an interim measure till issue of travel documents and deportation."

25. It is not in dispute that the petitioners are not economic migrants to India. They are refugees who fear persecution in their home country. It is also not disputed that long term VISA was given to them on the recommendation of UNHCR. The solitary instance of the petitioners having violated the penal municipal law of the country has made the respondents decide that the petitioners be deported to their home country. It appears that the petitioners were found to be in possession of pseudoephedrine tablets, attracting penal provisions of Sections 29/25A of the NDPS Act. The sentence imposed upon them by a competent Court of law has already been served by them. This Court has not been apprised of any instance prior to their involvement in the aforesaid case or of any conduct of the petitioners during their incarceration in jail which could substantially demonstrate that their presence in the country would be detrimental to the interest of the nation in general.

26. It is the decision of the Union Government and FRRO to permit or not to permit a refugee to stay in a country or to grant or not to grant long term VISA in the first instance or its extension on a year wise basis. The Fundamental Right of a foreigner/refugee is only confined to Article 21, i.e. the right to life and liberty and does not include the right to reside and settle in India, which right is only applicable to the citizens of the country. The power of the Indian Government to expel foreigners is absolute and unlimited and there is no provision in the Constitution of India or other law, putting fetters on the aforesaid discretion of the Government.

27. In Louis De Raedt & Ors. vs. Union of India, (1991) 3 SCC 554, the Supreme Court has held that there is no hard and fast rule regarding the manner in which a person concerned is to be given an opportunity to place his case. In the aforesaid case, since it was not claimed by the petitioner that if he were given a notice before passing a prejudicial order, he could have placed some relevant material for the Government to consider, the Supreme Court did not accord the aforesaid right of hearing to the petitioner.

28. The petitioners, in the present case have also not claimed any such right nor have they stated before the Court that it noticed they would be in a position to explain their case for being permitted to stay in this country as a refugee. This Court, taking note of the fact that the petitioners, but for one instance, have lived peacefully in this country for a long time and nothing adverse was reported against them while they were in custody; their families also have been given long term VISAs which has not yet expired and they have mingled and socialised to their advantage with the Indian population, feels that an opportunity be given to the petitioners by the FRRO before finally taking a decision regarding their deportation.

29. Clause 11 of the internal guidelines regarding refugees in India, referred to above, states that in case long term VISA or its extension is not granted, the Ministry of Home Affairs will consider all possible alternatives, including deportation to the home country and in consultation with UNHCR for a third country option.

30. The principle of "non-refoulement", which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as "non-refoulement" affects/protects the life and liberty of a human being, irrespective of his nationality. This protection is available to a refugee but it must not be at the expense of national security.

31. Whether the petitioner, on their conviction and serving out the sentence of one year and seven months in jail, have posed a danger to the national security and have, thus, lost their right for consideration for extension of their long term VISA, is an issue which surely requires to be revisited by the respondents.

32. Since the petitioners apprehend danger to their lives on return to their country, which fact finds support from the mere grant of refugee status to the petitioners by the UNHCR, it would only be in keeping with the golden traditions of this country in respecting international comity and according good treatment to refugees that the respondent FRRO hears the petitioners and consults UNHCR regarding the option of deportation to a third country, and then decide regarding the deportation of the petitioners and seek approval thereafter, of the MHA (Foreigners Division).

33. Thus, Respondent no. 2 is directed to hear the petitioners and explore a third country option for their deportation. The UNHCR is also expected to give its inputs to the FRRO for the needful. After a conscious decision is taken, the necessary concurrence/approval may be obtained from MHA (Foreigners Division). The aforesaid exercise be completed before 31st of March, 2016. The petitioners shall not be deported from India till then. 34. The petition is disposed of with the aforesaid directions.

Crl. M.A. Nos.12616/2015, 12617/2015, 12619/2015

1. In view of the main petition having been allowed, these applications have become infructuous.

2. These applications are disposed of accordingly.

ASHUTOSH KUMAR, J

DECEMBER 21, 2015

IN THE HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Shabir Ahmed & Ors. v. State & Ors.

561-A Cr. P.C. NO. 425/2016 & MP NO. 01/2016

Coram : Hon'ble Mr. Justice B. S. Walia

Date : 23.08.2016

For petitioners: M/s A. S. Khera & Amarpreet Singh, Advocates.

Petition Under section 561-A Cr.P.C., for partial Quashment of order dated 20-07 2015 wherein the additional Session Judge Jammu has ordered, "on completion of the sentence, the accused shall be pushed back to their country i.e. Myanmar by the concerned authorities" whereas the petitioners / accused persons therein are protected from such an action on account of their Registration as Refugees by United Nations High Commissioner for Refugees, India.

ORDER

1. Learned counsel for the petitioners states that the impugned order directing that on the expiry of sentence awarded to the petitioners, they be forcibly pushed back to Myanmar (Burma) is legally unsustainable in view of the refugee status enjoyed by the petitioners as per the United Nations High Commissioner for Refugees (UNHCR) whereunder a refugee in particular is to be protected from forcible return to his/her country or to any other country where she/he would face threats to his/her life or freedom.

2. Learned counsel for the petitioners states that in view of the refugee status of the petitioners granted by the UNHCR, the petitioners cannot be forcibly returned to Myanmar (Burma) where they face threat to their life and liberty.

   Notice of motion.

3. Meanwhile, till the next date before the Bench and subject to filing of objections by the other side, the petitioners would not be forcibly repatriated to Myanmar (Burma) except in accordance with law while taking into account the refugee status of the petitioners as granted by UNHCR vide annexure-C.

(B. S. Walia)
Judge
Jammu

HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

Mohammad Firoz v. State of JK and others

OWP no. 141/2016

MP no. 01/2016

Coram : Hon'ble Mr. Justice B.S. Walia

Date : 21.11.2017

For petitioner : Mr S. F. Qadiri,

: Mr Shah Faisal, Advs

For respondent: Mr B. A. Dar, Sr. AAG

1. Pursuant to order dated 9th February 2016, Ms. Parveen D/o aShri Rafiq Ahmad R/o Myanmar has been produced in the Court of Station House Officer, Police Station Aishmuqam. Prompt action taken by Mr. Dar, learned AAG as well as respondent No. 5 is appreciated.

2. Ms. Parveen D/o Shri Rafiq Ahmad stated in Court that she is 15 years of age, was kidnapped by unknown person from Myanmar in June 2015 and thereafter was forcibly married to respondent No. 6 and his family and has no grievance against respondent No. 6 and his family members, yet she does not wish to stay with respondent No.6 and his family members and wanted to go back to her family members in Myanmar. She further stated that she has studied up to 7th Class and can read and understand Urdu language.

3. She stated that the petitioner was her maternal uncle and that he along with his wife namely Noorjahan were residing in New Delhi and till arrangements could be made to send her back to Myanmar, she would like to stay with her maternal uncle and aunt namely Mohammad Feroz and Noorjahan. Statement of Ms. Parveen has been separately recorded and the same has been read over, and explained to said Parveeen D/o Shri Rafiq Ahmad, who acknowledges the contents thereof to be as per her stating so, The statement is taken on record.

4. Learned counsel for the petitioner states that matter be adjourned to Wednesday i.e. 17th February 2016, in order to enable the petitioner to come to Srinagar and to work out the modalities for sending his niece i.e. Ms. Parveen back to her parents at Myanmar.

5. Adjourned to 17th February 2016. Ir the meantime, Station House Officer women's Police Station Rambagh, Srinagar through respondent

No. 4 is directed to provide appropriate boarding and lodging to Ms. Parveen D/o Rafiq Ahmad and also ensure proper care and housing of said Parveen D/o Shri Rafiq Ahmad till further orders.

6. It is also deemed appropriate to implead Union of India through Ministry of External Affairs as well as Home Affairs. Registry to make appropriate changes in cause title, issue notice to learned Assistant Solicitor General of India for 17th February 2016 to seek appropriate instructions for arranging deportation of Ms. Parveen. Dio Sbri Ratlq Ahmad to Myanamar and to place the same before the Court on next date.

7. On Ms. Parveua. Shri .Rafiq Ahmad being handed over to Station House Officer, Women's Police Station Rambagh, it would be the responsibility of Station House Officer, Women's Police Station, Rambagh, Srinagar to produce said Parveen D/o Slut Rafiq Ahmad before this Court on the next date of hearing. Copy of the order be provided to learned counsel for the parties under the seal. and signature of Bench Secretary of this Court.

IN HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

Mohammad Firoz v. State of JK and others

OWP no. 141/2016

MP no. 01/2016

Coram	: Hon'ble Mr. Justice Mohammad Yagoob Mir,
	: Hon'ble Mr. Justice Ali Mohammad Magrey
Date	: 21.11.2017
For petitioner	: Mr S. F. Qadiri,
	: Mr Shah Faisal, Advs
For respondent	: Mr B. A. Dar, Sr. AAG
	: Mr. Tahir Maiid Shamsi, ASCII
	: A. M. Magrey, J (Oral)

1. The details of the circumstances as to how Ms. Parveen daughter of Mr Shah Mohammad Rafiq resident o alfmar, Bkgju, Who is in Kashmir, has been explicitly indicated in, the order dated 12.02.2016. She is admitted to be a minor victim presently lodged in the Dbservation Home at Harwan in terms of order dated 03.03.2016.

2. The present writ petition has been filed by Mr Mohammad Firoz, who claims to be her maternal uncle. In the order dated 12.02.2016, Ms. Parveen has acknowledged that Mr Mohammad Firoz is her maternal uncle. The said Mr Mohammad Firoz is residing with his wife (Noorjahan) in Delhi under a stay visa issued by the Bureau of Immigration India.

3. The wishes of Ms Parveen were ascertained and recorded in the order dated 12.02.2016 to the effect that she would like to stay with her maternal uncle and aunt namely Mr Mohammad Firoz and Noorjahan, respectively. The only hitch was that Ms Parveen was not having a stay visa.

4. In terms of order dated 2.8.2017, the Ministry of External Affairs (Myanmar Section) and Ministry of Home Affairs Foreigners Division (Myanmar Section) were directed to ensure that Ms Parveen is facilitated in obtaining the stay visa and accordingly Ms Parveen had travelled to Delhi and the respondents had provided all assistance to her and she was interviewed by UNHCR on 21.8.2017.

5. As noticed in terms of order dated 24.8.2017, Ms Parveen was granted the UNHCR Refugee Card and needed a stay visa to stay in India with her maternal uncle.

6. Respondents were directed to facilitate Ms Parveen for applying for the said stay visa from the concerned FRRO (Ministry of Home Affairs/ State Home Department). The Secretary, High Court Juvenile Justice Committee, was also directed to prepare all the documentation and ensure that the same are submitted to the concerned authorities.

7. On submission of the documents and the recommendation of the Government of J&, finally, one of Home Affairs/ Foreigners Division, Government of India, New Delhi to the victim. Xerox copy of the Visa as well as a letter of Ministry of Home Affairs/ Foreigners Division dated 07.11.20 7 were taken on record on 13.11.2017.

8. Today, Mohammad Firoz along with his counsel appeared. Ms Parveen was also brought before the Court from the Observation Home Harwan with the help of High Court Juvenile Justice Committee and escorted by Mr Mohammad Yousuf Mir, District Child Protection Officer; Mr Fayaz Ahmad, Ms Yusra Rasool, Superintendents of Juvenile Observation Home, Harwan and Ms Tabasum Altaf, Probation Officer/ Child Welfare Officer, Juvenile Observation Home, Harwan.

9. The wishes of Ms Parveen were again ascertained who stated that she would like to stay with her maternal uncle and aunt namely Mohammad Firoz, present in the Court, and Noorjahan respectively. The concern of the Court, obviously, is to handover the custody of the minor Parveen to the genuine person. Mr Mohammad Firoz, present in the court, is identified by Ms Parveen as her maternal uncle and this court has no reason to disbelieve the statement of Ms Parveen.

10. In order to ensure care and protection to the victim it had become necessary to have the statement of Ms Parveen recorded by the learned Registrar Judicial of this Court today itself. Therefore, in the first instance the learned Registrar Judicial was directed to have the statement of Ms Parveen, present in the court, recorded. In compliance, the learned Registrar Judicial has recorded the statement and placed the same on record. Perusal of the statement reveals that Ms Parveen has again reiterated her wish to stay with her maternal uncle and aunt namely Mohammad Firoz and Noorjahan respectively, in Delhi.

11. In the above background the following directions are passed:

    a) The Officers of the Observation Home Harwan named above and District Child Protection Officer, Srinagar, shall ensure

handing over of the custody of Ms Parveen to her maternal uncle Mohammad Firoz by tomorrow in the Juvenile Observation Home, Harwan. Both the Superintendents of the Juvenile Observation Home, Harwan, shall take full details of the person with whom the petitioner, Mohammad Firoz, is stated to be working in Delhi including his contact numbers and other allied details.

b) Mission Director, Integrated Child Protection Scheme, ICPS, J&K, Jammu, shall report about the orders passed by this Court with reference to handing over the custody of Ms Parveena to her maternal uncle. He shall take up the matter with the Delhi Commission for Protection of Child Rights (DCPCR), 5th Floor, ISBT, Kashmere Gate, Delhi, for ensuring care and protection to the victim during her stay with her maternal uncle.

c) Both the Superintendents of Observation Home shall, at the time of handing over the custody of Ms Parveen, to her maternal uncle handover detailed letter addressed to the Mission Director, ICDS, J&K, Jammu, for doing the needful as directed with a copy to the Delhi Commission for Protection of Child Rights.

d) Petitioner shall report about the welfare of the minor on monthly basis to the District Child Protection Officer, Srinagar.

e) Mission Director, ICDS, J&K, Jammu, shall file status to this Court every month after seeking report from the DCPCR, regarding the protection and welfare of Ms Parveen.

f) Both State and Union Respondents shall ensure care and protection to the minor Parveen as and when needed during her stay with her maternal uncle.

g) Mr B. A. Dar, Sr. AAG, shall also file status of the case and in case the investigating officer requires the presence of Ms Parveen for recording statement all gf gee permission of this court.

h) Petitioner, Mohammad Firoz, maternal Wide of Ms Parveen shall furnish undertaking that he will take good care of her and will provide all the details as and when asked to the District child Protection Officer, Srinagar as also the Superintendents of Juvenile Observation Home, for the care and protection of Ms. Parveen and shall be liable for action in terms of applicable laws in case anything wrong is reported about him.

12. Registry to list this matter on 22nd April, 2018.
13. Copy of the order be furnished to the learned counsel appearing for the parties for compliance.

(Ali Mohammad Magrey) (Mohammad Yaqoob Mir)

Judge Judge

Srinagar

21.11.2017

IN THE HIGH COURT OF DELHI AT NEW DELHI

Sameer Hamood Ahmed Mohammad Al-Waeli v. Union of India and Anr

W .P.(C) 434/2017 & C M N Os.2000/2017 (Stay), 2001/2017

Coram	: Hon'ble Mr. Justice Sanjeev Sachdeva
Date	: 12.05.2017
For petitioner	: Mr.Colin Gonsalves, Sr. Advocate with : Mr. Gunjan Singh, Mr.Fazal Abdali and : Mr. Shashank, Advocates.
For respondents	: Mr.Rajesh Gogna, CGSC

O R D E R

1. The petitioner, by the present petition, seeks a direction to the respondents to consider the application of the petitioner for grant of long-term visa. Pending consideration of the said application, it is prayed that the petitioner be not deported.
2. Learned counsel for the respondents submits that the petitioner has not made an application for grant of a long-term visa. He submits that if an application is made, the same shall be considered in accordance with law with in a period of three months.
3. Learned senior counsel for the petitioner submits that the petitioner shall be making an application within one week from today.
4. On petitioner making an application for grant of long-term visa, the respondents shall consider the same in accordance with law within a period of three months. The order on the application shall be duly communicated to the petitioner.
5. Pending the consideration of the said application and, for a period of two weeks thereafter, no coercive steps shall be taken against the petitioner for deportation.
6. The writ petition is disposed of in the above terms.
7. Dasti under the signatures of the Court Master.

MAY 12, 2017

SANJEEV SACHDEVA, J.

IN THE HIGH COURT OF CALCUTTA

Abdur Sukur @ Adi Sukur & Anr. v. The State of West Bengal & ors.

W.P. 23644(W) of 2019

Coram : Hon'ble Mr. Justice Sabyasachi Bhattacharyya

Date : 24.12.2019

For petitioners :Mr. Rachit Lakhmani

: Mr. Indrojeet Dey

For respondent :Mr. A.K. Nag

Affidavit-of-service filed in court today be kept on record.

1. Despite service, none appears on behalf of the proforma respondents, although the respondent nos.1 to 5 are represented through counsel. The grievance of the petitioner is that the petitioners belongto the "Rohingya" Community, who are at present stateless in view of Myanmar having disownedthem.
2. The plight of the petitioners is that they have, according to learned counsel for the petitioners, completed their sentence for the alleged offences against them upon being detained by the respondent nos. 1 to 5 and that the said respondents are now attempting to deport them to Myanmar.
3. It is argued that such deportation would tantamount to a death sentence against the petitioners, in view of the plight of thepetitioners in Myanmar, which country has the declared policy of an all-out onslaught on the said "Rohingya" Community.
4. Learned counsel for the respondent nos. 1 to 4 submits that the writ petition is vague as regards the period of sentence which has been undergone by the petitioners. It is further submitted that the Ministry of External Affairs of the Union of India is a necessary party and ought to be heard in thisregard.
5. At this juncture, an adjournment is sought for on behalf of the Union of India.
6. However, in view of the imminent plight of the petitioners, who, despite having basic human rights in consonance with the Fundamental Rights provided by the Constitution of India as well as the U.N. Charter and

the norms of any civilized society, a minimum protection ought to be given to the petitioners till the writ petition is decided, in order to uphold the spirit of humanity, if not the Fundamental Rights enshrined in the Constitution of India, which is the grundnorm of all Indian statutes.

7. Accordingly, the respondents are directed to file their affidavit(s)-in-opposition within January 10, 2020. Reply/replies, if any, shall be filed by the petitioners within January 17, 2020.

8. The respondents shall be restrained by an order of injunction from deporting the petitioners from India during pendency of the writ petition.

9. The respondents are further directed to ensure that the petitioners are provided with the basic amenities, compatible with a life worthy of respect. It is further clarified that, if the advocate-on- record and/or any other advocate, representing the petitioners, seeks leave to have access to the petitioners in the meantime, such advocate(s) will be granted such access by the respondents to the limited extent that the respondents might monitor the timing of such access and such access may be, at the discretion of the respondents, under the supervision of the respondents.

Let the matter appear next "For Hearing" on January 20, 2020.

(Sabyasachi Bhattacharyya, J.)

II. ACCESS TO ASYLUM

In numerous instance the High Courts in India have recognized the right to seek asylum and have provided opportunities to asylum seekers to approach the UNHCR as per the relevant laws of the country. It is also pertinent to also mention that right to seek asylum is one of the most basic human rights, the Universal Declaration of Human Rights enshrines in **Article 14** that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

The table below lists cases relating to access to asylum that was recognised by the Courts, followed by a summary and the orders.

Name of the case	Court and date of order	Summary of the order/ judgement
Mr Bogyi vs Union of India	Gauhati High Court 17 November 1989	The petitioner, an undertrial prisoner, was allowed for a period of two months to visit Delhi to seek asylum from UNHCR.
Ms. Zothansangpuii vs The State of Manipur	Gauhati High Court 20 September 1989	The petitioner a Burmese citizen entered India in fear of persecution. The Court taking into consideration the sympathetic nature of the case decided that the petitioner should not be deported and allowed a period of one month to go to Delhi for the purpose of seeking asylum.
U. Myat Kyaw & Anr vs State of Manipur	Gauhati High Court 26 November 1991	The petitioners were released on interim bail for two months in order to enable them to approach the UNHCR in Delhi to seek asylum.
Johura Begum @ Jahira Bibi vs Union of India & Ors	Calcutta High Court 3 July 2014	The petitioner was convicted u/s 14 Foreigners Act and detained in a correctional home. Her husband and children were granted refugee status and staying in Jammu. On humanitarian grounds, the court directed that the petitioner be transferred to Mahila Sadan, Delhi where the petitioner could seek asylum and conveniently meet her family.

Mrs. Swati Alias Masuma and Anr vs Shanti Sadan Women Shelter Home and Ors	Bombay High Court 20 August 2016	The Petitioner, holding a refugee card issued by UNHCR, submitted that since more than two and a half years, she is staying in the protection home with her seven months old child. The court allowed the petitioner to be released from the protection home in order for her to take all necessary steps immediately for making an application for getting a Long Term Visa.
Mohammad Nasir vs State of Manipur and ors	Judicial Magistrate, Manipur 2 December 2019	Petitioner an asylum seeker from Myanmar prayed for issuing notice to respondent to not deport him and to allow him access to the Office of UNHCR to complete the refugee status determination process. The Court requested the UNHCR to take the decision of his application within a period of six weeks and also permitted UNHCR officials to visit Manipur Central Jail, Sajiwa where the petitioner is lodged at present.

IN THE GAUHATI HIGH COURT

High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram, Arunachal Pradesh.

Mr. Bogyi Petitioner v. Union of India

Civil Appellate Side Civil Rule No. 1847/89.

Coram	: Hon'ble Chief Justice Mr. Justice Phuken
Date	: 17. 11. 89
For the Petitioner	: Mr. Nandita Haksar
For the Respondent	: Mr. N. Kotehwar Singh, Mr. Hrishikesh Roy, and : Mr. D. Dass, advocates.

ORDER

Heard Ms N. Haksar, learned counsel for the petitioner. Heard also the learned Advocate General Manipur and SK. Chand Mahammad, Senior Central Govt. Standing counsel.

The petitioner who is an undertrial prisoner has approached us for allowing him to go to Delhi to seek political asylum from United Nations High Commissioner for Refugees, New Delhi, in view of the circumstances stated in the petition. It is stated in the petition that the petitioner apprehended that on expiry of his detention if he is deported to Burma his life would be in danger. Therefore the petitioner prays for granting of an opportunity to enable him to make attempt to obtain political asylum.

We therefore direct the respondents to release the petitioner on furnishing security to the satisfaction of the Magistrate at Imphal. The petitioner shall be so released for a period of two months. The petitioner shall during the period of two months, be entitled to visit Delhi for making necessary arrangements. Immediately on reaching Delhi the petitioner shall report to the Officer-in-charge, Parliament Street Police Station, New Delhi. If he is successful in obtaining necessary permission to qualify as a refugee, he shall be released forthwith and need not serve out the sentence, if any. This fact shall be communicated by this court to the officer-in-charge, Parliament Street Police station, New Delhi-1. In the event within the aforesaid period he does not get the status of a refugee he shall surrender before the learned Magistrate at Imphal to serve out the remaining sentence, if any.

The State Government is given the liberty to approach this court for modification of this order if so advised.

Furnish a copy of this order to the learned counsel for the petitioner by today.

Sd/-A. Raghuv Chief J.

Sd/- S. N. Phukan Judge

20. 11. 89

IN THE GUWAHATI HIGH COURT

The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh

Imphal Bench

Zothansangpuii v The State of Manipur

Civil Rule No. 981 of 1989

Coram	: Hon'ble Mr. Justice S. N. Phukan
	: Hon'ble Mrs. Justice M. Sharma
Date	: 20. 9. 89
For the petitioner	: Miss Nandita Haksar & Mr. N. Koteshwar Singh, Advocates.
For the respondents	: Addl. Central Govt. standing Counsel & Learned Senior Govt. Advocate

ORDER

1. The petitioner Ms. Zothasangpuli aged about 33 years has approached us for an appropriate direction in view of the following facts:-

   Admittedly the petitioner is a Burmese Citizen and she entered this country along with others as a result of terror let loose by the military authorities of Burma. She was prosecuted under relevant laws of our country and the learned Chief Judicial Magistrate, Chandel in Case No. Criml Case (P) No. 77 of 1989 convicted the petitioner on the plea of guilt and sentenced her to simple imprisonment for a term of 180 days and also another fifteen days under the Foreigners' Act and under Rule 6(1) of the Rules framed under the passport Act. The period of sentence is going to expire on 4th October, 1989. The petitioner apprehends that in view of the circumstances under which she had to come to this country, be her life may be in danger if she is deported to Burma. It is also stated that she is unwell and needs treatment. Petitioner has prayed that an opportunity may be given to her to go to Delhi to seek political asylum in this country or some other country of her choice.

2. We have heard Ms. Nandita Hakser, learned counsel for the petitioner, Mr. Pramode Singh, learned Senior Govt. Advocate and Mr. Chetia, learned Central Govt. Standing Counsel. As the petition was moved yesterday Mr. Chetia could not obtain necessary instructions.

3. We are of the view that the petitioner deserves some sympathy, and as such, we have to give suitable directions to enable her to go to Delhi for the purpose of seeking political asylum as stated in the petition.

4. It is, therefore, directed that after the petitioner is released at the end of the period of sentence, which is stated to be the 4th October, 1989, she may not be deported for a period of one month. During that period she may visit Delhi for making necessary arrangement. During her stay in Delhi, she shall report to the Parliament Street police station on the next day of her arrival and one-day prior to her departure from Delhi. To remain in this country for a period of one month from 4th October, 1989 she shall produce necessary sureties before the learned Chief Judicial Magistrate , Imphal to his satisfaction. If necessary learned Chief Judicial Magistrate, Imphal may enlarge this period of one month in view of the long vacation of this Court.

With the above directions the petition is disposed of.

Sd/-M. Sharma
Judge

Sd/- S. N. Phukan
Judge

IN THE GAUHATI HIGH COURT

(High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram, Arunachal Pradesh)

Imphal Bench

U. Myat Kyaw and Anr. v. State of Manipur and anr

Civil Rule No. 516 of 1991

Coram	: Hon'ble Justice W. A. Shishak
	: Hon'ble Justice S. Barman Roy
Date	: 26. 11. 1991
For petitioner	: Ms. Nandita Haksar, Advocate
For respondents	: Advocate General Manipur

ORDER

1. Heard Ms. Nandita Haksar, learned counsel for the petitioners. The learned Advocate General, Manipur informs us that the two petitioners entered into Indian Territory illegally i.e. without valid travel documents and they are ledged in Manipur Central Jail.

2. Ms. Haksar states that in the wake of political disturbance in Myanmar (Burma), several citizens of that country especially those persons who took part in the movement for democracy of that country, took shelter in Thailand and also in India. According to the learned counsel, these two petitioners also entered into Indian Territory on 14 July, 1991. They voluntarily surrendered to the authority and they were taken into custody. Since July, 1991, they have been lodged in Jail. We are informed by the learned Advocate General that case has been registered against them for illegal entry under Section 14 of the Foreigners Act. It has been submitted by the learned counsel for the petitioners that in similar petition of similar situation in respect of certain citizens of that country, this court had allowed the petitioners to be released on bail in order to enable them to approach the United Nations High commission for Refugees in Delhi to seek United Nations refugee status.

3. After hearing the learned counsel of both sides, we direct that the petitioners be released on interim bail for a period of two months on furnishing personal bonds of Rs 5000/-(Five Thousand) each to the satisfaction of the learned Chief Judicial Magistrate, Chandel

for going the Delhi for the aforesaid purpose. The learned Advocate General submits that there should be local sureties.

4. On perusal of the facts and circumstances stated in the petition, we are of the view that local surety may not be easily available and to insist on furnishing surety may cause hardship to the petitioners. In such situation, we allow the petitioners to go on interim bail on personal bond.

Copy of this order be furnished to the learned counsel for the petitioners.

Sd/-S. Barman Roy
Judge

Sd/-W. A. Shishal
Judge

IN THE HIGH COURT OF CALCUTTA

W.P. 33910 (W) of 2013

Johura Begum @ Jahira Bibi v. The Union of India & Ors.

Coram	: Hon'ble Mr. Justice Sanjib Banerjee
Date	: 12.12.2013
For the petitioner	: Mr. Debashis Banerjee
For the respondent	: Mr. K. M. Hossain for the State
	: Mr. Sanjay Bardhan for the Union of India

1. The petition is by a Myanmar national who has been convicted under Section 14 of the Foreigners Act and is now lodged in the Dum Dum Central Correctional Home.

2. The petitioner's husband and their seven children have been granted asylum-seeker status and appear at present to be at a refugee camp in Jammu. The petition is for the purpose of stalling the petitioner being repatriated to Myanmar and for the petitioner to be considered to be accorded the same status as the petitioner's husband and their seven children so that the family is not broken. Pursuant to the direction issued on November 21, 2013, the Ministry of Home Affairs (Foreigners Division), has indicated by way of written instructions to Advocate representing the Union of India that the Ministry of Home Affairs would have no objection to the transfer of the petitioner to Tihar in Delhi on humanitarian grounds. The Ministry has also indicated that there is a prescribed procedure for claiming refugee status. The report indicates that in view of Rohingya Muslims facing persecution in the native country of Myanmar, the petitioner's case would be considered sympathetically by the Ministry.

3. In view of the humanitarian stand taken by the Ministry of Home Affairs, W.P. 33910 (W) of 2013 is disposed of by requiring the Registrar (Administration) to forward a copy of this order to the State Home Secretary for appropriate steps to be taken to remove the petitioner from the Dum Dum Central Correctional Home to Tihar Correctional Home in Delhi as expeditiously as possible so that it may be more convenient for the petitioner's family members to meet the petitioner there.

4. A copy of the detailed procedure for applying for refugee status is made over to Advocate for the petitioner to make an application in

accordance therewith for grant of refugee status to the petitioner.

5. The exercise of removing the petitioner from Dum Dum to Delhi should be completed within a period of four weeks from date.
6. There will be no order as to costs.
7. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.

(Sanjib Banerjee, J)

IN THE HIGH COURT OF CALCUTTA

Johura Begum v. The Union of India & Ors.

W.P. 14050 (W) of 2014

Coram	: Hon'ble Mr. Dipankar Datta
Date	: 07.05.2014
For petitioner	: Mr. D. Banerjee, Ms. P. Banerjee and Mr. S. Bardhan, Advocate
For respondent	: Mr. A. Banerjee, Ms. M. Tewari, Advocate.

1. Having heard learned advocates appearing for the respective parties, I direct the Secretary, Ministry of Home Affairs (Foreigners Division) to submit a report before this Court on the feasibility of keeping the petitioner in Lampur Detention Home, Delhi till she is granted refugee status.
2. Such report may be filed on 09.06.2014 when the writ petition shall be listed once again under the heading 'To Be Mentioned'.

(Dipankar Datta, J.)

IN THE HIGH COURT OF CALCUTTA

Johura Begum v. The Union of India & Ors.

W.P. 14050 (W) of 2014

Coram	: Hon'ble Mr. Dipankar Datta
Date	: 03.07.2014
For Petitioner	: Mr. Debashis Banerjee…..for the petitioner
For Respondent	: Mr. Sanjay Bardhan for the Union of India Mr. Amitesh Banerjee and Ms. Munmun Tewari for the State

1. Documents produced by Mr. Bardhan, learned advocate appearing for the Union of India reveal that the Ministry of Home Affairs/Foreigners Division has no objection if the petitioner, a Myanmar national, is transferred to Mahila Sadan, Nirmal Chhaya Complex, Jail Road, New Delhi.
2. In view of the above, this writ petition stands disposed of with a direction upon the Registrar (Administration) of this Court to forward a copy of this order to the Secretary (Home), Government of West Bengal for taking appropriate steps to shift the petitioner from Dum Dum Central Correctional Home to Mahila Sadan, Nirmal Chhaya Complex, Jail Road, New Delhi within two weeks from date of receipt of a copy of this order.
3. Since the Deputy Director, Department of Social Welfare, Government of NCT of Delhi has further informed the section officer that the department has been providing clothing, bedding, lodging and dietary articles to the foreign nationals, I hope and trust that the petitioner shall also be entitled to the same. If the petitioner has been suffering from any disease, I further hope and trust that the department shall take a humane approach and ensure that she receives proper medical advice and treatment.
4. There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously.

(DIPANKAR DATTA, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Mrs. Swati Alias Masuma and anr v. Shanti Sadan Women Shelter Home and ors

Criminal Writ Petition No.1909 Of 2016

Criminal Appellate Jurisdiction

Coram	: Hon'ble Mr. Justice Naresh H. Patil
	: Hon'ble Mr. Justice Prakash D. Naik
Date	: 20.08.2016
For petitioners	: Ms.Gayatri Singh, Senior Advocate, : i/by Archana P. Rupwate.

For respondents: Mrs.M.M.Deshmukh, APP, for State. Mrs.Rebecca Gonsalves for Respondent no.3. Inspector Waranj, FRRO, Mumbai, present. Smt.Sangeeta Pankaj Meher, representing Shanti Sadam Women Shelter Home, Ulhasnagar present.

1. Learned counsel appearing for Union of India submitted that the Petitioner being a foreign national, she will have to apply for a long term visa (`LTV') under Registration of Foreigners Rules, 1992. An application in the prescribed format is required to be submitted online to Foreigners Registration Officer, Thane Rural. Learned counsel has placed on record a communication made by Joint Secretary (Foreigners), Government of India, dated 29 December 2011 addressed to the Chief Secretaries of the State Governments in India.
2. Learned Senior Advocate appearing for the Petitioner submitted that since more than two and a half years, the Petitioner is staying in the protection home with her child, who is seven months baby. According to learned Senior Advocate, Petitioner got married to one Abdulla Ansari s/o Nasiruddin Sahab, resident of Bhivandi, District Thane. She submitted that the Petitioner holds a UNHCR refugee card issued by United Nation's High Commissioner for refugees. The issuing location is mentioned as OCM, New Delhi, India. Learned Senior Advocate submitted that as a refugee, the Petitioner is protected from arbitrary detention or forcible return to her country. During her stay in India, she being holder of UNHCR refugee card holder, she is subject to all

applicable national laws in India. Learned Senior Advocate submitted that the Petitioner will have to apply for LTM to the appropriate authority as mentioned above. It is prayed that the Petitioner girl be directed to be released from the protection home so that she could stay with her husband along with the child and take necessary steps for getting LTV.

3. Learned APP submitted that the Magistrate after completing the inquiry, passed an order on 14 October 2013 directing Superintendent of Shanti Sadan Mahila Aashram, Ulhas Nagar (Shanti Sadan Women Shelter Home) to deport the Petitioner to her native place with the help of investigating officer and special task force. Learned APP submits that consequent to the said order, necessary communications were made by Superintendent of Shanti Sadan Women Shelter Home, Ulhas Nagar to various authorities, Home Ministry of Union Government etc. It is submitted that so far, the authorities of Shanti Sadan Women Shelter Home, Ulhas Nagar have not received any communication in respect of deportation of the Petitioner. Therefore, there was no other option but to continue to keep the Petitioner in the protection home.

4. We have noticed in the record that the Magistrate passed an order of deportation in the year 2013, which order is impugned in this petition. By order dated 19 September 2013, the Magistrate, Bhivandi passed following order :

    1. "The victim Smt.SwAti @ MASooMA SAdullA Amin be kept At ShAnti SADAn MAhilA AshrAm, UlhASnAgAr till 03/10/2013;

    2. The Superintendent of ShAnti SADAn MAhilA AshrAm, UlhASnAgAr is hereby directed to produce the sAid victim on 03/10/2013 before this Court for further order;

    3. The District ProBAtion Officer is hereby directed to MAke An inquiry in respect of the Age, chArACter And Antecedents of the victim And the suitAbility of her husBAnd, pArents, gUArdiAn for tAking her chArge And the nAture of the influence which conditions in her home Are likely to hAVE or her if she is sent to home of victim Smt.SwAti @ MASoom SAdullA Amin And to file report ACCordingly on or before 03/10/2013 in seAled envelope;

    4. Issue letters ACCordingly."

5. We have perused the record placed before us and considered the submissions. Consequent to the order passed by Judicial Magistrate, First Class, Bhivandi on 19 September 2013 below application of investigating officer for necessary orders, the Petitioner was kept in

Shanti Sadan Women Shelter Home , Ulhas Nagar. The Petitioner still continues to stay in the said shelter home. By a further order dated 14 October 2013, the Judicial Magistrate, First Class, Bhivandi while rejecting the application of Mohammad Abdulla Mohammed Nasir Ansari and the application of uncle of Abdulla, directed deportation of the Petitioner to Burma. Petitioner claims to be holding UNHCR refugee card. It was submitted on behalf of the Respondents that for continuing lawful stay in India of Petitioner, the Petitioner will have to take LTV, as stated above. We find substance in the contention of learned Senior Advocate appearing for the Petitioner that as of today the Petitioner should be directed to be released to complete the formalities and take appropriate steps. Learned Senior Advocate submitted that the Petitioner and her husband would submit necessary undertakings, as directed by this Court.

6. Pending hearing of this petition, by way of an interim order, we would allow the Petitioner to be released from Shanti Sadan Women Shelter Home, Ulhas Nagar along with her daughter on certain conditions.

7. We, therefore, pass following order:

   (a) The Petitioner shall be released from Shanti Sadan Women Shelter Home, Ulhas Nagar along with her child;

   (b) The Petitioner shall execute an undertaking to Bhivandi City Police Station stating her residential address in Bhivandi, cell phone number and/or land line telephone number, if any. The Petitioner shall not change her residential address without prior intimation to Police. The Petitioner shall report to Bhivandi Police Station every Sunday of the week between 10 am to 11 am;

   (c) The concerned investigating officer attached to Bhivandi Police Station shall visit Shanti Sadan Women Shelter Home, Ulhas Nagar for securing the undertaking of the Petitioner;

   (d) After release, the Petitioner shall take necessary steps immediately for making an application for getting LTV;

   (e) Police is entitled to secure an undertaking of Abdulla Ansari s/o Nasiruddin Saheb as well;

   (f) The undertaking which the Petitioner would be furnishing, shall be furnished in the office of Superintendent of Shanti Sadan Women Shelter Home, Ulhas Nagar. The Superintendent of Shanti Sadan Women Shelter Home, Ulhas Nagar shall counter sign such undertaking with an endorsement that same was taken in her presence;

   (g) Petitioner shall not leave the jurisdiction of Thane District.

8. It is clarified that we have not expressed any opinion on the marital status of the Petitioner as well as citizenship and nationality of the Petitioner.

9. Stand over to 13 September 2016, at 3.00 p.m.

10. All concerned to act on a copy of this order duly authenticated by registry of this Court.

(PRAKASH D. NAIK, J.) (NARESH H. PATIL, J.)

IN THE HIGH COURT OF MANIPUR

Mohammad Nasir v State of Manipur & Ors

WP(CrI) No.4 of 2019

Coram	: Hon'ble Mr. Justice Lanusungkum Jamir
	: Hon'ble Mr.Justice Kh.Nobin Singh
Date	: 02.12.2019
For petitioner	: Mr. M. Rakesh, Adv
For respondents	: Mr. Kh. Athouba, Mr. W.Darakishore, Advs

Heard Mr. M. Rakesh. learned counsel appearing for the petitioner as well as Mr. Kh. Athouba, learned PP appearing for the respondents No. 1 & 2 and Mr. W. Darakishore, learned senior panel counsel, Central Govt appearing on behalf of the respondents No 3 & 4.

The petitioner has filed this petition with the following prayers:

(a) To admit this Writ Petition;

(b) To issue a writ in the nature of Mandamus or any other writ or order or direction directing the Respondents to release the petitioner from the Manipur Central Jail, Sajiwa and to allow the petitioner to have access to the Office of the UN High Commission for Refugees (UNHCR), New Delhi to complete the refugee Status Determination process;

(c) To issue an appropriate writ or order or direction for quashing the decision of deportation of the Petitioner, (if any), and:

(d) To issue a writ in the nature of Mandamus or any other writ or order or direction directing the respondents to expedite the Long Tenn Visa (LTV) application procedures for the petitioner, upon his receipt of refugee status by the UNHCR,

(e) In the interim to issue a Writ in the nature of Mandamus or any other Writ or order or direction directing the Respondents not to deport the petitioner to his country of origin till his Refugee Status Determination Process is completed by the UNHCR;

(f) To issue any other appropriate Writ, order or directions, which the Hon'ble High Court may deem fit and proper in the facts and circumstances of the case:

Mr. M. Rakesh, learned counsel for the petitioner submits that in the

meantime, the petitioner made a representation before the United Nations High Commissioner for Refugees (UNHCR) seeking for refugee status.

Learned counsel appearing for the petitioner has drawn the attention of this Court to Annexure-A/3 of the writ petition which is a certificate dated 25-10-2018 issued by the UNHRC indicating that the petitioner has been registered as an asylum seeker with the office of the UNHCR, New Delhi for refugee status. The certificate dated 25-10-2018 is also reproduced herein below:

UNHCR

United Nations High Commissioner for Refugees

B-2/16 Vasant Vihar

New Delhi 110057

India

UNHCR Representation in India

Tel: (+91-11) 4353044

Fax: (+91-11)43530460

Email: indne@unhcr.org

25 October 2018

Reference: HCR/PRLJ513-18CO2713

TO WHOM IT MAY CONCERN

This is to certify that Mr. Mohammad Nasir, son of Mr Mohammad Salim from Myanmar, has been registered as an asylum seeker in the Officer of the United Nations High Commissioner for Refugees, New Delhi for Refugee Status. His application for asylum is under consideration

Any assistance provided to Mr. Mohammad Nasir would be highly appreciated UNHCR. New Delhi

In view of the above, at this stage, we request the United Nations High Commissioner for Refugees to take a decision on the representation of the petitioner within a period of 6 (six) weeks with effect from today. The officials of the UNHCR are also permitted to visit Manipur Central Jail, Sajiwa where the petitioner is lodged at present. List the matter again on 31St January, 2020. Registry to furnish a copy of this order to the learned counsel appearing for all the parties.

JUDGE

III. RIGHTS OF REFUGEES, ASYLUM SEEKERS AND FOREIGNERS and RECOGNITION OF INTERNATIONAL LAW OBLIGATIONS

There are some rights which cannot be denied to any individual despite their citizenship status. The Constitution of India, inter alia, recognises the right to equality (Article 14), right to life and personal liberty (Article 21), right to protection in respect of conviction of offences (Article 20), right to protection under arbitrary arrest (Article 22), freedom of religion (Article 25) for both citizens as well as non-citizens. Further, Article 51 asserts that the State shall endeavor to foster respect for international law and treaty obligations. The Parliament under Article 253 has been granted the "power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body (read with entry 14 of the Union List).

The cases below highlights some of the cases where the Supreme Court and the High Courts have recognised India's international obligations and as well as its constitutional values of protecting foreigners (including refugees).

Name of the case	Court and date of order	Summary of the order/ judgement
Gramophone Company of India Limited vs Birendra Pandey	Supreme Court (1984) 2 SCC 534 21 February 1984	The Court recognised that the comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament.
Digvijay Mote vs Govt of India and another	Karnataka High Court 17 February 1994	Appellant requested the Court to direct the Government to provide food for the children of Sri Lankan refugees who were staying and studying in a residential school in Karnataka. Since the Government of Karnataka agreed to arrange for the supply of food, the court disposed of the petition without discussing its merit with the consent of both sides.
Vishaka & Ors vs State of Rajasthan & Ors	(1997) 6 SCC 241 13 August 1997	International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into the provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.

Chairman vs Chandrima Das	Supreme Court (2000) 2 SCC 465 28 January 2000	Court held that the victim although a foreign national was entitled to all the constitutional rights available to a citizen so far as "Right to Life" was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Government employees.
Premavathy Rajathi vs State of Tamil Nadu	Madras High Court H.C.P. No.1038 of 2003 14 November 2003	This petition in the nature of habeas corpus sought liberty of the petitioners (Sri Lankan citizens) from the Special Camp, Chengalpattu, wherein they were lodged under section 3 (2)(e) of the Foreigners Act. The Court directed the government to take up the review of each individual case, provide adequate facilities, vocational training and allowed to lead a family-life.
Gyan Chand and Ors vs State of Uttar Pradesh	Uttaranchal High Court Writ - C No. - 13461 of 2010 26 July 2004	The petitioners were refugees from Pakistan and claimed rights on a particular land. The Court suggested that it is appropriate for the Government to undertake an inquiry on the subject by some responsible officer and find out the basic questions related to the petition and accordingly disposed it off.
Raju vs State of Tamil Nadu and ors	Madras High Court 27 July 2005	The petitioner, a Sri Lankan refugee lost his daughter in the Tsunami in Tamil Nadu in 2004 and therefore sought compensation. The Court directed the government to consider the claim of the petitioner.

Sardar Shah Mohd Khan vs State of Assam	Guwahati High Court 19 May 2016	The State Police Accountability Commission came to the finding that the Police Authorities committed serious misconduct by superficially conducting the verification without giving due consideration to Refugee certificate issued by UNHCR for which he is liable for departmental proceeding. The Court therefore held that the action by the respondent Police authorities are illegal and bad in law. The charges framed under Section 14 of the Foreigners Act, 1946 against the petitioner were set aside and quashed.
T. Udhayakala vs The District Collector & Ors	Madras High Court 19 July 2016 & 11 July 2016	In a habeas corpus petition, the court allowed the detenu to move to a different camp where he could stay with his family. In a subsequent petition, the court allowed the petitioner to be takento any place outside the camp for treatment for mental disorder or other purpose like appearing before the Embassy.
Arya Khatami vs Union of India and Ors	Delhi High Court & Bombay High Court 6 March 2018 (Last order date)	The petitioner an Iranian refugee under the mandate of UNHCR approached the Delhi High Court to quash the exit order. The Court ordered that no coercive steps should be taken against him and liberty was granted to him to approach the appropriate forum. Thereafter, for want of jurisdiction, he accordingly approached the Bombay High Court. In the meantime, his resettlement application was accepted by the Government of Canada and the FRRO Pune granted him exit permission to leave for Canada and therefore the petition was withdrawn.

IN THE SUPREME COURT OF INDIA

REPORTABLE

Gramophone Company of India Ltd v. Birendra Bahadur Pandey And Others

(1984) 2 Supreme Court Cases 534

Civil Appeals Nos. 3216 to 3218 of 1983

Coram : Hon'ble Mr. Justice Chinnappa Reddy

Date : 21.02.1984

1. Nepal is our neighbour. Unfortunately Nepal is land-locked. Nepal's only access to the sea is across India. So, as one good neighbour to another with a view to "maintain, develop and strengthen the friendly relations" between our two countries, by treaty and by International Convention, we allow a right of innocent passage in order to facilitate Nepal's international trade. One of the questions before us is the extent of this right: Does the right cover the transit of goods which may not be imported into India? May goods which may not be brought into India be taken across Indian territory? What does 'import' mean, more particularly what does 'import' mean in Section 53 of the Copyright Act? Can an unauthorised reproduction of a literary, dramatic, musical or artistic work or a record embodying an unauthorised recording of a record (which, for short, adopting trade parlance, we may call a pirated work), whose importation into India may be prohibited, but whose importation into Nepal is not prohibited, be taken across Indian territory to Nepal? These are some of the questions, which arise for consideration in this appeal.

2. The questions have arisen this way: The appellant, the Gramophone Company of India Limited, is a well-known manufacturer of musical records and cassettes. By agreement with the performing artistes to whom royalties are paid, the appellant company is the owner of the copyright in such recordings. The appellant received information from the customs authorities at Calcutta that a consignment of pre-recorded cassettes sent by Universal Overseas Private Ltd., Singapore to M/s Sungawa Enterprises, Kathmandu, Nepal, had arrived at Calcutta Port by ship and was awaiting dispatch to Nepal. The appellant learnt that a substantial number of cassettes were 'pirated works', this fact having

come to light through the broken condition of the consignment which was lying in the Calcutta docks. Basing upon the information received, the appellant sought the intervention of the Registrar of Copyrights for action under Section 53 of the Copyright Act, 1957. This provision enables the Registrar, after making such enquiries as he deems fit, to order that copies made out of India of a work which if made in India would infringe copyright, shall not be imported. The provision also enables the Registrar to enter any ship, dock or premises where such copies may be found and to examine such copies. All copies in respect of which an order is made prohibiting their import are deemed to be goods the import of which is prohibited or restricted under Section 11 of the Customs Act, 1962. The provisions of the Customs Act are to have effect in respect of those copies. All copies confiscated under the provisions of the said Act are not to vest in the Government, but to be delivered to the owner of the copyright in the work. As the Registrar was not taking expeditious action on the application of the appellant and as it was apprehended that the pirated cassettes would be released for transportation to Nepal, the appellant filed a writ application in the Calcutta High Court seeking a writ in the nature of mandamus to compel the Registrar to pass an appropriate order under Section 53 of the Copyright Act and to prevent release of the cassettes from the custody of the customs authorities. The learned single Judge of the Calcutta High Court, on the request of the appellant, issued a rule nisi and made an interim order permitting the appellant to inspect the consignment of cassettes and if any of the cassettes were thought to infringe the appellants copyright, they were to be kept apart until further orders of the Registrar. After causing the necessary inspection to be made, the Registrar was directed to deal with the application under Section 53 of the Copyright Act in accordance with law after hearing interested parties. The Registrar was directed to deal with the application within eight weeks from the date of the High Court's order. In the event of any of the cassettes held back by the appellant being found not to infringe any provision of the Copyright Act, the appellant was to pay damages as assessed by the Court. Against the learned single Judge's order, the consignee preferred an appeal under Clause 15 of the Letters Patent. A Division Bench of the Calcutta High Court held that the word 'import' did not merely mean bringing the goods into India, but comprehended something more, that is, "incorporating and mixing, or mixing up of the goods imported with the mass of the property in the local area". The learned Judges thought it would be wrong to say that there was importation into India, the moment the goods crossed the Indian customs barrier. Keeping in view the treaties with Nepal, the Division Bench took the view that

there was no importation when the goods entered India en route to Nepal. The appeal was, therefore, allowed and the writ petition filed by the present appellant was dismissed. And so, the writ petitioner in the High Court has appealed to us under Article 136 of the Constitution.

3. First, we shall examine if there is any mandate of international law or if the rules of international law afford us any guidance and if such mandate or guidance is perceptive under Indian law. Two questions arise, first, whether international law is, of its own force, drawn into the law of the land without the aid of municipal statute and, second, whether, so drawn, it overrides municipal law in case of conflict. It has been said in England that there are two schools of thought, one school of thought propounding the doctrine of incorporation and the other, and the doctrine of transformation. According to the one, rules of international law are incorporated into the law of the land automatically and considered to be part of the law of the land unless in conflict with an Act of Parliament. According to the other, rules of international law are not part of the law of the land. Unless already so by an Act of Parliament, judicial decision or long established custom. According to the one whenever the rules of international law changed, they would result in a change of the law of the land along with them, "without the aid of an Act of Parliament". According to the other, no such change would occur unless those principles are "accepted and adopted by the domestic law". Lord Denning who had once accepted the transformation doctrine without question, later veered round to express a preference for the doctrine of incorporation and explained how courts were justified in applying modem rules of international law when old rules of international law changed. In fact, the doctrine of incorporation, it appears, was accepted in England long before Lord Denning did so. Lord Denning himself referred to some old cases. Apart from those, we may refer to West Rand Central Gold Mining Co. v. King where the Court said:

> It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.

4. Lauterpacht in International Law (General Works) refers to the position in Germany, France, Belgium and Switzerland and says it is the same. He quotes what a German court said to meet an argument that the role of customary international law conflicted with Article 24 of the

German Code of Civil Procedure. The court had said, "The legislature of the German Reich did not and could not intend any violation of generally recognised rules of international law, when enacting Article 24 of the German Code of Civil Procedure". Lauterpacht refers to another German case where the argument that "there ought not to be a direct recourse to the law of nations, except insofar as there has been formed a German customary law" was rejected with the statement, "The contention of the Creditor that international law is applicable only insofar as it has been adopted by German customary law, lacks foundation in law. Such a legal maxim would, moreover, if generally applied, lead to the untenable result that in the intercourse of nations with one another, there would obtain not a uniform system — international law — but a series of more or less diverse municipal laws". Lauterpacht summarises the position this way:

> While it is clear that international law may and does act directly within the State, it is equally clear that as a rule that direct operation of international law is within the State subject to the overriding authority of municipal law. Courts must apply statutes even if they conflict with international law. The supremacy of international law lasts, pro foro interno, only so long as the State does not expressly and unequivocally derogate from it. When it thus prescribes a departure from international law, conventional or customary, Judges are confronted with a conflict of international law and municipal law and, being organs appointed by the State, they are compelled to apply the latter.

5. There can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no, municipal law must prevail in case of conflict. National courts cannot say yes if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law

must perforce apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield.

6. The proposition has been well stated by Latham, C.J. in Politics v. Commonwealth:

   Every statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law.... It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity. The question, therefore, is not a question of the power of the Commonwealth Parliament to legislate in breach of international law, but is a question whether in fact it has done so.

7. The Supreme Court of India has said practically the same thing in Tractoroexport, Moscow v. M/s Tarapore & Co.: (SCC p. 571, para 15)

   Now, as stated in Halsbury's Laws of England, Vol. 36, page 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided, that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of international law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law.

   The observations show that the Court was only concerned with a principle of interpretation, but, by implication, it may be possible to say that the Court preferred the doctrine of incorporation; otherwise the question of interpretation would not truly arise. What has been said in the Tractoroexport case is entirely consistent with what we have said earlier.

8. Is there any well established principle of international law on the question of the right of land-locked States to innocent passage of goods across the soil of another State? It appears that "the leading authorities on international law have expressed divergent views on the question of the transit rights of land-locked countries. While one group of writers, such as, Sibert, Scelle and others have held the view that these countries

have an inherent right of transit across neighbouring countries, other 'equally eminent authorities, such as, McNair and Hyde have held the view that these rights are not principles recognised by international law, but arrangements made by sovereign States. The result of the lack of unanimity has been that the land-locked countries have to rely on bilateral, regional or multi-lateral agreements for the recognition of their rights. The very existence of innumerable bilateral treaties, while on the one hand it raises a presumption of the existence of a customary right of transit, on the other it indicates the dependence of the right on agreement. The discontenting situation led to attempts by nations to codify the rules relating to transit trade. The earliest attempt was the Convention on the Freedom of Transit known generally as the Barcelona Convention. The second attempt was the Convention on the High Seas, 1958. The most recent is the 1965 Convention on Transit Trade of Land- locked States. As this is the latest Convention on the subject and as both India and Nepal have signed the Convention, it may be useful to refer to it in some detail. The Convention was the result of a Resolution of the United Nations General Assembly which, "recognising the need of land- locked countries for adequate transit facilities in promoting international trade", invited "the Governments of Member States to give full recognition to the needs of land-locked Member States in the matter of transit trade and therefore, to accord them adequate facilities in terms of international law and practice in this regard, bearing in mind the future requirements resulting from the economic development of the land-locked countries". Article 1(fl) of the Convention defines the term 'land-locked States' as meaning "any Contracting State which has no sea-coast". The term 'traffic in transit' is defined like this: "the passage of goods including unaccompanied baggage across the territory of a Contracting State between a land-locked State and the sea when the passage is a portion of a complete journey which begins or terminates within the territory of that land-locked State and which includes sea transport directly preceding or following such passage. The trans-shipment, ware-housing, breaking bulk, and change in the mode of transport of such goods as well as the assembly, disassembly or reassembly of machinery and bulky goods shall not render the passage of goods outside the definition of 'traffic in transit' provided that any such operation is undertaken solely for the convenience of transportation. Nothing in this paragraph shall be construed as imposing an obligation on any contracting State to establish or permit the establishment of permanent facilities on its territory for such assembly, disassembly or reassembly". The term 'transit State' is defined as meaning "any Contracting State with or without a sea-coast, situated between a land-locked State and

the sea, through whose territory 'traffic in transit' passes". Article 2 prescribes that freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport. Traffic in transit is to be facilitated on routes in use mutually acceptable for transit to the Contracting States concerned. No discrimination is to be exercised based on the place of origin, departure, entry, exit or destination or any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land vehicles or other means of transport used. Article 3 provides for exemption of Traffic in Transit from customs duties or import or export taxes or any special dues in respect of transit, within the transit State. Article 4 refers to means of transport and tariffs. Article 5 refers to methods and documentation in regard to customs, transport, etc. Article 6 refers to storage of goods in transit. Article 7 refers to delays or difficulties in traffic in transit. Article 8 refers to free zones or other customs facilities. Article 9 refers to provision of greater facilities. All that we need mention about Articles 4 to 9 is that details have necessarily to be worked out by mutual agreement. Article 10 refers to relation to most-favoured-nation clause. Article 11 refers to 'Exceptions to Convention' on grounds of public health, security, and protection of intellectual property. It is perhaps useful to extract the whole of Article 11.

Exceptions to Convention on grounds of public health, security, and protection of intellectual property

a. No Contracting State shall be bound by this Convention to afford transit to persons whose admission into its territory is forbidden, or for goods of a kind of which the importation is prohibited, either on grounds of public morals, public health, or security or as a precaution against diseases of animals or plants or against pests.

b. Each Contracting State shall be entitled to take reasonable precautions and measures to ensure that persons and goods, particularly goods which are the subject of a monopoly, are really in transit, and that the means of transport are really used for the passage of such goods, as well as to protect the safety of the routes and means', of communication.

c. Nothing in this Convention shall affect the measures which a Contracting State may be called upon to take in pursuance of provisions in a general international convention, whether of a world- wide or regional character, to which it is a party, whether such convention was already concluded on the date of this Convention or is concluded later, when such provisions relate:

i. to export or import or transit of particular kinds of articles such as narcotics, or other dangerous drugs, or arms; or

ii. to protection of industrial, literary or artistic property, or protection of trade names, and indications of source or appellations of origin, and the suppression of unfair competition.

d. Nothing in this Convention shall prevent any Contracting State from taking any action necessary for the protection of its essential security interests.

Article 12 refers to exceptions in case of emergency. Article 13 refers to application of the Convention in time of war. Article 14 refers to obligations under the Convention and rights and duties of United Nations Members. Article 15 refers to reciprocity. Article 16 refers to settlement of disputes. Article 17 refers to signature. Article 18 refers to ratification. Article 19 refers to accession. Article 20 refers to entry into force. Article 21 refers to revision. Article 22 refers to notifications by the Secretary-General. And Article 23 refers to authentic texts.

9. It is thus seen that the Convention while providing for freedom of transit for the passage of goods between a land-locked State and the sea, across the territory of a transit State emphasizes the need for agreement between the land-locked country and the transit country and, more important for our present purposes, it specifies certain exceptions. It is indeed remarkable that the Convention places traffic (illicit) in industrial, literary or artistic property on the same footing as traffic in narcotics, dangerous drugs and arms This opinion of the International Community as revealed by the Convention must be borne in mind in our further consideration of the question. It may be interesting to notice here what John H.E. Fried, who represented the Government of Nepal as one of the members of the delegation at the U.N. Conference which produced the Convention, has to say about those exceptions. In an article which he wrote in the Indian Journal of International Law, he said:

The test of a treaty are its exceptions. The proof of a treaty pudding is, when it cannot be eaten. It is the old problem of finding a balance between demands for saving clauses, and the opposite claim that the very value of a treaty depends on its reliability. For land-locked States, conditions under which their outlet to the outside world may be curtailed can of course be crucial.

The Convention declares exceptions permissible for five reasons: (1) certain well-specified reasons of public policy; (2) because of overriding

international obligations; (3) emergency in the country of transit; (4) in case of war; (5) protection of its essential security interests. A few words about each, in view of their extraordinary importance.

(1) Exceptions for reasons of public policy. The State of transit may— this is permissive, not obligatory — prohibit transit of certain goods for the reason that import into their own territory is prohibited, namely (Article 11, Para 1):

(a) grounds of public morals — e.g., indecent literature;

(b) on grounds of public health or public security; (e.g., contaminated food or improperly packed explosives);

(c) as precaution against animal diseases, plant diseases, or pests.

This clause (dubbed at the Conference as the "dirty pictures and rotten fish clause") will not hamper international trade if properly applied.

(2) The same can probably be said of the measures which a Contracting State may be called upon to take ("poutetre amene a prendre" in the equally authentic French version which is several nickes less permissive) in obedience to certain international treaties to which it is a party, namely, treaty provisions relating to

(a) "export, import or (!) transit of particular kinds or articles such as narcotics, or other dangerous drugs, or arms". (As to arms this would therefore only become operative if a world- wide or regional treaty prohibiting or restricting international arms trade existed.)

(b) "protection of industrial, literary or artistic property, or protection of trade names", and the like.

These provisions are noteworthy because they permit the States of transit to enforce, say a copyright or trade-mark convention even if, for example, neither the country of origin nor of destination is party to it.. . . Far as these provisions go, transit traffic must not be hampered for any other reason of public policy of the State of transit. If that State forbids importation of certain luxury goods for financial reasons, or of certain textiles to protect its own spinning industry, that is, economic reasons, or of short-wave radios for political reasons — all such goods must still be permitted to pass through its territory.

(3) Qualified Emergency. . . . ..

(4) War. . . . . .

(5) Protection of essential security interests. . . . . .

10. We may now take a look at the treaties with our neighbour Nepal and the Protocols. First, the Treaty of Trade' which was contracted "in order to expand trade between their respective territories and encourage collaboration in economic development". Article 2 stipulates that the contracting parties shall endeavour to grant maximum facilities and to undertake all necessary measures for the free and unhampered flow of goods, needed by one country from the other to and from their respective territories. Article 3 enjoins the contracting parties to accord unconditionally to each other treatment no less favourable than that accorded to any third country with respect to (a) customs duties and charges of any kind imposed on or in connection with importation and exportation and (b) import regulations including quantitative restrictions. Article 4 provides that the contracting parties should, on a reciprocal basis, exempt from basic customs duty as well as from quantitative restrictions the import of such primary products as may be mutually agreed upon, from each other. Article 8 casts a duty on the contracting parties to cooperate effectively with each other to prevent infringement and circumvention of the laws, rules and regulations of either country in regard to the matters relating to foreign exchange and foreign trade. Article 9 specially provides that notwithstanding the earlier provisions of the treaty either Contracting Party may maintain or introduce such restrictions as are necessary for the purpose of

    (a) protecting public morals,

    (b) protecting human, animal and plant life,

    (c) safeguarding national treasures,

    (d) safeguarding the implementation of laws relating to the import and export of gold and silver bullion, and

    (e) safeguarding such other interests as may be mutually agreed upon.

    Article 10 which may be extracted in full is as follows: "Nothing in this Treaty shall prevent either Contracting Party from taking any measures which may be necessary for the protection of its essential security interests or in pursuance of general international conventions, whether already in existence or concluded hereafter, to which it is a party relating to transit, export or import of particular kinds of articles such as opium or other dangerous drugs or in pursuance of general conventions intended to prevent infringement of industrial, literary or artistic property or relating to false marks, false indications of origin or other methods of unfair competition".

11. It appears to us that the Treaty of Trade concerned itself with trade

between India and Nepal and not with trade between Nepal and other countries. The provisions relating to import, export, transit and the free and unhampered flow of goods refer to the import and the export from one country to another i.e. from India to Nepal and from Nepal to India and to the transit and the free and unhampered flow of goods in the course of trade between the two countries. Even so, express reservation is made to enable each of the countries to impose restrictions for certain purposes and to take such measures as may be necessary for the protection of essential security interests and effectuating international conventions relating to opium and other dangerous drugs and also to effectuate "general conventions intended to prevent infringement of industrial, literary or artistic property or relating to false marks, false indications or origin or other methods of unfair competition". (Article 10)

12. The Treaty of Transit is more relevant. Its scheme, and sequence and even the language indicate that it is based on the 1965 Convention on Transit Trade of Land-locked Countries. The Preamble to the treaty mentions that a treaty has been concluded "recognising that Nepal as a land-locked country needs access to and from the sea to promote its international trade, and recognising the need to facilitate the traffic in transit through their territories".

13. Article 3 defines 'Traffic in Transit' and is as follows: "The term 'Traffic in Transit' means the passage of goods including unaccompanied baggage across the territory of a Contracting Party when the passage is a portion of a complete journey which begins or terminates within the territory of the other Contracting Party. The trans-shipment, warehousing, breaking bulk and change in the mode of transport of such goods as well as the assembly or reassembly of machinery and bulky goods shall not render the passage of goods outside the definition of 'traffic in transit' provided any such operation is undertaken solely for the convenience of transportation. Nothing in the article shall be construed as imposing an obligation on either Contracting Party to establish or permit the establishment of permanent facilities on its territory for such assembly, disassembly, or reassembly".

14. Article 1 requires" the Contracting Parties to accord 'Traffic in Transit' freedom of transit across their respective territories through routes mutually agreed upon making no destination based on flag of vessels, the places of origin, departure, entry, exit, destination, ownership of goods or vessels.

15. Article 4 exempts Traffic in Transit from customs duties and transit duties or other charges except reasonable charges for transportation and such other charges as are commensurate with the costs of services

rendered in respect of such transit.

16. Article 5 requires each of the Contracting Parties to provide, for the convenience of traffic in transit, warehouses or sheds, for the storage of traffic in transit awaiting customs clearance before onward transmission.

17. Article 6 stipulates that Traffic in Transit shall be subject to the procedure laid down in the Protocol. Article 8 and 9 correspond to the provisions of Articles 11, 12 and 13 of the 1965 Convention on Transit Trade of Land-locked States and are similar to Articles 9 and 10 of the Treaty of Trade and reserve the right of each of the Contracting Parties to impose restrictions for certain purposes and take measures in connection with certain interests. In particular Article 9 mentions that nothing in the treaty shall prevent either Contracting Party from taking any measure which may be necessary in pursuance of general conventions intended to prevent infringement of industrial, literary or artistic property or relating to false marks, false indications of origin or other methods of unfair competition.

18. The Protocol annexed to the Treaty of Transit contains a detailed procedure for the transit of goods across the territory of India en route from the Port of Calcutta to their Nepalese destination. The Protocol contains detailed provisions to ensure the goods reaching Nepal and to prevent the contingency of the goods escaping into the Indian market while on the way to Nepal.

19. While the Treaty of Trade generally guarantees to each of the Contracting Parties the free and unhampered flow of goods needed by one country from the other, the Treaty of Transit generally guarantees to each of the Contracting Parties freedom of transit across the territory of the other Contracting Party in respect of goods which have to pass through the territory of such other Contracting Party to reach the first Contracting Party from outside the territory of the second Contracting Party. In practice the two treaties really mean a guarantee to Nepal to permit free and unhampered flow of goods needed by Nepal from India and a guarantee of freedom of transit for goods originating from outside India across the territory of India to reach Nepal. In the matter of payment of customs duties the Treaty of Trade provides for the most favourable treatment while the Treaty of Transit grants exemption from such payment. Both treaties contain reservations. There is a reservation enabling the imposition of such restrictions as are necessary for the purpose of protecting public morals, human, animal and plant life, safeguarding national treasures, the implementation of laws relating to the import and export of gold and silver bullion and the safeguarding of other mutually agreed

interests. There is an express reservation for the protection of essential security interests. There is also provision for necessary measures in pursuance of general international conventions relating to transit, export or import of articles such as opium or other dangerous drugs. There is further provision for taking necessary measures in pursuance of general conventions intended to prevent infringement of industrial, literary and artistic property or relating to false marks, false indications of origin or other methods of unfair competition. So, the two treaties generally assure to Nepal the free and unhampered flow from India and freedom of transit across India, to goods or of goods which we may say in the broad way are not res extra commercium. In particular the treaties expressly contain reservations enabling each of the contracting parties to take measures in pursuance of general conventions for the protection of industrial, literary and artistic property.

20. So we have it that Article 11 of the 1965 Convention on Transit Trade of Land-locked States, Article 10 of the Treaty of Trade and Article 9 of the Treaty of Transit contain exceptions to protect "industrial, literary or artistic property" and to prevent "false marks, false indications of origin or other methods of unfair competition", pursuant to general conventions. Neither the International Convention of 1965 nor the treaties between the two nations prohibit the imposing of restrictions for this purpose. On the other hand, they contain reservations to the contrary. So great is the concern of the International Community for industrial, literary or artistic property that the Convention on Transit Trade of Land-locked Countries views traffic in this kind of property with the same gravity as it views traffic in narcotics, dangerous drugs and arms So, the Convention on Transit Trade of Land-locked States and the treaties between the two countries, leave either country free to impose necessary restrictions for the purpose of protecting industrial, literary or artistic property and preventing false marks, false indications of origin or other methods of unfair competition in order to further other general conventions. It is clear that for this purpose, it is not necessary that the land-locked country should be a party to the general convention along with the transit country. The interpretation placed by John H.E. Fried that the provisions of the 1965 Convention permit the States of transit to enforce, say a copyright or trade mark convention even if, for example, neither the country of origin nor of destination is party to it appears to us to be a correct interpretation.

21. The next step for us to consider is whether there is any general Convention on Copyright. An artistic, literary or musical work is the brain- child of its author, the fruit of his labour, and, so, considered to be his property. So highly is it prized by all civilised nations that it

is thought worthy of protection by national laws and international conventions relating to copyright. The International Convention for the protection of literary or artistic works first signed at Berne on September 9, 1886, was revised at Berlin in 1908, at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and finally at Paris in 1971. Article 1 of the Convention, as revised, constitutes the countries to which the Convention applies into a Union for the protection of the rights of authors in their literary and artistic works. The expression 'literary and artistic works' is defined to include every production in the literary, scientific and artistic domain whatever any be the mode or formation of its expression. It is provided that the work shall enjoy protection in all countries of the Union. Various detailed provisions are made in the Convention for the protection of the works. Article 9 provides that authors of literary and artistic works protected by the Convention shall enjoy the exclusive right of authorising the reproduction of these works in any manner or form. It is also expressly stipulated that any sound or visual recording shall be considered as a reproduction for the purposes of the Convention. We are not really concerned with the several details of the Convention. But we may refer to Article 16 which provides:

e. Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection;

f. The provisions of the preceding paragraphs shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected;

g. The seizure shall take place in accordance with the legislation of each country.

India, we may mention is a party to the Berne Convention.

22. The Universal Copyright Convention which was first signed in Geneva on September 6, 1952 was revised in Paris in 1971. Each Contracting State is called upon to undertake "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works including writings, musical, dramatic and cinematograph works and paintings, engraving and sculpture". The rights are to include the exclusive right to authorise reproduction by any means, public performance and broadcasting. Each Contracting State is required to adopt such measures as are necessary to ensure the application of the Convention. The Convention is not in any way to affect the provision of the Berne Convention for the protection of literary or artistic works or membership in the Union created by that Convention. The Universal Copyright Convention is

not applicable to the relationships among countries of the Berne Union insofar as its relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the Berne Union. India is a signatory to the Universal Copyright Convention also.

23. The time is now ripe for us to refer to our own Copyright Act of 1957. Section 2(c), (h), (o), (p), (f) and (w) define 'artistic work', 'dramatic work', 'literary work', 'musical work', 'cinematograph film' and 'record' respectively. Section 2(y) defines 'work' as meaning "any of the following works, namely,—

(i) a literary, dramatic, musical or artistic work;

(ii) a cinematograph film;

(iii)a record."

Record' is defined by Section 2(w) to mean "any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom, other than a sound-track associated with the cinematograph film". 'Recording' is defined by Section 2(x) to mean "the aggregate of the sounds embodied in and capable of being reproduced by means of a record". 'Infringing copy' in relation to a record is defined to mean, by Section 2(m)(iii), "any such record embodying the same recording. If such record is made or imported in contravention of the provisions of the Act". Section 13(1) states that copyright shall subsist throughout India in (a) original, literary, dramatic, musical and artistic works; (6) cinematograph films; and (c) records. Section 14 explains the meaning of 'copyright' in relation to various 'works'. In the case of a record, copyright is said to mean "the exclusive right, by virtue of, and subject to the provisions of, this Act to do or authorise the doing of any of the following acts by utilising the record, namely:

(i) to make any other record embodying the same recording;

(ii) to cause the recording embodying in the record to be heard in public;

(iii) to communicate the recording embodied in the record by radio diffusion" [Section 14(l)(d)].

Sections 17 to 21 deal with 'Ownership of Copyright and the rights of the owner', Sections 22 to 29 with 'Term of Copyright', Sections 30 to 32 with 'Licences', Sections 33 to 36 with 'Performing Rights Societies', Sections 37 to 39 with 'Rights of Broadcasting Authorities', Sections 40 to 43 with 'International Copyright' and Sections 44 to 50 with 'Registration of Copyright'. Sections 51 to 53 deal with 'Infringement of Copyright'.

24. Section 51 states when copyright in a work shall be deemed to be infringed. In particular clause (b) states that copyright shall be deemed to be infringed

    when any person—

    (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

    (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

    (iii) by way of trade exhibits in public, or

    (iv) imports (except for the private and domestic use of the importer) into India, any infringing copies of the work.

There is an explanation to which it is not necessary to refer for the purposes of this case.

25. Section 52 enumerates the acts which shall not constitute an infringement of copyright. It is unnecessary to refer to the various acts enumerated in Section 52; it is enough to state that bringing into India an infringing work for the purpose of transit to Nepal or any other country is not one of the excepted acts.

26. Section 53 which is of direct relevance as it deals with 'importation of infringing copies' needs to be fully extracted. It says:

    53.(1) The Registrar of Copyrights, on application by the owner of the copyright in any work or by his duly authorised agent and on payment of the prescribed fee, may, after making such enquiry as he deems fit, order that copies made out of India of the work which if made in India would infringe copyright shall not be imported.

    (2) Subject to any rules made under this Act, the Registrar of Copyrights or any person authorised by him in this behalf may enter any ship, dock or premises where any such copies as are referred to in sub-section (1) may be found and may examine such copies.

    (3) All copies to which any order made under sub-section (1) applies shall be deemed to be goods of which the import has been prohibited or restricted under Section 11 of the Customs Act, 1962, and all the provisions of that Act shall have effect accordingly:

Provided that all such copies confiscated under the provisions of the said Act shall not vest in the Government but shall be delivered to the owner of

the copyright in the work.

This provision empowers the Registrar of Copyrights to make an order that copies made out of India of any work which if made in India would infringe copyright, shall not be imported. This the Registrar may do on the application of the owner of the copyright in that work or by his duly authorised agent on payment of the prescribed fee and after making such enquiry, as he deems fit. The effect of such an order by the Registrar is to deem all copies to which the order applies to be goods of which the import has been prohibited or restricted under Section 11 of the Customs Act, 1962, and to attract all the provisions of the Customs Act on that basis, including the liability to be confiscated, with the slight modification that copies confiscated under the provisions of that Act shall not vest in the Government, but shall be delivered to the owner of the copyright.

27. The question is what does the word 'import' mean in Section 53 of the Copyright Act? The word is not defined in the Copyright Act though it is defined in the Customs Act. But the same word may mean different things in different enactments and in different contexts. It may even mean different things at different places in the same statute. It all depends on the sense of the provision where it occurs. Reference to dictionaries is hardly of any avail, particularly in the case of words of ordinary parlance with a variety of well-known meanings. Such words take colour from the context. Appeal to the Latin root won't help. The appeal must be to the sense of the statute. Hidayatullah, J. in Burmah Shell v. Commercial Tax Officer has illustrated how the contextual meanings of the very words 'import' and 'export' may vary.

28. We may look at Section 53, rather than elsewhere to discover the meaning of the word 'import'. We find that the meaning is stated in that provision itself. If we ask what is not to be imported, we find that the answer is copies made out of India which if made in India would infringe copyright. So it follows that 'import' in the provision means bringing into India from out of India. That, we see is precisely how import is defined under the Customs Act. Section 2(23) of the Customs Act, 1962 defines the word in this manner: "Import, with its grammatical variation and cognate expression means bringing into India from a place outside India". But we do not propose to have recourse to Customs Act to interpret expressions in the Copyright Act even if it is permissible to do so because Section 53 of the Copyright Act is made to run with Section 11 of the Customs Act.

29. It was submitted by the learned counsel for the respondents that where goods are brought into the country not for commerce, but for onward transmission to another country, there can, in law, be no importation. It was said that the object of the Copyright Act was to

prevent unauthorised reproduction of the work or the unauthorised exploitation of the reproduction of a work in India and this object would not be frustrated if infringing copies of a work were allowed transit across the country. If goods are brought in, only to go out, there is no import, it was said. It is difficult to agree with this submission though it did find favour with the Division Bench of the Calcutta High Court, in the judgment under appeal. In the first place, the language of Section 53 does not justify reading the words 'imported for commerce' for the words 'imported'. Nor is there any reason to assume that such was the object of the Legislature. We have already mentioned the importance attached by international opinion, as manifested by the various international conventions and treaties, to the protection of copyright and the gravity with which traffic in industrial, literary or artistic property is viewed, treating such traffic on par with traffic in narcotics, dangerous drugs and arms In interpreting the word 'import' in the Copyright Act, we must take note that while the positive requirement of the Copyright Conventions is to protect copyright, negatively also, the Transit Trade Convention and the bilateral Treaty make exceptions enabling the Transit State to take measures to protect copyright. If this much is borne in mind, it becomes clear that the word 'import' in Section 53 of the Copyright Act cannot bear the narrow interpretation sought to be placed upon it to limit it to import for commerce. It must be interpreted in a sense which will fit the Copyright Act into the setting of the international conventions.

30. The Calcutta High Court thought that goods may be said to be imported into the country only if there is an incorporation or mixing up of the goods imported with the mass of the property in the local area. In other words the High Court relied on the 'original package doctrine' as enunciated by the American Court. Reliance was placed by the High Court upon the decision of this Court in the Central India Spinning and Weaving & Mfg. Co. Ltd., The Empress Mills, Nagpur v. Municipal Committee, Wardha. That was a case which arose under the C.P. and Berar Municipalities Act and the question was whether the power to impose "a terminal tax on goods or animals imported into or exported from the limits of a municipality" included the right to levy tax on goods which "were neither loaded nor unloaded at Wardha but were merely carried across through the municipal area". This Court said that it did not. The word 'import', it was thought meant not merely the bringing into but comprised something more, that is "incorporating and mixing up of the goods with the mass of the property in the local area", thus accepting the enunciation of the 'original package doctrine' by Chief Justice Marshall in Brown v. State of Maryland. Another reason given by the learned Judges to arrive at the conclusion that

they did, was that the very levy was a 'terminal tax' and, therefore, the words 'import and export', in the given context, had something to do with the idea of a terminus and not an intermediate stage of a journey. We are afraid the case is really not of any guidance to us since in the context of a 'terminal tax' the words 'imported and exported' could be construed in no other manner than was done by the Court. We must however say that the 'original package doctrine' as enunciated by Chief Justice Marshall on which reliance was placed was expressly disapproved first by the Federal Court in the Province of Madras v. Boddu Paidanna and again by the Supreme Court in State of Bombay v. F.N. Balsam. Apparently, these decisions were not brought to the notice of the court which decided the case of Central India Spinning and Weaving & Mfg. Co. Ltd., The Empress Mills, Nagpur v. Municipal Committee, Wardha. So we derive no help from this case. As we said, we prefer to interpret the words 'import' as it is found in the Copyright Act rather than search for its meaning by referring to other statutes where it has been used.

31. The learned counsel for the appellant invited our attention to Radhakishan v. Union of India; Shawhney v. Sylvania and Laxman; Bernado v. Collector of Customs, to urge that importation was complete so soon as the customs barrier was crossed. They are cases under the Customs Act and it is needless for us to seek aid from there when there is enough direct light under the Copyright Act and the various conventions and treaties which have with the subject 'copyright' from different angles. We do not also desire to crow our judgment with reference to the history of the copyright and the customs legislations in the United Kingdom and India as we do not think it necessary to do so in this case.

32. We have, therefore, no hesitation in coming to the conclusion that the word 'import' in Sections 51 and 53 of the Copyright Act means "bringing into India from outside India", that it is not limited to importation for commerce only, but includes importation for transit across the country. Our interpretation, far from being inconsistent with any principle of international law, is entirely in accord with International Conventions and the Treaties between India and Nepal. And, that we think is as it should be.

33. We have said that an order under Section 53 may be made by the Registrar of Copyrights on the application of the owner of the copyright, but after making such enquiry as the Registrar deems fit. On the order being made the offending copies are deemed to be goods whose import has been prohibited or restricted under Section 11 of the Customs Act. Thereupon the relevant provisions

of the Customs Act are to apply, with the difference that confiscated copies shall not vest in the Government, but shall be delivered to the owner of the copyright. One fundamental difference between the nature of a notification under Section 11 of the Customs Act and an order made under Section 53 of the Copyright Act is that the former is quasi-legislative in character, while the latter is quasi- judicial in character. The quasi-judicial nature of the order made under Section 53 is further emphasised by the fact that an appeal is provided to the Copyright Board against the order of the Registrar under Section 72 of the Copyright Act. We mention the character of the order under Section 53 to indicate that the effect of an order under Section 53 of the Copyright Act is not as portentous as a notification under Section 11 of the Customs Act. The Registrar is not bound to make an order under Section 53 of the Copyright Act so soon as an application is presented to him by the owner of the copyright. He has naturally to consider the context of the mischief sought to be prevented. He must consider whether the copies would infringe the copyright if the copies were made in India. He must consider whether the applicant owns the copyright or is the duly authorised agent of the copyright. He must hear those churning to be affected if an order is made and consider any contention that may be put forward as an excuse for the import. He may consider any other relevant circumstance. Since all legitimate defences are open and the enquiry is quasi-judicial, no one can seriously complain.

34. In the result, the judgment of the Division Bench is set aside and that of the learned single Judge restored. There is no order as to costs. We are grateful to the learned Attorney-General, who appeared at our instance, for the assistance given by him.

SUPREME COURT OF INDIA

REPORTABLE

Digvijay Mote v. Union of India and Ors.

(1993) 4 SCC 175

Coram : Hon'ble Justice Mr. M Venkatachaliah,

: Hon'ble Justice Mr. S Mohan

Date : 16.08.1993

JUDGMENT

Author: S Mohan

1. These Writ Petitions have been preferred by way of Public Interest Litigation for the enforcement of fundamental rights, political rights and fundamental duties of the people and electorate-citizens of India under, inter alia, Articles 14 and 19 read with Articles 326 and 51-A and various statutory provisions.

2. The following prayers are made before us in Writ Petition (Civil) No. 385 of 1993:

   (1) direct Respondent 4 to stay the proceedings and functions of the existing Lok Sabha and the privileges of its members until the disposal of this petition;

   (2) direct Respondent 4 to injunct the Council of Ministers headed by Mr. P.V. Narasimha Rao, from aiding and advising the President forthwith;

   (3) restrain the voting rights and other privileges of the elected members of Parliament from the State of Punjab until final hearing and disposal of this petition;

   (4) issue a writ of mandamus or writ in the nature of mandamus or an order or injunction debarring Respondent 3 from discharging the functions of or officiating as Chief Election Commissioner until the final hearing and disposal of this petition;

   (5) issue a writ of mandamus against Respondent Nos. 2 and 3 directing each of them not to proceed with the holding of Parliamentary General Election in the State of Jammu & Kashmir until the final hearing and disposal of this petition;

(6) declare that until the disposal of this petition, election or general elections to the Lok Sabha/Legislative Assemblies shall be held under the authority, supervision, direction and control of this Hon'ble Court until arrangements are made as prayed in the petition;

(7) restrain the Respondent 1 from amending the Constitution or the Representation of the People Act or enacting new legislation or taking any major policy decision until the final hearing and disposal of this petition;

(8) direct Respondent No. 2 to afford access to the petitioner herein to enable him to refer the public documents and other papers and reports in the library of the Respondent No. 2, to effectively pursue this petition before this Hon'ble Court; and (9) pass such further and other orders as this Hon'ble Court may deem fit and proper under the circumstances of the case.

3. The petitioner claims to be an active social worker. He further claims that he is a keen observer of the electoral process in the Republic of India. This petition has been preferred in public interest with the sole object of cleansing the existing electoral process and to contest the election. The petitioner has every prospect of winning the election.

4. According to the petitioner, the election process in this country is afflicted with distortions, very often intentionally. When the Parliamentary elections were held in the country in December, 1984, the State of Assam which elects 14 Representatives to the Lok Sabha was delinked on the ground that the electoral rolls were not updated. This is in violation of Articles 14 and 19 of the Constitution. The State of Assam and Punjab have become the worst victims of terrorist activities. During the entire term of Ninth Lok Sabha, Assam did not have its representation. Tenth Lok Sabha was constituted including the Representatives from Assam and Punjab State, however, Jammu & Kashmir State had been deleted.

5. Thus, according to him, all the consequential proceedings, leading to the prayers, are illegal. The petitioner appearing in-person reiterates the same.

6. To every democracy, election is essential. No doubt, such elections will have to be free and fair. Fazal Ali, J. in N.P. Ponnuswami v. Returning Officer Namakkal Constituency 1952 SCR 218, 229 (as quoted in Mohinder Singh Gill v. The Chief Election Commissioner explained thus:

> The concept of democracy as visualised by the Constitution

presupposes the representation of the people in Parliament and State legislatures by the method of election. And, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should a set of laws and rules making provisions with respect to all matters relying to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with the elections. Articles 327 and 328 deal with the first of these requisites, Article 324 with the second and Article 329 with the third requisite.

7. Again Krishna Iyer, J. in Mohinder Singh Gill's case (supra) at page 285 stated: "A free and fair election based on universal adult franchise is the basic; the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections, are the specifics. Part XV of the Constitution plus the Representation of the People Act, 1950 (for short, the 1950 Act) and the Representation of the People Act, 1951 (for short, the Act), Rules framed thereunder, instructions issued and exercises prescribed, constitute the package of electoral law governing the parliamentary and assembly elections in the country. The super-authority is the Election Commission, the kingpin is the returning officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provisions."

8. The conduct of election is in the hands of the Election Commission which has the power of superintendence, directions and control of election vested in it as per Article 324 of the Constitution. Consequently, if the Election Commission is of the opinion that having regard to the disturbed conditions of a State or a part thereof, free and fair elections could not be held it, postpone the same. Accordingly, on account of unsettled conditions, the elections in the State of Assam and Jammu & Kashmir could be postponed.

9. However, it has to be stated this power is not unbridled. Judicial review will still be permissible, over the statutory body exercising its functions affecting public law right. We may, at this stage, usefully quote 'Judicial Remedies in Public Law'- Clive Lewis, page 70:

> The term "public law" has, in the past, been used in at least two senses. First, it may refer to the substantive principles of public law governing the exercise of public law powers, and which form

> the grounds for alleging that a public body is acting unlawfully. These are the familiar Wednesbury principles. A public law "right" in this senses could be described as a right to ensure that a public body acts lawfully in exercising its public law powers. The rights could be described in relation to the individual heads of challenge, for example, the right to ensure that natural justice is observed, or to ensure that the decision is based on relevant not irrelevant considerations, or it taken for a purpose authorised by statute, or is not Wednesbury unreasonable. Secondly, "public law" may refer to the remedies that an individual may obtain to negative an unlawful exercise of power. These are essentially remedies used to set aside unlawful decisions, or prevent the doing of unlawful acts, or compel the performance of public duties. These remedies now include the prerogative remedies of certiorari, mandamus or prohibition, and the ordinary remedies of declarations and injunctions when used for a public law purpose involving the supervisory jurisdiction of the courts over public bodies.

10. Again at page 122 it is stated:

> Statute may impose a duty on a public body to act in certain circumstances and may grant corresponding rights to an individual. There may still be the question of whether or not the circumstances exist or the individual has demonstrated his eligibility. That question may be a matter for the public body to determine. If the public body makes some error of law or other public law wrong in coming to its determination, the court may quash the determination.

11. Reference can also be made to Mohinder Singh Gill's case (supra) once again where the principle of natural justice was imported into Article 324(1). At page 298 it was stated:

> We decide two questions under the relevant article, not arguendo, but as substantive pronouncements on the subject. They are:
>
> (a) ...
>
> (b) Since the text of the provision is silent about hearing before acting, is it permissible to import into Article 324(1) an obligation to act in accord with natural justice?

12. The answer is provided at pages 298 and 299:

> Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 has to be read in the light of the

constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualized in Article 327 the Commission cannot shake himself free from the enacted prescriptions. After all, as Mathew, J. has observed in Indira Gandhi: (supra) In the opinion of some of the judges constituting the majority in Bharati's case (supra), Rule of Law is a basic structure of the Constitution apart from democracy. The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere. (P.523) And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperia in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

Even so, situations may arise which enacted law has not provided for Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercise, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest-terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism-instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bless, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra (1958) SCR 308 and Harishankar

> (1955) 1 SCR 380 discretion vested in a high functionary may be reasonably trusted to be properly not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J:
>
> But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power.

13. At page 307 it is stated:

> Nobody will deny that the Election Commission in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden wide discretion is fraught with tyrannical potent ion even in high personages, absent legal norms and institutional checks, and relaxation of legal canalisation on generous 'VIP' assumptions may boomerang. Natural justice is one such check on exercise of power.

14. The resultant position is that it cannot be stated that the exercise of power under Article 324 is not altogether unreviewable. The review will depend upon the facts and circumstances of each case.

15. We find absolutely no merit whatever in the Writ Petitions which are hereby dismissed in limine.

IN THE SUPREME COURT OF INDIA

REPORTABLE

Vishaka & Ors v. State of Rajasthan and Ors

(1997) 6 SCC 241

Coram : Hon'ble Ms. Chief Justice of India Sujata V. Manohar

: Hon'ble Mr. Justice B. N. Kirpal

Date : 13.08.1997

JUDGMENT

Verma, CJI:

1. This Writ Petition has been filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. With the increasing awareness and emphasis on gender justice, there is increase in the effort to guard such violations; and the resentment towards incidents of sexual harassment is also increasing. The present petition has been brought as a class action by certain social activists and NGOs with the aim of focussing attention towards this societal aberration, and assisting in finding suitable methods for realisation of the true concept of 'gender equality'; and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

2. The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

3. Each such incident results in violation of the fundamental rights of 'Gender Equality' and the 'Right of Life and Liberty'. It is clear violation of the rights under Articles 14, 15 and 21 of Constitution. One of

the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1)(g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. This class action under Article 32 of the Constitution is for this reason. A writ of mandamus in such a siltation, if it is to be effective, needs to be accompanied by directions for prevention; as the violation of fundamental rights of this kind is a recurring phenomenon. The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility fro ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

4. The notice of the petition was given to the State of Rajasthan and the Union of India. The learned Solicitor General appeared for the Union of India and rendered valuable assistance in the true spirit of a Law Officer to help us find a proper solution to this social problem of considerable magnitude. In addition to Ms. Meenakshi Arora and Ms. Naina Kapur who assisted the Court with full commitment, Shri Fali S. Nariman appeared as Amicus Curiae and rendered great assistance. We place on record our great appreciation for every counsel who appeared in the case and rendered the needed assistance to the Court which has enabled us to deal with this unusual matter in the manner considered appropriate for a cause of this nature.

5. Apart from Article 32 of the Constitution of India, we may refer to some other provision which envisage judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19(1)(g) and 21, which have relevance are:

Article 15:

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-

(1) The State shall not discriminate against any citizen on only of religion, race, caste, sex, place of birth or any of them.

(2) xxx xxxx xxxx

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) xxxx xxxx xxxx"

Article 42:

"42. Provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief."

Article 51A:

"51A. Fundamental duties. - It shall be the duty of every citizen of India, -

(a) to abide by the Constitution and respect its ideals and institutions, ...

xxxx xxxx xxxx

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

xxx xxxx xxxx"

6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51:

"51. Promotion of international peace and security - The State shall endeavour to -

xxxx xxxx xxxx

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another;

xxx xxx xxx"

Article 253:

"253. Legislation for giving effect to international agreements - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with

any other country or countries or any decision made at any international conference, association or other body."

Seventh Schedule: "List I - Union List:

xxxx

xxxx

xxxx

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

xxx

xxx

xxx"

7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the parliament enacts to expressly provide measures needed to curb the evil.

8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and o make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirements as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who

rendered valuable assistance in the performance of this difficult task in public interest.

9. The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and norms declared by this Court to govern the behaviour of the employers and all others at the work places to curb this social evil.

10. Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.

11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

> "Objectives of the Judiciary:
>
> 10. The objectives and functions of the Judiciary include the following:
>
> (a) to ensure that all persons are able to live securely under the Rule of Law;
>
> (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
>
> (c) to administer the law impartially among persons and between persons and the State."

12. Some provisions in the 'Convention on the Elimination of All Forms of Discrimination against Women', of significance in the present context are:

Article 11:

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to

ensure, on basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

xxxx xxxxx xxxx

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

xxx xxxxx xxxxx

Article 24:

"States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognised in the present Convention."

13. The general recommendations of CEDAW in this context in respect of Article 11 are:

"Violence and equality in employment:

22. Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.

23. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advance, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, should be provided.

24. States should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place."

14. The Government of India has ratified the above Resolution on June 25, 1993 with some reservations which are not material in the present context. At the Fourth World Conference on Women in Beijing, the Government of India has also made a official commitment, inter alia, to formulate and operationalize a national policy on women which will continuously guide and inform action at every level and in every

sector; to set up a Commission for Women's Rights to act as a public defender of women's human rights; to institutionalise a national level mechanism to monitor the implementation of the Platform for Action. We have, therefore, no hesitation in placing reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

15. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to compass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms fro construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister fro Immigration and Ethnic Affairs vs. Tech. 128 ALR 535, has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

    In Nilabati Behera vs. State of Orissa 1993(2) SCC 746, a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

16. In view of the above, and the absence of enacted law to provide fro the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution.

17. The GUIDELINES and NORMS prescribed herein are as under:-

HAVING REGARD to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993, TAKING NOTE of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time, It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. **Duty of the Employer or other responsible persons in work places and other institutions:**

   It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. **Definition:**

   For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

   a) physical contact and advances;

   b) a demand or request for sexual favours;

   c) sexually coloured remarks;

   d) showing pornography;

   e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. **Preventive Steps:**

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. **Criminal Proceedings:**

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. **Disciplinary Action:**

Where such conduct amounts to mis-conduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. **Complaint Mechanism:**

   Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. **Complaints Committee:**

   The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

   The Complaints Committee should be headed by a woman and not less than half of its member should be women.

   Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

   The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. **Workers' Initiative:**

   Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. **Awareness:**

   Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in suitable manner.

10. Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

18. Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.

IN THE SUPREME COURT OF INDIA

REPORTABLE

The Chairman, Railway Board and Ors v. Mrs. Chandrima Das & Ors

(2000) 2 SCC 465

Coram : Hon'ble Mr. Justice R.P.Sethi,

: Hon'ble Mr. S.Saghir Ahmad

Date : 28.01.2000

JUDGMENT

S.SAGHIR AHMAD, J.

Leave granted.

1. Mrs. Chandrima Das, a practising advocate of the Calcutta High Court, filed a petition under Article 226 of the Constitution against the Chairman, Railway Board; General Manager, Eastern Railway; Divisional Railway Manager, Howrah Division; Chief Commercial Manager, Eastern Railway; State of West Bengal through the Chief Secretary; Home Secretary, Government of West Bengal; Superintendent of Police (Railways), Howrah; Superintendent of Police, Howrah; Director General of Police, West Bengal and many other Officers including the Deputy High Commissioner, Republic of Bangladesh; claiming compensation for the victim, Smt. Hanuffa Khatoon, a Bangladeshi national who was gang-raped by many including employees of the Railways in a room at Yatri Niwas at Howrah Station of the Eastern Railway regarding which G.R.P.S. Case No. 19/98 was registered on 27TH February, 1998. Mrs. Chandrima Das also claimed several other reliefs including a direction to the respondents to eradicate anti-social and criminal activities at Howrah Railway Station.

2. The facts as noticed by the High Court in the impugned judgment are as follows:-

> "Respondents Railways and the Union of India have admitted that amongst the main accused you are employees of the railways and if the prosecution version is proved in accordance with law, they are perpetrators of the heinous crime of gang rape repeatedly committed upon the hapless victim Hanufa Khatun. It is not in dispute that Hanufa came from Bangladesh. She at the relevant

time was the elected representative. She at the relevant time was the elected representative of the Union Board. She arrived at Howrah Railway Station on 26TH February, 1998 at about 14.00 hours to avail Jodhpur Express at 23.00 Hours for paying a visit to Ajmer Sharif. With that intent in mind, she arrived at Calcutta on 24TH February, 1998 and stayed at a hotel at 10, Sudder Street, Police Station Taltola and came to Howrah Station on the date and time aforementioned. She had, however, a wait listed ticket and so she approached a Train Ticket Examiner at the Station for confirmation of berth against her ticket. The Train Ticket Examiner asked her to wait in the Ladies Waiting room. She accordingly came to the ladies waiting room and rested there.

At about 17.00 hours on 26TH February, 1998 two unknown persons (later identified as one Ashoke Singh, a tout who posed himself as a very influential person of the Railway and Siya Ram Singh a railway ticket broker having good acquaintance with some of the Railway Staff of Howrah Station) approached her, took her ticket and returned the same after confirming reservation in Coach No.S-3 (Berth NO.17) of Jodhpur Express. At about 20.00 hours Siya Ram Singh came again to her with a boy named Kashi and told her to accompany the boy to a restaurant if she wanted to have food for the night. Accordingly at about 21.00 hours she went to a nearby eating house with Kashi and had her meal there. Soon after she had taken her meal, she vomitted and came back to the Ladies Waiting room. At about 21.00 hours Ashoke Singh along with Rafi Ahmed a Parcel Supervisor at Howrah Station came to the Ladies Niwas before boarding the train. She appeared to have some doubt initially but on being certified by the lady attendants engaged on duty at the Ladies Waiting Room about their credentials she accompanied them to Yatri Niwas. Sitaram Singh, a khalasi of electric Department of Howrah Station joined them on way to Yatri Niwas. She was taken to room NO.102 on the first floor of Yatri Niwas. The room was booked in the name of Ashoke Singh against Railway Card pass No. 3638 since 25TH February, 1998. In room NO.102 two other persons viz. one Lalan Singh, Parcel Clerk of Howrah Railway Station and Awdesh Singh, Parcel Clearing Agent were waiting. Hanufa Khatun suspected someting amiss when Ashoke Singh forced her into the room. Awdesh Singh bolted the room from outside and stood on guard outside the room. The remaining four persons viz. Ashoke, Lalan, Rafi and Sitaram took liquor inside the room and also forcibly compelled her to consume liquor. All the four persons who were

present inside the room brutally violated, Hanufa Khatun, it is said, was in a state of shock and daze. When she could recover she managed to escape from the room of Yatri Niwas and came back to the platform where again she met Siya Ram Singh and found him talking to Ashoke Singh. Seeing her plight Siya Ram Singh pretended to be her saviour and also abused and slapped Ashoke Singh. Since it was well past midnight and Jodhpur Express had already departed, Siya Ram requested Hanufa Khatoon to accompany him to his residence to rest for the night with his wife and children. He assured her to help entrain Poorva Express on the following morning. Thereafter Siyaram accompanied by Ram Samiram Sharma, a friend of Siyaram took her to the rented flat of Ram Samiram Sharma at 66, Pathuriaghata Street, Police Station Jorabagan, Calcutta. There Siyaram raped Hanufa and when she protested and resisted violently Siyaram and Ram Samiran Sharma gagged her mouth and nostrils intending to kill her as a result Hanufa bled profusely. On being informed by the landlord of the building following the hue and cry raised by Hanufa Khatun, she was rescued by Jorabagan Police."

3. It was on the basis of the above facts that the High Court had awarded a sum of RS.10 lacs as compensation for Smt. Hanuffa Khatoon as the High Court was of the opinion that the rape was committed at the building (Rail Yatri Niwas) belonging to the Railways and was perpetrated by the Railway employees.

4. In the present appeal, we are not concerned with many directions issued by the High Court. The only question argued before us was that the Railways would not be liable to pay compensation to Smt. Hanuffa Khatoon who was a foreigner and was not an Indian national. It is also contended that commission of the offence by the person concerned would not make the Railway or the Union of India liable to pay compensation to the victim of the offence. It is contended that since it was the individual act of those persons, they alone would be prosecuted and on being found guilty would be punished and may also be liable to pay fine or compensation, but having regard to the facts of this case, the Railways, or, for that matter, the Union of India would not even be vicariously liable. It is also contended that for claiming damages for the offence perpetrated on Smt. Hanuffa Khatoon, the remedy lay in the domain of Private Law and not under Public Law and, therefore, no compensation could have been legally awarded by the High Court in a proceeding under Article 226 of the Constitution and, that too, at the instance of a practising advocate who, in no way, was concerned or connected with the victim.

5. We may first dispose of the contention raised on behalf of the appellants that proceedings under Article 226 of the Constitution could not have been legally initiated for claiming damages from the Railways for the offence of rape committed on Smt. Hanuffa Khatoon and that Smt. Hanuffa Khatoon herself should have approached the Court in the realm of Private Law so that all the questions of fact could have been considered on the basis of the evidence adduced by the parties to record a finding whether all the ingredients of the commission of "tort" against the person of Smt. Hanuffa Khatoon were made out, so as to be entitled to the relief of damages. We may also consider the question of locus standi as it is contended on behalf of the appellants that Mrs. Chandrima Das, who is a practicing Advocate of the High Court of Calcutta, could not have legally instituted these proceedings.

6. The distinction between "Public Law" and "Private Law" was considered by a Three-Judge Bench of this Court in Common Cause, A Regd. Society vs. Union of India & Ors. (1999) 6 SCC 667 = AIR 1999 SC 2979 = (1999) 5 JT 237, in which it was, inter alia, observed as under:

> "Under Article 226 of the Constitution, the High Court has been given the power and jurisdiction to issue appropriate Writs in the nature of Mandamus, Certiorari, Prohibition, Quo-Warranto and Habeas Corpus for the enforcement of Fundamental Rights or for any other purpose. Thus, the High Court has jurisdiction not only to grant relief for the enforcement of Fundamental Rights but also for "any other purpose" which would include the enforcement of public duties by public bodies. So also, the Supreme Court under Article 32 has the jurisdiction to issue prerogative Writs for the enforcement of Fundamental Rights guaranteed to a citizen under the Constitution.
>
> Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of that rule. The exercise of constitutional powers by the High Court and the Supreme Court under Article 226 or 32 has been categorised as power of "judicial review". Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution.

> With the expanding horizon of Article 14 read with other Articles dealing with Fundamental Rights, every executive action of the Govt. or other public bodies, including Instrumentalities of the Govt., or those which can be legally treated as "Authority" within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under Article 32 or the High Courts under Article 226 and can be validly scrutinised on the touchstone of the Constitutional mandates."

7. The earlier decision, namely, Life Insurance Corporation of India vs. Escorts Limited & Ors. 1985 Supp. (3) SCR 909 = (1986) 1 SCC 264 = AIR 1986 SC 1370, in which it was observed as under:

> "Broadly speaking, the Court will examine actions of State if they pertain to the pubic law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances."

was relied upon.

8. Various aspects of the Public Law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from Rudul Sah vs. State of Bihar 1983(3) SCR 508 = (1983) 4 SCC 141 = AIR 1983 SC 1086. [See also : Bhim Singh vs. State of Jammu & Kashmir (1985) 4 SCC 577 = AIR 1986 SC 494; People's Union for Democratic Rights vs. State of Bihar, 1987 (1) SCR 631 = (1987) 1 SCC 265 = AIR 1987 SC 355; People's Union for Democratic Rights Thru. Its Secy. vs. Police Commissioner, Delhi Police Headquarters, (1989) 4 SCC 730 = 1989 (1) SCALE 599;

SAHELI, A Woman's Resources Centre vs.Commissioner of Police, Delhi (1990) 1 SCC 422 = 1989 (Supp.) SCR 488 = AIR 1990 SC 513; Arvinder Singh Bagga vs. State of U.P. (1994) 6 SCC 565 = AIR 1995 SC 117; P. Rathinam vs. Union of India (1989) Supp. 2 SCC 716; In Re: Death of Sawinder Singh Grower (1995) Supp. (4) SCC 450 = JT (1992) 6 SC 271 = 1992 (3) SCALE 34; Inder Singh vs. State of Punjab (1995) 3 SCC 702 = AIR 1995 SC 1949; D.K. Basu vs. State of West Bengal (1997) 1 SCC 416 = AIR 1997 SC 610].

9. In cases relating to custodial deaths and those relating to medical negligence, this Court awarded compensation under Public Law domain in Nilabati Behera vs. State of Orissa (1993) 2 SCC 746 = 1993 (2) SCR 581 = AIR 1993 SC 1960; State of M.P. vs. Shyam Sunder Trivedi (1995) 4 SCC 262 =1995 (3) SCALE 343; People's Union for Civil Liberties vs. Union of India (1997) 3 SCC 433 = AIR 1997 SC 1203 and Kaushalya vs. State of Punjab (1996) 7 SCALE (SP) 13; Supreme Court Legal Aid Committee vs. State of Bihar (1991) 3 SCC 482; Dr. Jacob George vs. State of Kerala (1994) 3 SCC 430 = 1994 (2) SCALE 563; Paschim Bangal Khet Mazdoor Samity vs. State of West Bengal & Ors. (1996) 4 SCC 37 = AIR 1996 SC 2426; and Mrs. Manju Bhatia vs. N.D.M.C. (1997) 6 SCC 370 = AIR 1998 SC 223 = (1997) 4 SCALE 350.

10. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.

11. In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. This Court in Bodhisatwa vs. Ms. Subdhra Chakroborty (1996) 1 SCC 490 has held "rape" as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed as under:

> "Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21."

12. Rejecting, therefore, the contention of the learned counsel for the appellants that the petition under Public Law was not maintainable, we now proceed to his next contention relating to the locus standi of respondent, Mrs. Chandrima Das, in filing the petition.

13. The main contention of the learned counsel for the appellants is that Mrs. Chandrima Das was only a practising advocate of the Calcutta High Court and was, in no way, connected or related to the victim, Smt. Hanuffa Khatoon and, therefore, she could not have filed a petition under Article 226 for damages or compensation being awarded to Smt. Hanuffa Khatoon on account of the rape committed on her. This contention is based on a misconception. Learned counsel for the appellants is under the impression that the petition filed before the Calcutta High Court was only a petition for damages or compensation for Smt. Hanuffa Khatoon. As a matter of fact, the reliefs which were claimed in the petition included the relief for compensation. But many other reliefs as, for example, relief for eradicating anti-social and criminal activities of various kinds at Howrah Railway Station were also claimed. The true nature of the petition, therefore, was that of a petition filed in public interest.

14. The existence of a legal right, no doubt, is the foundation for a petition under Article 226 and a bare interest, may be of a minimum nature, may give locus standi to a person to file a Writ Petition, but the concept of "Locus Standi" has undergone a sea change, as we shall presently notice. In Dr. Satyanarayana Sinha vs. S. Lal & Co. Pvt. Ltd., AIR 1973 SC 2720 = (1973) 2 SCC 696, it was held that the foundation for exercising jurisdiction under Article 32 or Article 226 is ordinarily the personal or individual right of the petitioner himself. In writs like Habeas Corpus and Quo Warranto, the rule has been relaxed and modified.

15. In S.P. Gupta & Ors. vs. Union of India & Ors., AIR 1982 SC 149 = (1981) Supp. SCC 87, the law relating to locus standi was explained so as to give a wider meaning to the phrase. This Court laid down that "practising lawyers have undoubtedly a vital interest in the independence of the judiciary; they would certainly be interested in challenging the validity or constitutionality of an action taken by the State or any public authority which has the effect of impairing the independence of the judiciary." It was further observed that "lawyer's profession was an essential and integral part of the judicial system; they could figuratively be described as priests in the temple of justice. They have, therefore, a special interest in preserving the integrity and independence of the judicial system; they are equal partners with the Judges in the administration of justice. The lawyers, either in their

individual capacity or as representing some Lawyers' Associations have the locus standi to challenge the circular letter addressed by the Union Law Minister to the Governors and Chief Ministers directing that one third of the Judges of the High Court should, as far as possible, be from outside the State."

16. In the context of Public Interest Litigation, however, the Court in its various Judgments has given widest amplitude and meaning to the concept of locus standi. In People's Union for Democratic Rights and Ors. vs. Union of India & Ors., AIR 1982 SC 1473 = (1982) 3 SCC 235, it was laid down that Public Interest Litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to Court. (See also: Bandhua Mukti Morcha vs. Union of India & Ors., AIR 1984 SC 802 = 1984 (2) SCR 67 = (1984) 3 SCC 161 and State of Himachal Pradesh vs. Student's Parent Medical College, Shimla & Ors., AIR 1985 SC 910 = (1985) 3 SCC 169 on the right to approach the Court in the realm of Public Interest Litigation). In Bangalore Medical Trust vs. B.S. Muddappa and Ors., AIR 1991 SC 1902 = 1991 (3) SCR 102 = (1991) 4 SCC 54, the Court held that the restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of a broad and wide construction in the wake of Public Interest Litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere "busy-body".

17. Having regard to the nature of the petition filed by respondent Mrs. Chandrima Das and the relief claimed therein it cannot be doubted that this petition was filed in public interest which could legally be filed by the respondent and the argument that she could not file that petition as there was nothing personal to her involved in that petition must be rejected.

18. It was next contended by the learned counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis

she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the "Moral Code of Conduct" having been adopted by the General Assembly of the United Nations. We will come to the question of Domestic Jurisprudence a little later as we intend to first consider the principles and objects behind Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations General Assembly Resolution of 10TH December, 1948. The preamble, inter alia, sets out as under:

> "Whereas recognition of the INHERENT DIGNITY and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.
>
> Whereas it is essential to promote the development of friendly relations between nations.
>
> Whereas the people of the United Nations have in the Charter affirmed their faith in fundamental human rights, IN THE DIGNITY AND WORTH OF THE HUMAN PERSON AND IN THE EQUAL
>
> RIGHTS OF MEN AND WOMEN and have determined to promote social progress and better standards of life in larger freedom. Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.
>
> Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge."
>
> Thereafter, the Declaration sets out, inter alia, in various Articles, the following:
>
> "Article 1 -- All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 -- Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS.

Furthermore, NO DISTINCTION SHALL BE MADE ON THE BASIS OF THE POLITICAL, JURISDICTIONAL OR INTERNATIONAL STATUS OF THE COUNTRY OR TERRITORY to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

Article 3 -- Everyone has the right to life, liberty and security of person.

Article 5 -- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7 -- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 9 -- No one shall be subjected to arbitrary arrest, detention or exile."

19. Apart from the above, the General Assembly, also while adopting the Declaration on the Elimination of Violence against Women, by its Resolution dated 20TH December, 1993, observed in Article 1 that, "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." In Article 2, it was specified that, "violence against women shall be understood to encompass, but not be limited to:

    (a) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

    (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

    (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

> In Article 3, it was specified that "women are entitlted to the equal enjoyment and protection of all human rights, which would include, inter alia,:
>
> (a) the right to life, (b) the right to equality, and (c) the right to liberty and security of person.

20. The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence. Lord Diplock in Salomon v. Commissioners of Customs and Excise [1996] 3 All ER 871 said that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specfic treaty obligations. So also, Lord Bridge in Brind v. Secretary of State for the Home Department [1991] 1 All ER 720, observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

21. The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the quetion of domestic application of international and regional human rights specially in relation to women, was considered. The Zimbabwe Declaration 1994, inter alia, stated:

> "Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women."

22. But this situation may not really arise in our country.

23. Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the Fundamental Rights is contained in Part III of the Constitution. The purpose of

this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Govt. at the Centre or in the State.

24. The Fundamental Rights are available to all the "citizens" of the country but a few of them are also available to "persons". While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non- citizen" both, Article 15 speaks only of "citizen" and it is specifically provided therein that there shall be no discrimination against any "citizen" on the ground only of religion, race, caste, sex, place of birth or any of them nor shall any citizen be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort on the aforesaid grounds. Fundamental Right guaranteed under Article 15 is, therefore, restricted to "citizens". So also, Article 16 which guarantees equality of opportunity in matters of public employment is applicable only to "citizens". The Fundamental Rights contained in Article 19, which contains the right to "Basic Freedoms", namely, freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practise any profession, or to carry on any occupation, trade or business, are available only to "citizens" of the country. The word "citizen" in Article 19 has not been used in a sense different from that in which it has been used in Part II of the Constitution dealing with "citizenship". [See: State Trading Corporation of India Ltd. vs. The Commercial Tax Officer and Others, AIR 1963 SC 1811 = 1964 (4) SCR 99]. It has also been held in this case that the words "all citizens" have been deliberately used to keep out all "non-citizens" which would include "aliens". It was laid down in Hans Muller of Nurenburg vs. Superintendent Presidency Jail Calcutta, AIR 1955 SC 367 (374) = 1955 (1) SCR 1284, that this Article applies only to "citizens". In another decision in Anwar vs. State of J & K, AIR 1971 SC 337 = 1971 (1) SCR 637 = (1971) 3 SCC 104, it was held that non-citizen could not claim Fundamental Rights under Article 19.

In Naziranbai vs. State, AIR 1957 M.B. 1 and Lakshmi Prasad & Anr. vs. Shiv Pal & Others, AIR 1974 Allahabad 313, it was held that Article 19 does not apply to a "foreigner". The Calcutta High Court in Sk. Md. Soleman vs. State of West Bengal and Another, AIR 1965 Calcutta 312, held that Article 19 does not apply to a Commonwealth citizen.

In Anwar vs. State of J & K, AIR 1971 SC 337 = 1971 (1) SCR 637 = (1971) 3 SCC 104 (already referred to above), it was held that the rights under Articles 20, 21 and 22 are available not only to "citizens" but also to "persons" which would include "non-citizens".

Article 20 guarantees right to protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty while Article 22 guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with Article 3, Article 7 and Article 9 of the Universal Declaration of Human Rights, 1948.

25. The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948. [See: Article 3 quoted above]. The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in Kubic Darusz vs. Union of India & Ors. (1990) 1 SCC 568 = AIR 1990 SC 605. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country. Let us now consider the meaning of the word "LIFE" interpreted by this Court from time to time. In Kharak Singh vs. State of U.P., AIR 1963 SC 1295 = 1964 (1) SCR 332, it was held that the term "life" indicates something more than mere animal existence. [See also : State of Maharashtra vs. Chandrabhan Tale, AIR 1983 SC 803 = 1983 (3) SCR 337 = (1983) 3 SCC 387]. The inhibitions contained in Article 21 against its deprivation extends even to those faculties by which life is enjoyed. In Bandhua Mukti Morcha vs. U.O.I., AIR 1984 SC 802 = 1984 (2) SCR 67 = (1984) 3 SCC 161, it was held that the right to life under Article 21 means the right to live with dignity, free from exploitation. [See also: Maneka Gandhi vs. U.O.I., AIR 1978 SC 597 = 1978 (2) SCR 621 = (1978) 1 SCC 248 and Board of Trustees of the Port of Bombay vs. Dilip Kumar Raghavendranath Nadkarni, AIR 1983 SC 109 = 1983 (1) SCR 828 = (1983) 1 SCC 124].

On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the Constitutional

provisions. They also have a right to "Life" in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens.

26. The Rights guaranteed under Part III of the Constitution are not absolute in terms. They are subject to reasonable restrictions and, therefore, in case of non- citizen also, those Rights will be available subject to such restrictions as may be imposed in the interest of the security of the State or other important considerations. Interest of the Nation and security of the State is supreme. Since 1948 when the Universal Declaration was adopted till this day, there have been many changes - political, social and economic while terrorism has disturbed the global scenario. Primacy of the interest of Nation and the security of State will have to be read into the Universal Declaration as also in every Article dealing with Fundamental Rights, including Article 21 of the Indian Constitution.

27. It has already been pointed out above that this Court in Bodhisatwa's case (supra) has already held that "rape" amounts to violation of the Fundamental Right guaranteed to a woman under Article 21 of the Constitution.

28. Now, Smt. Hanuffa Khatoon, who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as "Right to Life" was concerned. She was entitled to be treated with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be subjected to physical violence at the hands of Govt. employees who outraged her modesty. The Right available to her under Article 21 WAS thus violated. Consequently, the State was under the Constitutional liability to pay compensation to her. The judgment passed by the Calcutta High Court, therefore, allowing compensation to her for having been gang-raped, cannot be said to suffer from any infirmity.

29. Learned counsel for the appellants then contended that the Central Govt. cannot be held vicariously liable for the offence of rape committed by the employees of the Railways. It was contended that the liability under the Law of Torts would arise only when the act complained of was performed in the course of official duty and since rape cannot be said to be an official act, the Central Govt. would not be liable even under the Law of Torts. The argument is wholly

bad and is contrary to the law settled by this Court on the question of vicarious liability in its various decisions. In State of Rajasthan vs. Mst. Vidhyawati AIR 1962 SC 933, it was held that the Govt. will be vicariously liable for the tortious act of its employees. This was a case where a claim for damages was made by the heirs of a person who died in an accident caused by the negligence of the driver of a Govt. vehicle. Reference may also be made to the decisions of this Court in State of Gujarat vs. Memon Mahomed Haji Hasan AIR 1967 SC 1885 and Smt. Basava Kom Dyamogouda Patil vs. State of Mysore AIR 1977 SC 1749. These principles were reiterated in N. Nagendra Rao & Co. vs. State of A.P. AIR 1994 SC 2663 = (1994) 6 SCC 205 and again in State of Maharashtra vs. Kanchanmala Vijaysing Shirke, 1995 ACJ 1021 (SC) = (1995) 5 SCC 659 = JT 1995 (6) SC 155. Reliance placed by the counsel for the appellants on the decision of this Court in Kasturi Lal Ralia Ram Jain vs. State of U.P. AIR 1965 SC 1039 = 1965 (1) SCR 375 cannot help him as this decision has not been followed by this Court in the subsequent decisions, including the decisions in State of Gujarat vs. Memon Mahomed Haji Hasan and Smt. Basava Kom Dyamogouda Patil vs. State of Mysore (supra). The decision in Kasturi Lal's case was also severely criticised by Mr. Seervai in his prestigious book - Constitutional Law of India. A Three- Judge Bench of this Court in Common Cause, A Regd. Society vs. Union of India (1999) 6 SCC 667 also did not follow the decision in Kasturi Lal's case (supra) and observed that the efficacy of this decision as a binding precedent has been eroded.

The theory of Sovereign power which was propounded in Kasturi Lal's case has yielded to new theories and is no longer available in a welfare State. It may be pointed out that functions of the Govt. in a welfare State are manifold, all of which cannot be said to be the activities relating to exercise of Sovereign powers. The functions of the State not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to Sovereign power.

30. Running of Railways is a commercial activity. Establishing Yatri Niwas at various Railway Stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of Sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the Railway Stations and Yatri Niwas, are essential components of the Govt. machinery which carries on the commercial activity. If any of such employees commits an act of tort,

the Union Govt., of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. Kasturi Lal's decision, therefore, cannot be pressed in aid. Moreover, we are dealing with this case under Public Law domain and not in a suit instituted under Private Law domain against persons who, utilising their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed.

31. No other point was raised before us. The appeal having no merit is dismissed with the observation that the amount of compensation shall be made over to the High Commissioner for Bangladesh in India for payment to the victim, Smt. Hanuffa Khatoon. The payment to the High Commissioner shall be made within three months. There will be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

REPORTABLE

Premavathy v. State of Tamil Nadu and ors

H.C.P. No.1038 of 2003

and H.C.P.Nos. 1101, 1118, 1119, 1120, 1121

1122, 1123, 1085, 1170 and 1226 OF 2003

Coram	: Hon'ble Mr. Justice V.S. Sirpurkar
	: Hon'ble Mr. Justice M. Thanikachalam
Date	: 14.11.2003
For petitioners	: Mr. B. Kumar, Senior Counsel
	: Ms. Sudha Ramalingam and
	: Mr. P.V.S. Giridhar, Advocates
For respondents	: Mr. I. Subramanian, Public Prosecutor/Sr. Advocate

ORDER

Petitions under Art.226 of the Constitution, praying for Writ of Habeas Corpus as stated in the petitions

V.S. SIRPURKAR, J.

1. This judgment will dispose of H.C.P. NOS.1038, 1111, 1118, 1119, 11 20, 1121, 1122, 1123, 1085, 1170 and 1226 of 2003 as common question of law and also the facts are involved therein. Common arguments were also laid. While H.C.P. NOS.1118, 1119, 1120, 1121, 1122, 1123, 10 85, 1170 and 1226 of 2003 have been argued by Shri B. Kumar, learned senior counsel, Shri P.V.S. Giridhar, learned counsel argued H.C.P. NOS.1038 and 1121 of 2003.

2. All the petitions are in the nature of habeas corpus petitions and seeking the liberty of the petitioners from the Special Camp, Chengalpattu, wherein they are lodged being Sri Lankan refugees and treating them as foreigners under SEC.3(2)(E) of the Foreigners Act. In all the writ petitions, the orders, putting them in the Special Camp, passed by the respondent State Government, are also challenged.

3. All these writ petitioners are the citizens of Sri Lanka and they came to India. There has been a constant influx of Sri Lankan citizens as, the

political situation in Sri Lanka had become volatile and unsafe. None of them entered the Indian territory with valid documents and after coming to India they were registered as 'refugees' and were put in the Camps set up for the Sri Lankan refugees along with their families. The present petitioners are, however, directed to be kept in the Special Camp, which is set up at Chengalpattu in what was earlier a Sub Jail. It is a common ground again that practically all the petitioners have been involved in criminal cases. In some of the cases, the investigation is pending while in some others, it is completed and the charge sheet is also filed. In some of the cases, even the trial has commenced. Few of the petitioners are facing the trials for offences under Sec.465, 475 IPC and against one of them even the offence under Sec.489A, 489B, 489C, 489D IPC read with SEC.12(1)(C) of the Passport Act is alleged. Practically, all of them are facing the prosecution under SEC.12(1)(B) and 12(1)(C) of the Passport Act. The allegations against them are of various nature. Few of them have been found to be in possession of forged documents. Some others have been found in possession of fake rubber-stamps of Ramnad and Madurai District Collectors. Some have been found in possession of forged credit cards. Others have been found in possession of forged passports of various countries like Italy, France, Sri Lanka, etc.; some others have also found in possession of fake American Dollars. Some have also been found in possession of jewels purchased by using forged credit cards. They have been picked up from various places in Tamil Nadu. In short, all the petitioners are involved in serious crimes.

4. Few of the petitioners have been ordered to be released on bail while the cases of some others have not reached that stage. But, it is a common ground that all of them are facing the orders passed under SEC.3(2)(E) of the Foreigners Act against them, directing them to stay in the aforesaid Special Camp.

5. Learned counsel have taken a position that such orders and the placement of the petitioners in pursuance thereto in the Special Camp amount to 'preventive detention'. The further common ground is that the constitutional safeguards available to a detenu under the preventive detention have not at all been followed while passing the order of detention and even thereafter. For example, no grounds are stated in the detention; there has been no application of mind; petitioners have not been given an opportunity to mak e representations; nor are their representations considered as required under ART.22 of the Constitution. It is then pointed out that in the garb of placing them in the Special Camp, they are facing a worse lot than the detenus under the preventive detention.

6. It is further commonly argued that their condition in the special camp is pathetic and they have to stay under inhuman conditions. Their personal liberty has been completely ended. Their health condition is pathetic and there is hardly any medical facility to them. The further contention is that they have absolutely no 'privacy' and they are locked up during night time in their cells like prisoners, though they are not 'prisoners' in stricto sensu. It is also pointed out that investigation or the criminal cases pending against them are perpetuated. Even on that count, they are offered subhuman treatment. It is a common argument that they are not allowed to mix at all with the society nor are they allowed to earn their livelihood. They are not even allowed to attend the important functions like marriages, illness of the relatives or death of the near and dear ones. Reference is also made to Article 21 of the Constitution as also to the human rights which are denied to the petitioners.

   6.1. It has also been argued that the orders passed under SEC.3(2)(e) of the Foreigners Act are illegal as before passing these orders, no opportunity whatsoever was given to the petitioners and number of them were picked up without notice.

   6.2. Still further limb of the argument is that the delegation of powers under SEC.3(2)(E) of the Foreigners Act was as back as in 1958 and, therefore, the subsequent changes made in law cannot be said to be covered in that delegation and, therefore, the delegation itself has become bad in law.

   6.3. It is also reiterated on behalf of the petitioners that in passing the orders in the manner and thereafter incarcerating the petitioners, Articles 9 and 12 declared by International Convention of Civil and Political Rights as also Article 13 declared by Universal Declaration of Human Rights have been breached. The manner in which the orders were passed was also arbitrary and the procedure adopted could not stand to the test of reasonableness contemplated under ART.14 of the Constitution of India and, therefore, the orders were invalidated. On all these grounds, the alleged detention of these petitioners is challenged.

7. A very strong reliance has been placed by the learned senior counsel on the reported decision of the Division Bench of this Court in YOGESWARI v. STATE OF TAMIL NADU (2003-1-L.W.(CRL.) 352), in which the Division Bench of the Court has taken a view that such placement in the special camps amounts to preventive detention and chosen to quash the same on the ground that the constitutional obligations of the State Government vis-a-vis the detention was not followed.

8. As against this, the learned Public Prosecutor/Senior Advocate, Shri I. Subramanian, contends, on the basis of a common counter, that firstly this is an action under SEC.3(2)(E) of the Foreigners Act, which power has been delegated to the State Government by the Central Government. Therefore, this does not amount to preventive detention and there would be no question of following any constitutional obligations under ART.22 of the Constitution. Learned counsel contends that the question whether this amounts to a preventive detention is no more res integra and was already decided by the Division Bench in the reported decision in KALAVATHY v. STATE OF TAMIL NADU (1995(2)L.W. Crl.). He points out further that the Supreme Court had dismissed the Special Leave Petition, challenging the decision in Kalavathy case. Learned counsel further says that the judgment in Kalavathy case, came to be approved by the Supreme Court in another Special Leave Petition wherein after hearing the State Government, the Supreme Court dismissed the Special Leave Petition filed by a person identically circumstanced as these petitioners, giving the reasons. Learned counsel, therefore, says that the Supreme Court has declared a binding law under ART.141 holding that the placement of the foreigners in the Special Camps does not amount to preventive detention. Learned counsel was at pains to point out that in that case also, the concerned petitioner was facing the prosecution and was ordered to be released on bail by court before which he was being prosecuted and yet the Supreme Court did not choose to interfere on the ground that such placement does not amount to preventive detention. Learned counsel further points out that Kalavathy case, cited supra, was specifically brought to the notice of the Supreme Court and it was specifically mentioned and approved in the aforementioned order passed by the Apex Court. He, therefore, submits that the subsequent decision by the Division bench of this Court in Yogeswari case, cited supra, would be of no consequence as it is "per incurium".

9. Learned counsel further points out that even the factual plea laid on behalf of the petitioners are not correct and justified. He points out that each of the petitioner receives Rs.35/- per day as a dole for his expenses. The petitioners have a facility to stay separately in a cell which cells are never locked. However, only the outer gate of the special camp is locked for the sake of safety. He points out that out of these petitioners some are the members of the militant outfit and face the danger of being attacked by the rival militant organisations. He, therefore, suggests that the orders are absolutely correctly based.

10. The further contention is that these petitioners are given competent medical facility and they are also allowed to mingle with their family

which is clear from the fact that one of the petitioners has become father of two children during his stay in the said special camp. He refutes the charge that the petitioners are not allowed to meet their relatives and points out that there is a Television for their entertainment and practically all the petitioners are having their own radio sets which are allowed to be used by them.

11. In short, the learned Public Prosecutor refutes the charge that the petitioners are kept in Special Camp or in inhuman conditions inside the special camp. These measures would be must for the security of India as also for the safety of the inmates themselves. This is besides the fact that all the petitioners are required by the Indian law as they are involved in the crimes committed by them while in India.

12. On these rival submissions, we would be required to examine the following questions:

    1. WHETHER the continued placement of the petitioner in the Special Camp amounts to "preventive detention" and would attract the strict safeguards of ART.22 of the Constitution?

        (a) In that, whether this Court is bound by the judgment of the coordinate Bench reported in Yogeswari case, cited supra?

    2. Whether the treatment offered to the petitioners is of subhuman nature and whether the measures adopted by the respondents amount to a denial of human-rights of the petitioners?

    3. Are the petitioners entitled to any other relief?

13. It will be the basic question in these writ petitions to decide as to whether the regulation and placement of the petitioners achieved by passing the orders under SEC.3(2)(E) of the Foreigners Act would amount to "detention". Very weighty arguments were advanced before us by Shri B. Kumar, learned senior counsel as also by Shri P.V.S. Giridhar. According to the learned counsel, these arguments were considered and accepted by this Court in Yogeswari case, cited supra, and, therefore, that decision would be binding on us. We will have to, therefore, trace out the roots of this subject right from the first authoritative decision on this subject, which is handed out by the Division Bench of this Court in Kalavathy case, cited supra. We are told at the Bar that this decision was followed in few unreported judgments of this Court. However, it was for the first time that a diametrically opposite view was taken by a Division Bench of this Court in Yogeswari case, cited supra, holding that the orders passed under SEC.3(2)(E) of the Foreigners Act would amount to preventive detention orders. In fact, all the arguments which were raised in Yogeswari case, cited

supra, were repeated before us also. It will, therefore, be necessary first to examine the decision in Kalavathy case.

14. The Division Bench in that case firstly took stock of the provisions under SEC.3(2)(E) and SEC.3(2)(G) as it was urged that powers under SEC.3(2)(G) of ordering arrest, detention or confinement against a foreigner though were not delegated by the Central Government and only the powers under SEC.3(2)(E) were so delegated to the State Government what was being done by keeping these foreigners in the special camp was to indirectly detain them or confine them and, therefore, this was a colourable exercise of powers. In particular, the Division Bench considered the impact of SEC.3(2)(E)(I) under which a foreigner could be required to reside in a particular place. An argument was raised that the term 'place' had to be broadly interpreted and as such, restricting the residence to the place which was formerly a sub-jail could not actually be covered under SEC.3(2)(E)(I) but actually amounted to a detention or confinement as contemplated in SEC.3(2)(G), which power was admittedly not delegated and , therefore, the said regulation of the residence amounted to detention. The Division Bench observed that there was nothing in the language of the section to indicate that the word 'place' was either as big or as small as a town, village, market place or otherwise. The Bench further observed that the word 'place' has been used to denote certainty rather than ' size'. The Division Bench also came to the conclusion that the Special Camp which had an area of 10000 sq.ft. could certainly be termed as a 'particular place'. The Division Bench then further took into consideration the full impact of SEC.3(2)(E)(II) also, which empowered the Government to impose any restriction on the movements of the foreigners and came to the conclusion that the foreigners could not only be asked to stay in a particular place but, restrictions could also be placed on movements. In view of this position, the Division Bench refuted the argument that the exercise of the powers by the Government under SEC.3(2)(E) was in reality an exercise under SEC.3(2)(G). It also refuted the further argument that such regulation or putting the restrictions on the movements amounted to an arrest. The Division Bench, therefore, came to the conclusion that there was no protection to such foreigner under ART.22(4) of the Constitution as that Article dealt with the protection against arrest and detention in certain cases. Thereafter, the Division Bench in paragraph 16 dealt with the protection claimed by the petitioners there under ART.14 and 21. It took stock of the counter-affidavits filed in that case that some of the Sri Lankan refugees had to be segregated as some of them being members of the militant organisations or were having close links with the outlawed militant organisations. It took note of the observations

made in G.B. Singh v. Government of India (AIR 1973 SC 2667) to the effect that the first duty of the State was to survive and for that it had to deal with enemies both overt and covert whether they be inside the country or outside and the fact that such person, if released, would continue to indulge in activities prejudicial to the security and integrity of this country. The Division Bench recorded a finding that if the reasonable restrictions were imposed by the State to preserve its security, which was paramount, it could not be said that there was a discrimination against such a person. It noted the fact that only a small percentage of Sri Lankan who were entertained as refugees were put in the Special Camps in view of the information available to the State Government that they belonged to the militant group and had close links with LTTE and also had a role to play in the Rajiv Gandhi assassination case. The Bench then repelled the challenge under ART.21 of the Constitution and held, relying on the decision in Govind v. State of M.P. (AIR 1975 SC 1378), that the orders were passed in keeping with the procedure established under SEC.3(2)(E) of the Act under which, the State Government had power to impose restrictions. It also noted that the validity of the Foreigners Act was upheld by the Supreme Court and, therefore, it was obvious that what was being done was under a valid law justifying the interference with the person's life or personal liberty. It further took note of the Division Bench decision in Ananda Bhavanand @ Swamy Geethananda v. Union of India (1991 L.W. Crl. 393) as also the Bombay High Court judgment in Bawalkhan v. B.C. Shah (AIR 1960 Bombay 27) and came to the conclusion that there was no question of the procedure adopted by the State Government in passing the order being held against the spirit of ART.21. It also made observations that so long as the refugees were staying in India without causing any nuisance, there was no question of circumscribing their rights but, when it was found that they were acting prejudice to the security of the country, the powers under SEC.3(2)(E) could always be used and merely because the hearing was not given to them that by itself would not go against the spirit of ART.21 or as the case may be ART.14. In that, the Division Bench also relied on the judgment of the Supreme Court in Louis De Raedt v. Union of India (AIR 1991 SC 1886) as also the earlier view expressed in Hans Muller v. Superintendent, Presidency Jail, Calcutta (AIR 1955 SC 367). In the circumstances, the Division Bench deduced that no notice prior to the passing of the impugned orders could be expected by the foreigners against whom the order was passed. It also took note of the fact that these Sri Lankan nationals would have the opportunity to leave the boundaries of the special camp on sufficient cause with the permission of the District Collector concerned and, therefore, there

was no question of procedural mandate being violated. It observed:

"To reiterate, the survival of the State is paramount, and if to preserve the security and integrity of the country, certain restrictions have to be imposed on these foreigners, it will be difficult, on the present set of facts, to hold, that there has been violation of the mandate of ART.21 of the Constitution."

The Division Bench, therefore, went on to dismiss the writ petition.

15. We have deliberately dealt with the judgment in Kalavathy case, cited supra, in extenso as firstly, some of the arguments raised before us more particularly regarding ARTS.14 and 21 have been dealt with in that judgment. Secondly, the aspect as to whether their regularisation of their residence under SEC.3(2)(E) amounts to preventive detention has been squarely answered in that judgment holding that it is not a preventive detention, which question we have treated as the basic question. Learned counsel also argued before us that some of the factual aspects are different in the said judgment and, therefore, that judgment should be restricted to the facts in that case. Learned counsel also further argued that judgment cannot be a final authority because some questions, which were raised in the subsequent judgment in Yogeswari case, cited supra, were not raised before that Bench and, therefore, that judgment should not be held to be having a binding effect on us. It will, therefore, be now necessary to see as to on what precise grounds has the judgment in Kalavathy case, cited supra, been refused to be followed by the Bench in Yogeswari case, cited supra.

16. The basic premise in Yogeswari case, cited supra, appears to be found in paragraphs 4.4, 4.5 and 4.6 because the other aspects included in paragraphs 4.1, 4.2, 4.3, 4.7 and 4.8 are absolutely common. We will, therefore, deal with the contention raised and found favour with in those three paragraphs. They are as follows:

> "4.4. According to him, the object of keeping the detenu in Special Camp, namely to regulate his continued presence in India, is no longer valid since the detention of a foreigner is now regulated by the National Security Act, 1980 which has replaced the Preventive Detention Act, 1950.
>
> 4.5. According to the learned senior counsel, when the Parliament has enacted a fresh legislation on the same subject, namely dealing with foreigners providing for greater safeguards, then those provisions would come under the provisions of the latter Act and in the absence of the Advisory Board and the opportunity to the detenu, detention for an unlimited period of time is clearly illegal.

4.6. It is submitted that the National Security Act, 1980 is a special enactment on the subject which covers the field and the same shall prevail over the Foreigners Act, 1946."

16.1.Shortly, stated the contention boils down to the proposition that because of Sec.3 of the National Security Act, 1980, which is a post-constitutional enactment, the earlier pre-constitutional provision like SEC.3(2)(E) of the Foreigners Act would stand eclipsed and be rendered non-functional. This is more particularly because the exercise of the power under SEC.3(2)(E) and the manner in which the power was being exercised would suggest that it was in fact the power under SEC.3(2)(G) of arrest, detention and confinement, which was being exercised. We must hasten to add that in paragraph 7 of Yogeswari case, cited supra, a clear-cut reference has been made to the order passed by the Supreme Court in S.L.P. No.369 of 1996 (Chinnapillai case). The learned Judges then went on to hold in paragraph 11 that the power to regulate the continued presence of a foreigner in India and if it was necessary to do so, the power has to be exercised under Sec.3 of the National Security Act, 1980. The learned Judges went on to hold in the same paragraph that if SEC.3(2)(E), read as a whole, would show that the power of regulation is not a measure of punishment but only regularisation. A reference was made to SEC.3(2)(G) as SEC.4(2) of the Foreigners Act. In paragraph 12, the Division Bench has made a reference to ART.21 and noted that it was available to all and not necessarily only to the citizens of India and then the learned Judges further held therefore where a person's liberty was taken away or if he is to be made an intern, after the coming into force of the Constitution, such an order depriving the person of his liberty must comply with the requirement of Articles 21 and 22(5) of the Constitution. Learned Judges reiterated that since the National Security Act empowers the authorities to pass the orders under Sec.3 in reference to a foreigner with a view to regulate his continued presence in India in keeping with the constitutional safeguards, the power under the Foreigners Act cannot be availed of. The learned Judges noted that the Foreigners Act, being a pre-constitutional enactment, was not in consonance with the Fundamental Rights guaranteed to any person and, therefore, such person comes under the special enactment, viz. National Security Act, 1980 on the same subject-matter, power could not be availed of by the authorities under the Foreigners Act. The learned Judges then noted:

"Therefore, even assuming that internment is not a detention, the requirement to reside at a particular place set apart should be

in consonance with Articles 21 and 22(4) of the Constitution. It follows that there should be sufficient safeguard for such an order in conformity with Articles 21 and 22(4) of the Constitution."

16.2. In paragraph 13, the learned Judges observed that the National Security Act, 1980, being a special latter enactment, alone can hold the field and the power within the latter enactment with all its restrictions could be invoked and maintained and it was not justifiable on the part of the Government to invoke SEC.3(2)(E) of the Foreigners Act only to avoid the latter Act for the purpose of regulating the continued presence of a foreigner. A brief reference to SEC.3(2)(G) of the Foreigners Act is made thereafter in paragraph 14 and a finding of fact is given that the order to keep the detenu to remain in the Special Camp which was previously a sub-jail and that he was kept there inside a cell and was allowed limited movement outside the cell during day-time is a clear case of confinement, for which there was no order under SEC.3(2)(G) of the Act. It is, therefore, reiterated that the restriction amounted to detention.

16.3. In paragraph 15, the learned Judges observed that the Division Bench in Kalavathy case, cited supra, could not consider the question vis-a-vis the National Security Act, 1980.

16.4. These were the grounds on which the judgment in Yogeswari case, cited supra, was finalised. In the later part of the judgment and more particularly from paragraph 16, the learned Judges found that the impugned order under SEC.3(2)(E) firstly did not take into account the bail order granted by the Sessions Judge, Tiruchy; secondly, that it was an admitted position that the order of detention was passed only because of the pendency of the criminal case and for no other reason; thirdly, that the Government had no objection to send back the foreigner back to his country and it was only because of the pendency of the criminal case that the order came to be passed; and lastly, the detenu in that case entered into Indian territory authorisedly and had completed all the formalities and also had the residence in India since 1983.

16.5. In the subsequent paragraphs, it was noted that the facts in Kalavathy case, cited supra, were distinguishable on facts as, that case considered the persons who had close links with L.T.T.E. and had posed a danger to the security of the State on account of their belonging to various militant groups. The observations in Kalavathy case, cited supra, that some of the militants had a role to play in Rajiv Gandhi assassination was also taken note of as a

distinguishable factor from the present case.

16.6. In paragraph 19, further reference was made to Hans Muller case, cited supra, and a reference was also made to the concession made by the then Attorney General that the unrestricted power given by SEC.4(1) of the Foreigners Act, 1946 to confine and detain foreigners had become invalid on the passing of the Constitution because of Articles 21 and 22 and, therefore, to bring this part of the law into the line with the Constitution, Section 3(1)(B) Preventive Detention Act, 1950 was enacted. It was, therefore, deduced that a confinement of a foreigners would become invalid if he did not meet with the requirement of Articles 21 and 22.

16.7. Taking recourse to the decision in VARADHARAJ v. STATE OF TAMIL NADU (AIR 2002 SC 2953), the Court held that the fact that the order granting bail and the no objection of the Public Prosecutor therefor were the relevant documents and, therefore, the fact that the detenu in that case had been granted bail should have been taken note of while passing the order under SEC.3(2)(E) and that not having been done, the order had become illegal.

16.8. Lastly, reference was made to Louis De Raedt case, cited supra, where the Supreme Court had recognised the right under Article 21 of the Constitution to the foreigners and on that basis it was held that before depriving the right of a person as guaranteed under Article 21 of the Constitution or even after doing the same, the detenu was not given any opportunity whatsoever for over two years and, therefore, the impugned order was liable to be set aside on that count alone.

17. We have elaborately considered the judgment in Yogeswari case, cited supra. That is the mainstay of the attack in this case. However, one thing is certain that though there is a specific reference made to the order of the Supreme Court in S.L.P. No.369 of 1996 (Chinnapillai case), there does not seem to be any consideration regarding the same in the whole judgment. We have very carefully scanned each paragraph of the said judgment to search for such consideration of that Supreme Court order and unfortunately, we find none. This exercise was necessary because the argument before us by the learned Public Prosecutor was that the order in Yogeswari case, cited supra, was per incurium of the Supreme Court order. The learned Public Prosecutor was at pains to point out that though the order in Chinnapillai case, cited supra, was passed while dismissing the Special Leave Petition, since the Supreme Court had given the reaso ns and had also considered the judgment in Kalavathy's case, it was a 'declared law' and was binding under

ART.141 of the Constitution of India. For better understanding, the order in Chinnapillai case, cited supra, and for deciding as to whether it was a 'law declared' under ART.141, we would rather quote the order: "The petitioner is a Sri Lankan citizen. Although, he has been ordered to be released on bail by the Court, he has been lodged in a Special Refugee Camp. He has been lodged in the Camp since he does not have the necessary travelling documents. In support of his contention that the lodgment in a Refugee Camp does not amount to detention, the learned counsel for the State of Tamil Nadu cites Kalavathy etc. v. State of Tamil Nadu etc. 1995

L.W. (Crl.) 692. He further states that the special leave petition against the judgment of the Madras High Court has already been dismissed by this Court. In this view of the matter, we see no ground to interfere. The special leave petition is dismissed." (emphasis supplied).

18. A look at the order of the Apex Court will suggest that it is not a simple dismissal of the Special Leave Petition without giving the reasons. Had that been the intention, there would have been no reference to the facts in that case. The Supreme Court has taken note of the fact that in that case, the concerned foreigner was facing the criminal prosecution and was also ordered to be bailed out yet the order under SEC.3(2)(E) came to be passed against him. A direct reference thereafter was made in paragraph 2 to Kalavathy's case wherein the contention raised by the Public Prosecutor that the regularisation in the Special Camp does not amount to detention. Lastly it was stated that the Special Leave Petition against the Kalavathy's case, cited supra, was dismissed. The Supreme Court lastly said that "in this view of the matter, there was no ground to interfere".

19. Shri B. Kumar, learned senior counsel strenuously suggested that this cannot be a 'law declared' because like in the earlier matter against Kalavathy's judgment, the reasons have not been given by the Supreme Court and this amounts to a mere dismissal without giving any reasons. We find it difficult to agree with the contention for the obvious reasons. By making a direct reference to Kalavathy's case, it is obvious that the Supreme Court has considered the same. It cannot be countenanced that the Supreme Court did not consider the judgment at all and merely went on to dismiss the Special Leave Petition on the basis of the statement made by the Public Prosecutor that the Special Leave Petition was dismissed against the Kalavathy's judgment. This is apart from the fact that in Kalavathy's judgment, the court was not considering the factual situation that a foreigner was ordered to be released on bail and yet, he was lodged in the Special Refugee Camp. There, such a question never arose. Very significantly,

though such a question was there in Yogeswari case, cited supra, which was subsequently decided by this Court, in that judgment there is no reference to the Supreme Court order when in fact, the High Court had considered the circumstance of the bail order against the State and in favour of the foreigner in complete contradiction to Chinnapillai case. We are, therefore, left with no doubt that this is a case where the Supreme Court had not merely dismissed the Special Leave Petition without giving any reasons. Shri B. Kumar draws our attention to the words "in this view of the matter, we see no ground to interfere" and tries to interpret that the matter considered by the Supreme Court was merely the dismissal of the Special leave Petition against Kalavathy's case, cited supra. In fact those lines refer to the view expressed in Kalavathy's case and also the facts in the first paragraph that though a foreigner was ordered to be released on bail, he was lodged in the Special Camp. This would, therefore, be a clear approval of Kalavathy's judgment and would have a binding effect under ART.1 41 of the Constitution.

20. Shri Kumar, very heavily relied upon the observations made in the Full Bench decision of this Court in PHILIP JEYASINGH v. THE JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES (1992 VOL.1 216) as also the decision of the Supreme Court in STATE OF U.P. AND ANOTHER v. SYNTHETICS AND CHEMICALS AND ANOTHER (1991 -4- SCC 139) and more particularly on the observations in paragraphs 39 to 41 thereof wherein the doctrines of 'per incurium' and 'sub silentio' were explained by the Supreme Court. According to the learned counsel, firstly the question regarding Sec.3(b) of National Security Act was never raised or argued in Kalavathy's case and secondly, the factual situation in Kalavathy's case was slightly different inasmuch as there, the court was dealing only the foreign nationals who had direct links with L.T.T.E. or other militant organisations and who were also responsible for the assassination of Rajiv Gandhi.

20.1. Regarding the first contention, learned counsel, therefore, says that it was open for the Division Bench in Yogeswari case, cited supra, to consider the question on the backdrop of Sec.3 of National Security Act and it was right in considering the said question. In short, the contention of the learned counsel is that the decision in Kalavathy's case is sub silentio on the question of Sec.3 of the National Security Act and, therefore, the decision as to whether the regularisation of the residence of a foreigner under SEC. 3(2)(E) in the Special Camps amounts to a ?detention? or not had no binding effect on the Division Bench deciding Yogeswari case. Learned counsel further submits that the decision in Yogeswari case, being a decision of the co-

ordinate Bench, becomes binding on us. It is with that idea the learned counsel invited our attention to paragraph s 40 and 41 of the aforementioned judgment. One more reason is that as per the learned Public Prosecutor, however, the decision in Yogeswari's case is per incurium of the judgment of the Supreme Court in Chinnapillai's case, cited supra. Shri Kumar, however, further submits that there would be no question of the said decision being per incurium of Chinnapillai case because, the decision in Chinnapillai case is no judgment nor a law declared. It is for this reason that we have pointed out that the judgment in Chinnapillai case is in fact a 'law declared'. For reference, see the judgment of the Supreme Court in Supreme Court Employees Association v. Union of India (AIR 1990 SC 334) and more particularly the observations in paragraph 22. However, as has been suggested by us, the learned counsel very forcefully invites our attention to the aforementioned decision in State of U.P. v. Synthetics and Chemicals Ltd. (1991 -4- SCC 139 and invited our attention to the following observations in paragraph 41: "that precedents sub-silentio and without argument are of no moment. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 ... it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent."

20.2. We have seen the aforesaid judgment very carefully. In the first place, we reiterate that the judgment in Chinnapillai case, cited supra, was not without reasons and though a reference was made in the statement of facts in Yogeswari case to that effect, the High Court did not apply its mind at all. Undoubtedly, the said decision would be binding only if it is a law declared and, in our opinion, it is clearly a declared law, holding that even if a foreigner, who has a bail order in his favour, is put in the Special Camp, it would not amount to a preventive detention. Once it is held to be a binding precedent, it is obvious that though a reference was made to Chinnapillai's case, its' non-consideration would make Yogeswari decision a decision per incurium and such decisions which are per incurium would have no binding force. We have also seen the Full Bench decision of this Court in Philip Jeyasing case, cited supra,

and we respectfully agree with the principles stated therein but, we do not find anything to take a different view we are taking in respect of Yogeswari's case.

20.3. As regards the second contention raised by the learned senior counsel that the decision in Kalavathy's case was given on its own facts, which were different from the facts in Yogeswari's case and, therefore, in Yogeswari's case, the High Court could hold that the regulation would amount to detention. Such is really not the import. In Kalavathy's case, the facts regarding the petitioners being dangerous persons or they being connected with the militant organisations or further some of them being responsible for the assassination of Rajiv Gandhi were recorded only to emphasise the aspect of the security of India. The learned Judges reiterated those facts only to hold that the security of any country is paramount important. That factual scenario had nothing to do with the ultimate principle laid down by the learned Judges that the regulation of such persons does not amount to detention. The argument, in our opinion, is clearly incorrect.

21. Shri B. Kumar went up to the extent of saying even the Supreme Court had not considered the effect of SEC.3(2) of the National Security Act. It will not be our domain to comment on the Supreme Court judgment. Once the Supreme Court approves the principle that the putting up of a foreigner in the Special Camp does not amount to his preventive detention, that would be a binding law on us as it was on the Division Bench deciding the Yogeswari's case.

22. Learned senior counsel then reiterated that if we have any reservations about the law laid down in Yogeswari's case, we should make a reference to the Full Bench for getting the question decided as to whether the placing of a foreigner in the Special Camp would amount to his preventive detention or not. We would desist from doing so for the simple reason, that if the judgment in Yogeswari's case is per incurium, as we have shown, then, it would not have any binding effect on us. In that event, it would not be necessary for us to make any reference to a Full Bench. We would instead choose to follow the judgment of the Supreme Court, which confirms the earlier Division Bench judgment of Kalavathy's case by this Court.

23. Learned senior counsel, however, invited our attention to Sec.3(b) of the National Security Act again and again in order to point out that the said provision would render the pre-constitutional provision of SEC.3(2) of the Foreigners Act null and void because that area would be a 'occupied field' by the Central Government itself.

24. The contention is basically incorrect. In the first place, the correct reading of SEC.3(2) of the National Security Act would suggest that it is basically a power to order preventive detention "if it is felt necessary" by the detaining authority to regulate the stay of a foreigner and/or his movements in India. The words 'if it is necessary so to do' point out that ordinarily there could be a regulation of the movements or stay of the foreigner in India but where, under the ordinary law like SEC.3(2)OF the Foreigner Act "if it is felt necessary", the detaining authority would have the power to order his preventive detention also. In short, the two acts, viz. the Foreigners Act and the National Security Act operate entirely in different spheres. We hasten to add that the power to arrest, detain or intern a foreigner is specifically mentioned in SEC.3(2)(G) of the Foreigners Act but it is not that power which has been delegated to the State Government. It is the power under SEC.3(2)(E) of the regulation alone which has been delegated by the Central Government to the State Government. Therefore, the State Government is well advised to use that power but where it feels necessary to order a preventive detention, which is a more concentrated remedy as compared to a mere regulation, it can do so under SEC.3(2) of the National Security Act. The inference that the two provisions operate in the common field and, therefore, the Foreigners Act becomes eclipsed or otiose or nullified, in our opinion, is a law which is too broadly stated. In fact, it is unnecessary for us to express ourselves on that aspect as it would be for the higher court to consider the same in a given case at appropriate time if that argument is raised before that court. Today, however, such is not the case and, therefore, we would choose to be bound by the law stated by this Court and affirmed by the Supreme Court that the placement of a foreigner in the Special Camp is not a preventive detention.

25. It was tried to be argued further that Sec.3 of the National Security Act is a subsequent enactment and, therefore, that enactment was liable to be given the full effect because it operated in the same field as SEC.3(2)(E) of the Foreigners Act. Paragraph 20 of the judgment in SARWAN SINGH AND ANOTHER v. KASTURI LAL (AIR 1977 SC 265) was relied upon.

26. We have nothing to say about the principle involved in the said Supreme Court decision. However, we have already shown that the two provisions are entirely different and cannot be said to be occupying the same field. One is a mere regulation of the movement while, the other is a preventive detention. The implications of both are vastly different, which need not be elaborated here. The argument is, therefore, incorrect.

27. It is suggested that even this argument was not considered in Kalavathy's case and, therefore, in Yogeswari's case, the High Court was justified in considering a new aspect. We have already given the reasons that a specific affirmation of a principle by the Supreme Court would be binding on us and there will be no point in our considering the contention that a particular provision of law was not considered by the Supreme Court. We desist from expressing any opinion about the proprietary of such an argument being made before us.

28. Shri P.V. Giridhar, learned counsel appearing on behalf of some of the petitioners, tried to suggest that even if Kalavathy's case was held to be affirmed by the Supreme Court yet, an argument would still be open before us in respect of the 'open areas' left which, according to the learned counsel, were the arguments regarding the violation of the petitioners' rights under ART.21. Learned counsel invited our attention to the following observations of the Supreme Court in paragraph 14 of Kharak Singh's case, cited supra:

    "intrusion into the residence at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, constitute a violation of the freedom guaranteed by ART.19(1)(D) or 'a deprivation' of the 'personal liberty' guaranteed by ART.21."

    On this basis, the learned counsel tried to develop an argument that since there was no privacy left to the persons like the petitioners, who were lodged in the Special Refugee Camps, it was a breach of right of privacy of the petitioners.

29. Such an argument was in fact repelled in Kharak Singh's case. This is apart from the fact that the petitioners being foreigners would have no right under ART.19(1)(D) and further merely because their privacy would be breached would be no defence against an order under SEC.3(2) of the National Security Act unless it is found that the order was tainted with mala fides or not warranted at all or unless the provisions of SEC.3(2)(E) of the Foreigners Act are held to be unconstitutional. Learned counsel very fairly conceded that he was not challenging the validity of SEC.3(2)(E) of the Foreigners Act and indeed, that argument could not have been made as the constitutionality of the Foreigners Act had been confirmed by the Supreme Court.

30. Regarding the argument for breach of ART.21, all that we would say that in this case, the order has been passed under a procedure handed out by SEC.3(2)(E) of the Foreigners Act. Therefore, it cannot be said that the liberty of the petitioners has been curtailed or their right of privacy has been breached without any orders or without following the procedure established by law. This is apart from the fact that in

Kalavathy's case, the aspect of ART.21 as also the aspect of ART.14 were considered by the Division Bench and it was found that the passing of the order under SEC.3(2)(E) of the Foreigner Act would not amount to a breach of the rights under ART.21 and ART.14. We have already pointed out that in paragraph 18 the question has been answered by the Division Bench though it was argued that in that case, the Court was dealing with the dreaded militants who were responsible for the assassination of Rajiv Gandhi. We cannot forget the fact that in the present case also some of the petitioners are facing some serious criminal charges. In our opinion, the classification between the foreigners as those who are not facing any criminal charges and those who are facing such charges would be a rationale, reasonable and valid classification.

31. Learned counsel also tried to argue that the question of ART.2 1 relating to the breach of privacy right of the petitioners and the question of denial of humanrights did not fall for consideration in Kalavathy's case or before the Supreme Court. We do not think that this argument was not considered in Kalavathy's case. It was undoubtedly considered though from a different factual angle. We cannot express anything in respect of the order passed by the Supreme Court in Chinnapillai case because it is not in our domain to consider the judgment of the Apex Court. The judgments are binding on this Court and we have pointed out that a particular principle reiterated and affirmed by the Supreme Court would always be binding and it will not be for us to find out as to which particular aspect was considered by the Supreme Court and which other was not.

32. Arguments were tried to be made by the learned counsel suggesting that there was no proper delegation of the powers under SEC.3(2)(e) of the Foreigners Act also. However, that point was not pursued by the learned counsel further as it was pointed out that the delegation in 1958 was not only proper but, even the subsequent changes in law would also be governed under that.

33. Learned counsel also urged about the procedural safeguards of there being no notice or no hearing to the petitioners. We have already considered that question and held that all that has been concluded in Kalavathy's case.

34. In this view, we are of the clear opinion that the petitions have no merit and must be dismissed. However, before doing so, it would be for us to take stock of some factual aspects regarding the conditions of the petitioners as also regarding the arguments at the Bar that some directions need be given for the relaxation of some of the conditions.

35. Shri B. Kumar, learned senior counsel, reiterted that this Special Refugee Camp was a Sub Jail and that it has three-tier security set up and guarded by the armed personnel for 24 hours; that there were 41 cells of the dimension 8' X 10' and the rear side of the each cell was required to be used as a toilet for which there was no exit; that the inmates were never allowed to go out of the Special Camp and the relatives were allowed to meet the inmates only with the prior permission of the Tasildhar and Police; those relatives were never allowed to say and were required to leave before 5 p.m.; that the names of the relatives had to be furnished in advance and no new names could be added to the list of the relatives who could meet the persons like the petitioners; inmates could not even come out to purchase their provisions and other bare necessities and that had to be done with the help of a village menial, who alone could go out and make purchases from outside; the inmates were being taken out with very strong escort either to the courts or to the hospitals but nowhere else; that there are no entertainment available inside the Special Camp in any manner.

36. Shri Giridhar, learned counsel also supported these arguments on the ground of the abuse of human-rights in case of these persons. It was suggested that in the writ of Habeas Corpus also as was done by the Supreme Court in SUNIL BATRA v. UNION OF INDIA (AIR 1980 SC 157 9), the treatment should not be such so as to deny the human-rights to these persons.

37. Learned Public Prosecutor opposed this argument and pointed out that the persons in the Camps do not have to be dealt with the strictness as is required in case of the persons like the petitioners who are in the Special Camp. It has been reiterated in the counter that it is only for those foreigners who are suspected to be connected with the militant organisations or such persons who are involved in the criminal case in the State or those whose presence outside the Special Camp might pose a serious threat to the safety and security of the Nation and/or to the VIPs/VVIPs, etc., that such arrangement is made of putting them in the Special Camps. However, that is considered on a proposal sent by the Superintendent of Police, Q Branch, CID Chennai alone, who is the sponsoring authority for this purpose. It has been reiterated in their counter, that it is not that the foreigners have to be lodged in the Special Camps for ever. It has been pointed out that there are number of persons, about 150, who were even connected with the militant organisations like LTTE or who faced serious charges, were allowed to leave the Special Camps for going back to Sri Lanka or any other country for settlement. Lists are also given camp-wise and it is found that from every Special Camp, a very substantial number

of persons have been allowed to leave. It cannot be denied that there was full justification for keeping these persons in Special Camps as they had probably misused the facility given by the Government of India to allow them to stay in India on account of the alleged internal disturbances in Sri Lanka. We have already rejected the argument that there was absolutely no reason for such persons to be placed in the Special Camp. The question is only as to how they should be treated.

38. The Government has come out with the detailed counters regarding the treatment given to persons lodged in the Special Camp wherein, it is suggested that they are entitled to certain amounts which, though meagre, would subsist them in the Special Camp. They are allowed to cook their own food. Practically, all of them are allowed to use the electric gadgets like hot plates, television with cable connection, radio, etc. They are also given the worship facility. It is pointed out that even the clothes are provided to the persons who are the residents of the Open Camps. It is also pointed out that the allegation regarding the privacy not being there is also not wholly true inasmuch as one of the inmates became the father of two children though he alone was lodged in the Special Camp since his family-members like wife, etc. were allowed to meet him in complete privacy.

39. We would not go into that question. However, what concerns us is the complaint made by the learned counsel that once they are put in the Special Camp, that is almost a one-way ticket for them in the sense that they cannot go out. In our opinion, it would be better if the Government is directed to take up the review in each individual case, atleast twice a year. For this purpose, the concerned persons can be given an opportunity to make representations and to show the change of circumstances. We also feel that such persons, who are not potentially dangerous or whose life itself is not in danger on account of their connections with the militant organisations could be allowed to go out atleast once a week for making purchases, etc. of course, under a proper police escort so that they do not take any undue advantage of the facility given. It is suggested by the learned counsel that whenever an application is made for going out on some occasions like, marriage, family functions, funeral, etc. such applications are not considered in time. We would expect the Government to dispose of these applications expeditiously and not beyond a period of four weeks, if they are made to a proper authority. This will, of course, be subject to the Government's right to make bi-annual review in case of each such person. We are also of the opinion that the facility of meeting with the relations should be in a more relaxed manner so that they are able to meet their relatives and other persons (not necessarily only those whose names have been earlier given). Similarly, we have already

taken a note of the argument by the learned Public Prosecutor that these persons would not be kept in the Special Camps the moment the requirement of their being lodged in the Special Camp comes to an end like when they are acquitted of the charge or when they are convicted and served out their sentences. We would also expect that the State Government and the Public Prosecutors in the criminal cases pending against these persons would be more vigilant and their criminal cases should be disposed of with top priority. Accordingly, a general direction shall issue that all those persons who are lodged in the Special Camp on account of a pending criminal prosecution, such criminal case should be disposed of giving top priority to that case. All the concerned courts shall be informed of this direction.

40. In the matter of their visits or going out for any other purposes, unnecessary restraint shall not be shown but, such applications shall be considered with humanitarian approach and more stringent conditions then necessary shall not be imposed while ordering a temporary release from the Special Camps.

41. We have also observed that they shall be given full and free medical facilities and would have the advantage of being treated by the competent Doctors in the proper hospitals.

42. As far as possible these persons should be allowed to lead a family-life. If the inmates are children, they can even be given the facility of education. The State Government can also think of providing them any work in the Special Camps itself, which would be of voluntary nature, and to pay for the work done by them at reasonable rates.

43. In addition to these directions, we recommend to the Government to encourage these inmates to take up indoor and outdoor games and also hold yoga and meditation classes for them. They should also be provided with a facility of library. If necessary, they could also be given some vocational training so that this period of regulation does not mean a total waste of time in their lives. Lastly, the Government should take a corrective attitude instead of retributive attitude against them.

44. All the observations made in paragraphs 39 to 42 WOULD be treated as the directions by this Court to the State Government.

45. With this, we dispose of the writ petitions subject to the above directions.

HIGH COURT OF JUDICATURE AT ALLAHABAD

REPORTABLE

Gyan Chand and ors v. State of U.P. and ors

Writ - C No. - 13461 of 2010

Coram	: Hon'ble Arun Tandon,
	: Hon'ble Naheed Ara Moonis
Date	: 04.11.2016
For Petitioner	: Shiv Sagar Singh
For Respondent	: Mr. C.S.C., K.C. Tripathi
	: Mr. Vijay Sinha, Advocate

1. This bunch of writ petitions has been filed by approximately 800 petitioners claiming to be the recorded tenure holders of land situated in village Bathuakhera, Pargana and Tehsil Moradabad, district Moradabad. The land of the petitioners was subject matter of acquisition proceeding initiated by issuance of notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act, 1894") dated 26.9.1989. This notification under Section 4 was followed by a notification under Section 6 of the same Act, 1894 dated 6.1.1990. Under the notifications, Section 17 (4) had been invoked and Section 5 was done away with. It is not in dispute that the tenure holders, whose land had been so acquired, had been paid compensation after making of the award on 30.3.1991 and that in some cases even additional compensation has been paid and accepted. It is also submitted before us that the enhancement of compensation is being contested by respondent no. 5 by way of appeal, which is pending before this court.

2. The farmers have come up before this court with the allegations that the entire acquisition proceedings suffer from wrongful exercise of powers conferred under the Act, 1894 by the State Government. It is their case that the purpose of acquisition was in fact different from the one, which had been stated in the notification under Section 4 and Section 6 of the Act, 1894 and, therefore, the acquisition proceedings are void abnitio. In support of the plea so raised on behalf of the petitioners Sri Shashi Nandan, learned Senior Counsel assisted by Sri Shiv Sagar Singh, Advocate took the court to the recitals contained

in the notification under Section 4 of the Act, 1894, which reads as follows;

"In continuation of Government notification No. 2919/XVIII-10 (P.P.)-89 dated September 26, 1989 issued under sub-section (1) of Section 4 and sub-section (4) of Section 17 of the Land Acquisition Act, 1894 (Act No. 1 of 1894) and lastly published through public notice affixed dated December 15, 1989. The Governor is pleased to declare under Section 6 of the said Act that he is satisfied that the land mentioned in the Schedule below is needed for public purpose namely establishment of a News Print Paper Project for the planned industrial development in district Moradabad through News Print and Paper Mills Ltd. (NEPA), New Delhi and under Section 7 of the said Act to direct the Collector of Moradabad to take order for the acquisition of the said land."

3. He also referred to the concluding part of the notification, which reads as follows;

"For what purpose required - For the establishment of News Print Paper Project by the National News Print and Paper Mills Ltd., New Delhi for the planned Development in district Moradabad."

4. It is admitted to the parties before us that M/s. NEPTA Ltd. is a Government Company duly registered in Madhya Pradesh. Sri Shashi Nandan would therefore submit that from a simple reading of the notification it would be clear that the purpose of the acquisition was for establishment of News Printing Paper Project through a Government Company.

5. It is stated that from the counter affidavit filed on behalf of the said Government Company M/s. NEPTA Ltd. it is admitted that the possession of the land subject matter of acquisition was taken on various dates, namely, 11.4.1990, 30.4.1990, 7.9.1990, 29.7.1991, 9.3.1993 and 31.10.1994 respectively. Similar recitals have been made in paragraph 3 (V) of the counter affidavit filed on behalf of the said Company. It is further apparent from the tripartite agreement dated 11.4.1996 that even an indenture of transfer or terms was not executed by the State Government in favour of M/s. NEPTA Ltd. for the acquired land till 11.4.1996. The records further reflects that on the directions of the Central Government, a decision was taken by M/s. NEPTA Ltd. to discontinue the project in public sector and to invite private entrepreneurs to take over the project for its further implementation on going basis. Such decision must have been taken by the Central Government prior to 22.2.1994. In as much as on the said date i.e. 22.2.1994 M/s. NEPTA Ltd. had published a notice inviting bids for transfer of the project.

6. It is with reference to this invitation of bids that the respondent no. 5 M/s. Century Textile & Industry Limited, which is a private limited company is said to have offered a bid of Rs. 21 crores for the same land. The same was found to be adequate by respondent no. 4 M/s NEPTA Ltd., a sale deed was executed on 17.2.1996, a copy whereof has been annexed at page 96 to the writ petition. It is further contended before us that at no point of time respondent no.4 was ever interested in establishing any project as was disclosed in the acquisition notification, which fact is established from the admission qua the possession of the land having been taken upto the month of September 1994 when an invitation to offer bids for transfer of the said project itself was published in February 1994.

7. Sri Shashi Nandan, learned Senior Advocate contended that following the judgment of the Apex Court in Royal Orchid Hotels Limited and another Vs. G. Jayarama Reddy and others, reported in (2011) 10 SCC 608 the acquisition in question has to be held to be a colourable exercise of powers by the authority and, therefore, void. It is stated that the basic intention of the authorities was to give benefit to a private company in the matter of establishment of paper industry while exercising the powers under the Act, 1894 camouflaged to be one for a Government company.

8. Acquisition of land for private company is regulated by Chapter VII of Act, 1894, at the relevant time and the procedure to be followed therein is entirely different viz-a-viz which is provided for acquiring for public purpose including government undertaking.

9. Sri M.D. Singh 'Shekhar', learned Senior Counsel for the respondent no. 5 in reply submitted before us that the writ petition has been filed after 20 years of the acquisition notification and after 18 years of the award and receipt of compensation by the petitioners. The writ petition, therefore, deserves to be dismissed on the ground of laches. He has relied upon the Division Bench Judgment of this court in Lahri Singh Vs. State of U.P. and others passed in Writ-C No. 2104 of 2006 and connected writ petitions decided on 23.5.2016, wherein reference has been made to the various judgments of the Apex Court, which have been noticed in paragraphs 11 to 18 of the said judgment. He then contended that the respondent no. 5 has responded to the notice inviting bids, which was published by the respondent no. 4 and has made the payment of the amount for transfer as noticed in the sale deed. The company has also paid additional compensation to the farmers and is contesting the proceedings in regard before the High Court. He submits that this Court may not interfere with the acquisition at the stage of the proceeding.

10. On behalf of the respondent no. 4 it is stated that land was acquired for establishment of paper project by respondent no. 4 company but because of the directions of the Central Government to do away with the project a decision has been taken to transfer the project as a whole along with land to the private company, namely, respondent no.5 M/s Century Textile & Industry Ltd.

11. Learned Standing counsel for the State-respondents takes a similar stand and submits that once compensation has been paid the petitioners have no locus to challenge the acquisition or transfer affected thereafter.

12. We have considered the submissions made by the learned counsel for the parties and have gone through the records of the present writ petition.The purpose for which the land of the farmers was proposed to be acquired had specifically been mentioned in the notifications issued under the Act, 1894. The relevant extract of the notification issued under Section 6 of the ACT,1894 has already been quoted herein above.From simple reading of the said notification, it would be seen that the land was proposed to be acquired for a Government Company, namely, M/s NEPTA Ltd. for establishment of a "News Print Paper Project" by the National News Print and Paper Mills Ltd., New Delhi. It is, therefore, writ large on record that the procedure as applicable in the matter of acquisition of land for public purpose was adopted. But even before the actual possession of the entire land holding i.e. 800.114 acres of land subject matter of acquisitions could be taken by the State Government and before any indenture of transfer could be executed by the State of Uttar Pradesh after such acquisition in favour of M/s. NEPTA Ltd., a decision was taken by the Central Government requiring the M/s. NEPTA Ltd. to discontinue the project and to transfer the same to a private company. The relevant facts in that regard are contained in paragraph 3 (v) and (vi) of the counter affidavit filed on behalf of respondent no.4 as also in the deed of conveyance executed on 17TH February, 1996 and tri partite agreement/indenture executed on 11TH April, 1996 as detailed herein above.

13. We can, therefore, safely draw a conclusion that at no point of time, M/s. NEPTA Ltd. ever planned to set up any industry i.e. News Print Paper Project over the acquired land. Desire in that regard was a mere paper formality resulting in acquisition proceedings.We have been informed in open Court proceedings today by the learned counsel for the parties that except for planting trees, M/s. NEPTA Ltd. in fact carried on absolutely no development activity over the acquired land, not even a single machine, which could be used for the project was ever

purchased or installed over the acquired land. It has been stated that no money was paid by M/s. NEPTA Ltd. towards compensation (which fact is not so stated in the pleadings). The procedure for acquisition of land for private companies is regulated under Chapter VII of the Act, 1894, a complete different procedure is prescribed.

14. What has happened in the facts of the case is that the State Government while exercising powers under the Act, 1894 for acquiring the land of the farmers for public purpose in fact has created a situation whereby public company has been authorized to dispose of the land along with project in favour of a private company and thereby evading the compliance of the provisions of Chapter-VII of the Act, 1894.

15. Facts in hand are more or less akin to the facts, which were subject matter of consideration before the Apex Court in the case of Royal Orchid Hotels Ltd. (Supra). We may reproduce the relevant paragraphs of the judgment in the case of Royal Orchid Hotels Ltd. (Supra), wherein like nature of exercise undertaken by the State Government was held to be void and abuse of powers vested in the authorities under the Act, 1894. Relevant paragraphs of the said judgment are being quoted herein below:

"24. The first question which needs consideration is whether the High Court committed an error by granting relief to respondent NO.1 despite the fact that he filed writ petition after long lapse of time and the explanation given by him was found unsatisfactory by the learned Single Judge, who decided the writ petition after remand by the Division Bench.

25. Although, framers of the Constitution have not prescribed any period of limitation for filing a petition under Article 226 of the Constitution of India and the power conferred upon the High Court to issue to any person or authority including any Government, directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari is not hedged with any condition or constraint, in last 61 years the superior Courts have evolved several rules of self-imposed restraint including the one that the High Court may not enquire into belated or stale claim and deny relief to the petitioner if he is found guilty of laches. The principle underlying this rule is that the one who is not vigilant and does not seek intervention of the Court within reasonable time from the date of accrual of cause of action or alleged violation of constitutional, legal or other right is not entitled to relief under Article 226 of the Constitution. Another reason for the High Court's refusal to entertain belated claim is that during the intervening period rights of third parties

may have crystallized and it will be inequitable to disturb those rights at the instance of a person who has approached the Court after long lapse of time and there is no cogent explanation for the delay. We may hasten to add that no hard and fast rule can be laid down and no straightjacket formula can be evolved for deciding the question of delay/laches and each case has to be decided on its own facts.

26. In Dehri Rohtas Light Railway Company Limited v. District Board, Bhojpur (1992) 2 SCC 598, this Court set aside the judgment of the Patna High Court whereby the writ petition filed by the appellant against the demand notice issued for levy of cess for the period 1953-54 to 1966-67 was dismissed only on the ground of delay. The facts of that case show that the writ petition filed by the appellant questioning the demand for 1967-68 to 1971-72 WAS allowed by the High Court. However, the writ petition questioning the demand of the earlier years was dismissed on the premise that the petitioner was guilty of laches.

27. While dealing with the question of delay, this Court observed (Dehri Rohtas case, SCC pp. 602-03, paras 12-13):

"12. THE question thus for consideration is whether the appellant should be deprived of the relief on account of the laches and delay. It is true that the appellant could have even when instituting the suit agitated the question of legality of the demands and claimed relief in respect of the earlier years while challenging the demand for the subsequent years in the writ petition. But the failure to do so by itself in the circumstances of the case, in our opinion, does not disentitle the appellant from the remedies open under the law. The demand is per se not based on the net profits of the immovable property, but on the income of the business and is, therefore, without authority. The appellant has offered explanation for not raising the question of legality in the earlier proceedings. It appears that the authorities proceeded under a mistake of law as to the nature of the claim. The appellant did not include the earlier demand in the writ petition because the suit to enforce the agreement limiting the liability was pending in appeal, but the appellant did attempt to raise the question in the appeal itself. However, the Court declined to entertain the additional ground as it was beyond the scope of the suit. Thereafter, the present writ petition was filed explaining all the circumstances. The High Court considered the delay as inordinate. In our view, the High Court failed

to appreciate all material facts particularly the fact that the demand is illegal as already declared by it in the earlier case.

13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Tilokchand case relied on is distinguishable on the facts of the present case. The levy if based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for." (emphasis supplied)

28. In Ramchandra Shankar Deodhar v. State of aharashtra (1974) 1 SCC 317, the Court overruled the objection of delay in filing of a petition involving challenge to the seniority list of Mamlatdars and observed:

"10. Moreover, it may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Art. 16 is itself a fundamental right guaranteed under Art. 32 and this Court which has been assigned the role of a sentinel on the qui vive for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse relief solely on the jejune ground of laches, delay or the like."

20. In Shankara Cooperative Housing Society Limited v.

M. Prabhakar and others (2011) 5 SCC 607, this Court considered the question whether the High Court should entertain petition filed under Article 226 of the Constitution after long delay and laid down the following principles:

"(1) There is no inviolable rule of law that whenever there is a delay, the Court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

(2) The principle on which the Court refuses relief on the ground of laches or delay is that the rights accrued to others by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because Court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners.

(3) The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4) No hard-and-fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts.

(5) That representations would not be adequate explanation to take care of the delay."

37. The pleadings and documents filed by the parties in these cases clearly show that the Corporation had made a false projection to the State Government that land was needed for execution of tourism related projects. In the meeting of officers held on 13.1.1987, i.e. after almost four years of the issue of declaration under Section 6, the Managing Director of the Corporation candidly admitted that the Corporation did not have the requisite finances to pay for the acquisition of land and that Dayananda Pai, who had already entered into agreements with some of the landowners for purchase of land, was prepared to rovide funds subject to certain conditions including transfer of 12 acres 34 guntas land to him for house building project. After 8 months, the Corporation passed resolution for transfer of over 12 acres land to Dayananda Pai. The Corporation also transferred two other parcels of land in favour of Bangalore International Centre

and M/s. Universal Resorts Limited. These transactions reveal the true design of the officers of the Corporation, who first succeeded in persuading the State Government to acquire huge chunk of land for a public purpose and then transferred major portion of the acquired land to private individual and corporate entities by citing poor financial health of the Corporation as the cause for doing so.

38. The Courts have repeatedly held that in exercise of its power of eminent domain, the State can compulsorily acquire land of the private persons but this proposition cannot be over-stretched to legitimize a patently illegal and fraudulent exercise undertaken for depriving the landowners of their constitutional right to property with a view to favour private persons. It needs no emphasis that if land is to be acquired for a company, the State Government and the company is bound to comply with the mandate of the provisions contained in Part VII of the Act. Therefore, the Corporation did not have the jurisdiction to transfer the land acquired for a public purpose to the companies and thereby allow them to bypass the provisions of Part VII. The diversification of the purpose for which land was acquired under Section 4(1) read with Section 6 clearly amounted to a fraud on the power of eminent domain. This is precisely what the High Court has held in the judgment under appeal and we do not find any valid ground to interfere with the same more so because in Annaiah v. State of Karnataka the High Court had quashed the notifications issued under Sections 4(1) and 6 in their entirety and that judgment has become final."

In the same judgment the Apex Court has examined the issue of delay for approaching the Writ Court in the case before the Apex Court, writ petition was filed after more than 12 years of the acquisition proceedings and the Apex Court found it just and equitable to hold that delay was not fatal so as to deny equitable remedy under Article 226 of the Constitution of India in the facts of that case.

16. It is no doubt true that laches is one of the ground on which the Writ Court may refuse to entertain the writ petition as has been decided under various judgments of the Apex Court, taken note of by the Division Bench of this Court in the case of Lahiri Singh (Supra) but at the same time it is also well settled that non-entertainment of writ petition on the ground of laches is a self imposed restriction by the Writ Court and each case has to be judged on its own merit.

17. In the facts of the case, when we find that while poor farmers had only been paid nearly 3 crores in all for the 800.114 acres of land, which had been acquired. The Government Company M/s. NEPTA Ltd. has disposed of the same land by a deed of conveyanc e for a sum of Rs. 22

crores approximately. Are the Government Companies to be provided land after acquisition only for the purposes of further transfer so that they may earn money by such transfer of property is a serious concern for the Court.

18. In our opinion, the purpose of acquisition of the land of poor farmers can only be for public purpose as defined under the Act, 1894 except where acquisition is under Chapter VII of the Act, 1894. In social welfare of a Country like India, no privilege is to be given to a Government Company to become a trader of the acquired land. Acquisition of land in the garb of public purpose in the facts of the case and thereafter permitting the transfer of the acquired land in favour of private company vitiates the entire acquisition proceedings by the State Government.

19. We have no hesitation to hold that acquisition in the facts of the case is a colourable exercise of powers by the State Government and is held to be void abnitio. Notifications under Sections 4 and 6 of the Act, 1894 are, therefore, liable to be declared as in-operative.

20. In the facts of the case, we feel that interest of justice demands that we reject the contention of the respondents that these writ petitions be dismissed on the ground of laches, for protecting the interest of poor farmers whose land was illegally acquired by colourable exercise of powers by the State Government.

21. However we are also conscious of the fact that in the meantime, respondent no.5, M/s Century Textile & Industry Ltd. which had responded to the invitation of bid must have invested money for setting up of an industry and that the petitioners have been paid compensation by the State Government qua the land acquired.

22. We are also of the opinion that restoration of possession to the farmers of the acquired land under the notifications can be avoided, if the amount received by the Government Company M/s. NEPTA Ltd. as sale consideration i.e. Rs. 22 crores approximately is directed to be received back by the State Government from M/s NEPTA Ltd. and the State Government is directed to distribute the same (Rs. 22 crores approximately) among the farmers in their respective shares with reference to the award made.

23. We, therefore, allow these bunch of writ petitions by holding that the notifications issued under Sections 4 and 6 of the Act, 1894 are held to be invalid and inoperative in the eyes of law, but the relief of restoration of possession of the land to the farmers can be avoided by the State Government by receiving back the sale consideration, which has been obtained by the Government Company, M/s NEPTA Ltd., from the said

company i.e. Rs. 22 crores approximately and to distribute the same among the farmers proportionately as per the award made.

24. The entire exercise may be completed within two months from the date a certified copy of this order is filed before respondent NO.2. In case the State Government fails to do so within the period so permitted herein above, the petitioners would be entitled for restoration of the possession of their land holdings in terms of prayer NO.2.

All these writ petitions are allowed subject to the observations made above.

(Naheed Ara Moonis, J.) (Arun Tandon, J.)

Allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Raju v. The State of Tamil Nadu and ors
Writ Petition No. 24063 of 2005 and
W. P. M. P No. 26235 of 2005

Coram	: Hon'ble Mr. Justice P. D. Dinakaran
Date	: 27. 07.2005
For petitioner	: M/s. D. Geetha, Advocate
For respondent	: Mr. E. Sampathkumar, Advocate

ORDER

1. Petitioner prays for a direction to the respondents to pay the compensation for the death of his daughter Ms. Kirthika, who lost her life in the Tsunami waves on 26.12.2004, as announced by the Government of Tamil Nadu in G. O. Ms. No. 574, Rev (NC III) Department dated 28.12.2004 and the compensation announced by the Union Government.

2. The petitioner is a Sri Lankan Citizen by birth. He came to India along with his family from Srilanka due to the internal disturbances in Sri Lanka in the year 1990. He was placed at the Vaniyaru Refugee Camp, Pappireddipatti Taluk Dharmapuri District in Tamil Nadu on his arrival. While he was living there with his family, his daughter Hirthika was born on 20.01.1992. Her birth has been registered with the Registrar of Births.

3. As he was involved in the fishing business in Srilanka, he moved to the Srilankan refugee camp at Keexhpathupattu, Dindivanam Taluk, Villupuram District along with his family to seek out his livelihood by continuing the fishing business. Since he was not permitted to live inside the camp, he was living on the coast at No. 14, III Cross Street, Mudaliar Kappam, Goonimdu, Villupuram District from 2002 onwards. His daughter Hirthika, aged 13 years was studying in 6th standard in the Government High School, Mudaliarpet. On 26.12.2005, when the tsunami struck the coast, she was swept away by the Tsunami waves and washed away all his belongings along with his house. On 29.12.2004 he came to know about the death of his daughter.

4. As per G. O. Ms. No. 574, Rev. (NC III) Department, dated 28.12.2004 and the compensation announced by the Union Government, the

petitioner is entitled to get compensation of Rupees one lakh. In regard to the same, the Panchayatars, sent a representation-dated 07.02.2005 to the respondents. As there was no response, he gave a complaint to the Tsunami Legal Action Committee (TLAC). According to the petitioner, though he is a Srilankan Refugee, his daughter is a Indian National and hence entitled to the benefits of the Government Order. Hence, the present writ petition.

5. Heard the Learned Counsel for the petitioner as well as the learned Government Advocate on behalf of the respondents.

6. G. O. Ms. No. 574, Revenue (NC.III) Department, dated 28.12.2004 reads as follows:

Revenue (NC III) Department

G. O. Ms. No. 574 Dated 28.12.2004

ORDER

1. A massive tidal wave of extreme ferocity caused by the effect of Earthquake off the Indonesian Coast hit Tamil Nadu and smashed everything in sight to nothing. It is an extraordinary calamity of rare severity and the damage has been unprecedented.

2. An extremely high death – toll has occurred in the space of a few minutes. Nagapattinam District is the worst affected. Cuddalore, Kanniyakumari, Kancheepuram and Chennai Districts have also been severely affected. The damage is along the entire coast line of Tamil Nadu.

3. As per the reports so far received from the District Collectors/ SC & CRA, on 28.12.2004, the death toll is reported to be 4904. The list is enclosed. The Hon'ble Chief Minister has announced an immediate relief at the rate of Rs. 1 lakh per person dead in the family (next of kin) from the Chief Minister's Public Relief Fund.

4. In pursuance of the announcement made by the Hon'ble Chief Minister, an amount at the rate of Rs. 1 lakh per person dead in the calamity is sanctioned from the Chief Minister's Public Relief Fund to the families of the deceased.

5. The Joint Secretary to Government, Finance Department is requested to issue necessary cheques from the Chief Minister's Public Relief Fund to the respective District Collectors.

6. The Collectors of the respective districts are requested to identify the legal heirs of the deceased persons and disburse the amount in the

form of an account payee cheque or a post office saving bank account after obtaining the appropriate stamped receipt from the beneficiaries. The District Collectors shall also prepare a list containing the names of persons dead family – wise and the legal heirs to whom the above relief amount is disbursed with details of address and send the same to the Government in Finance (CMPRF) Department along with the stamped receipt for the amount disbursed duly attested by an Officer not below the rank of Tahsildar.

7. The order issues with the concurrence of the Finance Department vide its U. O. No. 87172 / CMPRF / 04 dated 28.12.2004.

(BY ORDER OF THE GOVERNOR)

R. SATAPATHY,

SECRETARY TO GOVERNMENT

8. In the facts and circumstances of the case, suffice it to direct the respondents to consider the claim of the petitioner in the light of G.O. Ms. No. 574, Revenue (NC III), Department, dated 28.12.2004, if the petitioner is entitled to the benefits of the said Government Order and pass appropriate orders on merits, within a period of eight weeks from the date the date of receipt of copy of this order.

9. The writ petition is disposed of accordingly. No costs Connected WPMP is closed.

Sd/-

Asst. Registrar

IN THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court Of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Sardar Shah Mohammad Khan v. The State of Assam and anr.

Case No: CH.Pet. 1000/2015 District : Kamrup

Category: 10263 (Criminal Revisions for quashing of criminal proceeding)

Coram	: Hon'ble Mr. Justice M.R. Pathak
Date	: 19.05.2016
For petitioner	: Mr.GZ Ahmed
	: Mrs. U Zeeham, Advocates
For respondents	: Mr. K. Munir, Addl. P.P

ORDER

1. Heard Mr. G.Z. Ahmed, teamed counsel for the petitioner as well as Mr. K. Munir, learned Addl. P.P. Assam.

2. On 26.09.2014, one Sri Umesh Chandra Das, Sub-inspector (Border) of Hatigaon Police Station lodged an FIR before the Officer-in-Charge of Hatigaon Police Station stating that vide S/NO.C(B)/126/14/3709-28 dated 18.07.2014 he caused an enquiry locally and confidentially to ascertain the nationality of the accused petitioner, who was residing at Hatigaon area of Kamrup (Metro) District and during enquiry he was interrogated wherein he stated that he is an Afghan national from Zarmilan Angurada, Paktika but he failed to produce any valid travelling documents, like Passport and/or Visa etc. or any other valid documents to prove his Afghanistan nationality and accordingly submitted before the authority to register a case under the provisions of the Foreigners Act, 1946 against the present petitioner. On the basis of the same, Hatigaon P.S. Case No. 300/2014 corresponding to GR No. 10062/14 was registered under Section 14 of the Foreigners Act, 1946. During investigation, the petitioner was arrested on 27.09.2014 and by an order dated 08.10.2014, learned Judicial Magistrate, First Class (JMFC, in short). Kamrup (M), Guwahati enlarged him on bail.

3. After completion of the investigation, the Investigating Officer of said Hatigaon P.S. Case No. 300/2014 on 17.10.2014 submitted the charge sheet of the case vide C.S. NO. 83/2014, finding prima facie materials against the petitioner under Section 14 of the Foreigners Act, 1946.

4. On receipt of the said charge sheet in Hatigaon P.S. Case No.300/2014 corresponding to G.R. Case No. 10062/2014 under Section 14 of the Foreigners Act, 1946 against the present petitioner, by his order dated 08.12.2014, learned Chief Judicial Magistrate, Kamrup (Metro), Guwahati transferred the said case to the learned JMFC, Kamrup (M), Guwahati for its disposal without taking any cognizance of the case. After receipt of the said case record on transfer, learned JMFC, Kamrup (M), Guwahati on 08.12.2014 itself, issued summon in the said G.R. Case No. 10062/2014 to the accused person i.e. the petitioner, fixing 31.03.2015 for his appearance. There is nothing on record to show that summon of the case was served upon the petitioner, but it appears from the record of the case that on 31.03.2014, the petitioner voluntarily appeared before the learned Trial Magistrate, i.e. the Court of learned JMFC, Kamrup (M), Guwahati and by an application prayed before the Court to allow him to remain on previous Court bail. Considering the same, the Trial Court by its order 31.03.2015 allowed the petitioner to remain on his previous Court bail granted earlier on 08.10.2014 fixing 18.04.2015 as the next date of the said G.R. Case. On 18.04.2015, the Trial Court came to a conclusion that there is sufficient ground to presume that the accused petitioner has committed an offence punishable under Section 14 of the Foreigners Act, 1946 and accordingly framed charge under Section 14 of the said 1946 Act against him, which was read over and explained to him, to which, the petitioner pleaded not guilty and claimed to be tried. The Trial Court accordingly fixed the matter on 22.05.2015 for evidence of the prosecution.

5. In the meanwhile, the petitioner on 17.01.2015 submitted a complaint before the State Police Accountability Commission, Assam, Guwahati against the informant Sri Umesh Chandra Das, Sub-Inspector (Border), the Opposite party No. 2, who filed the FIR of the case dated 26.09.2014 before the Officer-in-charge, Hatigaon Police Station, for falsely implicating him in the case as well as for filing the charge sheet in the said Hatigaon P.S. Case No. 300/2014 under Section 14 of the Foreigners Act, 1964 stating that he is a poor Afghan Refugee and the Indian authority has issued him a Refugee Certificate bearing Certificate No. HCR/305-10C01482 dated 04.08.2010 valid up to 19.08.2016 and the informant of the said Hatigaon P.S. case in the night of 26.09.2014 called him on 2/3 occasions demanding money from him and was threatened that failing the same, he shall be implicated in a false case for which he had to go to jail and as the petitioner denied such payment to said Sri Umesh Chandra Das, Sub-Inspector (Border), police arrested him and send him to jail.

6. In the said application dated 17.01.2015 before the State Police Accountability Commission, Assam, the accused petitioner also stated that he had all valid documents with him, which were seized by police but were not mentioned in the seizure list. The petitioner submitted that all his valid documents were granted by the United Nation High Commissioners for Refugees (UNHCR) in its New Delhi Office which are duly registered and pursuant to the same, the Senior Superintendent of Police and Foreigners Registration Officer, DSB, Guwahati City vide communication under Memo No. DSB/City/VII/PN/2014/4215 dated 03.07.2014 allowed the petitioner to stay in his address at Hatigaon up to 31.12.2014 for his business purpose directing him to leave Guwahati on or before 31.12.2014 intimating the said authority.

7. The State Police Accountability Commission in the SPAC Case No. 04/2015 (arising out of petitioner's application dated 17.01.2015) after hearing the parties and consideration of the matter vide its order dated 06.08.2015 came to the conclusion that the informant Sri Umesh Chandra Das, S.I. (UB) who was in the Hatigaon Police Station at the relevant time, without properly scrutinizing the documents, superficially conducted the verification, without giving due consideration to the certificates like the Refugee Certificate of the petitioner issued by the UNHCR dated 04.08.2010 referred above as well as the communication dated 03.07.2014 issued by the Senior Superintendent of Police & Foreigners Registration Officer, Guwahati City, filed the FIR in the said Hatigaon P.S. Case No. 300/2014, and arrested the petitioner on 27.09.2014 before the expiry period of his refugee certificate granted by the UNHCR as well as his before his expiry of the period of his stay at Guwahati up to 31.12.2014 as granted by the Sr. S.P. of Police & Foreigners Registration Officer, Guwahati City as wholly unjustified since there was no urgency in arresting the petitioner on 27.09.2014 before such expiry of the target date. By the said order dated 06.08.2015, the said Commission also came to the finding that the said informant Sri Umesh Chandra Das, committed serious misconduct, for which he is liable for departmental proceeding and observed that the Police Headquarter may submit additional facts/ views if any under the provisions of Section 82 of the Assam Police Act, 2007.

8. After receipt of the copy of the said order dated 06.08.2015 of the Assam State Police Accountability Commission, Guwahati; the petitioner approached this Court in this petition under Section 482 Code of Criminal Procedure, read with Section 397 of the Code of Criminal Procedure, against the legality & validity of the FIR dated 26.09.2014 with regard to Hatigaon P.S. Case No 300/2014 as well

as charge sheet dated 17.10.2015 filed in the said Hatigaon P.S. Case and the order dated 18.04.2015 by which the Trial Court i.e. the Court of JMFC, Kamrup (M), Guwahati framed the charge against the petitioner under Section 14 of the Foreigners Act, 1946 in the G.R. Case No. 10062/2014, arising out of said Hatigaon P.S. Case.

9. Perused the records of G.R. Case No 10062/2014 arising out of Hatigaon P.S. Case No. 300 of 2014. To provide for impartial and efficient police service safeguarding the interest of the people making the police force professionally organized service oriented and accountable to the law, the State Government formulated the Assam Police Act, 2007 and it came into force with effect from 31.08.2007 after its publication in the Assam Gazette on the even date. Sections 69 to 89 under Chapter-VIII of the said Assam Police Act, 2007 deals with Police Accountability. Section 70 of the said 2007 Act provides for Police Accountability Commission and the Section 78 provides for function of the said Commission, which provides that the Commission shall enquire into allegations of serious mis-conduct against police personnel either on suo-moto or on a complaint received from - a) a victim or any person on his behalf, b) the National or State Human Rights Commission, c) the police or d) the any other source. Amongst others arrest or detention without due process of law is considered as a serious mis-conduct. Section 79 of the said 2007 Act provides for Powers of the Commission which reads as follows:

"In the cases directly enquired by it, the Commission shall have all the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908 and in particular in respect of the following matter -

a) summoning and enforcing the attendance of witnesses and examining them on oath,

(b) discovery and production of any document,

(c) receiving evidence on affidavit,

(d) requisitioning any public record or copy thereof from any office,

(e) issuing authorities for the examination of witnesses or documents and

(f) any other matter as may be prescribed.

10. Section 82 of the Assam Police Act, 2007 provides for Decisions and Directions of the Commission. Section 88 of the said 2007 Act provides for Rights of the Complainant. Proviso to Section 88 of the said 2007 Act lays down that "no complaint shall be entertained by the Commission or the District Authority if the subject matter of the complaint is being examined by any other Commission, or any Court.

In the present case, the petitioner filed his complaint before the Chairman of the Assam State Police Accountability Commission on 17.01.2015 and as seen from the record that up to 31.03.2015, the said G.R. Case No. 10062/2014 arising out of aforesaid Hatigaon P.S. Case No. 300/2014 was neither under examination before any other Commission nor in any Court of law, not even in the present case before the Trial Court, i.e. the Court of learned JMFC, Kamrup (M) Guwahati and it is only on 31.03.2015 the Trial Court recorded the presence of the accused petitioner in the said case, whereas it is only on 18.04.2015 in the said G.R. Case No. 10062/2014, the Trial Court framed the charge against the accused petitioner for the offence publishable under Section 14 of the Foreigners Act, 1946. As such it is found that there was no illegality in entertaining the complaint of the petitioner dated 17.01.2015 by the Assam State Police Accountability Commission, Guwahati.

11. After hearing the learned counsel for the parties and considering the entire aspects of the matter and considering the Refugee Certificate under No. HCR/302-10C01482 dated 04.08.2010 issued by the United Nations High Commissioner for Refugees (UNHCR) by its New Delhi office issued in favour of the petitioner being valid up to 19.08.2016 as well as the communication issued by the Senior Superintendent of Police & Foreigners Registration Officer, Guwahati City under Memo No. DSB/City/ VII/PN/2014/4215/C dated 03.07.2014, which are not in dispute, and on the finding of the Assam State Police Accountability Commission, by its order dated 06.08.2015 passed in SPAC Case No. 04/2015 arising out of petitioner's application dated 17.01.2015, the Court is of the considered view that the FIR dated 16.09.2014 filed by the informant/O.P. No.2 on the basis of which Hatigaon P.S. Case No 300/2014 under Section 14 of the Foreigners Act, 1946 was registered, petitioner's arrest and his detention on the basis of said P.S. Case, as well as the Charge Sheet No. 83/2014 dated 17.10.2014 filed in the said Hatigaon P.S. Case and the order dated 18.04.2015 passed by the Trial Court i.e. the Court of JMFC, Kamrup (M) Guwahati in said G.R. Case No. 10062/2014 framing charge under Section 14 of the Foreigners Act, 1946 against the petitioner, prior to the validity period of his stay at Guwahati i.e. up to 31.12.2014 and before the validity period of UNACR's Refugee Certificate granted to him up to 19.08.2016 are illegal and bad in law.

12. Accordingly, the FIR dated 26.09.2014 with regard to Hatigaon P.S. Case No 300/2014 under Section 14 of the Foreigners Act, 1946 as well as the Charge Sheet No. 83/2014 dated 17.10.2014 submitted by the concerned 10. in the said Hatigaon P.S. Case No. 300/2014 as well as the order dated 18.03.2014 passed by the Trial Court in the Court

of JMFC, Kamrup (M) in G.R. Case No. 10062/2014 arising out of said Hatigaon P.S. Case No. 300/2014 farming charge under Section 14 of the foreigners Act, 1946 against the petitioner are hereby set aside and quashed.

13. However, as the petitioner has not placed any document before the Court seeking permission to stay at his residential address at Hatigaon, Guwahati beyond the period of 31st December, 2014 as provided by the Senior Superintendent of Police & Foreigners Registration Officer, DSB.. Guwahati City vide his communication dated 03.07.2014 noted above nor placed any communication and/or order extending his stay at his said address at Hatigaon, Guwahati issued by the said Sr. S.P. & Foreigners Registration Officer, Guwahati City: the petitioner is directed to leave Guwahati on or before 31st May, 2016 with the intimation to the said Superintendent of Police & Foreigners Registration Officer, DSB., Guwahati City, if not already left Guwahati in terms of his said communication dated 03.07.2014.

14. With the aforesaid observation and direction, this Criminal Petition stands disposed of.

15. The Registry shall send down the Case Records of G.R. Case No. 10062/2014 arising out of Hatigaon P.S. Case No. 300/2014 to the Court of learned Judicial Magistrate, 1st Class, Kamrup (Metro) Guwahati with a copy of this order.

Sd/-

Justice M. R. Pathak.

Judge

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

T. Udhayakala v The District Collector and Ors

HCP (MD) No.815 of 2016

Special Original Jurisdiction

Coram : Hon'ble Mr.Justice K.K. Sasidharan

Hon'ble Mr.Justice B.Gokul Das

Date : 11.07.2016

Petition filed under Article 226 of the Constitution of India, praying this court to issue a WRIT OF HABEAS CORPUS, directing the respondents to produce the person or the body of the detenu / petitioner's husband namely Thayapararaj, S/o. Kathirvelu, aged about 35 years before this Hon'ble Court and set him at liberty.

ORDER

This petition coming on for hearing on this day, upon perusing the petition, affidavit filed in support thereof, typed set of the case and the earlier order of this court and upon hearing the arguments of M/s A.RAJINI, Advocate for the petitioner and of Mr.K. Chellapandian, Additional Advocate General assisted by Mr.C.Mayilvahana Rajendran, Additional Public Prosecutor on behalf of the Respondents, this court made the following order:

ORDER

(Order of the Court was made by K.K. SASIDHARAN, J.)

1. We have passed the following order on 04 July, 2016, directing the appearance of the Joint Secretary to Government, Public (SC) Department, Chennai.

   "This Habeas Corpus Petition is filed to direct the respondents to produce the body of the detenu, by name Thayapararaj and set him at liberty.

2. When this Habeas corpus Petition came up for actission on 29 June, 2016, the learned Additional Public Prosecutor submitted that the detenu is presently confined at the Special Camp, Trichy, pursuant to the order passed by the Public (SC) Department, dated 01 March, 2016. The matter was adjourned to file a counteraffidavit and produce

the records.

3. When the matter was taken up for consideration, the learned Additional Public Prosecutor, by placing reliance on the order in G.O.NO.SR.III/61-2/2016, Public (SC) Department, dated 01 March, 2016, submitted that pursuant to the order passed by the Government, the detenu is lodged at the Special Camp for Sri Lankan Immigrants/ refugees at Trichy.

4. The order dated 01 March, 2016, does not contain any reason much less justifiable reason to lodge the detenu at the Special Camp. Even according to the respondents, the detenu has undergone the punishment and no case is pending against him.

5. The learned Additional Public Prosecutor is not in a position to justify the detention of the detenu. The order dated 01 March, 2016 is bereft of details. We, therefore, direct the Joint Secretary to Government, Priblic (sc) Department, to appear before us in person at 10.30 a.m. on 11 July, 2016, along with the relevant file to justify the detention of Thiru.Thayapararaj, 3/o. Rathirvel, who is the husband of the petitioner.

6. We direct the Superintendent of Police, Branch CID, Chennai and the Officer In-charge of the Special Camp for Sri Lankan Immigrants/ refugees, Trichy, to produce the detenu before us at 10.30 a.m., on 11 July, 2016.

7. Post on 11 July, 2016.

8. When the Habeas corpus Petition was taken up for hearing today, the learned Additional Advocate General, on instructions, submitted that the respondents are prepared to arrange accommodation to the petitioner at Trichy, so as to enable her to visit the detenu every day from 10.00 a.na., to 05.00 p.m. The learned Additional Advocate General, further, submitted that it would not be possible to permit the detenu to stay with the petitioner and family at Mandapam on account of security reasons. In short, it is the contention of the learned Additional Advocate General that it would not be possible for the police to watch the movement of the detenu, in case he is permitted to stay with the petitioner at Mandapam.

9. The petitioner has produced a copy of the proceedings, whereby and whereunder, a house was allotted to her by the District collector, Ramanathapura, to stay with her children. The house is situated at Door No.OB- 2012 in Mandapam Refugee Settlement.

10. The petitioner, who appeared as party-in-person, submitted that the accommodation given to her is situated inside the Mandap am camp

and it is well protected by the Branch police. The petitioner, further, submitted that it would not be possible to enter the area without the permission of the police. Similarly, it would not be possible to the inmates of Carop, Refugees and other residents of Marcapaw Refugee Settlement to leave the place without the permission of knowledge of the police. In short, it is the contention of the petitioner that the Mandapam camp, where she is presently residing, is a high security area where there are sufficient policemen posted to watch the movement of the inmates and those who are residing in the houses allotted to the refugees and others like her and as such, the detenu can be permitted to stay there.

11. The detenu is presently detained at the Trichy Special Carap along with other inmates effective 04 March, 2016, vide order dated 01 March, 2016.

12. The detenu was earlier involved in a case in Crime No.27 of 2014 under Section 14 of the Foreigners Act 1946 and Section 3 (a) r/w 6(a) of the Passport (Entry into India) Rule, 1950, which resulted in his conviction by the learned Judicial Magistrate, Rameswaram. The Certificate issued by the superintendent of Prisons, Central Prison-1 (convict), Puzhal, dated 08 October, 2015, indicates that the detenu has undergone the imprisonment and he was released on 08 October, 2015. There are no other cases pending against him.

13. The core question is as to whether we should permit the detenu to reside along with the petitioner and her three children either at Trichy or at Mandapam on humanitarian ground.

14. The learned Additional Advocate General submitted that the respondents would provide accorterodation to the petitioner at Trichy, so as to enable her to meet the detenu everyday from 10.00 a.m. to 05.00 p.u. It is the case of the state that it would not be possible to keep surveillance over the detenu, in case he is shifted to Mandapam.

15. The learned Additional Advocate General subsequently, on instruction, submitted that the respondents would arrange a house at the Quarantine Camp, Mandapam, so as to enable the petitioner to stay there with the detenu.

16. The records produced before us by the respondents indicate that the State is taking steps to deport the petitioner and the detenu to Sri Lanka, pursuant to the request made by the Foreign Government. In fect, the learned Additional Advocate General fairly submitted that the Home Department has already taken up the issue with the Government and every effort would be taken to deport the detenu and the petitioner to Sri Lanka at the earliest. Such being the factual

position, we are of the view that appropriate orders, to take care of the interest of the State as well as the detenu, should be passed in this matter. We are also of the view that no prejudice would be caused to the state by transferring the detenu to Mandapam from Trichy.

17. We direct the Joint Secretary to Government, Public (SC) Department, Government of Tamil Nadu and the respondents to transfer the detenu, by name Thayapararaj from the Special Camp at Trichy to the house allotted to the petitioner bearing Door No.OB-20/2 in Mandapam Refugee Settlement at Ramanathapuram in Ramanathapuram District forthwith and in any case, by 05.00 p.m., on 13 July, 2016. The movement of the detenu after transfer would be curtailed, in view of the pending proceedings initiated to deport him to Sri Lanka.

18. We direct the second respondent to keep surveillance over the detenu by providing round the clock security.

19. We direct the detenu to obtain permission from the Superintendent of Police, Q Branch CID, Chennai or from this Court, in case he wanted to undertake travel to Chennai to appear before the Sri Lankan Embassy, in connection with the application stated to have been submitted for issuing a passport to travel to Sri Lanka. In short, without the perruission of the Superintendent of Police, Q Branch CID, Chennai Or this court, the detenu shall not move from the residence bearing Door No.OB-20/2.

20. It is open to the respondents to take all the necessary steps to ensure the presence of the detenu in the hore bearing Door No. OB-20/2 till he is deported to Sri Lanka, pursuant to the pa request made to that effect by the Sri Lankan authorities.

21. Mr. Saleem, Joint Secretary to Government, Public (SC) Department, Secretariat, Chennai, is present in court today. His further appearance is dispensed with.

22. Post on 14 July, 2016 'for reporting compliance'

sd/-

11/07/2016/ true copy /

Sub-Assistant Registrar (C.S.)

Maduria Bench of Madras High Court,

Madurai-625 023.

IN THE HIGH COURT OF DELHI AT NEW DELHI

Arya Khatami v. Union of India

W.P. (C) 10889/2017 and CM Nos. 44592-93/2017

Coram : Hon'ble Ms. Justice Indermeet Kaur

Date : 07.12.2017

ORDER

1. Petitioner is aggrieved by the order dated 09.11.2017 wherein an Exit Permit has been issued to the petitioner, he has been intimated to book his air ticket to proceed out of the country. This order had been communicated by the Police Inspector, Pune City.

2. Learned counsel for the petitioner points out that the petitioner is admittedly an UNHCR refugee; he has been living in India since the last 17 years. He has also applied for refugee status in Canada which has since been approved.

3. On advance notice, learned counsel for the respondent has put in appearance. Learned counsel for the respondent rightly points out that this order having been communicated to the petitioner by the Police inspector, Pune City and the petitioner also being a resident of Pune, the petition before this court would not lie.

DECEMBER 7, 2017 INDERMEET KAUR, J

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Arya (Aria) Khatami v. Police Inspector S.B.H. Pune and Ors

Criminal Writ Petition No. 5298 Of 2017

Criminal Appellate Jurisdiction

CORAM : Hon'ble Mr. Justice R.M. Savant

: Hon'ble Mr. Justice Sarang V. Kotwal

DATE : 06.03.2018

1. The learned APP Mrs. Sonawane tenders a letter dated 04/03/2018 of Shri S S Nimbalkar – Police Inspector, Vigilance and Prosecution Cell, FRO SB-II, Pune City wherein in the concluding paragraph it has been stated to the following effect :-

   "The office of FRO, Pune City has no objection regarding Migration of Mr. Arya Khatami to Canada and Exit permit will be issued to him as per his application"

2. In view thereof, the learned counsel appearing on behalf of the Petitioner Shri Kranti L.C. seeks withdrawal of the above Writ Petitioner. The above Writ Petitioner is accordingly allowed to be withdrawn and dismissed as such. The letter dated 04/03/2019 of Shri SS Nimbalkar – Police Inspector, Vigilance and Prosecution Cell, FRO SB-II, Pune City is taken on record and marked as "X".

3. Learned counsel for the petitioner accordingly seeks permission of this court to withdraw this permission. Liberty is granted to the petitioner to approach the appropriate forum in accordance with law. Meanwhile no coercive steps will be taken against the petitioner for the next four weeks,

   Petition disposed of in the above terms.

   Dasti under the signatures of the Court Master.

[SARANG V. KOTWAL, J] [R.M.SAVANT, J]

IV. BAIL

Release on bail is important for refugees and asylum seekers. While bail is a matter of right in bailable-offences under Section 436 Criminal Procedure Code (CrPC), with respect to non-bailable offences the discretion lies upon the officer in charge of the police station or the Magistrate, under Section 437 CrPC. Denial of bail most often than not leads to further psychological and physical sufferings among refugees and asylum seekers. The High Courts in India in numerous cases have released asylum seekers/refugees on bail. The table below outlines some of the bail cases which is followed by a summary and the orders/judgements.

Name of the case	Court and date of order	Summary of the order/ judgement
Mr. Malika Marui Safi vs State Of Delhi	Delhi High Court 25 April 1997	The Petitioner was arrested u/s 419, 420, 468, 471 of the Indian Penal Code and Section 14 of the Foreigners Act, 1946. The Petitioner informed that UNHCR has recognized him as a refugee and is willing to pay the bail bond on his behalf. The Court admitted the Petitioner to bail.
Premanand & Anr vs State of Kerala	Kerala High Court 2013 (3) KLJ 543 12 July 2013	Accused u/s 13 and 14 of the Foreigners Act read with section 3 of the Passport (Entry to India) Act, 1920. The Court highlighted that a refugee stands of a different footing from a foreigner. Further, importance of human rights as well as national security was highlighted. Thereby bail was allowed.
Meri Lal Talong and Anr vs State of UP	Allahabad High Court 11 September 2014	Two Burmese refugees were held guilty by the Trial Court under the Narcotic Drugs and Psychotropic Substances Act. Based on humanitarian grounds and absence of any past criminal antecedents enlarged them on bail during pendency of the appeal.

IN THE HIGH COURT OF DELHI AT NEW DELHI

Mr. Malika Marui Safi v. State of Delhi

Crl.M. (M) No.1135/97

Coram	: Hon'ble Mr. Justice Manmohan Sarin
Date	: 25.04.1997
For Petitioner	: Mr. Deepak Kumar Thakur, Advocate
For Respondent	: Mr. Anil Soni, Advocate

1. The petitioner was arrested pursuant to a report on the complaint of Royal Netherlands Embassy, Chanakyapuri. FIR No.44/97 under Sections 419,420,468,471 IPC and section 14 Foreigners Act, 1946 was registered against the petitioner.
2. The petitioner was admitted to bail vide order dated 13th February, 1997 by the Additional Session Judge on executing a bail bond in the sum Rs20, 000 with one surety in the like amount. Vide order dated 9th April 1997, the learned Additional Sessions Judge declined the prayer for deposit of the amount instead of executing the bail bond and furnishing surety, as ordered earlier, but reduced the amount to Rs.10, 000.
3. Petitioner has been recognised as a refugee by the United Nations High Commission of Refugees. Certificate to that effect has been filed. The petitioner's son is also said to be ailing. Medical certificate to that effect is also filed.
4. Learned counsel submits that the United Nations High Commission of Refugees is willing to pay the sum of Rs 20,000/ on behalf of the petitioner.
5. Considering the fact that the petitioner is a refugee and is unable to produce local surety, I admit the petitioner to bail subject to his depositing a sum of Rs 20,000/ in court and also executing a personal bond for the said amount. Petitioner is directed to report once a week to the S.H.O, Police Station Chanakyapuri and would not leave the town without the permission of the Trial court.
6. Petition stands disposed of.

April 25, 1997 Sd/- Manmohan Sarin

Judge

IN THE HIGH COURT OF KERALA

REPORTABLE

Premanand & Anr. v. State of Kerala

2013 (3) KLJ 543

B.A. No. 4210 of 2013

July 12, 2013

Coram	: Hon'ble Mr. Justice S.S. Satheesachandran
Date	: 12.07.2013
For Petitioner	: Salim V.S.
	: H. Nujumudeen, Advocates
For Respondent	: T. Asaf Ali (DGP)

ORDER

1. Petitioners are two among the accused (A3 and A6) in Crime No. 1404/2013 of Aluva East Police Station registered for offences punishable under sections 13 and 14 of the Foreigners Act read with section 3 of the Passport (Entry to India) Act,1920. They have filed the above application seeking their enlargement on bail under section 439 of the Code of Criminal Procedure, for short the Code.

2. Getting reliable information that some Srilankan citizens are staying without permission, in a lodge, namely, Ambili Tourist Home near private bus stand, Alwaye, a police party headed by Sub Inspector of Police, Alwaye Police Station went over to that lodge. A group of Srilankan citizens including petitioners, ten in number, were found in that lodge without having valid passports or travel documents. Their interrogation disclosing that one Ramesh had brought them from Tamilnadu promising to send them to Australia all of them were arrested. Later on production before the magistrate they were remanded to judicial custody. Petitioners applied for bail and it was turned down by the magistrate vide Annexure A8 order. They have therefore approached this court seeking bail.

3. I heard Sri V.S. Salim, learned counsel for petitioners and also Sri T. Asaf Ali, State Public Prosecutor.

4. Learned counsel for petitioners submitted that some of the accused in the crime who were arrested with them had already been enlarged on

bail by the magistrate. Petitioners are refugees and they are not liable to be proceeded under the Foreigners Act and also the Passport Act since they were forced to flee from their mother country to save their lives and also fear of prosecution when a civil war was going on in that country, is the submission a of counsel. Exploiting their situation while they were in a refugee camp in Tamilnadu one Ramesh approached them promising to arrange for their trafficking to Australia. They were made to believe that they would get employment and also a secured peaceful life in Australia. After they reached Alwaye and while put up in the hotel police arrested them and eversince they are continuing in custody. Proceedings against petitioners under the Foreigners Act and the Passport Act are an abuse of process of law and violation of b human rights when they have the status of refugees is the submission of counsel. Though there is no law as such governing the refugees in the country rights conferred on refugees under the United Nations International convention and its Protocol have to be recognised and respected, submits the counsel. Judicial pronouncements made by apex court in Vishaka and Others v. State of Rajasthan and others (1997) 6 SCC 241).:1997 ICO 205 and Madras High Court in A.C. Mohd. Siddique v. Government of India and others, 1998 (47) DRJ 74 in which rights conferred under the International Convention and Protocol are recognised, is relied by counsel to urge for granting bail to petitioners.

5. Learned State Public Prosecutor fairly submitted that the case of a refugee proceeded against for offences under the Foreigners Act and also the Passport Act may demand a different approach from that of a 'foreigner' as such having regard to human d right issues involved. But, still, since no law governing refugees has been formulated by legislation and refugees too fall within the definition of foreigner, on infringement of provisions of the Foreigners Act or the Passport Act by them, they are liable to be proceeded under the law of the land. Petitioners, whose status claimed as refugees is not disputed, were parties to the plan conceived for their illicit trafficking to a foreign country and they deserted their refugee camp, submits the Public Prosecutor. If at all bail is granted to e them taking into consideration that they are refugees, and human rights issues involved, adequate conditions be imposed with directions for sending them back to refugee camp and handing them over to authorities supervising such camp asking to keep a close watch of them and make them available for investigation and also trial, submits Public Prosecutor. Commissioner of Rehabilitation of Refugees, Chepauk, Chennai is the authority to whom such directions are to be issued for making them available for investigation /trial of the case is the further submission. Leamed Public Prosecutor also submits that he contacted the authorities and they have

expressed readiness to take petitioners, refugees, if released on bail, to monitor and keep a watch over them and make them available for investigation/trial of the case.

6. Status of petitioners as refugees is not disputed. No legislation has been enacted by g the Parliament governing the refugees so far and that being so all existing Indian laws apply to them also. Refugees too fall within the definition of "foreigner" under the Foreigners Act. Provisions of that Act and also the Orders passed thereunder apply to them as also. Section 2(a) of the Foreigners Act, 1946 defines a foreigner as 'a person who is not a citizen of India.' However, it is to be noticed, when issues relating to or concerning refugees arose for consideration the apex Court emphasising that the right to life' enshrined under Article 21 of the Constitution mandated that no one can be deprived of his or her life and personal liberty without the due process of law, has applied the common law precepts and also the obligations arising from international law under United Nations 1951 Convention and its 1967 Protocol, though India is not a signatory to them.

7. Article 1 paragraph 2 of the United Nations 1951 Convention defines the "refugee' thus:

   "A person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country."

   Where a person is forced to leave his mother country for the reason of being b persecuted for one or other reason stated under the above definition, and takes refugee in our country a number of factors have to be taken into account in considering the applicability of the laws like Foreigners Act and the Orders thereunder against such person though he too falls within the definition "foreigner" as not a citizen of India. He stands on a different footing from a foreigner or any illegal emigrant who entered the country without valid passport or travel document. Though the definition 'foreigner' under the Foreigners Act takes in a refugee also the circumstances under which he was forced to leave his mother country and given the status of refugee on entry into the country, necessarily have to be given due consideration taking note that every single situation pertaining to refugees is replete with human rights as well. But all the same too much humanitarian consideration in the case of refugees is also not possible without having regard to the considerations of national security. We cannot overlook the security aspects involved, more so in the present scenario where external agencies with the aid of anti-national elements inside the country

are making attempts to destablise the foundation of the republic. A dispassionate view having regard to the security considerations and also human rights issues involved has to be taken in matters connected with the refugees by the law enforcement agencies and more so by the courts when any issue relating to them arise for consideration.

8. The Supreme Court of India has in number of cases stayed deportation of refugees even where claim for refugees status was pending determination provided a prima facie case has been made out for grant of 'refugees' status. In Chakma refugee case Supreme Court declared that no one shall be deprived of his or her life or liberty without the due process of law.

9. Indian Constitution does not contain any specific provision which obliges the state to enforce or implement treaties and conventions. The Supreme Court has held in a number of decisions in Gramophone Company of India Ltd v. Birendra Bahadur Pandey, AIR 1984 SC 667::1984 ICO 325, Jolly George Varghese v. Bank of Cochin, AIP 1980 SC 470::1980 ICO 41 that international convention law must go through the process of transformation into municipal law before such international law becomes internal law. The decisions are also to the effect that in a case where there is no conflict between international law and domestic law and international law sought to be applied are not in contravention of the spirit of the Constitution the court may apply international law more so when it is necessary to advance the ends of justice. If there is conflict between internal law and international law, no doubt internal law has to prevail.

10. Though the present proceedings is one relating to bail applied by the accused in a crime registered and pending investigation, having regard to the status of petitioners proceeded with as refugees human rights issues involved cannot at all be lost sight of, but, of course, with consideration of national security as well. When petitioners are shown to be refugees and, further, as having been lodged at earmarked refugee camp, in all probabilities, with rules and guidelines regulating their activities, the question whether they have violated such rules and thus liable to be prosecuted thereof under any law for the time being in force may also arise for consideration. Now that learned Public Prosecutor has stated that the competent authority dealing with Srilankan refugees, Commissioner of a Rehabilitation of Refugees, Chepauk, Chennai has promised to receive their custody and keep a close watch over them, and make them available for investigation of the crime/ trial, interests of justice, at this stage, demand handing over petitioners to such authority after their release from custody. The investigating agency has also to look into whether petitioners and other accused in

the crime who have the status of refugees are liable to be prosecuted under the Foreigners Act and also the Passport Act or under any other penal law, in view of their status as refugees. No doubt the State Public Prosecutor has to give them proper legal advice having regard to the totality of the facts and circumstances involved in the case and also looking into the broader aspects involved, both human rights issues and national security in matters relating to refugees.

11. In the circumstances the petition is disposed with following directions:

Petitioners, both of them, shall execute bond for Rs.10,000/- each for their appearance as and when directed by the court. On execution of the bonds, they shall be taken from the jail to Chennai and handed over to the Commissioner of Rehabilitation of Refugees, Chepauk, Chennai or any of his subordinate competent and authorised to receive their custody. The investigating agency shall obtain an undertaking from the Commissioner of Rehabilitation of Refugees, Chepauk, Chennai to cause production of petitioners before the magistrate, if need be, and also for making them available for investigation or for trial of the case and produce it before the magistrate within two weeks from the date of release and handing over of petitioners as directed above.

The directions given above have to be taken note of by the magistrate for passing appropriate orders with respect of other accused, who have the status of refugees, but, already released on bail, if any application is moved by investigating agency for handing them over to the authority referred to above.

IN THE ALLAHABAD HIGH COURT

Meri Lal Tan Talong and Another v. State of U.P.

Criminal Appeal No. - 2423 of 2014

Coram	: Hon'ble Mr. Justice Het Singh Yadav
Date	: 11.09.2014
For petitioner	: Dr. C.P. Upadhyay, Advocate
For respondent	: Sanjai Kumar Singh, Govt. Advocate

1. Heard Dr. C.P. Upadhyay, learned counsel for the applicants/appellants and Sri Sanjay Kumar Singh, learned counsel for the Narcotics Control Bureau (in short 'N.C.B.') on bail prayer of the appellants. I have also been taken through the record.

2. The prosecution version briefly stated as emerges from the impugned judgment is that on 15.3.2013, a complaint/information from Satish Kumar, Branch Manager, North Eastern Carrying Corporation Ltd. (in short 'N.E.C.C.') was received in the office of Zonal Director, N.C.B. It was stated therein that some parcels having bilty no. 13869376 dated 12.3.2013 were lying at the godown of N.E.C.C. at Sahibabad (Ghaziabad) which were destined to Ms. Khiang Than Collection New Market Aizwal (Mizoram containing footwears and advertisement goods etc. booked by Dimple Times Perfume centre, may contain drugs. The Superintendent, N.C.B. marked the complaint to Sri Arpan Sangwan, Investigating Officer N.C.B. and directed him to take necessary action as per law. Authorization for search of the cartons lying at N.E.C.C. Godown was also issued in favour of the investigating Officer. A search team was constituted who raided the godown of N.E.C.C. at about 20.30 hours. The investigating officer met with the informant Satish Kumar and Azamuddin Ansari, employees of N.E.C.C. and disclosed them the purpose of their visit. The cartons relating to the consignment no. 13869376 in all 17 in number, were produced before the team and they were checked by the team in the presence of aforementioned two independent witnesses. Out of 17 cartons, 16 cartons were found containing white tablets concealed inside the goods contained in the cartons. With the help of field testing kit, it was found the tablets of Pseudoephedrine, a controlled substance under the N.D.P.S. Act (in short 'the Act') and its total weight was 275.09kg. The parcels were seized and a seizure memo and panchnama were

prepared on the spot. After conducting the spot proceedings, seized cartons and controlled substance were kept in the 'malkhana' of N.C.B. Thereafter, on 1.4.2013 at about 10.45 A.M., the investigating officer of N.C.B. received information from Sri P.L. Sharma of N.E.C.C. that one lady Meri was making enquiry about the parcels booked by bilty no. 13869376 dated 12.3.2013 for Aizwal and she is likely to come to N.E.C.C. godown office at about 11.30 hours to 12.30 hours. This information was reduced in to writing by the investigating officer and conveyed it to the Superintendent, N.C.B., who directed him to constitute a team and take action as per law. The investigating officer along with team arrived at the godown office of N.E.C.C. at about 12.15 hours and met with Azimuddin Ansari and apprised him about the information given from the office of N.E.C.C. The accused persons at about 12.00 hours had come to the office of N.E.C.C. godown and were making inquiry about the parcels in reference from the officials of N.E.C.C. In the meanwhile, the N.C.B. team reached there. The investigating officer enquired their names on which they disclosed their identity as Meri Lal Tan Talong and Japheth. The investigating officer introduced himself to the accused persons and also informed them about the seizure of the controlled substance from the parcels about which they were enquired. Both the accused persons served with the notice under Section 50 of the Act and explained them their legal right of option to give their search before a Gazetted officer or a Magistrate. But they declined the offer and offered that the N.C.B. team may take their search. Their search were made as per law but nothing incriminating was recovered from them. They both were served summons as per provisions of Section 67 of the Act on the spot and on the basis of recovery of controlled substance already made, their statements under Section 67 of the Act were recorded. Both made voluntarily statement and admitted their involvement in the commission of the crime. Accordingly, they were arrested on the spot. The investigating officer also recorded voluntarily statement of independent witnesses under Section 67 of the Act. The accused persons were produced before the court concerned on 2.4.2013. They were put to trial on the complaint filed by the investigating officer in the court concerned for the offences under Sections 9A, 25A and 29 of the Act read with Section 200 of Code of Criminal Procedure, 1973. The prosecution got examined as many as 14 witnesses, out of whom some are independent public witnesses. The trial court concluded the trial held them guilty under Section 25A read with Section 29 of the Act and sentenced them to undergo 7 years rigorous imprisonment and fine of Rs. 1 lac each with a default sentence.

3. Dr. Upadhyay strenuously urged that as per prosecution version itself the alleged controlled substance was neither recovered from the possession of the appellants-applicants nor it was recovered on their pointing out. As per statements said to have given in writing by both of the applicants, purported to be under Section 67 of the Act, the applicants were not the consigners of the consignment from which the controlled substance was allegedly recovered. As per the testimony of the employees of N.E.C.C., who are the star witnesses of this case and identify the applicant- Meri Lal Tan Talong, two women had come to their office to book the consignment no. 13869376 containing 17 parcels to Aizawal.

4. However, the applicant- Meri Lal Tan Talong was not the consigner but another woman with whom Merry came to their office was the consigner. The applicant Japheth had not come to the office of N.E.C.C. along with the consigner to book the consignment. There is even not a shred of evidence against the applicants that they had contravened any order made under Section 9A of the Act. It is not the case of the N.C.B. that they were found in possession, transport, import, export, sell, purchase, consume, use, storage, distribution, disposal or acquisition of any controlled substance. There is also no evidence against the applicants regarding committing abatement of any offence or that they were party to any criminal conspiracy to commit any offence punishable under Section 29 of the Act. Both the applicants are Burmese refugees and were daily wagers. The applicant Meri Lal Tan Talong is a widow and mother of a kid aged about 5 years. As per her statement allegedly made under Section 67 of the Act, she is extremely poor and was engaged to help her employer in the purchase of shoes, etc. from the market at Delhi. There is no one to look after her kid. So far as the applicant Japheth is concerned, as per the prosecution version he never came to the office of N.E.C.C. to book the consignment in reference. The officers of N.C.B have concocted the entire theme of this case and foisted a false case upon them just to make a show of their good work. The offence for which the applicants have been convicted is punishable up-to 7 years imprisonment and fine. The learned trial court, however, imposed maximum prescribed sentence upon them without considering the mitigating circumstances before awarding the extreme penalty. Chance of disposal of this appeal in near future is bleak, therefore, the applicants deserve to be enlarged on bail during pendency of the appeal.

5. Learned counsel for N.C.B., Sri Singh strongly repudiates the submissions made as above. It is vociferously argued by him that 275.09kg Pseudoephedrine, a controlled substance, was being transported to Aizwal by the applicants which is a raw material for manufacturing of

heroin and other N.D.P.S. substances. The N.C.B. by adducing enormous evidence against the applicants by examining independent witnesses, has proved beyond doubt that Meri Lal Tan Talong was one of the consigner of the consignment containing 17 parcels from which controlled substance was being exported inter-State hiding it in the parcels with other articles kept therein. The applicants were caught red handed when they were enquiring about non-delivery of consignment in reference to the consignee and also asking the officials of N.E.C.C. to return their consignment, if it is not sent to consignee. Thus, from these facts it is clear that the applicants were also participated in the abatement of offence punishable under Section 25A of the Act and they are also party to the criminal conspiracy to commit offence. The applicants are not entitled to get any benefit that the offence for which they have been convicted, is punishable only up to 7 years imprisonment. The offence punishable under Section 25A of the Act is also serious in nature because it relates to the recovery of huge quantity of controlled substance which is the raw material of manufacturing of so many narcotic drugs. Reliance has been place on Union of India Vs. Kuldeep Singh, 2004 (2) SCC 590 in which Hon'ble Supreme Court has held that sentence should be proportionate to the gravity of the offence. The period of sentence should depend upon the facts and circumstances of each case having regard to the factors such as nature of offence, manner in which it was committed, motives for the crime, conduct of the accused and all other attended circumstance. The court must also keep in view the rights of the victim of crime and the society at large. Reduction of sentence considering the age of an accused's father, his family problems and that the accused is not a habitual offender, not justified.

6. I have considered the submissions made by learned counsel for both sides and have also perused the impugned judgment.

7. As per the record of N.E.C.C., Khiang Than @ Mami was the consigner of 17 parcels for Aizwal from which controlled substance was recovered. The applicant- Merry Lal Tan Tluang said to have assisted her in booking the consignment through N.E.C.C. As per the version of N.C.B. also the controlled substance was not recovered from the possession of the applicants. Both the applicants have booked in this case on the basis of information given by the officials of N.E.C.C. that one lady Meri had enquired about the parcels in reference and she is likely to come to their office on 1.4.2013 between 11.30 hours to 12.30 hours. Even their statement recorded under Section 67 of the Act taken on its face value do not establish that the applicants are the consigner of the parcels in reference. It is only established that the applicant Meri Lal Tan Talong said to be a daily wager of the consigner and joined her

in booking of the parcels in reference. The applicant Japheth has no role to play in the booking of the parcels in reference. The applicant - Meri Lal Tan Talong is a widow woman having a kid aged about 5 years and nobody is there to 1OOK after her son. Both the applicants are from very poor background and they are said to be staying at Delhí being refugees of Myanmar. The applicants have also no past criminal antecedents. The chance of disposal of appeal in near future is bleak Therefore, the Court is of the view that both the applicants deserve to be enlarged on bail during pendency of the appeal.

8. It is made clear that the views expressed herein above are prima facie in nature for disposal of this bail prayer only and should not influence the appeal.

9. Let the appellants/applicants - Meri Lal Tan Talong and Japheth convicted in Special S.T. NO. 87 of 2013, N.C.B. Vs. Meri Lal Tan Talong and another, arising out of Complaint No. VIII/07/DZU/13, under Section 25A read with Section 29 N.D.P.S Act, District-Ghaziabad be released on each one of them furnishing a personal bond of Rs.1,00,000/- and two local sureties each in the like amount to the satisfaction of the learned C.J.M., Ghaziabad.

10. Realization of 50% amount of fine shall remain stayed and remaining 50% shall be deposited in the court concerned before their release.

11. Learned C.J.M., Ghaziabad is directed to transmit the photostat copies of the personal bonds and sureties bonds of the appellants soon after acceptance to this Court, to be kept on the record of the appeal.

Order Date: 11.09.2014

A. Pt. Singh/Naresh

V. NON-PENALISATION, DISCHARGE, ACQUITTAL, RELEASE ORDER

In numerous instances High Courts in India have given recognition to India's international obligations, along with the laws of the land and humanitarian consideration, on the basis of which release orders, discharge, and non-penalisation in cases of illegal entry has taken place. This section outlines the summaries followed by the order/judgements delivered.

Name of the case	Court and date of order	Summary of the order/ judgement
Yogeswari vs The State of Tamil Nadu	Madras High Court HCP No.971 of 2001 10 April 2003	Detention under the Foreigners Act has to be in compliance with Article 21 and Article 22(4) of the Constitution of India. Hence, the Court quashed the detention order of the detenu who was a Sri Lankan refugee.
Ba Aung and another vs UOI & ors	Calcutta High Court 2006	Exit permission to leave for Sweden was allowed since the detention of the appellants were not wanted for any other purpose and also because the Court believed that the detention of the petitioners was continuing without authority of law which thereby affects the personal liberty of the detainees. Further, the Court jail authorities was directed to handover the petitioners to the UNHCR.
Wali Ahmad @ Ahmad Oly vs Union of India & ors.	Calcutta High Court 10 December 2018	Petitioner completed his sentence of imprisonment for violation of Section 14 of the Foreigners Act and was still languishing in the prison. The Court directed the Home Secretary, Govt. of W.B. in consultation with the Union Secretary, Ministry of External Affairs, to take a decision on the release of the petitioner and his status as a refugee, mandatorily within a period of one month.

IN THE HIGH COURT OF MADRAS

REPORTABLE

Yogeswari v. The State of Tamil Nadu

Habeas Corpus Petition No.971 of 2001

Coram	: Hon'ble Mr. Justice P. Shanmugam and
	: Hon'ble Mr. Justice S.K. Krishnan
Date	: 10.04.2003
For petitioner	: Mr. B. Kumar, Senior Counsel and
	: Mr. R. Loganathan, Advocates
For respondents	: Mr. A. Navaneethakrishnan,
	: Addl. Public Prosecutor.

PRAYER: Petition under Article 226 of the Constitution of India seeking to issue a Writ of Habeas Corpus calling for the records in relation to the detention order passed under the provisions of Foreigners Act, 1946 made in G.O. No.SR.III/3136-4/2000 dated 11.12.2000 on the file of the first respondent herein, quash the same and consequently direct the respondents to produce the body of the detenu Anandh @ Anandh @ Geetha Annan, S/o. Chitrambalam, now detained in the Special Camp for Srilankan Refugees at Chingleput before this Hon'ble Court and set him at liberty forthwith.

O R D E R

DELIVERED BY P. SHANMUGAM, J.

1. The above Habeas Corpus Petition is filed seeking to quash the order passed by the first respondent dated 11.12.2000 under Section 3(2)(E) of the Foreigners Act, 1946 and for a direction to the respondents to set at liberty the petitioner's son Thiru. Anandh @ Anandh @ Geetha Annan, who is hereinafter referred to as the detenu.

2. The petitioner is a Sri Lankan citizen. She came to India along with her son, the detenu herein, as a refugee due to the ethnic violence in Sri Lanka during 1983. According to her, she came by lawful means using their Passports. On arrival in India, they registered themselves as refugees and complied with several other formalities required of

a refugee from Sri Lanka. The detenu is married and having a three years old daughter. According to the petitioner, on 16.10.2000 , four plain clothed men from 'Q' Branch C.B.C.I.D. came to the residence of the petitioner at about 2 pm and took the detenu. Since the petitioner was not aware of the whereabouts of the detenu and persons who took him, initially she had filed a criminal complaint before the J-1 Saidapet Police Station. The case was registered as Crime NO.2 954 of 2000. Subsequently, the petitioner came to know that a case was registered against the detenu in Crime NO.1 of 2000 under Sections 120B, 489A, 489B, 489C and Section 12(1)(C) of the Passport Act read with Section 14 of the Foreigners Act, 1946 and that he was remanded to judicial custody on 25.10.2000. According to her, the detenu was innocent and therefore, she had applied for bail and after the initial rejection of the bail application, upon completion of 90 days and after the filing of the final report by the police, the learned Principal Sessions Judge, Tiruchirapalli ordered release of the detenu on bail in Crl. M.P. NO.211 of 2001 on 1.2.2001. As it took some time to comply with the conditions and furnishing of the sureties, when the detenu was about to be released on bail, on 19.2.2001, the C.B.C. I.D. served upon the detenu, the impugned order dated 11.12.2000 and he has been ever since detained in the Special Camp for Sri Lankan Refugees at Chengalpattu. The above H.C.P. is filed against this order.

3. When the matter came up for hearing on an earlier occasion, the following order was passed by the Division Bench on 23.9.2002 :-

"As soon as the matter was taken up, the Public Prosecutor submitted that the Government have no objection for sending the detenu back to Srilanka, if he makes a representation to that effect praying for his repatriation back to Srilanka and that as on date, the Government is unable to send him back in view of the pendency of a case registered for an offence of possession of a counterfeit Srilankan currency note. It is his further submission that a report from the Mint Forensic Expert is awaited and it is likely to be made available to the investigating officer in Crime NO.1 of 2000 on the file of 'Q' Branch C. I.D., Trichy, in a week or ten days, and as soon as it is received, the final report will be filed against the detenu. He further submits that since the offence is punishable with the imprisonment or fine and in the event of the Court sentencing him only to fine, the Government will consider his request, if any made, favourably taking into consideration the facts and circumstances available as on that date. He, therefore, prays two weeks time. At his request, adjourned by two (2) weeks, for which course, the learned counsel for the petitioner has no objection. Adjourned by two (2) weeks."(emphasis is added)

As no orders as per the undertaking and as contemplated were passed, the matter was mentioned before another Bench and after several requests and adjournments by the learned Additional Public Prosecutor, the following order ultimately came to be passed on 5.3.2003:

"As an interim measure, without going into the main relief sought for in the petition, we are satisfied that the only objection for the detention of the detenu Anandh @ Anandh @ Geetha Annan in the Special Camp for Srilankan Refugees at Chengalput viz. the pendency of the criminal case, can be directed to be disposed of in a time-bound manner, since the learned Senior Counsel for the petitioner submitted that the detenu will be prepared to pay the fine to close the criminal case. Hence, we direct the Judicial Magistrate No.II, Trichy, to advance the committal proceedings in

P.R.C. NO.13/2003 to 10.3.2003 and commit the matter to the Sessions Court, and in turn, the Sessions Court shall take up the matter on 17.3.2003 and dispose of the same on merits and in accordance with law.

2. Post this H.C.P. on 19.3.2003."

It was specifically understood, according to the learned senior counsel and not controverted, that in the hearings on those days that considering the facts and circumstances of the case, the matter could be closed instead of going into the merits of the H.C.P. and accordingly, the said order came to be passed.

4. However, now, the learned senior counsel for the petitioner submits that contrary to the spirit and the purpose for which two orders were passed by the Division Bench earlier, charges have been framed against the detenu on 17.3.2003 under Sections 489A, 489B, 489C and 489 D and the detenu was served with the charge sheet running to hundreds of pages and without even giving an opportunity for him to contest the case regarding the framing of charges under certain sections, the matter is posted for trial on 19.3.2003. In the above circumstances, this court is constrained to consider the main case on merits.

4.1 Learned senior counsel for the petitioner submits that from the date of the impugned order passed on 11.12.2000 and served on the detenu on 19.2.2001, the detenu was kept in the Special Camp which is virtually a prison. The Special Camp at Poonamallee was previously the sub-jail and now converted to a Special Camp and is guarded by police and prison authorities. The detenu is kept inside the cell between 6 am and 6 pm and is allowed to move out in the small open space which is closed by gates and therefore,

the detention of the detenu in the Special Camp is nothing but an imprisonment. The detenu had been kept in the Special Camp without providing an opportunity to him to question the impugned order and without a trial and conviction and therefore, the order is unconstitutional and violative of Articles 21 and 22 of the Constitution of India.

4.2 According to him, the only ground considered by the Division Benches as referred in the earlier two orders and also in the counter affidavit is that the pendency of a criminal case. In paragraph 16 of the counter filed by the Deputy Secretary to the Government, it is stated as follows:

"It is submitted that there is no question of detention for an unlimited and indefinite period. A case is pending against the petitioner's son and hence, he cannot be allowed to leave the Special Camp now. After disposal of the case, he may be permitted to leave to a country of his choice if no other case is pending."

If the pendency of the case is the only point against the detenu, his detention inspite of the bail order granted by the criminal court in Crl.M.P. NO.211 of 2001 is clearly unconstitutional and deprivation of the personal liberty of the detenu and other rights guaranteed under Articles 21 and 22 of the Constitution.

4.3 Learned senior counsel further submits that the authorities have failed to consider that the bail order itself was granted after several attempts, after the filing of the final report by the police and after the completion of 90 days and inspite of that position, the detenu was kept confined from December, 2000 for more than two years now and the charge sheet was filed only on 17.3.2003. The order of detention, according to him, is therefore clearly illegal.

4.4 According to him, the object of keeping the detenu in a Special Camp, namely to regulate his continued presence in India, is no longer valid since the detention of a foreigner is now regulated by the National Security Act, 1980 which has replaced the Preventive Detention Act, 1950.

4.5 According to the learned senior counsel, when the Parliament has enacted a fresh legislation on the same subject, namely dealing with foreigners providing for greater safeguards, then those provisions would come under the provisions of the latter Act and in the absence of the Advisory Board and the opportunity to the detenu, detention for an unlimited period of time is clearly illegal.

4.6 It is submitted that the National Security Act, 1980 is a special enactment on the subject which covers the field and the same shall prevail over the Foreigners Act, 1946.

4.7 It is further submitted that the power to detain the foreigner is available only with the Central Government under Section 3(2)(G) of the Foreigners Act, 1946 and the same has not been delegated to the State Government and hence, the Government cannot, by exceeding its power, pass an order of detention and confinement.

4.8 Lastly, it is submitted that the act of the first respondent in this case is colourable and malafide exercise of power done only in order to frustrate the conditional bail order granted by the competent court and there is no requirement to regulate the continued presence of the detenu, since the bail order granted by the criminal court regulates the presence of the detenu and in any event, the order was passed without taking into consideration the grant of bail and in arbitrary exercise of power.

4.9 For all the above reasons, learned senior counsel prays to set aside the impugned order and release the detenu from the Special Camp wherein he is detained.

5. On behalf of the first respondent, a counter affidavit has been filed wherein it is stated that the detenu was arrested on 24.10.2000 at Tiruchirapalli when he was found in possession of 50 numbers of 1000 denomination Sri Lankan counterfeit currencies and one number 1000 denomination Sri Lankan counterfeit currency. The detenu was produced before the Magistrate who remanded him to custody and therefore, he was lodged in the Special Camp on 19.2.2001, Chengalpattu on his release from the Central Jail, Tiruchirapalli on bail. According to the counter, the order was passed after taking into account the likelihood of the release of the detenu from jail on bail. According to the first respondent, the order was passed to regulate the continued presence of the detenu, a Sri Lankan, in India. It is submitted that the inmates of the Special Camp are provided with basic amenities and are allowed to move freely within the premises of the Special Camp. The respondent deny that the detenu was arrested and detained and according to them, he was only ordered to reside in the Special Camp and his movement is regulated for his continued presence in India, since he is a foreigner. The respondent states that there is no violation of Articles 14 and 21 of the Constitution. It is further stated that the authorities are empowered to pass the order and that the statutory provisions do not contemplate any show cause

notice or an opportunity to the detenu and there is no question of the right of the detenu to make any representation with the corresponding obligation on the respondents to consider the same and grant the relief sought for.

6. In the additional counter affidavit filed in reference to the supplementary affidavit, it is stated that the National Security Act is a preventive detention Act having its own separate, distinguished procedures, though it applies to foreigners also, but that is only for the purpose mentioned under the Act and the procedure contemplated under the Act will apply. According to the additional counter, the National Security Act has not repealed the Foreigners Act insofar as it seeks to regulate the continued presence of the foreigners in India.

7. Learned Additional Public Prosecutor, while opposing the arguments advanced by the counsel for the learned senior counsel for the petitioner, strongly relied upon the judgment of a Division Bench of this court in KALAVATHY VS. STATE OF TAMIL NADU [1995 (2) LAW WEEKLY (CRL.) 690 (2)] and contended that the points raised by the petitioner in this case are squarely answered in the said judgment. By referring to the order passed by the Supreme Court in S.L.P. No.369 of 1996, he contended that the petitioner in that case, a Sri Lankan national, under similar circumstances, was ordered to be lodged in the Special Camp and as he did not have the necessary travelling documents, it was found that his detention was not illegal. According to him, the said order of the Supreme Court will apply to the facts of this case also. Learned Additional Public Prosecutor also relied upon the judgment of the Supreme Court in UNION OF INDIA VS. VENKATESHAN [2002 (3) SUPREME TODAY 421] and submitted that the courts should always lean against the implied repeal of an enactment, unless the two provisions are repugnant to each other and they cannot stand together and it is not possible on any reasonable hypothesis to give effect to both at the same time.

8. We have heard the learned senior counsel for the petitioner, the learned Additional Public Prosecutor and considered the matter carefully.

9. The National Security Act, 1980 is an Act meant to provide for preventive detention in certain cases and matters connected therewith. Section 3 of the Act empowers the Central or the State Government, "(b) if satisfied with respect to any foreigner that with a view to regulate his continued presence in India or with a view to make arrangements for his expulsion from India it is necessary to do so, make an order that such person be detained."

Section 5 of the Act empowers the State Government to regulate the place and conditions of detention. Section 5(a) says that the detenu can be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for discipline as the appropriate Government may, by general or special order, specify. The Foreigners Act, 1946, which is a preConstitutional enactment, was an Act meant to confer upon the Central Government certain powers in respect of foreigners. Section 3 of the Foreigners Act, 1946 says that the Central Government may, by order, make provisions either generally or with respect to all foreigners, "for prohibiting, regulating or restricting the entry of a foreigner into India or the departure therefrom or their presence or continued presence therein".

Sub-section (2) of Section 3 of the Act empowers the authorities to impose any restriction on his movements.

10. The impugned order in this case is passed under Section 3(2)(E) of the Foreigners Act, 1946 for regulating the continued presence of the detenu. According to the Government, the regulation includes imposing of restrictions on his movements, and the order directing that the detenu shall reside in the Special Camp amounts only to a restriction on his movements and not detention. Even though Section 3(g) of the Act empowers arrest, detention and confinement, according to the respondents, insofar as the detenu in this case is concerned, the said power has not been exercised and there is no need to exercise the power under the National Security Act, 1980.

11. In order to regulate the continued presence of a foreigner in India and if it is necessary to do so, the power to be exercised is Section 3 of the National Security Act, 1980. A State Government is empowered under the Foreigners Act, 1946 to regulate the continued presence of a foreigner by imposing restrictions on his movements. The power that is exercised under Section 3 of the Foreigners Act, 1946, among other things, empowers the authorities to pass an order that a foreigner shall not remain in India or in any prescribed area thereunder, that he shall remove himself to and remain in such area as may be prescribed and shall comply with such conditions as may be prescribed or specified, namely to reside in a particular place to restrict his movements, to require him to prove his identity, to require him to submit himself to examination, prohibit him from joining association and other activities, etc., all read together would only show that the power of regulation with purpose is not a measure of punishment. They are nothing but regulatory measures. Section 3(2)(G) of the Act also provides the power of detention. Section 4 of the Act dealing with confinement,

subject to conditions as to maintenance of discipline, etc. says under Sub-section 4(2) as follows:-

"Any foreigner (hereinafter referred to as a person on parole), in respect of whom there is in force any order under Clause (e) of Subsection (2) of Section 3 requiring him to reside at a place set apart for the residence under supervision of a number of foreigners, shall while residing therein be subject to such conditions as to maintenance, discipline and punishment to offences and breaches of discipline as the Central Government, from time to time, by order, determine."

12. Article 21 of the Constitution of India which protects the life and personal liberty and Article 22(4) which provides safeguards against preventive detention shall apply to any person, whether a citizen or not. Therefore, where a person's liberty is taken away, or if he is made an intern, after the coming into force of the Constitution, such an order depriving the person of his liberty must comply with the requirement of Articles 21 and 22(5) of the Constitution. When the National Security Act, 1980 empowers the authorities to pass an order under Section 3, specifically in reference to a foreigner, with a view to regulate his continued presence in India and which complies with the Constitutional requirements, the power under the Foreigners Act, 1946 cannot be availed of. Apart from the fact that Foreigners Act, 1946 is a pre-Constitutional Act, which is not in consonance with the fundamental rights guaranteed to any person and when such person comes under the special enactment namely the National Security Act, 1980 on the same subject matter, the power cannot be availed of by the authorities under the Foreigners Act. Therefore, even assuming that internment is not a detention, the requirement to reside at a particular place set apart should be in consonance with Articles 21 and 22 (4) of the Constitution. It follows that there should be sufficient safeguard for such an order in conformity with Articles 21 and 22(4) of the Constitution.

13. The National Security Act, 1980, being a special latter enactment, alone can hold the field and the power within the latter enactment with all its restrictions could be invoked and maintained. It is not justifiable on the part of the Government to invoke Section 3(2)(E) of the Foreigners Act, 1946 only to avoid the latter Act for the purpose of regulating the continued presence of a foreigner.

14. A distinction is made between the internees held under Section 3 (2)(G) of the Foreigners Act, 1946 and the internees held under Subsection 2(E) of the Act. Insofar as the latter category of foreigners are concerned, they are to reside at a place set apart for residence. In this case, the facts that the detenu was ordered to remain in the Special

Camp which was previously a sub-jail and that he was kept there inside a cell and was allowed limited movement outside the cell during day time is a clear case of confinement, for which there is no order under Section 3(2)(G) of the Act. There was no order under the National Security Act, 1980 either. Hence, there is a restriction amounting to detention. Therefore, the argument that the court should lean against the implying repeal does not arise for consideration in the facts of this case.

15. The Division Bench, in KALAVATHY's case cited supra, could not consider the question vis-a-vis the National Security Act, 1980 to regulate the continued presence of a foreigner.

16. Assuming that the legality of the order as set out above can be sustained, on merits, we find that the order is vitiated on many counts:

    i) The impugned order did not take note of the bail order passed by the learned Principal Sessions Judge, Tiruchirapalli in Crl.M.P. NO.211 of 2001 dated 1.2.2001 WITH a condition that the detenu should reside at Chengalpattu and report before the Judicial Magistrate, Chengalpattu everyday.

    ii) Even though the counter affidavit says that the bail order was taken note of, the admission in the counter is that since a case is pending against the detenu, he cannot be allowed to leave the Special Camp and it is also stated that the detention order is passed only because of the pendency of the case and nothing else.

    iii) The learned Additional Public Prosecutor, in the orders extracted above, has maintained that the Government has no objection in sending the detenu back to Sri Lanka and that the impugned order was passed only because of the pendency of the criminal case against the detenu. If that is so, then, regulating the presence of the detenu under the Foreigners Act, 1946 can only be in a place set apart for residential purpose and not in a Special Camp which is meant for keeping persons who have entered into India unauthorizedly and as refugees.

    iv) Insofar as the detenu in this case is concerned, he has entered into India along with the petitioner herein authorizedly, has complied with all the formalities and also has a residence in India ever since 1983. Therefore, the impugned order clearly amounts to a detention and confinement.

17. In this context, the judgment of the Division Bench in KALAVATHY's case is clearly distinguishable on facts. The Division Bench, in that

case, was concerned with persons who had close links with L.T.T.E. and they had posed a danger to the security of the State. Apart from there being members belonging to various militant groups, the petitioners in that case were all of that category and therefore, this decision will not apply to the case of other foreigners. The argument of the learned Additional Public Prosecutor in that case was that the enquiry revealed that the respective foreign nationals were having illegal connections with L.T.T.E. Those foreign nationals were not in possession of any legal documents and they were having close links with L.T.T.E. It is only those internees who are kept in Special Camps, at the rate of four persons per cell, by locking up the inmates from 6 am to 6 pm with certain relaxation. It was argued that the petitioners in those cases had engaged themselves in anti-social activities like smuggling of arms and explosives unauthorizedly, exporting fuel and other essential commodities to Sri Lanka, besides committing offences against the local public, apart from getting involved in Rajiv Gandhi's assassination. It was further argued by the learned Additional Public Prosecutor in that case that Sri Lanka nationals were being permitted to stay in this country subject to the condition that they would not indulge in activities prejudicial to the interests of this country in any manner. If they had their own plans to settle in peace, they can follow the said plan or in the alternative, accept the plans of the Central and State Governments to settle themselves in this country peacefully. The State Government never intended to detain or regulate the movements of stay or peace. However, persons who belonged to various militant groups had to be segregated and their movements regulated not only in the interests of the State, but also for the welfare of those militants who were inimically disposed to each other. It was specifically stated by the learned Additional Public Prosecutor in that case as follows :-

"Except that reasonable restrictions have been imposed on those foreigners who have entered into India without any valid document and had indulged in activities which are prejudicial to the security, safety and territorial integrity of India, their liberty has not been taken away."

In that context, the Division Bench accepted the case that the detenu were neither arrested nor detained. The Division Bench, after considering these arguments, found from the facts narrated that only a small percentage of Sri Lankans who had been entertained as refugees were said to have been detained in the Special Refugee Camps "in view of the information available to the State Government that they belong to militant groups and have close links not only with the L.T.T.E. Organisation, but some of them had a role to play in the

Rajiv Gandhi's assassination".

18. The facts, set out above in the said case are totally in contrast with the facts of the case on hand and hence, the decision of the Division Bench that a special refugee camp cannot be termed as an internment camp thereby justifying the order passed under Section 3(2)(E) of the Foreigners Act, 1946 will not apply to the facts of this case. The detenu in this case will not come under any of the categories referred to by the Division Bench in the said judgment. He is a Sri Lankan citizen living in India as a foreigner and therefore, his internment as contemplated under Section 4 of the Foreigners Act, 1946, in the facts and circumstances of the case, is nothing but an order of detention and confinement.

19. In HANS MULLER VS. SUPERINTENDENT, PRESIDENCY JAIL, CALCUTTA [A.I.R. 1955 S.C. 367], a Constitution Bench of the Supreme Court was dealing with an order of detention passed by the State Government under Section 3(1) of the Preventive Detention Act, 1950. It was held therein that a legislation that forced jurisdiction on Governments in this country to deprive foreigners of their liberty cannot but be a matter that will bring the Union with relation to Foreign States, particularly when there is no public hearing and no trial in the ordinal courts of the land. There, the Supreme Court was concerned with a case of an expulsion of a foreigner. While considering the question of limitation imposed on the power of the Government by Articles 21 and 2 2 of the Constitution, the Supreme Court held as follows:-

"The right to make arrangements for an expulsion includes the right to make arrangements for preventing any evasion or breach of the order and the Preventive Detention Act confers the power to use the means of preventive detention as one of the methods of achieving this end. How far it is necessary to take this step in a given case is a matter that must be left to the discretion of the Government concerned, but in any event, when criminal charges for offences said to have been committed in this country and abroad are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. The detention in such cases is rightly termed preventive detention and falls within the ambit of the Preventive Detention Act and is reasonably related to the purpose of the Act."

The counter affidavit in this case has exactly stated as follows:-

"As there are possibilities for violating the conditions imposed by the Court by the petitioner's son, an order was issued under the Foreigners

Act, 1946."

Therefore, this is a clear case of detention.

20. In HANS MULLER's case, cited supra, the Attorney General had conceded the limitations under the Foreigners Act, 1946 as follows:-

"There are further limitations, but they were not invoked except that the learned Attorney General explained that the unrestricted power given by Section 4(1), Foreigners Act, 1946, (a pre-Constitution measure) to confine and detain foreigners became invalid on the passing of the Constitution because of Articles 21 and 22. Therefore, to bring this part of the law into the line with the Constitution, Section 3 (1)(B), Preventive Detention Act, 1950 was enacted. It was more convenient to insert new provisions about the confinement and detention of foreigners in the Preventive Detention Act rather than amend the Foreigners Act, because the Preventive Detention Act was a comprehensive Act dealing with preventive detention and was framed with the limitations of Articles 21 and 22 in view."

Therefore, the argument of the Attorney General, that confinement of a foreigner will become invalid if he does not conform to the requirement of Articles 21 and 22 of the Constitution, was approved by the Supreme Court.

21. Even assuming that the power under Section 3 exercised is under the Foreigners Act, 1946, on merits, the impugned order is liable to go. On facts, as set out earlier, the detenu was said to have been found in possession of foreign currency equivalent to Indian Rupees Twenty Five Thousand and he was detained for more than two years without a trial and without a charge sheet. Though the Government agreed that charges under Section 489 simpliciter could be framed and a fine imposed on the detenu, later on, they have proceeded to charge him under Sections 489A, 489B, 489C and 489D and charges were framed on 17.3.2003.

22. When bail order was passed by the competent criminal court imposing certain conditions, it is not open to the competent authority to pass an order without taking into account the conditional bail order, only in order to frustrate the bail order, by detaining the detenu in a Special Camp. The Government has no other objection except as to the pendency of the criminal case against the detenu and therefore, the regulation of his continued presence by interning/confining him in a Special Camp is clearly illegal. In VARADHARAJ VS. STATE OF TAMIL NADU [A.I.R. 2002 S.C. 2953], the Supreme Court has held that placing of the application for bail and the order thereon are not always mandatory and such requirement would depend upon the facts of

each case. In the light of the fact that the bail order came to be passed after 90 days when no charge was framed and in the light of the stand of the Government that they have no objection in the detenu leaving for a country of his choice if no other case is pending against him and that their only objection for the grant of bail is the pendency of the criminal case against him and also the stand of the Public Prosecutor before the two Division Benches that excepting the pendency of the criminal case against the detenu, they have no objection for his release, the order of bail has assumed significance and the detaining authority ought to have taken note of the bail application and the bail order and the stand of the Government in regard to the detenu. In VARADHARAJAN's case, cited supra, it was held that the failure to note the stand of the Public Prosecutor that he had no objection for the grant of bail is a vital material which the detaining authority ought to have taken note of and that non-consideration of this fact vitiates the order of detention.

23. In LOUIS DE RAEDT VS. UNION OF INDIA [A.I.R. 1981 S.C. 1886], the Supreme Court, while upholding the view that foreigners have a fundamental right under Article 21 of the Constitution for life and liberty, held that the power of India to expel a foreigner is absolute and unlimited. However, insofar as the right to be heard is concerned, it was held that there cannot be any hard and fast rule about the manner in which the person concerned is to be given an opportunity to place his case. Therefore, in this case, before depriving the right of a person as guaranteed under Article 21 of the Constitution or even after doing the same, the detenu was not given any opportunity whatsoever for over two years. On this ground also, the impugned order is liable to be set aside.

24. For all the above reasons, we hold that the order impugned in this case is illegal, unconstitutional and is liable to be set aside. Accordingly, the impugned order is hereby set aside. The H.C.P. is allowed. The respondents are hereby directed to release the detenu forthwith, subject to the detenu complying with the conditions stipulated in the bail order granted by the Principal Sessions Judge, Tiruchirapalli.

IN THE HIGH COURT OF CALCUTTA

Ba Aung and Anr v. Union of India and Ors.

Appeal from Constitutional Writ Jurisdiction

(Mandamus Appeal) Appellate Side

Memorandum of Appeal From Original Order No. 301 OF 2006

F.M.A. NO. 799 OF 2006

M.A.T. NO. 1858 OF 2006

ARISING PIT OF W.P. NO. 9504(W) OF 2006

For petitioner : Mr. M.P. Chakarborty,

: Mr. Debashish Banerjee

: Mr. Dipendra Mullik

For respondent : Ms. Anwara Qureishi

In Re: CAN 3708 of 2006

1. On 12th December 2006 in presence of the learned Counsel for the State, Mr. Anup Kumar Das, an order was passed on receipt of Commissioner of Ministry of Home, Union Government and the State Government, directing the State Government to inform this Court as to whether the State Government wanted detention of the petitioners for any other purpose or not. We also desired that an affidavit, in regard thereto, be filed by the State Respondent and as such the matter was adjourned till 21st of December 2006.

2. In spite of the aforesaid order being passed, today no one appears on behalf of the State Government nor has any affidavit been filed. We fail to understand as to why the State Government has not responded to the order passed on 12th December 2006. The detention is continuing and in our view the same is without authority of law which really affects the personal liberty of the persons concerned. Central Government has decided to allow the detainees to leave for Sweden. In view of the silence being maintained by the State Government, we can safely presume that the State Government does not require detention of the appellants for any other purpose and we record the State Government is deemed to have consented to the decision taken by the Central Government.

3. We, therefore, allow the writ petitioners to have the exit permission

strictly in accordance with the decision of the Central Government. The petitioners would thereafter be released for that purpose and the jail authorities are directed to handover the petitioners to the United Nations High Commissioner for Refugees with the prior intimation and communication to the Ministry of Home Department, Government of West Bengal as well as to the Ministry of Home Department, Union of India. The said authorities thereafter shall allow the petitioners to leave for Sweden.

The appeal and the application, being CAN 3708 of 2006, stand disposed of.

Urgent Xerox certified copy, if applied for, be given to the parties on priority basis.

Sd/- Kalyan Jyoti Sengupta, J Sd/-Arun Kumar Bhattacharya, J

IN THE HIGH COURT OF CALCUTTA

Wali Ahmad @ Ahmad Oly v. Union of India & ors

WP 9799(W) OF 2018

WITH

CAN 9026 OF 2018

Coram : Hon'ble Mr. Rajasekhar Mantha

Date : 10.12.2018

For petitioner : Mr. Kishore Mukherjee, Advocate

For respondent : Ms. Hera Nafis, Advocate

1. Sufficient grounds have been made out for the absence of the writ petitioner on 09.10.2018. Hence, the order is recalled and the writ petition is restored to its original file and number. Accordingly, CAN 9026 of 2018 is allowed and disposed of.

2. This matter was adjourned on 14.09.2018 to enable the learned counsel for the petitioner to take appropriate instructions on the refugee status, if any granted to the petitioner.

3. This matter has been adjourned on the last occasion for want of such instructions from the Union of India. Even today, the Union of India is unable to procure any instructions from the State. The conduct of the Union of India, particularly, the Ministry of External Affairs, Govt. of India is deprecated.

4. It is submitted that the petitioner has completed his sentence of imprisonment for violation of the fees under Section 14 of the Foreigners Act in March, 2018. He is stated to be languishing in Prison despite the same.

5. In the circumstances, this court has no option than to direct the Home Secretary, Govt. of W.B. in consultation with the Union Secretary, Ministry of External Affairs, Govt. of India to take a decision on the release of the writ petitioner and his status as a refugee or otherwise positively and mandatorily within a period of one month from the date of communication of a copy of this order.

6. It is reasonably expected that the shocking and lackadaisical attitude of the Ministry of External Affairs shall cease and they shall wake up to their statutory responsibilities.

For the reasons stated hereinabove, the instant writ application stands disposed of.

Let a copy of this order be communicated by the petitioner to the Home Secretary, Govt. of W.B. as also the Secretary, Ministry of External Affairs, Govt. of India.

There will be no order as to costs.

Urgent certified photostat copy of this order, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.

(Rajasekhar Mantha, J.)

VI. RIGHT TO CITIZENSHIP

According to Article 1 of the 1954 Convention relating to the Status of Stateless Persons relating to the Status of Stateless Persons, a stateless person is "a person who is not considered as a national by any State under the operation of its law." Article 15 of the Universal Declaration of Human Rights states that "[e]veryone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality." Statelessness, or the condition of having no legal or effective citizenship, is a critical issue. Most often than not it leads to denial of civil, political, economic, and social rights. The High Courts and the Supreme Court of India have recognised the right of citizenship for certain refugee communities considering relevant international law obligations and domestic laws.

The table below lists the related cases and a summary followed by the orders/judgements.

Name of the case	Court and date of order	Summary of the order/ judgement
NHRC vs State of Arunachal Pradesh and anr	Supreme Court (1996) 1 SCC 742 9 January 1996	The court directed the A.P government to ensure that the life and personal liberty of the Chakmas residing within the state are protected. The court also ordered that Chakmas could not be evicted from their homes nor be denied a domestic life and the comforts therein. Furthermore, on the matter of citizenship, the court held that they were entitled to apply for citizenship under Section 5 of the Citizenship Act, 1955 and while the application for Citizenship is pending consideration, they should not be evicted.
Jan Balaz vs Anand Municipality and ors	Gujarat High Court AIR 2010 Guj 21 11 November 2009	Court held that babies born in India to the gestational surrogate are citizens of this country and therefore, entitled to get the Passports.

Committee for C.R. of C.A.P. & ors. vs State of Arunachal Pradesh & ors	Supreme Court WP (Civil) No. 510 of 2007 17 September 2015	The petition under Article 32 of the Constitution of India was sought to direct the UOI through the MHA to grant citizenship to the Chakma and Hajong Tribals who migrated to India in 1964-1969 and were settled in the State of AP. The Court directed the Government of India and the State of AP to finalize the conferment of citizenship rights on eligible Chakmas and Hajons. The court gave a timeline of three months to complete the exercise.
Phuntsok Wangyal and ors vs Ministry of External Affairs & Ors	Delhi High Court 22 September 2016	The Court held that the nationality of Tibetans born in India between 1950 and 1987 cannot be questioned under the Citizenship Act. Further, the petitioners being citizens of India, cannot be discriminated against and cannot be denied the Indian passport by the respondents.
P Ulaganathan and ors vs The Government of India and ors	Madras High Court WP (MD) No. 5253 of 2009 17 June 2019	Petitioners who were Sri Lankan refugees sought conferment of citizenship. The Court observed that Article 21 of the Constitution of India applies to all persons, citizens and non-citizens and would also apply to refugees and asylum seekers. The court further held that keeping them under surveillance and severely restricted conditions and in a state of statelessness offends their right under Article 21 of the Constitution. The Court finally allowed the petitioners to submit a fresh application seeking citizenship.

IN THE SUPREME COURT OF INDIA

REPORTABLE

National Human Rights Commission v. State of Arunachal Pradesh and Another

Writ Petition (C) No. 720 of 1995

(1996) 1 SCC 742

Coram : Hon'ble Mr. Chief Justice A.M. Ahmadi

: Hon'ble Mr. Justice S.C. Sen

Date : 09.01.1996

The Judgment of the Court was delivered by

AHMADI, C.J.— This public interest petition, being a writ petition under Article 32 of the Constitution, has been filed by the National Human Rights Commission (hereinafter called 'NHRC') and seeks to enforce the rights, under Article 21 of the Constitution, of about 65,000 Chakma/Hajong tribals (hereinafter called 'Chakmas'). It is alleged that these Chakmas, settled mainly in the State of Arunachal Pradesh, are being persecuted by sections of the citizens of Arunachal Pradesh. The first respondent is the State of Arunachal Pradesh and the second respondent is the Union of India.

2. The NHRC has been set up under the Protection of Human Rights Act, 1993 (No. 10 of 1994). Section 18 of this Act empowers the NHRC to approach this Court in appropriate cases.

3. The factual matrix of the case may now be referred to. A large number of Chakmas from erstwhile East Pakistan (now Bangladesh) were displaced by the Kaptai Hydel Power Project in 1964. They had taken shelter in Assam and Tripura. Most of them were settled in these States and became Indian citizens in due course of time. Since a large number of refugees had taken shelter in Assam, the State Government had expressed its inability to rehabilitate all of them and requested assistance in this regard from certain other States. Thereafter, in consultation which the erstwhile NEFA administration (NorthEast Frontier Agency — now Arunachal Pradesh), about 4012 Chakmas were settled in parts of NEFA. They were also allotted some land in consultation with local tribals. The Government of India had

also sanctioned rehabilitation assistance @ Rs 4200 per family. The present population of Chakmas in Arunachal Pradesh is estimated to be around 65,000.

4. The issue of conferring citizenship on the Chakmas was considered by the second respondent from time to time. The Minister of State for Home Affairs has on several occasions expressed the intention of the second respondent in this regard. Groups of Chakmas have represented to the petitioner that they have made representations for the grant of citizenship under Section 5(1)(a) of the Citizenship Act, 1955 (hereinafter called "the Act") before their local Deputy Commissioners but no decision has been communicated to them. In recent years, relations between citizens of Arunachal Pradesh and the Chakmas have deteriorated, and the latter have complained that they are being subjected to repressive measures with a view to forcibly expelling them from the State of Arunachal Pradesh.

5. On 9-9-1994, the People's Union for Civil Liberties, Delhi brought this issue to the attention of the NHRC which issued letters to the Chief Secretary, Arunachal Pradesh and the Home Secretary, Government of India making enquiries in this regard. On 30-9-1994, the Chief Secretary of Arunachal Pradesh faxed a reply stating that the situation was totally under control and adequate police protection had been given to the Chakmas.

6. On 15-10-1994, the Committee for Citizenship Rights of the Chakmas (hereinafter called "the CCRC") filed a representation with the NHRC complaining of the persecution of the Chakmas. The petition contained a press report carried in The Telegraph dated 26-8-1994 stating that the All Arunachal Pradesh Students' Union (hereinafter called 'AAPSU') had issued "quit notices" to all alleged foreigners, including the Chakmas, to leave the State by 30-9-1995. The AAPSU had threatened to use force if its demand was not acceded to. The matter was treated as a formal complaint by the NHRC and on 28-10-1994, it issued notices to the first and the second respondents calling for their reports on the issue.

7. On 22-11-1994, the Ministry of Home Affairs sent a note to the petitioner reaffirming its intention of granting citizenship to the Chakmas. It also pointed out that Central Reserve Forces had been deployed in response to the threat of the AAPSU and that the State Administration had been directed to ensure the protection of the Chakmas. On 7-12-1994, the NHRC directed the first and second respondents to appraise it of the steps taken to protect the Chakmas. This direction was ignored till September 1995 despite the sending of reminders. On 25-9-1995, the first respondent filed an interim reply

and asked for time of four weeks' duration to file a supplementary report. The first respondent did not, however, comply with its own deadline.

8. On 12-10-1995 and again on 28-10-1995, the CCRC sent urgent petitions to the NHRC alleging immediate threats to the lives of the Chakmas. On 29-10-1995, the NHRC recorded a prima facie conclusion that the officers of the first respondent were acting in coordination with the AAPSU with a view to expelling the Chakmas from the State of Arunachal Pradesh. The NHRC stated that since the first respondent was delaying the matter, and since it had doubts as to whether its own efforts would be sufficient to sustain the Chakmas in their own habitat, it had decided to approach this Court to seek appropriate reliefs.

9. On 2-11-1995, this Court issued an interim order directing the first respondent to ensure that the Chakmas situated in its territory are not ousted by any coercive action, not in accordance with law.

10. We may now refer to the stance of the Union of India, the second respondent, on the issue. It has been pointed out that, in 1964, pursuant to extensive discussions between the Government of India and the NEFA administration, it was decided to send the Chakmas for the purposes of their resettlement to the territory of the present-day Arunachal Pradesh. The Chakmas have been residing in Arunachal Pradesh for more than three decades, having developed close social, religious and economic ties. To uproot them at this stage would be both impracticable and inhuman. Our attention has been drawn to a Joint Statement issued by the Prime Ministers of India and Bangladesh at New Delhi in February 1972, pursuant to which the Union Government had conveyed to all the States concerned, its decision to confer citizenship on the Chakmas, in accordance with Section 5(1)(a) of the Act. The second respondent further states that the children of the Chakmas, who were born in India prior to the amendment of the Act in 1987, would have legitimate claims to citizenship. According to the Union of India, the first respondent has been expressing reservations on this account. By not forwarding the applications submitted by the Chakmas along with their reports for grant of citizenship as required by Rule 9 of the Citizenship Rules, 1955, the officers of the first respondent are preventing the Union of India from considering the issue of citizenship of the Chakmas. We are further informed that the Union of India is actively considering the issue of citizenship and has recommended to the first respondent that it take all necessary steps for providing security to the Chakmas. To this end, central paramilitary forces have been made available for deployment

in the strife-ridden areas. The Union Government favours a dialogue between the State Government, the Chakmas and all concerned within the State to amicably resolve the issue of granting citizenship to the Chakmas while also redressing the genuine grievances of the citizens of Arunachal Pradesh.

11. The first respondent, in its counter to the petition, has contended before us that the allegations of violation of human rights are incorrect; that it has taken bona fide and sincere steps towards providing the Chakmas with basic amenities and has, to the best of its ability, protected their lives and properties. It is further contended that the issue of citizenship of the Chakmas has been conclusively determined by the decision of this Court in State of Arunachal Pradesh v. Khudiram Chakma (hereinafter called Khudiram Chakma case). It is therefore contended that since the Chakmas are foreigners, they are not entitled to the protection of fundamental rights except Article 21. This being so, the authorities may, at any time, ask the Chakmas to move. They also have the right to ask the Chakmas to quit the State, it they so desire. According to the first respondent, having lost their case in this Court, the Chakmas have "raised a bogey of violation of human rights".

12. The first respondent has filed a counter to the stand taken by the Union of India. The first respondent denies that the Union of India had sent the CRPF Battalions of its own accord; according to it, they were sent pursuant to its letter dated 20-9-1994 asking for assistance. It has also denied that certain Chakmas were killed on account of economic blockades effected by the AAPSU; according to it, these casualties were the result of a malarial epidemic. The first respondent reiterates that the sui generis constitutional position of the State debars it from permitting outsiders to be settled within its territory, that it has limited resources and that its economy is mainly dependent on the vagaries of nature; and that it has no financial resources to tend to the needs of the Chakmas having already spent approximately Rs 100 crores on their upkeep. It has also been stated that the Union of India has refused to share its financial responsibility for the upkeep of the Chakmas.

13. Referring to the issue of grant of citizenship it is submitted as follows:

"It is submitted that under the Citizenship Act, 1955 and the Rules made thereunder a specific procedure is provided for forwarding the application for grant of citizenship. According to that after receiving the application, the DC of the area makes necessary enquiries about the antecedents of the applicant and after getting a satisfactory report forwards the case to the State Government, which in turn forwards

it to the Central Government. It is submitted that on enquiry if the report is adverse the DC would not forward it further. It is submitted that the applications, if any, made in this regard have already been disposed of after necessary enquiry. There is no application pending before the DC."

It may be pointed out that this stand of the first respondent is in direct contravention of the stand adopted by it in the representation dated 25-9- 1995, submitted by it to the NHRC where it had stated:

"The question of grant of citizenship is entirely governed by the Citizenship Act, 1955 and the Central Government is the sole authority to grant citizenship. The State Government has no jurisdiction in the matter."

14. It is further submitted by the first respondent that under the Constitution, the State of Arunachal Pradesh enjoys a special status and, bearing in mind its ethnicity, it has been declared that it would be administered under Part X of the Constitution. That is the reason why laws and regulations applicable during the British regime continue to apply even today. The settlement of Chakmas in large numbers in the State would disturb its ethnic balance and destroy its culture and identity. The special provisions made in the Constitution would be set at naught if the State's tribal population is allowed to be invaded by people from outside.The tribals, therefore, consider Chakmas as a potential threat to their tradition and culture and are, therefore, keen that the latter do not entrench themselves in the State. Besides, the financial resources of the State without Central assistance, which is ordinarily not forthcoming, would throw a heavy burden on the State which it would find well nigh impossible to bear. In the circumstances, contends the first respondent, it is unfair and unconstitutional to throw the burden of such a large number of Chakmas on the State.

15. We are unable to accept the contention of the first respondent that no threat exists to the life and liberty of the Chakmas guaranteed by Article 21 of the Constitution and that it has taken adequate steps to ensure the protection of the Chakmas. After handling the present matter for more than a year, the NHRC recorded a prima facie finding that the service of quit notices and their admitted enforcement appeared to be supported by the officers of the first respondent. The NHRC further held that the first respondent had, on the one hand, delayed the disposal of the matter by not furnishing the required response and had, on the other hand, sought to enforce the eviction of the Chakmas through its agencies. It is to be noted that at no time has the first respondent sought to condemn the activities of the AAPSU. However, the most damning facts against the first respondent

are to be found in the counter-affidavit of the second respondent. In the assessment of the Union of India, the threat posed by the AAPSU was grave enough to warrant the placing of two additional battalions of CRPF at the disposal of the State Administration. Whether it was done at the behest of the State Government or by the Union on its own is of no consequence; the fact that it had become necessary speaks for itself. The second respondent further notes that after the expiry of the deadline of 30-10-1994, the AAPSU and other tribal student organisations continued to agitate and press for the expulsion of all foreigners including the Chakmas. It was reported that the AAPSU had started enforcing economic blockades on the refugee camps, which adversely affected the supply of rations, medical and essential facilities, etc., to the Chakmas. Of course the State Government has denied the allegation, but the independent inquiry of the NHRC shows otherwise. The fact that the Chakmas were dying on account of the blockade for want of medicines is an established fact. After reports regarding lack of medical facilities and the spread of malaria and dysentery in Chakma settlements were received, the Union Government advised the first respondent to ensure normal supplies of essential commodities to the Chakma settlement. On 20-9-1995 the AAPSU, once again, issued an ultimatum citing 31-12-1995 as the fresh deadline for the ousting of Chakmas. This is yet another threat, which the first respondent has not indicated how it proposes to counter.

16. It is, therefore, clear that there exists a clear and present danger to the lives and personal liberty of the Chakmas. In Louis De Raedt v. Union of India2 and Khudiram Chakma case this Court held that foreigners are entitled to the protection of Article 21 of the Constitution.

17. The contention of the first respondent that the ruling of this Court in Khudiram Chakma case has foreclosed the consideration of the citizenship of Chakmas is misconceived. The facts of that case reveal that the appellant and 56 families migrated to India in 1964 from erstwhile East Pakistan and were lodged in the Government Refugee Camp at Ledo. They were later shifted to another camp at Miao. In 1966, the State Government drew up the Chakma Resettlement Scheme for refugees and the Chakmas were allotted lands in two villages. The appellant, however, strayed out and secured land in another area by private negotiations. The State questioned the legality of the said transaction since, under the Regulations then in force, no person other than a native of that District could acquire land in it. Since there were complaints against the appellant and others who had settled on this land, the State, by order dated 15-2- 1984, directed that they shift to the area earmarked for them. This order was challenged on the ground that Chakmas who had settled there were citizens of

India and by seeking their forcible eviction, the State was violating their fundamental rights and, in any case, the order was arbitrary and illegal as violative of the principles of natural justice. On the question of citizenship, they invoked Section 6-A of the Act which, inter alia, provides that all persons of Indian origin who came before 1-1-1966 to Assam from territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985, and who had been ordinarily resident in Assam since their entry into Assam shall be deemed to be citizens of India as from 1-1-1966. Others who had come to Assam after that date and before 25-3-1971, and had been ordinarily resident in Assam since then and had been detected to be foreigners, could register themselves. It will thus be seen that the appellant and others claimed citizenship under this special provision made pursuant to the Assam Accord. The High Court held that the appellant and others did not fall under the said category as they had stayed in Assam for a short period in 1964 and had strayed away therefrom in the area now within the State of Arunachal Pradesh. On appeal, this Court affirmed that view. It is, therefore, clear that in that case, the Court was required to consider the claim of citizenship based on the language of Section 6-A of the Act. Thus, in Khudiram Chakma case1, this Court was seized of a matter where 57 Chakma families were seeking to challenge an order requiring them to vacate land bought by them in direct contravention of clause 7 of the Bengal Eastern Frontier Regulation, 1873. The issue of citizenship was raised in a narrower context and was limited to Section 6-A (2) of the Act. The Court observed that the Chakmas in that case, who were resident in Arunachal Pradesh, could not avail of the benefit of Section 6-A of the Act which is a special provision for the citizenship of persons covered by the Assam Accord. In the present case, the Chakmas are seeking to obtain citizenship under Section 5(1)(a) of the Act, where the considerations are entirely different.That section provides for citizenship by registration. It says that the prescribed authority may, on receipt of an application in that behalf register a person who is not a citizen of India, as a citizen of India if he/she satisfies the conditions set out therein. This provision is of general application and is not limited to persons belonging to a certain group only as in the case of Section 6-A. Section 5, therefore, can be invoked by persons who are not citizens of India but are seeking citizenship by registration. Such applications would have to be in the form prescribed by Part II of the Citizenship Rules, 1956 (hereinafter called “the Rules”). Under Rule 7, such application has to be made to the Collector within whose jurisdiction the applicant is ordinarily resident. Rule 8 describes the authority to register a person as a citizen of India under Section 5(1)

of the Act. It says that the authority to register a person as a citizen of India shall be an officer not below the rank of a Deputy Secretary to the Government of India in the Ministry of Home Affairs, and also includes such officer as the Central Government may, by a notification in the Official Gazette, appoint and in any other case falling under the Rules, any officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Home Affairs, and also includes such other officer as the Central Government may, by notification in the Official Gazette, appoint. Rule 9 next enjoins the Collector to transmit every application received by him under Section 5(1)(a) to the Central Government through the State Government or the Union Territory administration, as the case may be, along with a report on matters set out in clauses (a) to (e) thereof. Rule 10 provides for issuance of a certificate to be granted to persons registered as citizens and Rules 11 and 12 provide for maintenance of registers. These are the relevant rules in regard to registration of persons as citizens of India.

18. From what we have said herein before, there is no doubt that the Chakmas who migrated from East Pakistan (now Bangladesh) in 1964, first settled down in the State of Assam and then shifted to areas which now fall within the State of Arunachal Pradesh. They have settled there since the last about two and a half decades and have raised their families in the said State. Their children have married and they too have had children. Thus, a large number of them were born in the State itself. Now it is proposed to uproot them by force. The AAPSU has been giving out threats to forcibly drive them out to the neighbouring State which in turn is unwilling to accept them. The residents of the neighbouring State have also threatened to kill them if they try to enter their State. They are thus sandwiched between two forces; each pushing in opposite direction which can only hurt them. Faced with the prospect of annihilation the NHRC was moved, which, finding it impossible to extend protection to them, moved this Court for certain reliefs.

19. By virtue of their long and prolonged stay in the State, the Chakmas who migrated to, and those born in the State, seek citizenship under the Constitution read with Section 5 of the Act. We have already indicated earlier that if a person satisfies the requirements of Section 5 of the Act, he/she can be registered as a citizen of India. The procedure to be followed in processing such requests has been outlined in Part II of the Rules. We have adverted to the relevant rules herein before. According to these Rules, the application for registration has to be made in the prescribed form, duly affirmed, to the Collector within whose jurisdiction he resides. After the application is so received, the authority to register a person as a citizen of India is vested in the

officer named under Rule 8 of the Rules. Under Rule 9, the Collector is expected to transmit every application under Section 5(1)(a) of the Act to the Central Government. On a conjoint reading of Rules 8 and 9 it becomes clear that the Collector has merely to receive the application and forward it to the Central Government. It is only the authority constituted under Rule 8, which is empowered to register a person as a citizen of India. It follows that only that authority can refuse to entertain an application made under Section 5 of the Act. Yet it is an admitted fact that after receipt of the application, the Deputy Collector (DC) makes an enquiry and if the report is adverse, the DC refuses to forward the application; in other words, he rejects the application at the threshold and does not forward it to the Central Government. The grievance of the Central Government is that since the DC does not forward the applications, it is not in a position to take a decision whether or not to register the person as a citizen of India. That is why it is said that the DC or Collector, who receives the application should be directed to forward the same to the Central Government to enable it to decide the request on merits. It is obvious that by refusing to forward the applications of the Chakmas to the Central Government, the DC is failing in his duty and is also preventing the Central Government from performing its duty under the Act and the Rules.

20. We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty-bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, constitutional and statutory, to be considered for being registered as citizens of India.

21. In view of the above, we allow this petition and direct the first and second respondents, by way of a writ of mandamus, as under:

    (1) The first respondent, the State of Arunachal Pradesh, shall ensure that the life and personal liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State by organised groups, such as the AAPSU, shall be repelled, if necessary by requisitioning the service of paramilitary or police force, and if additional forces are considered necessary to carry out this direction, the first respondent will request the second respondent, the Union of India, to provide such additional force, and the second respondent shall provide such additional force as is necessary to protect the lives and liberty of the Chakmas;

    (2) Except in accordance with law, the Chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort therein;

    (3) The quit notices and ultimatums issued by the AAPSU and any other group which tantamount to threats to the life and liberty of each and every Chakma should be dealt with by the first respondent in accordance with law;

    (4) The application made for registration as citizen of India by the Chakma or Chakmas under Section 5 of the Act, shall be entered in the register maintained for the purpose and shall be forwarded by the Collector or the DC who receives them under the relevant rule, with or without enquiry, as the case may be, to the Central Government for its consideration in accordance with law; even returned applications shall be called back or fresh ones shall be obtained from the persons concerned and shall be processed and forwarded to the Central Government for consideration;

    (5) While the application of any individual Chakma is pending consideration, the first respondent shall not evict or remove the person concerned from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf; and

    (6) The first respondent will pay to the petitioner cost of this petition which we quantify at Rs 10,000 within six weeks from today by depositing the same in the office of the NHRC, New Delhi.

22. The petition shall stand so disposed of.

IN THE HIGH COURT OF GUJARAT

Jan Balaz v. Anand Municipality and ors.

AIR2010Guj21

Date	: 11.11.2009
Coram	: Hon'ble Mr. Chief Justice K.S. Radhakrishnan
	: Hon'ble Mr. Justice Anant S. Dave
For petitioner	: Mr. Dhaval C. Dave
	: Mr. P.A. Jadeja, Advs
For respondents	: Mr. Anshin H. Desai, Adv

Acts : ART (Regulation) Bill and Rules, 2008; Citizenship (Amendment) Act, 2003; Citizenship Act, 1955 - Sections 3 and 3(1); Constitution of India - Article 21; Guardian Wards Act, 1890; Evidence Act; Passport Act, 1967 - Sections 4(2), 6 and 6(2); Registration of Birth and Deaths Act, 1969; Uniform Parentage Act

Appeal No: Letters Patent Appeal No. 2151 of 2009 in Special Civil Application No. 3020 of 2008 and Civil Appli

Disposition: Application allowed

Judgement:

K.S. Radhakrishnan, C.J.

1. The question whether a child born in India to a surrogate mother, an Indian national, whose biological father is a foreign national, would get citizenship in India, by birth, is a momentous question which has no precedent in this country.

2. Petitioner is a German national and is a biological father of two babies given birth by a surrogate mother by name - Marthaben Immanuel Khristi - a citizen of India. Petitioner's wife Susanne Anna Lohle is a German national. Due to biological reasons, the wife of the petitioner was not in a position to conceive a child. Desiring to have a child of their own, they opted for In Vitro Fertilization (IVF). Assisted Reproductive Technology Infertility Clinic at Anand came to their help. Investigation revealed that wife of the petitioner would not be in a position to reproduce ova (eggs) as a result of which it would not be possible to conceive a child even with the help of a surrogate mother by using the sperm of the petitioner. An Indian citizen keeping

anonymity volunteered to donate ova, and through a scientific process the petitioner's sperm was fertilized with the donor's ova and the fertilized embryo was implanted to the uterus of the surrogate mother. Petitioner and his wife had entered into a surrogacy agreement with the second respondent - surrogate mother. After full discussion with Dr. Nayanaben Patel of the Clinic, surrogate mother was made known about the method of treatment. She had also agreed to hand over the child to the petitioner and his wife on delivery. Further surrogate mother had also agreed that she would not take any responsibility about the well-being of the child and the biological parents would have legal obligation to accept their child and that surrogate mother would deliver and the child would have all inheritance facts of a child of biological parents as per the prevailing law.

3. Surrogate mother gave birth to two baby boys on 4.1.2008. Petitioner then applied for registration of the birth of the children in the prescribed form to Anand Nagar Palika. Anand Nagar Palika issued a certificate of birth to the children as per the provisions of Registration of Birth and Deaths Act, 1969. Earlier date of birth was shown as 14.1.2008, which was later corrected as 4.1.2008 and the name of the petitioner's wife who was shown as the mother of the babies, was replaced with the name of Marthaben Immanuel Khristi.

4. Petitioner and his wife, though German nationals, are working in United Kingdom, stated that they are desirous of settling down in U.K. and for the said purpose they have to obtain VISA from the Consulate of the United Kingdom in India. Since babies were born in India and are Indian citizens, petitioner applied for their Passport in India showing their names as 'Balaz Nikolas' and 'Balaz Leonard'. Petitioner's name was shown as the father and surrogate mother's name was shown as the mother. Applications were entertained by the Passport Authorities and Passport No. G-8229646 and Passport No. G-8229647 respectively were issued in the name of above mentioned babies. Later, petitioner received an intimation-cum-notice issued by the Government of India, Ministry of External A□airs, Regional Passport O□ce, vide letter dated 6.5.2008 stating as follows:

On process it revealed that as usual procedure Passport is already issued under Tatkaal Scheme to both. Still the matter is pending in Hon'ble High Court of Gujarat and this is the citizenship related issue and also the endorsement regarding your surrogacy is to be taken in the Passport of your sons. Kindly let this o□ce know in whose possession at present the passport is lying? One such identical case Passport application is also received in which the name of the Mother who did not conceive the birth is given in the Birth Certificate, which is also violation of

Scheme 2(1) a and 2(1)(d) of the Birth and Death Registration Act 1969 therefore making endorsement of Hon'ble High Court's order is to be done in Passports. You are also hereby informed to surrender both the passport to this o□ce immediately, it will be returned to you after the final decision received from Hon'ble High Court.

5. Petitioner, on the basis of the direction of this Court on 13.5.2008, surrendered both the Passports on 14.5.2009 before the Passport Authority at Ahmedabad. Petitioner now seeks a direction to the Regional Passport O□cer to return those Passports so that he can take the babies to Germany and then make an application in Germany so as to acquire German Citizenship. Petitioner submits that surrogacy is not recognized in Germany. Even the Immigration O□ce at Siberia is also insisting production of the Passport and not Certificates of Identity issued by the Passport O□ce, Ahmedabad. Petitioner submits that since babies are born in India and are citizens of India, Germany would not recognize them as its citizens. Denial of Passports, according to the petitioner, is illegal and violative of Article 21 of the Constitution of India.

6. Detailed counter a□davit has been filed on behalf of the Regional Passport O□cer at Ahmedabad on 25.3.2008 and 4.11.2009, stating that surrogate mother cannot be treated as mother of the babies, and children born out of surrogacy, though in India, cannot be treated as Indian citizens within the meaning of Section 3 of the Citizenship Act, 1955. Further it is also stated that parents of the children are not Indian citizens and therefore, children are also not Indian citizens as per Section 3(1)(b) of Citizenship Act, 1955. Further it is also stated that as per Passport Act, 1967, only Indian citizens can apply for Indian Passport and as per Section 6(2)(a) of the Act, Passport cannot be issued to non-citizens. Further it is also stated that as per direction of the Government of India, Ministry of External Affairs, Passport Authority can issue identity certificate, showing name of surrogate mother, which does not entail citizenship to the children but would enable him to take his children out of India. Further, it was also pointed out that the Central Government is yet to legalize surrogacy and hence, children born out of surrogacy, though in India, cannot be treated as Indian citizens.

7. Learned Counsel appearing for the petitioner Mr. Dhaval C. Dave submitted that since both the children are born in India, they are Indian citizens by birth as per Section 3 of the Citizenship Act, 1955 and therefore, entitled to have all the rights of Indian citizens and the Passport Authorities are legally obliged to issue Passports to them under the Indian Passports Act, 1967. Learned Counsel submitted

that surrogacy is not prohibited in India and admittedly, children are born in India to a surrogate mother who herself is an Indian citizen. Learned Counsel submitted that petitioner and his wife are German citizens but as the children are not born in Germany, they would not get German citizenship, especially when German law does not recognize surrogacy. Learned Counsel submitted that for the purpose of obtaining VISA from the Consulate of United Kingdom, it is necessary that children should have an Indian Passport since they are born in India and not in Germany.

8. Learned Counsel Mr. Anshin Desai appearing for the Passport Authority submitted that children are not Indian citizens and therefore, not entitled to get Passport under the Indian Passport Act. Learned Counsel submitted that petitioner's intention is to acquire German citizenship and in order to facilitate that he is seeking Indian citizenship for the children. Learned Counsel submitted that in exceptional cases Passport Authorities can issue certificate of identity as was done in the case case of one Baby Manju Yamada. Learned Counsel also referred to the judgment of the Apex Court in Baby Manju Yamada v. Union of India (2008) 13 SCC 518 where the Passport Authorities have issued only certificate for permission to travel out of India.

9. We may at the outset point out that lot of legal, moral and ethical issues arise for our consideration in this case, which have no precedents in this country. We are primarily concerned with the rights of two new born innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance. Surrogate mother is not the genetic mother or biologically related to the baby, but, is she merely a host of an embryo or a gestational carrier? What is the status of the ova (egg) donor, which in this case an Indian national but anonymous. Is the ova donor is the real mother or the gestational surrogate? Are the babies motherless, can we brand them as legal orphans or Stateless babies? So many ethical and legal questions have come up for consideration in this case for which there are no clear answers, so far, at least, in this country. True, babies conceived through surrogacy, encounter a lot of legal complications on parentage issues, this case reveals. Legitimacy of the babies is therefore a live issue. Can we brand them as illegitimate babies disowned by the world. Further, a host of scientific materials are made available to us to explain what is traditional surrogacy, gestational surrogacy, altruistise surrogacy, commercial surrogacy etc. and also the response of various countries with regard to the surrogacy, especially commercial surrogacy.

10. Commercial surrogacy is never considered to be illegal in India and few of the countries like Ukrain, California in the United States. Law Commission of India in it's 220th Report on 'Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as rights and obligations of parents to a surrogacy' has opined that surrogacy agreement will continue to be governed by contract among parties, which will contain all terms requiring consent of surrogate mother to bear the child, agreement of a husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying the child to full term, willingness to hand over a child to a commissioning parents etc. Law Commission has also recommended that legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parents without there being any need for adoption or even declaration of guardian. Further it was also suggested that birth certificate of surrogate child should contain names of the commissioning parents only and that the right to privacy of the donor as well as surrogate mother should be protected. Exploitation of women through surrogacy was also a worrying factor, which is to be taken care of through legislation. Law Commission has expressed its desire that Assisted Reproductive Technology Bill with all safeguards would be passed in the near future.

11. Ukraine Surrogacy Laws are very favourable and fully support the individuals reproductive rights. Clause 123 of the Family Code of Ukraine and Order 771 of the Health Ministry of Ukraine regulate surrogacy. Ukraine laws permit commissioned parents to choose the gestational surrogacy, ova, or sperm donation embryo, adoption, programmes for which no permission is required. Legislation also provides for a commercial surrogacy agreement between the parties. Child born legally belongs to the commissioned parents and the surrogate mother cannot keep the child to herself. California is also accepting the surrogacy agreements, which has no statute directly dealing with surrogacy. Courts generally rely on Uniform Parentage Act to deal with various surrogacy agreements. California Supreme Court in Johnson v. Calvert (1993) 5 CAL 484 held that gestational surrogate has no parental rights to a child born to her since a gestational surrogacy contract is legal and enforceable and the intended mother is the natural mother under the Californian law. In the above case the intended mother donated the egg and a surrogate mother gave birth, in such a case the Court held that the person who intended to procreate should be considered as the natural mother. In another case decided by the U.S. Court in the year 1998 - Buzzanca v. Buzzanca - 1961 CAL. Appl. 4th 1410 (1998), the Court considered

the issue of traditional surrogacy agreements. That was a case where the surrogate mother has been artificially inseminated i.e. a surrogate mother was impregnated by using her ova and anonymous sperm, meaning thereby the intended parents had a genetic link to the child. Court held that when a married couple uses non-genetically related embryo and sperm implanted into a surrogate intended to procreate a child, they are lawful parents of the child. In another U.S case decided in 1998, In Re Marrijo Moschetta awarded legal parent rights to the intended father and surrogate mother. In another U.S case considered by the New Jersy Supreme Court, In Re Baby 537 A.2d 1227 (NJ.02/03/1988), gave custody to the natural father of the child, but rights of the adopted mother was denied. Surrogate mother who conceived the child via artificial insemination was granted visitation rights.

12. Japan has taken a di□erent legal stand in respect of surrogacy. Supreme Court of Japan, on March 23, 2007, denied parenthood to genetic parents since the twin babies were born to a surrogate mother at United States. Interpreting the Civil Code of Japan, the Supreme Court, held a mother who physically gives birth to a child is the legal mother. There is no provision in the Code to recognize the genetic mother as the legal mother. There exists no specific laws in Japan concerning parent-child relationship for artificial insemination, and the mother - and - child relationship will be based on the fact of delivery. The issue of Citizenship status of such an infant is also a burning problem in Japan. The Japan Supreme Court rejected the Japanese commissioning parents bid to register their twins born to a U.S surrogate mother in Japan, on the ground that the law presumes the woman, who gives birth to a child as its mother.

13. Germany, as law stands today, does not recognize surrogacy agreements. Law also prohibits egg donation and advocates for embryo procreation. Medical practitioners are also prevented from performing artificial insemination or embryo donation, which are all criminal o□ences. Same seems to be the situation in Sweden, Norway, Italy and so on. But countries like Belgium, Netherlands and Great Britain are little more liberal. Reference may be made to the decisions of the High Court of Justice, Family Division, Rex & Y (Foreign Surrogacy) 2008 EWHC 3030 (Fam) U.K.

14. We have indicated, in India there is no law prohibiting artificial insemination, egg donation, lending a womb or surrogacy agreements. No civil or criminal penalties are also imposed. Public pressure, for a comprehensive legislation defining the rights of a child born out of surrogacy agreement, rights and responsibilities of a surrogate

mother, egg donor, commissioning parties, legal validity of the surrogacy agreement, the parent child relationship, responsibilities of Infertility Clinic etc. are gaining momentum. Legislature will have to address a lot of emotional, legal and ethical issues. Question as to whether surrogacy can be seen as a ray of hope to otherwise a childless couple, so as to build up a family of their own, necessary for human happiness and social stability also calls for attention. Few are the case laws and precedents defining the rights of those who have a vital role to play in this reproductive technology. One case law worth mentioning in India is Baby Manje's case decided by the apex Court of India (2008) 13 SCC 518. Various issues which we have highlighted in this case were not discussed or answered in that case. That was a case where the Japanese Embassy in India refused to grant the child, born to surrogate Indian mother, VISA or Passport on the ground that the Japanese Civil Code recognizes a mother only to be a woman who gives birth to a baby. Attempts made to adopt Manji also did not fructify since Guardian Wards Act, 1890 did not allow single man to adopt those babies. E□orts were made to obtain Indian Passport, which also required a birth certificate. Question arose as to who was the real mother whether it was anonymous egg donor or the surrogate mother. Birth certificate was then issued by the local Municipality, by showing the father's name. Later the Regional Passport O□ce, Rajasthan issued a certificate of identity as part of a transit document and not the Passport. Certificate did not contain nationality, mother's name or religion of the baby.

15. Mother - child relationship is fraught with various problems, emotional, moral, ethical, legal, social etc. Study conducted by some organizations reveal that surrogate mothers have little di□culty in relinquishing their rights over a surrogate child to the intending parents and that the majority of surrogates are satisfied with their surrogacy experience and do not bother upon their bonding with the child they gave birth. Few other studies state that the surrogate mothers at time depict deep emotional attachment to the babies they give birth. Conflicting views have also been highlighted. Further elaboration on these ethical, psychological or moral issues are not necessary for our purpose.

16. We are in this case primarily concerned with the relationship of the child with the gestational surrogate mother, and with the donor of the ova. In the absence of any legislation to the contrary, we are more inclined to recognize the gestational surrogate who has given birth to the child as the natural mother, a view prevailing in Japan. Anonymous Indian woman, the egg donor, in our view, is not the natural mother. She has of course a right to privacy that forms part of right to life and liberty guaranteed under Article 21 of the Constitution of India.

Nobody can compel her to disclose her identity. Babies born are not in a position to know who is the egg donor and they only know their surrogate mother who is real. Wife, of the biological father, who has neither donated the ova, nor conceived or delivered the babies cannot in the absence of legislation be treated as a legal mother and she can never be a natural mother. In our view, by providing ova, a woman will not become a natural mother. Life takes place not in her womb, nor she receives the sperm for fertilization. Human fertilization is the union of a human sperm and egg usually occurring in the ampulla of the urine tube. Process involves development of an embryo. Process in this case followed is In Vitro Fertilization, a process by which egg cells were fertilized by sperm outside the womb in vitro. Resultantly, the only conclusion that is possible is that a gestational mother who has blood relations with the child is more deserving to be called as the natural mother. She has carried the embryo for full 10 months in her womb, nurtured the babies through the umbilical cord. Even if we assume that the egg donor is the real natural mother, even then she is an Indian national so revealed before the learned Single Judge, we are told. Both the egg donor as well as the gestational surrogate are Indian nationals, and hence the babies are born to an Indian national.

17. The Registrar, Birth and Deaths functioning under the Registration of Births and Deaths Act, 1969 has already issued certificate of birth to the children stating that they are born within the local area of Anand Nagar Palika, and showing mother's name as Marthaben Immanuel Khristi and father's name as the petitioner. Be that as it may, for the purpose of issuance of the Birth Certificate. Factum of birth of the babies has been established and that too in India to an Indian mother, whether to a gestational surrogate or donor of an ova. In the application for Passport, we have already indicated that petitioner has shown 'Khristi Marthaben Immanuel' as mother gestational surrogate who is admittedly an Indian national. Egg donor is also reported to be an Indian woman, of course her identity is not disclosed. Either way the mother of the babies is an Indian national. Petitioner, it is true, has not married Khristi Marthaben Immanuel, surrogate mother of the children or the egg donor. Children are born not out of a subsisting marriage. Even if the children are described as illegitimate children, even then they are born in this country to an Indian national and hence, they are entitled to get Citizenship by birth as per Section 3(1)(c)(ii) of the Citizenship Act, 1955, since one of their parent is an Indian citizen. Relevant portion of Section 3 is extracted hereunder for easy reference.

3. Citizenship by birth - (1) Except as provided in sub-section (2), every person born in India, --

(a) ..

(b) ..

(c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where --(i) .....

(ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.

Section 3 uses the expression 'every person born' and the emphasis is on the expressions 'person' and 'born'. 'Person' means a natural person. In Webster v. Reproduction Health Services etc. (1989) 492

U.S. 490, the Court held the word 'personal' within 14th Amendment means a human being after birth and not a foetus. Black's Legal Dictionary, Sixth Edition defines the word 'born' as an act of being delivered or expelled from mother's body whether or not placenta has been separated or cord cut. Both the babies in this case are persons born in India, indisputedly one of their parents is an Indian citizen, a surrogate mother. The two babies have therefore satisfied the ingredients of Section 3(1)(c)(ii) and hence they are Indian citizens by birth. Passport to travel abroad therefore, cannot be denied to those babies, who are Indian citizens, which would otherwise be violative of Article 21 of the Constitution of India. Section 6 of the Passport Act refers to the grounds for refusal of Passport. Section 6(2)(a) says that Passport can be denied if the applicant is not a citizen of India. In the instant case, we have already found that two babies born to the surrogate mother are Indian citizens by birth and hence entitled to get Passports.

18. Passport Authorities are willing to issue a certificate of identity under Section 4(2)(b) of the Passports Act, which is issued only for the purpose of establishing the identity of a person. In the instant case, the identity of the two babies has already been established, they are born in this country to a surrogate mother, an Indian national, and hence citizens of India within the meaning of Section 3(1)(c)(ii) of the Citizenship Act.

19. A comprehensive legislation dealing with all these issues is very imminent to meet the present situation created by the reproductive science and technology which have no clear answers in the existing legal system in this country. Views expressed by us, we hope, in the present fact settings, will pave way for a sound and secure legislation to deal with a situation created by the reproductive science and technology. Legislature has to address lot of issues like rights of the children born out of the surrogate mother, legal, moral, ethical. Rights,

duties and obligations of the donor, gestational surrogate and host of other issues.

20. Further, under the Indian Evidence Act, no presumption can be drawn that child born out of a surrogate mother, is the legitimate child of the commissioning parents, so as to have a legal right to parental support, inheritance and other privileges of a child born to a couple through their sexual intercourse. The only remedy is a proper Legislation drawing such a presumption including adoption. Further the question as to whether the babies born out of a surrogate mother have any right of residence in or citizenship by birth or mere State orphanage and whether they acquire only the nationality or the biological father has to be addressed by the legislature.

21. Indian Council of Medical Research (ICMR) has issued certain guidelines on surrogacy and Assisted Reproductive Technology (ART) in 2005. The new Bill ART (Regulation) Bill and Rules, 2008 is yet to become law, and there is extreme urgency to push through the legislation answering all these issues.

22. We, in the present legal frame-work, have no other go but to hold that the babies born in India to the gestational surrogate are citizens of this country and therefore, entitled to get the Passports and therefore direct the Passport Authorities to release the Passports withdrawn from them forthwith.

23. Special Civil Application is accordingly allowed. Appeal and the civil application stand disposed of accordingly. Interim orders stand vacated.

IN THE SUPREME COURT OF INDIA

REPORTABLE

Committee for C.R. of C.A.P. & Ors v. State of Arunachal Pradesh & Ors

WP (CIVIL) No.510 of 2007

(1996) 1 SCC 742

Civil Original Jurisdiction

Coram : Hon'ble Mr. Anil R. Dave

: Hon'ble Mr. Adarsh Kumar Goel

Date : 17.09.2015

JUDGMENT

Adarsh Kumar Goel, J.

1. This petition under Article 32 of the Constitution of India mainly seeks direction against Union of India through Ministry of Home Affairs to grant citizenship to the Chakma and Hajong Tribals who migrated to India in 1964-1969 and were settled in the State of Arunachal Pradesh.

2. Petitioner No.1 has described itself as Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh (CCRC). According to the averments in the petition, representations were filed with the National Human Rights Commission (NHRC) alleging persecution of Chakmas and Hajongs in the State of Arunachal Pradesh. The NHRC approached this Court by way of a Writ Petition (C) No.720 of 1995 titled National Human Rights Commission vs. State of Arunachal Pradesh seeking direction from this Court to ensure that the Chakmas and Hajongs are not forcibly ousted from the State of Arunachal Pradesh, which was disposed of on 9th January, 1996[1]. In the said case, the Union of India appeared before this Court and stated that decision to settle the Chakmas in the State of Arunachal Pradesh was taken after discussion between the Government of India and the North-East Frontier Agency (NEFA) Administration (Predecessor of the State of Arunachal Pradesh). The Chakmas were residing in the State of Arunachal Pradesh for more than three decades and had close social, religious and economic ties. As per joint statement issued by the Prime Ministers of India and Bangladesh in February, 1972, the Union Government took a decision to confer citizenship on the Chakmas under Section 5(1)(a) of the Citizenship Act, 1955 but

the State of Arunachal Pradesh had reservations on this count. The Central Government was in favour of a dialogue between the State Government, the Chakmas and all concerned to resolve the issue of granting citizenship while also redressing the genuine grievances of citizens of Arunachal Pradesh.

3. The stand of the State of Arunachal Pradesh was that it had provided basic amenities to the Chakmas but the State had a right to ask the Chakmas to quit the State. The State could not permit outsiders to settle within its territory as it had limited resources and the Union of India had refused to share its responsibility. The Deputy Commissioner of the area was to forward the applications for citizenship after due inquiry but no such application was pending. Further stand of the State was that settlement of Chakmas will disturb its ethnic balance and destroy its culture and identity. The tribals of the State consider Chakmas as potential threat to their tradition and culture.

4. This Court considered rival submissions and held that the Chakmas apprehend threat on the All Arunachal Pradesh Students Union (AAPSU) who were reported to be enforcing economic blockades on the refugee camps, adversely affecting supply of ration, medical and essential facilities to the Chakmas. Some Chakmas had died on account of blockade. This Court further noticed that Chakmas could invoke Section 5(1)(a) of the Citizenship Act by filing application in form prescribed by Part II of the Citizenship Rules, 1956. The observations in NHRC case (supra), inter alia, are as follows:-

> 18. From what we have said hereinbefore, there is no doubt that the Chakmas who migrated from East Pakistan (now Bangladesh) in 1964, first settled down in the State of Assam and then shifted to areas which now fall within the State of Arunachal Pradesh. They have settled there since the last about two and a half decades and have raised their families in the said State. Their children have married and they too have had children. Thus, a large number of them were born in the State itself. Now it is proposed to uproot them by force. The AAPSU has been giving out threats to forcibly drive them out to the neighbouring State which in turn is unwilling to accept them. The residents of the neighbouring State have also threatened to kill them if they try to enter their State. They are thus sandwiched between two forces, each pushing in opposite direction which can only hurt them. Faced with the prospect of annihilation the NHRC was moved, which, finding it impossible to extend protection to them, moved this Court for certain reliefs.
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> 19. By virtue of their long and prolonged stay in the State, the Chakmas who migrated to, and those born in the State, seek

citizenship under the Constitution read with Section 5 of the Act. We have already indicated earlier that if a person satisfies the requirements of Section 5 of the Act, he/she can be registered as a citizen of India. The procedure to be followed in processing such requests has been outlined in Part II of the Rules. We have adverted to the relevant rules hereinbefore. According to these Rules, the application for registration has to be made in the prescribed form, duly affirmed, to the Collector within whose jurisdiction he resides. After the application is so received, the authority to register a person as a citizen of India, is vested in the officer named under Rule 8 of the Rules. Under Rule 9, the Collector is expected to transmit every application under Section 5(1)(a) of the Act to the Central Government. On a conjoint reading of Rules 8 and 9 it becomes clear that the Collector has merely to receive the application and forward it to the Central Government. It is only the authority constituted under Rule 8 which is empowered to register a person as a citizen of India. It follows that only that authority can refuse to entertain an application made under Section 5 of the Act. Yet it is an admitted fact that after receipt of the application, the Deputy Collector (DC) makes an enquiry and if the report is adverse, the DC refuses to forward the application; in other words, he rejects the application at the threshold and does not forward it to the Central Government. The grievance of the Central Government is that since the DC does not forward the applications, it is not in a position to take a decision whether or not to register the person as a citizen of India. That is why it is said that the DC or Collector, who receives the application should be directed to forward the same to the Central Government to enable it to decide the request on merits. It is obvious that by refusing to forward the applications of the Chakmas to the Central Government, the DC is failing in his duty and is also preventing the Central Government from performing its duty under the Act and the Rules.

20. We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State

Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty- bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, constitutional and statutory, to be considered for being registered as citizens of India.

5. Accordingly, direction was issued to the State of Arunachal Pradesh to ensure that life and liberty of Chakmas residing in the State was protected against any attempt to evict them by organized groups such as AAPSU and their applications could be forwarded to the Central Government.

6. Case of the petitioners, further is that the application of the State of Arunachal Pradesh for modification and Writ Petition (C) No.593 of 1997 filed by an organization of tribals of Arunachal Pradesh against the judgment of this Court was also dismissed. Another writ petition being Writ Petition No.13 of 1998 against the judgment of this Court was dismissed on 9th December, 2002. Thereafter applications were filed for citizenship but the same were not acted upon. The Election Commission of India in the light of judgment of this Court passed orders dated 3rd March, 2004 declaring the resolution dated 14th May, 2003 passed by the State of Arunachal Pradesh against facilities to the petitioners to be unconstitutional but the authorities of the State of Arunachal Pradesh had not forwarded the applications as required under Rule 9 of the Citizenship Rules to the Central Government.

7. Counter affidavit has been filed by the Union of India stating that the applications directly received by the Ministry of Home Affairs were forwarded to the Government of Arunachal Pradesh which had not been returned except few applications with negative recommendations. The said applications were returned back to the Government of Arunachal Pradesh. Ministry of Home Affairs had advised the Government of Arunachal Pradesh to act in compliance with the judgment of this Court.

8. The stand of the State of Arunachal Pradesh is that there was no threat to the life and liberty of the Chakmas and Hajong refugees. After receiving the judgment of this Court, the judgment was circulated to Inspector General of Police, Deputy Commissioners of

the concerned Districts and Principal Chief Conservator of Forests. The State Government was fully bound by the direction of this Court and had taken all necessary steps to comply with the same. The State of Arunachal Pradesh had received 4382 applications. Though the popular sentiment of the indigenous tribals was different, the State of Arunachal Pradesh was honouring the order of this Court. It is further stated that Chakmas and Hajong tribes were settled in NEFA from 1964 to 1969 when there were no elected bodies in the State of Arunachal Pradesh. The laws applicable in the State of Arunachal Pradesh like the Government of India Act, 1870, the Bengal Eastern Frontier Regulation, 1873, the Scheduled District Act, 1874, the Assam Frontier Tract Regulation, 1880, the Assam Frontier Forest Regulation, 1891, the Chin Hills Regulations, 1896 and the Assam Frontier (Administration of Justice) Regulation, 1945 (1 of 1945) were not taken into account. One thousand four hundred ninety seven Chakmas have been included in the electoral rolls.

9. The petitioners have filed a rejoinder affidavit alleging that children of Chakmas and Hajongs are denied educational facilities. They were not being covered by the public distribution system. They presented a petition to the 10th Lok Sabha and also to Rajya Sabha Committee on Petitions. The said Committee in its 105th Report published on 14th August, 1997 made recommendation to grant Indian Citizenship to the Chakmas but the said recommendation has not been acted upon. The recommendation is as follows:

> 42. The Committee, therefore, recommends that the Chakmas of Arunachal Pradesh who came there prior to 25.3.1971 be granted Indian citizenship. The Committee also recommends that those Chakmas who have been born in India should also be considered for Indian citizenship. The Committee further recommends that the fate of those Chakmas who came to the State after 25.3.1971 be discussed and decided by the Central Government and State Government Jointly. The Committees also recommends that all the old applications of Chakmas for citizenship which have either been rejected or withheld by Deputy Commissioners or the State Deputy Commissioner or the State Government continue to block the forwarding of such applications to Central Government, the Central Government may consider to incorporate necessary provision in the Rules (or the Act it so required) whereby it could directly receive, consider and decide the application for citizenship in the 23 case of Chakmas of Arunachal Pradesh. The Committee also recommends that Chakmas be also considered for granting them the status of Scheduled Tribes at the time of granting the citizenship. The Committee would like to earnestly

urge upon the Central Government and State Government to ensure that until amicable solution is arrived at, the Chakmas are allowed to stay in Arunachal Pradesh with full protection and safety, honour and dignity.

10. When the matter came up for hearing before this Court on 1st August, 2012, the following order was passed :-

Mr. B. Bhattacharyya, learned Additional Solicitor General for respondent No. 5, and Mr. Anil Shrivastav, learned counsel for respondent Nos. 1 to 4, pray for some time to seek instructions and also to ensure that the controversy raised in the Writ Petition is resolved at the hands of the Central Government and the State Government at the earliest.

10. Again on 28th August, 2012, following order was passed : Mr. B. Bhattacharyya, learned Additional Solicitor General appearing for the respondent No. 5 - Union of India, submits that all 4637 applications for grant of citizenship in respect of Chakmas received in the Ministry of Home Affairs, Government of India have been returned to the State Government as the applications were not made to the appropriate authority in prescribed form and were also not accompanied with the recommendations of the State Government as per statutory requirement.

Having regard to the decision of this Court in National Human Rights Commission Vs. State of Arunachal Pradesh and Another, (1996) 1 SCC 742, and the directions contained therein, we direct the State of Arunachal Pradesh to submit a comprehensive report/affidavit to this Court in respect of 4637 applications returned by the Central Government to the State Government on the following aspects in respect of each application:-

(i) Whether the conditions laid down in the relevant clauses of Section 5 of the Citizenship Act, 1955 (for short, 'Act') are satisfied;

(ii) Whether the applicant has an intention to make India his permanent home;

(iii) Whether the applicant has signed oath of allegiance as specified in the Second Schedule to the Act; and

(iv) Whether the applicant is of good character and is otherwise a fit and proper person to be registered as a citizen of India.

The above report/affidavit shall be submitted by the State of Arunachal Pradesh to this Court through the Secretary (Political), Government of Arunachal Pradesh within two months from today.

A copy of the report/affidavit shall be given to the Advocate-on-Record for the petitioners well in advance.

11. On 20th January, 2014, this Court passed the following Order:

> List the matter on 5th May, 2014, so as to enable the Joint High Powered Committee constituted vide Government of India's Order No.13/2/2010-NE-II dated 10/08/2010. to place on record the progress made in the matter.
>
> We are sure that the Committee would make all efforts so that the work entrusted to it is concluded preferably before the next date of hearing.

12. Additional Affidavit dated 2nd January, 2013 was filed by the State of Arunachal Pradesh stating that the Government of India, Ministry of Home Affairs (N.E. Division) has constituted a committee under the Chairmanship of Joint Secretary (N.E.), Ministry of Home Affairs on 10th August, 2010 to examine various issues relating to settlement of Chakmas/Hajongs in Arunachal Pradesh including the possibility of granting Indian citizenship to eligible Chakmas/ Hajongs. The Committee has held its sitting on 9th January, 2012 and taken certain decisions. Thus, the issue was not being ignored though there was no delay in the matter.

13. We have heard learned counsel for the parties and perused the record.

14. Learned counsel for the petitioners submitted that their rights have been duly acknowledged by this Court in NHRC case (supra). Still, their legitimate right of citizenship has not so far materialized. They have been settled after a conscious decision at the highest level of the Government of India. They could not be treated as foreigners. He has placed reliance on a judgment of the Gauhati High Court dated 19th March, 2013 in PIL No.52 of 2010 titled All Arunachal Pradesh Students Union (AAPSU) vs. The Election Commission of India dismissing a petition filed by AAPSU against the guidelines issued by the Election Commission of India for revision of electoral rolls in respect of areas where there is substantial presence of Chakmas and Hajongs. In the said judgment, the Memorandum dated 23rd March, 2005 issued by the Election Commission of India and further guidelines dated 3rd October, 2007 for revision of electoral rolls with reference to 1st January, 2007 as qualifying date are also referred to. The objection against the Chakmas being treated as ordinary residents of Arunachal Pradesh in absence of possession of valid Inner Line Passes was also considered. The Election Commission of India supported its guidelines

with guidelines with reference to a judgment of the Delhi High Court dated 28th September, 2000 in W.P. No.886 of 2000 (Peoples Union for Civil Liberties vs. Election Commission of India & Ors.)

15. In the judgment of the Gauhati High Court, it was noted that in contradiction to those unwanted illegal migrants who sneak into the country, the Chakmas migrated to India on account of their displacement and the Government of India agreed to grant them citizenship. In these circumstances, the guidelines of the Government of India were held to be justified and did not warrant any requirement of Inner Line permit. The relevant observations are :

> [18] . Having regard to the facts and circumstances which have been also highlighted by the Hon'ble Supreme Court as referred to above in NRHC case, we are of the view that these additional guidelines, having been issued in the peculiar circumstances obtaining, cannot be held to be discriminatory.

Further, in view of the policy decision taken by the Government of India to settle the Chakma refugees in different States and also in Arunachal Pradesh in consultation with the authorities of the Arunachal Pradesh, and also to confer Indian citizenship, the contention of the petitioners that the aforesaid guidelines have the effect of violating the provisions of law in terms of lack of Inner Line Permit or violation of provisions of section 13 of the Registration of Births and Deaths Act, 1969 does not hold water. We are of the view that once a decision had been taken to settle these Chakma refugees in Arunachal Pradesh in consultation with the authorities of Arunachal Pradesh, they would become residents of Arunachal Pradesh and would not require the Inner Line Permit/Pass. Otherwise also, once they have been allowed to settle in Arunachal Pradesh, it would be deemed that such permits had been granted to them and in our considered opinion, any other view would negate and defeat the policy decision taken by the Government of India in consultation with the Arunachal Pradesh authorities to settle these Chakmas in Arunachal Pradesh.

Similarly, as regards, the other contention of the petitioners that the guidelines would contravene the provisions of section 13 of the Registration of Births and Deaths Act, 1969 also cannot be accepted. It may be noted that the Chakmas had taken refuge in this country under distress and trying circumstances after having been uprooted from their hearth and homes and made to flee to avoid persecution. Further, later on, after having allowed to settle in Arunachal Pradesh, they had faced difficulties and harassments from the neighbouring local populace which had been taken note of by the Supreme Court in NHRC case as mentioned above. Therefore, issuing of the additional

guidelines for the purpose of verification of the birth of the claimants on the basis of other credible materials for the purpose of enrolment in the electoral rolls where these Chakmas had been officially settled cannot be interfered with merely on the technical ground that certain provisions of Registration of Births and Deaths Act, 1969 have not been strictly complied with, if the evidences are otherwise credible and trustworthy.

We are of the view that the additional guidelines which had been issued by the Election Commission of India are merely to enable those Chakmas to enjoy such benefits as a citizen of this Country including the right to vote by having their names enrolled in the electoral rolls of the concerned constituency where they have been settled. Once, these Chakma refugees have been granted citizenship, they are entitled to enjoy all the rights and privileges that flow on becoming a citizen of this country and further, they are entitled to have their rights as citizens of this country protected and safeguarded.

16. We find merit in the contention of the petitioners. It stands acknowledged by this Court on the basis of stand of the Government of India that the Chakmas have a right to be granted citizenship subject to the procedure being followed. It also stands recognized by judicial decisions that they cannot be required to obtain any Inner Line permit as they are settled in the State of Arunachal Pradesh.

17. In State of Arunachal Pradesh vs. Khudiram Chakma[2], this Court noted the ancient history of Arunachal Pradesh as follows :

> 41. The history of the mountainous and multitribal north-east frontier region which is now known as Arunachal Pradesh ascends for hundreds of years into the mists of tradition and mythology. According to Pauranic legend, Rukmini, the daughter of King Bhishmak, was carried away on the eve of her marriage by Lord Krishna himself. The ruins of the fort at Bhalukpung are claimed by the Akas as the original home of their ancestor Bhaluka, the grandson of Bana Raja, who was defeated by Lord Krishna at Tezpur (Assam). A Kalita King, Ramachandra, driven from his kingdom in the plains of Assam, fled to the Dafla (now Nishang) foothills and established there his capital of Mayapore, which is identified with the ruins on the Ita hill. A place of great sanctity in the beautiful lower reaches of the Lohit River, the Brahmakund, where Parasuram opened a passage through the hills with a single blow of his mighty axe, still attracts the Hindu pilgrims from all over the country.

18. The above history shows the integral link of the State of Arunachal Pradesh with the rest of the country since ancient times. It is well known that the Chakmas and Hajongs were displaced from the area which became part of East Pakistan (now in Bangladesh) on construction of Kaptai Dam and were allowed to be rehabilitated under the decision of the Government of India. As earlier held by this Court, the Delhi High Court and Gauhati High Court, they need to be protected and their claims of citizenship need to be considered as per applicable procedure. They could not be discriminated against in any manner pending formal conferment of rights of citizenship. Their status also stands duly acknowledged in the guidelines of the Election Commission of India.

19. Learned Additional Solicitor General fairly stated that the Government of India will earnestly take appropriate measures in the matter, granted some more time.

20. Accordingly, we allow this petition and direct the Government of India and the State of Arunachal Pradesh to finalise the conferment of citizenship rights on eligible Chakmas and Hajongs and also to ensure compliance of directions in judicial decisions referred to in earlier part of this order for protection of their life and liberty and against their discrimination in any manner. The exercise may be completed at the earliest preferably within three months from today.

..J.

[ANIL R. DAVE] ..J.

[ADARSH KUMAR GOEL] NEW DELHI SEPTEMBER 17, 2015

IN THE HIGH COURT OF DELHI AT NEW DELHI

Coram : Hon'ble Mr. Justice Sanjeev Sachdeva
Date : 22.09.2016

Phuntsok Wangyal v. Ministry Of External Affairs & Ors
W.P.(C) 3539/2016

For petitioner : Mr Ankur Mittal, Adv
For respondent : Ms Sunieta Ojha and Mr Talish Ray

Lobsang Wangyal v. Union of India & Ors
W.P.(C) 4275/2016

For petitioner : Mr Giriraj Subramanium,
: Mr Simarpal Singh Sawhney
: Mr Sidhant Krishan Singh, Advocates.
For respondent : Mr Akshay Makhija,
: Ms Abha Malhotra
: Mr Gaurang Bindra, Advocates for Union of India.

Tenzin Dhonden v. Union of India & Ors
W.P.(C) 7983/2016

For petitioner : Mr Giriraj Subramanium,
: Mr Simarpal Singh Sawhney
: Mr Sidhant Krishan Singh, Advocates.
For respondents : Mr Vikram Jetley, Advocate for Union of India

JUDGMENT

SANJEEV SACHDEVA, J (ORAL)

CM No.34827/2016 in W.P.(C) 3539/2016 (delay in filing counter-affidavit for 15 days)

For the reasons stated in the application, the application is allowed.

The delay in filing counter-affidavit is condoned and the counter-affidavit is taken on record.

W.P.(C) Nos.3539/2016, 4275/2016 & 7983/2016

1. In W.P.(C) No.7983/2016, Mr Jaitley, learned counsel for the respondent, has filed the counter-affidavit on behalf of respondent in court. The same is taken on record.
2. All these petitions seek a direction to the respondents to consider the petitioners, who are children of Tibetan parents and born in India on or after 26.01.1950 and before 01.07.1987, as citizens of India in view of Section 3(1) (a) of the Citizenship Act, 1955 (hereinafter referred to as 'the Act') and to issue Indian passports.
3. The petitioner – Phuntsok Wangyal in W.P.(C) No.3539/2016 was born on 17.09.1977 and the petitioner – Lobsang Wangyal in W.P.(C) No.4275/2016 was born on 25.05.1970. The petitioners, in these two petitions, claim citizenship of India on the basis of Section 3(1)(a) of the Act.
4. The petitioner – Tenzin Dhonden in W.P(C) No.7983/2016 was born on 16.08.1992 and contends that his father was born in India on 01.01.1966 and claims citizenship of India by virtue of Section 3(1)(b) of the Act.
5. It is contended by the petitioners that the petitioners being citizens of India, cannot be discriminated against and cannot be denied the Indian passport by the respondents. It is also contended that the petitioners, being Indian citizens by virtue of the Citizenship Act, 1955, have no requirement of making any application with the respondents for being so declared and are entitled to all benefits and privileges, as are available to citizens of India.
6. Reliance is placed on the decision of a Coordinate Bench of this Court in Namgyal Dolkar versus Government of India, Ministry of External

Affairs, dated 22.12.2010 in W.P.(C) No.12179/2009, wherein similar relief has been granted.

7. Learned counsel for the respondents rely on a letter dated 26.08.2011 issued by the Ministry of Home affairs to the Election Commission of India, whereby Minutes of inter-Ministerial meeting held on 30.03.2010 was conveyed, inter alia, to the following extent:-

> "The children born to Tibetan Refugee in India will not be treated as Indian citizen automatically based on their birth in India before 01.07.1987 under Section 3(1)(a) of the Citizenship Act, 1955. All such persons will have to submit an application individually under Section 9(2) of the Citizenship Act, 1955 to MHA and thereafter the nationality status of all such children born to Tibetan Refugees in India, will be determined by MHA as per prescribed procedure available under the Citizenship Rules, 2009. All such children, as an when their nationality status as an Indian is decided by this Ministry, will have to surrender their Tibetan Refugee Certificate and Identity Card before accepting Indian citizenship."

8. It is contended that as per the said Minutes, all children born to Tibetan refugees in India would not be treated as Indian citizens based on their birth in India before 01.07.1987 and such persons shall have to submit applications individually under Section 9(2) of the Citizenship Act and thereafter the nationality status would be determined by the Ministry of Home Affairs, as per the procedure prescribed under the Citizenship Rules, 2009.

9. It is contended that the petitioners cannot be considered to be Indian citizens automatically and need to apply in terms of the decision of the respondent.

10. Section 3 of the Act reads as under:-

> "3. Citizenship by birth- (1) Except as provided in sub- section (2), every person born in India, -
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> (a) on or after the 26th day of January, 1950, but before the 1st day of July, 1987;
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> (b) on or after the 1st day of July, 1947, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;
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> (c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where
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> (i) both of his parents are citizens of India; or
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> (ii) one of whose parents is a citizen of India and the other is not an

illegal migrant at the time of his birth, shall be a citizen of India by birth.

(2) A person shall not be a citizen of India by virtue of this section if at the time of his birth –

(a) either his father or mother possesses such immunity from suits and legal process as is accorded to any envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India; or

(b) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy."

11. As per section 3(1) of the Act, there are three categories of persons who are citizens of India by birth: (i) those born, on or after the 26th day of January, 1950, but before the 1st day of July, 1987 or (ii) those born on or after the 1st day of July, 1947, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth or (iii) those born on or after the commencement of the Citizenship (Amendment) Act, 2003, where both of his parents are citizens of India or one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth.

12. However a person, who though satisfies the criteria of section 3(1) of the Act, would still not be a citizen of India if at the time of his birth (i) either his father or mother possesses such immunity from suits and legal process as is accorded to any envoy of a foreign sovereign power accredited to the President of India and he or she, as the case may be, is not a citizen of India or (ii) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.

13. The petitioner – Phuntsok Wangyal in W.P.(C) No.3539/2016 was born on 17.09.1977 and the petitioner – Lobsang Wangyal in W.P.(C) No.4275/2016 was born on 25.05.1970. Both of them satisfy the requirement of section 3(1) (a) of the Act i.e. born, on or after the 26th day of January, 1950, but before the 1st day of July, 1987.

14. The petitioner – Tenzin Dhonden in W.P(C) No.7983/2016 was born on 16.08.1992 and his father was born in India on 01.01.1966. Since the father of the petitioner – Tenzin Dhonden was born in India and satisfies the requirement of section 3(1) (a) of the Act, he would be an Indian Citizen and thus the petitioner satisfies the requirement of section 3(1) (b) of the Act i.e. those born on or after the 1st day of July, 1947, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time

of his birth.

15. None of the Petitioners admittedly suffer from the disqualification of section 3(2).

16. In Namgyal Dolkar (Supra) the learned Judge held as under:-

> "24. A plain reading of the above provision shows that a cut-off date was introduced by the Parliament for recognition of citizenship by birth. Except as provided by Section 3(2), "every person born in India on or after the 26th January 1950 but before the 1st day of July 1987" shall be a citizen of India by birth. Admittedly, in the present case, none of the prohibitions contained in Section 3(2) CA are attracted. The case of the Petitioner is within the ambit of Section 3(l)(a) since she was born in India on 13th April 1986, i.e., after 26th January 1950 but before 1st July 1987. The SOR accompanying the amendment Bill of 1986, by which the above provision was introduced and discussed in the Lok Sabha and Rajya Sabha, makes it clear that the change brought about by the amendment was to be prospective. The rationale behind introduction of a 'cut-off' date was that the position prior to 1st July 1987 was not intended to be disturbed.
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> 28. In the considered view of this Court, the above ground for rejection of the Petitioner's application for passport is untenable. As already noticed, the concept of 'nationality' does not have legislative recognition in the CA. The Petitioner's describing herself to be a Tibetan 'national' is really of no legal consequence as far as the CA is concerned, or for that matter from the point of view of the policy of the MEA. The counter affidavit makes it clear that the MEA treats Tibetans as 'stateless' persons. Which is why they are issued identity certificates which answers the description of travel documents within the meaning of Section 4(2)(b) PA. Without such certificate, Tibetans face the prospect of having to be deported. They really have no choice in the matter. It must be recalled that when her attention was drawn to the fact that she could not hold an identity certificate and a passport simultaneously, the Petitioner volunteered to relinquish the identity certificate, if issued the passport. That was the correct thing to do, in any event. The holding of an identity certificate, or the Petitioner declaring, in her application for such certificate, that she is a Tibetan national, cannot in the circumstances constitute valid grounds to refuse her a passport.
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> 29. The policy decision of the MHA not to grant Indian citizenship

by naturalisation under Section 6(1) CA to Tibetans who entered India after March 1959 is not relevant in the instant case. Having been born in India after 26th January 1950 and before 1st July 1987, the Petitioner is undoubtedly an Indian citizen by birth in terms of Section 3(l)(a) CA. The fact that in the application form for an identity certificate the Petitioner described herself as a Tibetan national will make no difference to this legal position. There cannot be waiver of the right to be recognized as an Indian citizen by birth, a right that is expressly conferred by Section 3 (1) CA. The Petitioner cannot be said to have 'renounced' her Indian citizenship by birth by stating that she is a Tibetan national. Renunciation can happen only in certain contexts one of which is outlined in Section 8 which reads as under:-

> "8. Renunciation of citizenship: (1) If any citizen of India of full age and capacity, makes in the prescribed manner a declaration renouncing his Indian citizenship, the declaration shall be registered by the prescribed authority, and, upon such registration, that person shall cease to be a citizen of India.
>
> Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs.
>
> (2) Where a person ceases to be a citizen of India under sub-section (1) every minor child of that person shall thereupon cease to be a citizen of India:
>
> Provided that any such child may, within one year attaining full age, make a declaration in the prescribed form and manner that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India."
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> xxxx xxxx xxxx xxxx

31. The Petitioner was born in India on 13th April 1986, i.e. after 26th January 1950 and before 1st July 1987, and is an Indian citizen by birth in terms of Section 3(l)(a) CA. She cannot therefore be denied a passport on the ground that she is not an Indian citizen in terms of Section 6(2)(a) PA."

17. This Court in Namgyal Dolkar (supra) has very categorically laid down that the persons like the petitioners are covered under Section 3 of the Citizenship Act, and cannot be denied a passport on the ground that they are not Indian citizens in terms of Section 6(2)(a) of the Passport Act, 1967. I am in complete agreement with the view taken

by the coordinate bench in the said judgment.

18. Learned counsel for the respondents do not contend that the said decision has either been set aside or stayed by any higher forum.

19. Even the Election Commission of India, to whom the said letter dated 26.08.2011 of the Ministry of Home Affairs, was addressed, has issued a letter dated 07.02.2014, which reads as under:-

"No.30/ID/2010-ERS Dated – 7th February, 2014

To,

The CEOs of all States/UTs

Subject: Registration of Tibetan Refugees and their offspring in the electoral roll-clarification – regarding

Sir/Madam,

I am directed to refer to the Commission's instruction dated 27th September, 2011, on the subject cited and to state that in the light of decision dated 7th August, 2013 of Karnataka High Court in WP No. 15437/2013 Tenzin Choephag Ling Rinpochwe Vs Union of India and others, the Commission has reconsidered its stand communicated by the aforesaid letter. (A copy of the HC order is enclosed as Annexure-1)

As per Section 3(1) (a) of the Citizenship Act, 1955, the children born to Tibetan Refugees in India shall be treated as Indian citizens based on their in India, on or after 26th January, 1950 and before 1st July, 1987. Hence, notwithstanding anything contained in Union Home Ministry letter number 26027/08/1994-S-I dated 26th August, 2011 conveyed to all CEOs vide ECI letter dated 27th September, 2011, the Commission clarifies that the EROs concerned should not deny enrolment to the children of Tibetan Refugees where they are satisfied that(1) the applicant was born in India, (2) he/she was born on or after 26th January, 1950 but before 1st July, 1987, and (3) he/she is ordinarily resident in the constituency in which the application for enrolment has been made.

Please bring this into the notice of all concerned EROs and other stakeholders for information and compliance.

Yours faithfully,

(R.K. Srivastava) Principal Secretary"

20. The Election Commission of India, by the said letter dated 07.02.2014, has stated that notwithstanding anything contained in the communication dated 26.08.2011, the Electoral Return Officers (EROs) are not to deny enrolment to the children of the Tibetan refugees where they satisfy the requirement of Section 3 of the Act.

21. Furthermore, Section 3 of the Act very categorically lays down the conditions under which a person acquires citizenship by birth. By a mere correspondence or an inter-Ministerial meeting, the statutory provisions cannot be defeated. No decision taken in an inter-ministerial meeting can override a statutory provision. The petitioner have been given rights under the Act, those rights cannot be taken away by a mere inter-ministerial decision.

22. The communication dated 26.08.2011 of the Ministry of Home Affairs notices the decision of this Court in Namgyal Dolkar (supra), but, records that the same may not be applicable per se in other cases. It is not understandable as to how such a view could be taken by the Respondents in view of the clear findings of this court in Namgyal Dolkar (supra). The action of the respondents is clearly unsustainable. The communication dated 26.08.2011 and the minutes of meeting dated 30.03.2010, being contrary to the Act, are quashed.

23. The writ petitions are allowed holding that the petitioners are Indian citizens and entitled to all benefits and privileges, as are available to Indian citizens. The respondents cannot require the petitioners to make any application under section 9 of the Act. The Petitioners cannot be denied Indian passport by the respondents on that ground.

24. The respondents are directed to issue the India passports to the petitioners, who have been declared to be Indian citizens, within a period of four weeks in accordance with the Rules.

25. The writ petitions are disposed of in the above terms. There shall be no order as to costs.

26. Dasti under signatures of the Court Master.

SANJEEV SACHDEVA SEPTEMBER 22, 2016/ 'sn'

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

P. Ulaganathan & Ors. v. Government of India & Ors.

WP (MD) No. 5253 of 2009

Coram	: The Honourable Mr. Justice G. R. Swaminathan
Date	: 17.06.2019
For Petitioners	: Mr. A. John Vincent
For Respondents	: Mr. V. Kathirvelu, Assistant Solicitor General of India, assisted by Mr. C. Nandagopal for R1, R2 and R9, Mr. Aayiram K. Selvakumar for R3 to R8

ORDER

1. The case of the writ petitioners is that they are descendants of indentured labour who settled down in the tea estates of Sri Lanka during the colonial times. There is no doubt that they are Tamil speaking people. Their forefathers hailed from what is the present day State of Tamil Nadu. They faced severe discrimination at the hands of the Sri Lankan Government after it gained independence in the year 1948. The writ petitioners contend that they should not be considered as part of those Tamilians from northern and eastern Sri Lanka who though Tamil-speaking are yet natives of Sri Lanka in every sense of the term. Sri Lanka witnessed a genocidal and brutal ethnic strife. 1983 was one of the worst moments in history. There was a virtual exodus of the Tamil people from Sri Lanka to India. They reached India by whatever mode that was available. The petitioners would claim that while those from northern and eastern Sri Lanka would have to be treated as refugees, persons like the petitioners will have to be treated more as Indians repatriates. After their entry into India, most of them were kept in Kottapottu camp in Trichy. Since they apprehended forcible deportation back to Sri Lanka, writ petitions were filed before the Madras High Court. Interim injunction was granted and the case was finally disposed of by recording the undertaking given by the Government that the writ petitioners will not be compulsorily sent back to Sri Lanka (vide order dated 21.03.1994 made in WP Nos.1448 to 1450, 1802, 5643, 15507 of 1988, 7533 and 16892 of 1991 and 6804, 6820, 7613, 8206, 12298 and 12343 of 1992). The writ petitioners had been periodically submitting representations seeking conferment of Indian citizenship. There was exchange of correspondence among the various authorities.

2. But then, there was no fruitful result forthcoming all these years. The writ petitioners plead that they are genealogical Indians. Their native places are in Tamil Nadu. They have blood relatives only here. Only because their forefathers had gone to Sri Lanka to work as labour in tea estates of Sri Lanka, they had to suffer this condition of statelessness. They had to escape from Sri Lanka to save their lives and limbs. They cannot go back to Sri Lanka. They have nothing there. It is not as if Sri Lanka is ready to welcome the petitioners' back. Since the authorities have not been positive in their approach, the petitioners have moved this Court seeking conferment of citizenship.

3. The Government of Tamil Nadu had filed a counter affidavit. It is admitted therein that most of the writ petitioners are staying in Kottapottu Transit Camp, Trichy as Sri Lankan refugees. Others are staying in various refugees camps which are located in Madurai, Perambalur, Karur, Mandapam Camp etc., It is further admitted that they arrived in India during 1983 to 1985. The writ petitioners are given monthly cash doles, ration essential commodities, accommodation, dress materials, utensils and free education etc., But, citizenship cannot be conferred on them as it is a policy matter to be decided by the Government of India. The Government of Tamil Nadu contests the petitioners' claim that they can be treated as repatriates. The Government of Tamil Nadu recognizes them only as refugees.

4. The specific stand of the Government of Tamil Nadu is that an illegal migrant is not eligible for grant of Indian citizenship under the provisions of Indian Citizenship Act, Act 1955 and the rules framed thereunder. The writ petitioners are not having valid and up to date residential permit/long term visa. They did not arrive in India through an appropriate passport. They came here through an illegal route. Therefore, they are illegal migrants and hence, the request of the petitioners cannot be complied with. The Government of Tamil Nadu therefore prays for dismissal of the writ petition.

5. The stand of the Government of India is no different. The policy of the Government of India is that Tamil Refugees/migrants who had entered into India after 1983 and possess a valid travel documents can apply for Indian Citizenship under Section 5(1) (c) of the Indian Citizenship Act, 1955. Other refugees/migrants who do not have valid passport/visa/residential permit are treated as illegal migrants and therefore they are not eligible for registration under Section 5 or for naturalization under Section 6 of the Indian Citizenship At, 1955. It is further submitted by the Government of India that no application has been received in Foreigners' Division of Ministry of Home Affairs for grant of Indian Citizenship or with the concerned District Collector. It

is further stated that even if the writ petitioners fulfil all the eligibility criteria, they cannot demand citizenship as a matter of right. This is because the Central Government always have the discretion to grant or refuse an application for grant of Indian citizenship. It is not required to assign any reason for grant or refusal.

6. The learned counsel appearing for the writ petitioners has filed detailed written arguments where there are copious references to international instruments such as Universal Declaration of Human Rights and Conventions relating to status of stateless persons and resolutions passed in various conventions. It is admitted by the learned counsel for the petitioners that India was not a party to any of these conventions. He would, however, invoke Article 51(c) of the Constitution of India which mandates the Government to foster respect for international law and treaty obligations in dealings of the organised people with one another.

7. The learned counsel for the petitioners would refer to the various decisions of the Hon'ble Supreme Court particularly Apparel Export Promotion Council vs. A.K. Chopra (AIR 1999 SC 625). The writ petitioners' counsel also would refer to an order dated 10.12.2018 passed by the High Court of Meghalaya in WP(C) No. 448 of 2018 (Amon Rana vs. State of Meghalaya). This Judgement passed by Hon'ble Mr. Justice S.R. Sen has since been reversed by the Hon'ble Division Bench and therefore, the said judgment cannot be looked into. Likewise, the reference to the international instruments is again of no avail. This is because Indian Parliament pursuant to the constitutional mandate laid down in Article 11 has framed the Indian Citizenship Act, 1955. Therefore, when a comprehensive law governing citizenship has been put in place, it is futile to look to international law, more so, when India is not a party to those conventions.

8. This Court cannot also lose sight of the stirring observations made by the Hon'ble Supreme Court in the decision reported in (2005) 5 SCC 665 (Sarbananda Sonowal vs. Union of India). It was observed that the duty of the State is to protect the nation from "external aggression and internal disturbance" on account of large scale illegal migration from neighboring countries which is also a form of aggression.

9. There is one other aspect. A writ petition in the nature of a public interest litigation was filed by a Sri Lankan Tamil Refugee for directing the Government of Tamil Nadu as well as the Government of India to ensure that they have driving licenses, bank accounts, movable articles, immovable properties and educational rights and the right to freedom of movement. The Hon'ble First Bench in the decision reported in AIR

2015 Mad 65 (Gnanaprakasam vs. Government of Tamil Nadu) held as follows :

"9. We have given a thought to the matter. We are of the view that the very maintainability of the P.I.L. filed on behalf of Sri Lankan citizens is in question. Not only that, the petitioner seems to be confusing the issue by claiming equality of rights with citizens of the country, something which is not permissible. There cannot be an absolute constitutional protection for a non-citizen by extending all the provisions of the Constitution of India to him.

10. The aspect urged qua issuance of licence has already been dealt with in the aforesaid affidavits to show that the matter concerns security of the State and there also, on proper verification, licences have been permitted. As regards higher education, there is no separate reservation nor can a parity be claimed in view of the judicial pronouncement referred to supra.

11. The judgments referred to by the learned counsel for the petitioner do not apply in the facts of the case. National Human Rights Commission vs. State of Arunachal Pradesh's case, (supra), dealt with certain protections provided under Section 6A of the Citizenship Act itself. It is in that context that certain observations are made, where a cut-off date was provided, giving them the entitlement to apply for citizenship. In Chairman, Railway Board vs. Chandrima Das (supra), the matter was of a Bangladesh refugee, who was raped and the grant of compensation on account of violation of the right to live with human dignity guaranteed under Article 21 of the Constitution of India. The aspect of security of State being important has been emphasized in that judgment, as even Part III of the Constitution of India does not contain absolute rights.

12. In our view, the stand of the respondents shows that assistance is being provided to the Tamil refugees from Sri Lanka, but they want more, as urged by the petitioner. There is no intrinsic right much less any constitutional right in this behalf, as their basic needs are being looked after, despite being refugees, in view of Article 21 of the Constitution of India. It is for the concerned Governments to decide whether any modified or further facilities are to be provided or not.

13. For all the aforesaid reasons, we are not inclined to entertain this writ petition.

14. Writ Petition stands dismissed."

10. The aforesaid decision rendered in WP No.18373 of 2008 may not come in the way of granting some relief in this writ petition. This is because, in the case on hand, citizenship is sought. That was not so in Gnanaprakasam's case.

11. The Government of India is not right in contending that it has not received any application for citizenship from the petitioners herein. In the typed set of papers, a number of representations have been enclosed urging the authorities to grant citizenship to the petitioners. The District Magistrate/District Collector, Trichirappalli has however not chosen to forward the petitioners' applications to the Government of India for the simple reason that the writ petitioners herein are illegal migrants.

12. Section 5(1) of the Citizenship Act, 1955 opens as follows :

> "Subject to the provisions of this section and such other conditions and restrictions as may be prescribed, the Central Government may, on an application made in this behalf, register as a citizen of India any person not being an illegal migrant who is not already such citizen by virtue of the Constitution or of any other provision of this Act if he belongs to any of the following categories, namely"

Therefore, the first condition that must be fulfilled is that the applicant is not an illegal migrant. This expression has been defined in Section 2(1)(b) of the Act which reads as follows :

"illegal migrant means a foreigner who has entered into India-

(i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or

(ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time."

Applying the aforesaid statutory definition, the petitioners are obviously illegal migrants. Once that is declared to be their status, they are not eligible for citizenship by registration under Section 5 of the Act. It is a futile exercise to forward their applications or to consider the same. That is what the State Government and the Central Government in unison say.

13. But then, the petitioners can invoke Article 21 of the Constitution of India. It applies to all persons, citizens and non-citizens alike. It would apply to refugees and asylum seekers. And most certainly to the

petitioners who are genealogically rooted to this soil and who speak our language and who belong to our culture.

14. The petitioners have amply demonstrated that they have formed the intention of making India their permanent home. The Government of India had given an undertaking that they will not be compulsorily sent back to Sri Lanka. Therefore, the case on hand presents a rather a unique situation. In mythology there is a region called Thirisangu Sorgam. The petitioners are in a similar situation. They have come away from Sri Lanka but they have not been absorbed here. But, the camps in which they have been housed are far from being a Sorgam. The camp conditions are hellish. One must read Pathinathan who is associated with the literary magazine Kalachuvadu in this regard. Even if one's heart is made of stone, it would still melt under the searing heat of reality. When IPS officers are made in charge of Mandapam Camp, it is called as punishment posting. It is only a temporary phase for them. They manage their way and somehow slither towards rehabilitation. But for the inmates, there is no hope whatsoever. It is endlessly bleak. The petitioners have been in camps for close to 35 years. Keeping them under surveillance and severely restricted conditions and in a state of statelessness for such a long period certainly offends their right under Article 21 of the Constitution of India.

15. The Central Government need not feel helpless or take shelter behind Section 5 of the Citizenship Act, 1955. Notwithstanding the absence of an express power to relax the rigour set out in the opening clause of Section 5(1) of the Act, this Court must hold that the sovereign authority does have an implied power to do so. In fact, the existence of the implied power to grant relaxation in cases arising under the Indian Citizenship Act, 1955 was recognised by the Hon'ble Delhi High Court in Felix Stefan Kaye vs Foreigners Regional Registration Office in WP(C) No. 2862/2018 & CM Nos. 11574-576/2018 dated 23.03.2018.

16. The Government of India must take note of the fact that the petitioners came to India when faced with a grave threat to their lives and limbs. They had to seek asylum in India. A person who is running for his life cannot obviously be expected to wait for a visa. Therefore, viewing the petitioners' case through the prism of the technical requirements of law, does not appear to be a humanitarian approach.

17. An illegal migrant cannot claim such a relaxation if he had merged with society surreptitiously. That is not the case here. The writ petitioners have been housed in camps set up by the Government.

18. Hence, I issue the following directions :

a. The writ petitioners are permitted to submit a fresh application seeking citizenship to the respective District Magistrates/ District Collectors.

b. The District Magistrates/District Collectors concerned are directed to forward the same without any delay to the Central Government.

c. Once the Central Government receives the petitioners' applications, it shall pass appropriate orders thereon within a period of sixteen weeks thereafter. The Central Government shall bear in mind that it has the power to consider the applications favorably notwithstanding the technical status of the applications as that of illegal migrants. The Central Government shall take note of the unique situation in which the petitioners are placed. The undertaking given before the Madras High Court that the applicants will not be sent back will also be factored in the process of consideration.

19. I consciously refrain from issuing any positive mandamus directing the Central Government to provide citizenship to the writ petitioners herein. This is because citizenship falls within the exclusive executive domain of the Central Government. My heart may bleed for the petitioners but I have to be mindful of the Lakshman Rekha that limits the bounds of judicial power. Going beyond will be encroachment. Any form of encroachment is bad. Encroachment by judiciary into the executive realm can be no exception. Some may say it is exceptionally bad.

20. The writ petition is disposed of accordingly. No costs.

PART II
CASES – LOWER COURTS

I. NON-REFOULEMENT and NON-PENALISATION

The 1951 Convention relating to the Status of Refugees states in Article 31 that refugees should not be penalised for their illegal entry. Further, Article 33 enshrines the principle of non-refoulement and thereby prohibits states from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations.

Despite the fact that India is not a party to the Refugee Convention, lower courts in numerous cases have given recognition to these international obligations. Hence, along with the laws of the land and humanitarian consideration, the courts have prohibited deportation, ordered release, discharge and acquittal of refugees and asylum seekers. This section first list the cases and a summary of the orders followed by the orders/ judgements.

NAME OF CASE	COURT and DATE OF ORDER	MAIN RATIO
State vs Mohd Ehsan	Metropolitan Magistrate New Delhi 17 March 1994	Accused granted refugee status by UNHCR; order of Deportation held to be unnecessary.
State of Maharashtra vs Mustafe Jama Ahmed	Judicial Magistrate Cantonment Court Pune 21 April 1994	Accused a Somalian Refugee charged under section 14 of the Foreigners Act. He was in India for education purpose and the Court believed that the accused deserves lenient view since he is a refugee and also because he was young student of 27 years of age and going straight to jail may spoil his future. The Court therefore sentenced him for simple imprisonment till rising of the court and a small amount of fine.

State vs Shri K. Htoon Htoon & 4 Others	Judicial Magistrate Churachandpur Manipur 23 December 1994	Accused had been granted Refugee status by UNHCR and therefore the prosecution allowed to withdraw the case u/s 321 Cr.P.C.
State vs Mohd. Riza Ali	Metropolitan Magistrate New Delhi 7 July 1995	Accused, an Iraqi refugee, voluntarily pleaded guilty of the charges u/s 420 and 471 of the IPC and 14 of the Foreigners Act. However, the accused submitted a refugee certificate granted by UNHCR due to which the Court held that the accused had a valid authorization to stay in India and hence cannot be convicted for the offence punishable under the Foreigners Act. On humanitarian grounds, the Court charged him only a minimum fine.
State vs Farid Ali Khan	Metropolitan Magistrate, New Delhi 1 November 1995	Sec 8 of the Foreigners Act allows every foreigner up to 24 hours (which can also be extended) to produce the papers of stay in India. The Court discharged the accused, a foreign national who had a refugee status and residential permit to stay in India but was given no such time to produce his documents.
State vs Mohd. Yaashin	Metropolitan Magistrate, New Delhi 1 August 1997	Accused was charged under section 420 and 471 of the Indian Penal Code and section 14 of the Foreigners Act. The Court considering that the accused has been granted refugee status took a lenient view and sentenced him to the imprisonment already undergone and to pay a minimum fine.
State vs Thang Cin	Metropolitan Magistrate New Delhi 3 June 2002	Convicted u/s 14 Foreigners Act; Since convict was granted Refugee status he was set at liberty.

State vs Chandra Kumar & Ors	Metropolitan Magistrate New Delhi 20 September 2010	Non-refoulement part of customary international law and binds India. Order of deportation quashed.
State vs Abdiqani Osman Abdi	Metropolitan Magistrate New Delhi 19 September 2014	Accused u/s 14 of the Foreigners Act and u/s 420, 467, 468 and 471 IPC. Court held the convict is a victim of circumstances therefore sentenced to imprisonment already undergone.
State vs Firoz Khan	Juvenile Justice Board, Delhi 7 May 2015	The Court granted a release order and directed to arrange a visit to UNHCR office for granting of refugee status.
Bittu Das and Anr vs State	Judicial Magistrate, Murshidabad, West Bengal 2 June 2016	Refugees although included under the wider definition of 'foreigners' as per the Foreigners Act, they have special status and for their safety they should not be deported.
State vs Tshibangu Kalala	Metropolitan Magistrate, New Delhi 12 January 2017	Refugees although included under the wider definition of 'foreigners' as per the Foreigners Act, they have special status and for their safety they should not be deported.
State of Maharashtra vs Thiotros Girme Gaien	Judicial Magistrate, Pune 16 January 2018	Accused acquitted of the offence punishable u/s 14 of the Foreigners Act vide section 248 Cr. P. C; Refugees are different from a foreigner or any illegal emigrant and cannot be deported.

The State of Manipur vs Mohammad Faisal Khan	Judicial Magistrate, Imphal, Manipur 19 February 2018	No deportation order can be passed against the accused who is refugee under the mandate of UNHCR
The State of Tripura vs Smt. Dilwara Begum & ors	Judicial Magistrate Khowai Tripura 24 May 2018	Accused persons in custody submitted certificate of granting refugee status by UNHCR. Court held that India though not a signatory of the 1951 Convention relating to the status of refugees it has been a member of the Executive Committee of UNHCR since 1995 and has also allowed hosting of refugees. Hence, the accused persons under custody were discharged from the prosecution.
State vs Mohd Joshim	Chief Judicial Magistrate, Barasat, West Bengal 22 August 2019	Accused charged u/s 14 of the Foreigners Act. Since accused recognised as a refugee under UNHCR's mandate case discharged u/s 239 CrPC.

IN THE COURT OF V.K. MALHOTRA, METROPOLITAN MAGISTRATE, NEW DELHI

State v. Mohd Ehsan

FIR No-435/93

P.S. L.Nagar

U/S 14 Foreigners Act

Coram : Ld. Mr. B.W. Pawar, Metropolitan Magistrate

Date : 17.03.1994

For Petitioner : APP for the State

For Respondent : Ms Sumbul Rizvi Khan

1. Report has been received through SHO, P.S. Lajpat Nagar, New Delhi. There is a mention in the report that accused Mohd Ehsan was granted refugee status and refugee certificate was issued to him bearing certificate no UNHCR/AF015825.A copy of the letter dated 8-3-94 was written to Bulwant Singh, in charge, PP Amar Colony, Lajpat Nagar, New Delhi is filed on record.
2. Since the accused has been granted refugee status by United Nations for the purposes of Temporary stay in India, the order for deportation is unnecessary. The accused is in JC since 30-11-93 as such no further substantive sentence is called for. The accused is sentenced and to pay a fine of Rs 3000/and in default of which 6 months SI. File be consigned to record.

-Sd-

In the court of Sh B.W. Pawar

J.M.F.C Cantonment Court, Pune

IN THE COURT OF SH. B.W. PAWAR
J.M.F.C. CANTONMENT COURT, PUNE

State of Maharashtra v. Mustafe Jama Ahmed

R.C.C. No.162/94

Coram : Ld. Mr. B.W. Pawar, Judicial Magistrate

Date : 21.04.1994

JUDGEMENT

1. Accused stands charge sheeted for an offence punishable u/s.14 of Foreigners Act.

   The prosecution case in short is that on 21.4.1994 that accused was found overstaying at Pune without any extension in Visa by police of Pune leading to present charge sheet.

2. Accused voluntarily pleaded guilty to the charge framed as per Exh.2. Heard accused on the point of sentence.

3. Perused his application Exh. 4 filled on his behalf by his counsel. Accused has produced certain documents along with his application. He claims that in view of notification of Government he be refugee from Somalia. He is entitled to have condon from police authority in case of his overstaying. It appears that accused has been in India for his education. He has filed on record his certificate issued by United Nations High Commissioner for Refugee. It shows that accused has been refugee from Somalia. In view of this fact I am of the opinion that accused deserves lenient view. Police papers disclose that accused is student and young man of 27 years of age. If he would send to straight to jail it may spoil his future. An opportunity can be given to him to have improving in his behaviour. I, therefore, take lenient view and convict him with following order.

ORDER

Accused is convicted of the offences punishable u/s 14 of Foreigners Act. He is sentenced to suffer S.I. till rising of the court and to pay fine of Rs.500/- i/d to suffer S.I. for one month.

IN THE COURT OF THE CHIEF JUDICIAL MAGISTRATE CHURACHANDPUR, MANIPUR

State v. Shri K. Htoon Htoon & Ors.

F.I.R. 18(3)89 SGT.P.S. U/S 14 Foreigners Act.

Coram : Ld. Mr. Kh.Brajachand Singh, Judicial Magistrate

Date : 23.12.1994

ORDER

1. The prosecution has filed and application U/S.321 Cr.P.C. for withdrawal of the case against the accused viz. K.Htoon Htoon. Heard the Ld.A.P.P. for the State.
2. The available record shows that the said accused and four others were granted bail by the Hon'ble Gauhati High Court, so that they can move to Delhi and pursue the U.N. High Commissioner of Refugee to get the "Refugee status". The present application before me, sates inter alia, that the said accused has been granted "Refugee status" by UNHCR and in view of such a situation, the prosecution has prayed for withdrawal of the case against the said accused.
3. On being considered the relevant laws, the fact and circumstances of the case, I think it justified to grant the permission U/S 321 Cr.P.C. thereby allowing the prosecution to withdraw the case against the said accused. The prayer of the prosecution is, thus, allowed. The said accused is discharged.
4. Furnished the copies of this order to the Director of prosecution for the State, and the accused for information.

IN THE COURT OF SH.V K MALHOTRA, METROPOLITAN MAGISTRATE, NEW DELHI

State v. Mohd. Riza Ali

FIR No. 414/93

P.S. IGI Airport

Coram : Ld. Mr. V.K. Malhotra, Metropolitan Magistrate

Present : A.P.P. for the State.

Date : 06.07.1995

1. Accused on bail with counsel.
2. Accused prays that he wants to plead guilty, as such charge be framed against him. I have warned the accused that he is not bound to make confession and that his confession can lead to his conviction also. However, the accused states that he is pleading guilty voluntarily.
3. Heard. Prima-facie case for framing of charge for the offence punishable under sections 420,471 IPC and section 14 of the Foreigner's Act is made out against the accused. Charge accordingly framed against the accused under the said sections. The accused has pleaded guilty to the charges. Since the plea of guilt made by the accused is voluntary I hold the accused guilty for the offences punishable u/s 420/471 IPC. The accused has stated that he has a valid authorisation to stay in India upto 25-10-95. Copy of such authorisation from United Nations High Commissioner for refugees was also fi led on the record. Since the accused had a valid permission to stay in India upto 25-10-95.and also that he had earlier permission with him since 1993-he cannot be convicted for the offence punishable u/s 14 of the Foreigner's Act.
4. I have heard the accused on the point of sentence. He is a resident of Iraq and since there was a prolong war going on between Iran and Iraq he shifted to Iran in 1980 and stayed there for 8/9 years and later on as a refugee he has been migrating from one country to another. Now, he is in India since 1993 and has been authorised by the United Nations High Commissioner for refugees to stay in India upto 25-10-95. He is getting maintenance allowance of Rs 1200/-per month and being a musician and a painter he is supplementing his income and meeting his both ends. Keeping in view the circumstances and the accused

being a refugee and after taking into consideration the fact that he is a victim of a travel agent a fi ne of Rs 10,000/ in default six months S.I. is sufficient to meet the ends of justice. It is ordered accordingly.

5. The accused has deposited Rs 4000/-today and for the balance amount of fine he seeks time by moving an application. He is directed to deposit the balance amount of fine of Rs 6000/-on 7 7-95.Put up on 7-7-95 for depositing the balance amount of fine.

Sd/-ACMM/ New Delhi

Present: Accused with counsel.

Balance fine of Rs 6000/ deposited by the accused.

File be consigned to R.R.

IN THE COURT OF MS. SEEMA MAINI, METROPOLITAN MAGISTRATE, NEW DELHI

State v. Farid Ali Khan

Coram : Ld Ms. Seema Maini, Metropolitan Magistrate

Date : 01.11.1995

For petitioner : A.P.P. for State

For respondent : Ms. Sumbul Rizvi Khan

1. Heard the counsel for Accused Ms. Sumbul Rizvi Khan and A.P.P. for State on point of Charge. The Accused is a foreign national who has been given a refugee status and residential permit to stay in India, which was very much valid on the day of his arrest which has later been put on record by the Prosecution on the directions of Ld. Sessions Judge at the time of Bail on 19.8.95.
2. As per the law of Citizenship, Foreigners and Passport Rules, Sec.8. Every foreigner shall be given 24 hours to produce the papers of his stay in India, time for which may be extended also. In the present case no such time was given to the accused who would have produced the Residential Permit issued by the Govt. of India otherwise on the day of arrest itself. In the circumstances, no offence in case is made out against the accused who is discharged. File be consigned to the Record Room.

Ms. Seema Maini

Metropolitan Magistrate

IN COURT OF SHRI BHARAT PARASHAR, METROPOLITAN MAGISTRATE, NEW DELHI

State v. Mohd. Yaashin

FIR No: 289/97

Coram : Ld. Md. Bharat Parashar, Metropolitan Magistrate

Date : 01.09.1997

Present : APP for the State

1. Accused on bail
2. Prima facie offence U/s 14 Foreigners Act, 1914 / 420 –IPC and U/S 471 IPC is made out against the accused. Accordingly charge for the offence U/s 14 F. Act, 1914 / 420 – IPC and U/S 471 IPC has been framed against the accused to which he plead guilty and prayed for release. I, accordingly hereby hold accused Mohd. Yaasin guilty of the offence U/S 14 F.Act 1914/420/471 –IPC and convict him thereunder. I have heard the convict and his counsel on the point of sentence. It has been submitted that convict is of age about 43 years and is the soul bread earner of his family comprising of two small children and a wife and aged parents. It has further been submitted that convict has already been granted refugee status by United Nation High Commissioner for refugees. A certificate to that eff ect has also been placed on record. It has further been submitted that convict has already been in jail for about 2 1/2 months during the course of the trial. A lenient view was thus prayed for.
3. Convict Mohd. Yaasin, an Afghan National cheated the immigration authorities of India in gaining entry on the basis of a Visa and passport, which subsequently were detected to be forged. The act of the convict is very serious and grave in nature. Still keeping in view the submissions made above and the fact that the on-going civil war in Afghanistan and consequent migration of its residents to neighbouring countries is a matter of common knowledge. The United Nations in cooperation with the Govt. of various countries including that of India has been making eff orts to rehabilitate migrating Afghan nationals and in pursuance of those eff orts they have been granted refugee certificates so that they may be given necessary assistance as and when required.
4. In view of my aforesaid discussion, I hereby have been taking a lenient

view and sentence convict Mohd. Yaasin to the imprisonment already undergone by him and to also pay a fine of Rs.7000/- for the offence U/S 14 F.Act 1914 read with U/S 420 /471 IPC. In default of payment of fi ne he shall further undergo simple imprisonment for a period of 30 days.

5. I further direct that after completion of period of sentence and if there is no permission granted to the convict by Govt. of India till then to remain in India any further, he be deported from India as per Law. A copy of this order may be given free of cost to the convict. File be consigned to Record Room.

Sd/

Bharat Parashar

(MM/Delhi)

IN THE COURT OF SHRI SANJAY GARG, METROPOLITAN MAGISTRATE, NEW DELHI

State v. Thang Cin
FIR NO. 330/01
P. S. Ch. Puri
U/S 14 F. Act

Coram : Ld. Mr. Sanjay Garg, Metropolitan Magistrate
Date : 03.06.2002
Present : APP for the State
Convict in J/C with counsel.

1. Heard the arguments on the point of quantum.
2. Convict is stated to be 31 years of age having his family constituting of three younger brother and three younger sister dependent upon him for the livelihood. Convict further stated that he is belong to Burma and he has come to India after crossing the border to avoid persecution in hands of the authorities in Burma as he belongs to Christian community. It is stated that convict has applied for getting refugees status with United Nation High Commission for refugee but before the refugee status was granted to him he was arrested by the police. It is stated that he is too poor to pay even the fine amount. He request for a lenient view.
3. Convict in W J/C since 15-9-01. He is in J/C for the last eight and half months. The convict has produced original certificate issued by United Nation High Commission for Refugees in Delhi, granting him refugee status for a one year. In the light of circumstances, I am of the opinion that the offence being a technical in nature, no useful purpose will be served by further sentencing him to any term of imprisonment. I thereby sentence the convict to the period already undergone by him as under trial in this case, after giving him benefit of section 428 Cr. P. C. Since convict is granted the Refugee status now, he be set at liberty.

Announced in the open court on 03.06.2002 (Sanjay Garg)
MM:New Delhi

IN THE COURT OF SH. ARUL VARMA, METROPOLITAN MAGISTRATE

(SPECIAL COURT – 2) DWARKA COURTS, NEW DELHI

State v. Chandra Kumar and Ors

FIR No. : 78/10.

PS: IGI Airport.

U/s: 419/420/468/471/120B IPC & 14 Foreigner's Act

Coram : Ld. Mr. Arul Varma, Metropolitan Magistrate

Date : 20.09.2011

ORDER ON SENTENCE AND DEPORTATION

Facts

1. Before an order on sentence is passed in the present matter, it would be apposite to succinctly recapitulate the facts of this peculiar case:

   The convict Chandra Kumar is a Sri Lankan Tamil refugee who has been staying at a refugee camp in India from the year 1990. He sought to eke out a better life in Italy but while leaving India, he was apprehended by the immigration authorities as he did not possess valid travel documents. Thereafter, he was charged for committing the offences of cheating, impersonation and forgery r/w/s 14 of the Foreigners Act, 1946. He claimed that he was duped by a travel agent. He moved an application for plea bargaining. Pursuant to moving of an application under the benevolent provisions of plea bargaining recently incorporated in the Code of Criminal Procedure, 1973, Chandra Kumar was convicted of the aforesaid offences upon his admission of guilt. Had he been an Indian citizen, he would in all probability have been set free at this stage, having been already incarcerated in judicial custody for a period of almost 6 months. An order on sentence would have been passed forthwith. However, the Ld. Additional Public Prosecutor, on instructions from the State, contended that an order of deportation should form a part of the order on sentence. It is in light of these circumstances that a detailed order is required to be passed

while handing out sentence to the accused. The issue of deportation needs some expatiation.

Submissions

2. The Court had a query regarding whence this Court derives authority to deport the convict herein. Ld. APP had contended that the Court has powers u/s 3 (2) of the Foreigners Act, 1946 to order deportation. However, a bare reading of the provision indicated that it is the prerogative of the Central Government to order deportation and the Courts do not possess any authority to do so. This understanding was fortified by the below mentioned observation of a Constitutional Bench of the Hon'ble Supreme Court in Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta & Others, 1955 AIR SC 367:

> "20. ... ... The right to expel is conferred by Section 3(2)(C) of the Foreigners Act, 1946 on the Central Government and the right to enforce an order of expulsion and also to prevent any breach of it, and the right to use such force as may be reasonably necessary "for the effective exercise of such power" is conferred by Section 11 (1), also on the Central Government.
>
> 22. The Foreigners Act, 1946 confers the right of expulsion on the Central Government. Therefore, a State Government has no right either to make an order on expulsion or expel."

3. Thus it is clear that the order to deport cannot be passed by this Court. But, the question remains that is there any bar which prohibits this Court in passing an order whereby the convict herein shall not be deported? This order seeks to shed some light on this aspect.

4. The Ld. APP had stated that relevant documents containing the modalities of deportation would be in the possession of the Foreigner's Regional Registration Office (FRRO), New Delhi. Court notice was issued to the FRRO, and consequently Incharge, Immigration Cell from the FRRO entered appearance and produced Government Order F.No. 25019/3/97 F.III dated 2.7.1998 of the Foreigners Division, Ministry of Home Affairs, Government issued by Under Secretary to the Government of India to Home Secretaries of all States/UTs. The Courts attention was invited to para no. 2 of the aforesaid Government Order. The same is reproduced as hereunder:

> "2. However, there have been cases where foreigners either overstay illegally, go underground or engage themselves in undesirable/illegal activities. In minor offences, action is taken to deport the foreigners by serving them with Leave India Notices u/s 3 of the Foreigners Act. For serious offences like long

overstayal, commission of offences under various other Acts like IPC, NDPS, Customs etc., cases are instituted in the court of laws and the foreigners may undergo long periods of imprisonment awarded by court. Finally, in both these cases, the foreigners have to be deported out of India."

5. The FRRO also filed a copy of Notification No. F.22 (29)/91 PPF 4058 dated 22.8.1991 issued by the Delhi Administration and Government of India's Notification No. 4/3/56(II)F.I dated 30.9.1992 whereby the power to deport under the Foreigners Act, 1946 was delegated by the Central Government to the FRRO. It was also submitted that all the foreign nationals who are received from jail after conviction/acquittal are handed over to the FRRO by the local police for their further deportation to their country of origin.

6. A query was raised regarding the existence of any notification/order/regulation etc. specifically dealing with the modalities of deportation of Sri Lankan refugees. Counsel for convict also sought information regarding grant of citizenship to the convict herein in order to avert his deportation. However, the official from FRRO submitted that the Foreigners Division, Ministry of Home Affairs would be in a better position to clarify the intricacies regarding deportation, and accordingly, court notice was sent to the Ministry whereupon Dy. Secretary, Ministry of Home Affairs (Foreigners Division) entered appearance to furnish the necessary clarification which would enable the Court in the determination of the following queries:

"1. (A) In general, what are the documents which contain the rules/regulations/notifications/orders governing the deportation of a Sri Lankan refugee.

(B) In particular, the rules/regulations/notifications/orders which makes deportation of a Sri Lankan refugee mandatory upon being convicted of an offence under the laws of the land.

2. A copy of 1996 order of the Centre (G.O. 370). The reference to this order has been made in page no. 132 of the written submissions filed on behalf of the convict.

3. Can a refugee, who has been convicted under the IPC, apply for citizenship in India? If so, the procedure thereof.

4. Does the Government make any distinction between the nature of offences committed while ordering deportation of a refugee? In other words does the commission of a less serious crime result in the grant of some exemption from deportation?

5. Whether the State of Tamil Nadu has a specific policy whereby Sri

Lankan refugees are not deported?

6. What are the modalities involved in procuring citizenship of India by a refugee? Does the sojourn by a refugee for the last 20 years in India entitle him to avail the benefits extended to a citizen?"

7. On 20.8.2011, the Dy. Secretary filed a detailed reply to the aforesaid queries. The reply of the Ministry was to the effect that the convict herein was liable to be repatriated as he was liability of Sri Lanka.

8. On the other hand, counsel for convict filed his written submissions and placed relianceon the following judgments:

(i) Hasan Ali Raihany Vs. Union of India, (2006) 3 SCC705.

(ii) Dr. Malavika Karlekar Vs. Union of India & Another, Writ Pet. (Crl. No.) 5831992.

(iii) National Human Rights Commission Vs. State of Arunachal Pradesh & Another, AIR 1996 SC 1234.

(iv) Louis De Raedt & Others Vs. Union of India & Others, 1991 AIR 1886, 1991 SCR (3) 149.

(v) State of Arunachal Pradesh Vs. Khudiram Chakma, AIR 1994 SC 1461.

(vi) U. Myat Kyaw & Others Vs. State of Manipur & Others, Civil Rule No. 516 of 1991.

(vii) Seyed Ata Mohamamdi Vs. Union of India & Others, AD 1458 of 1994.

(viii) Zothansangpuii Vs. State of Manipur, Civil rule No. 981 of 1989.

(ix) Khy Htoon & Others Vs. State of Manipur, Civil Rule No. 515 of 1990.

(x) Raju Vs. State of Tamil Nadu & Others, Writ Pet. No. 24063of 2005 and WPMP No. 26235 of 2005.

(xi) Ktaer Abbas Habib Al Qutaifi & Others Vs. Union of India & Others, 1999 Cri LJ 919.

(xii) Vishaka & Others. Vs. State of Rajasthan & Others, 1997 (6) SCC 241.

(xiii) David Patrick Ward & Another Vs. Union of India & Others, (1992) 4 SCC 154.

(xiv) Premavathy @ Rajathi presently interned at Special Camp for Srilankan Refugees Chengalpattu Vs. State of Tamil Nadu & Others, HCP No. 1038 of 2003 and HCP Nos. 11.1, 1118, 1119,

1120, 1121, 1122, 1123, 1085, 1170 and 1226 of 2003.

(xv) Ram Singh Vs. State of Rajasthan, 1978 WLN UC 90.

(xvi) J. Vasantha Gladis Daisy Vs. The Superintendent of Police, WP (MD) No. 10423 of 2005.

(xvii) Suo Moto Vs. State of Rajasthan, RLW 2005 (2) Raj 1385, 2005 (4) WLC 163.

9. Counsel for convict further stated that the convict has valid documents to stay in India and that he is in possession of a Refugee Certificate. Counsel for convict further submitted that the Government Order F.No. 25019/3/97 F.III dated 2.7.1998 is applicable only to foreigners who overstay illegally, go underground etc. and that the order is not applicable to the convict herein as he possesses valid documents. It was further contended that deportation can be ordered only when there are compelling reasons which threaten to jeopardize national security. Traveling on a forged passport is not that heinous an offence to pose a danger to the security of the country, and cannot be equated with grave offences like sedition, murder, rape, dacoityetc.

10. The arguments of counsel of the convict can be summed up as under:

- The convict has a well-founded fear of persecution in case he is deported to SriLanka.
- India is bound by the Customary International Law and consequently the principle of non refoulement forbids deportation of the convict herein as he has a well-founded fear of persecution.
- Article 21 of the Constitution of India which protects life and liberty of all citizens and non-citizens alike, is applicable in the present case and the convict refugee's life ought to be protected as per the mandate of Article 21.
- If an individual poses no danger or threat to the security of the country, he ought not to be deported.
- Various High Courts have stayed the deportation proceedings invoking humanitarian grounds.
- Our nation must march with the international community and the municipal law must respect rules of international law just as nations respect international conventions. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction.
- Article 51 (c) of the Constitution of India mandates that the State

shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another.

- The provisions of a convention which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can be relied upon by the Courts as facets of those fundamental rights, and thus can be enforced.
- An international convention consistent with the fundamental rights, and in harmony with its spirit, must be read into those provisions to enlarge the contents thereof.
- An opportunity should be granted to the convict to approach the UNHCR, Delhi to avert deportation.

11. During the course of arguments, counsel for convict filed additional written submissions in response to the reply dated 20.8.2011 filed by the Dy. Secretary, Ministry of Home Affairs, the gist of which is as hereunder:

    - Para 2 of annexure VI is explicit in as much as it states that there is no policy or plan to deport any of the Sri Lankan Tamil refugees living in Indian camps, to Sri Lanka.
    - Para 2 of annexure VI also reads "if a refugee in a camp is involved in any illegal activity punishable under the Indian Penal Code, he is dealt with in accordance with the provisions in criminal law". According to this para the refugee should be dealt in accordance with criminal law. However, the criminal laws do not provide for deportation.
    - The Ministry of Home Affairs had replied that the convict himself has to establish fear of persecution. It is submitted that only a well-founded fear of persecution is required to be established and not a fear of persecution beyond reasonable doubt.
    - Para no. (iii) of the Government Order No. 370 dated 10.9.1996, which is reproduced as hereunder, is not applicable:

        "(iii) Srilankans who have arrived in India from January 1993 onwards may be dealt with in accordance with the existing legal provisions as applicable to any other foreigner."

        At this juncture, it would be pertinent to note that the convict herein came to India prior to 1993 and as such the Government Order ought not to be applicable to the convict herein.

12. After hearing submissions of both the parties, and at the request of the counsel for convict, intervention of the UNHCR was also sought vide

order dated 5.8.2011. However, the court notice issued to UNHCR was returned unserved as the Chief of Missions, UNHCR claimed immunity from due legal process and requested the Court to obtain information from the UNHCR only through the Ministry of External Affairs, Government of India. Court notice was issued afresh apprising the UNHCR that no action had been taken or was ever contemplated to be taken against the UNHCR and that the Court had merely sought its intervention in order to arrive at an informed decision. At the same time, the order dated 5.8.2011 was routed to the UNHCR through the Ministry of External Affairs. Despite being personally apprised of the proceedings in the Court by the DCP (F), Ministry of External Affairs and after receipt of assurance of consideration by the UNHCR, none appeared on behalf of the Agency. A positive response from the Agency would have thrown more light on the matter. Be that as it may, it is imperative to deal with the contentions of both parties.

Introduction

13. The annals of history are replete with instances where prolonged suppression and tyranny gives rise to rebellion and ultimately to a revolution that might lead to dethroning the unjust regime. After the enaction of the 'Sinhala only' law which made 'Sinhala' as the national language of Sri Lanka and which curtailed job opportunities for the minority Tamilians, led to peaceful protests in the island. A time came when peaceful agitations did not yield any result that some fundamentalists took to arms and formed organisations that propagated violence and terror as a means of achieving one's goal.

14. It is when the ongoing conflict between the government and the rebel forces were taking place, refugees from Sri Lanka came in four waves. The convict herein had also to leave his country of birth in order to save himself and his family from being massacred.

15. The following poignant theme is evocative of the ordeal that a refugee has to suffer:

> "One refugee without hope is too many."
>
> This is also the Global Theme for the World Refugee Day, in 2011. The video can be seen at the UNHCR website where Hollywood actress Angelina Jolie, Goodwill Ambassador has appealed the world to 'do one thing' for the cause of refugees.

16. Refugee problem is a global problem. A successive stream of humanitarian crisis has high lightened the plight of the victims, as well as the threat, that large scale population movements pose to regional security, stability and prosperity. The Government of India

has seen the refugees problem from a broader prospective, derived from its ancient cultural heritage. Reminding the Indian ethos and the humanitarian thrust, Justice V.R. Krishna Iyer former Judge of the Supreme Court of India had given a message as Chairman, ICHLAR in these words:

> "The Indian perception is informed by a profound regard for person hood and a deep commitment to prevent suffering. Ancient India's cultural vision has recognised this veneration for the individual. The Manusmrithi deals elaborately with Dharma even amidst the clash of arms. The deeper springs of humanitarian law distinguished the people of India by the very fact that Dharma Yudhaor the humanitarian regulation of warfare, is in the very blood of Indian history. Cosmic compassion and ecological empathy flow from the abundant reservoir of Buddha's teachings whose mission was the search for an end to human sorrow or Dukha. 'Emperor Ashoka' renounced war as he beheld slaughter in the battle field. In the Mahabharatha and Ramayana the great epics of India, we find inviolable rules of ethics and kindness to be observed even by warring rulers in battle fields. One may conclude that the Indian Constitution, in enacting fundamental duties in Article 51 a has cast on every citizen the duty to promote harmony among all the peoples of India, to have compassion for living creatures and to develop humanism and abjure violence. Thus, humanitarian legality and concern for refugee status are writ large in the indian ethos "

17. Refugee protection not only has ancient roots but the principle of protecting the "necessitous stranger" can also be found in virtually all religions.

18. It would be interesting to know that our neighbour Pakistan hosts the maximum number of refugees in the world numbering to almost 2 million followed by Syria (1.5 million refugees), Iran (9,63,500 refugees), Germany (5,78,900 refugees), Jordan (5,00,300 refugees) and Tanzania (4,35,600 refugees) (Source: Encyclopedia of Human Rights Vol. 4, Edited by: David P. Forsythe, Oxford University Press Publications).

Principle of Non Refoulement

19. Refoulement refers to the expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill treatment i.e. persecution, torture or inhuman treatment.

20. Although, India is not a signatory to the United Nations Convention

On Refugees 1951 and its Optional Protocol 1967 and has not ratified it, yet it would be apt to peruse Article 33.1 of the Convention which contains the principle of non refoulement, and the same is reproduced as hereunder:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

21. Article 33.1 prohibits the refoulement of any refugee who has a 'well founded fear of persecution' and does not require any additional demonstration that a threat is "more likely than not" to materialise before the prohibition against returning a refugee to a place where he fears persecution becomes operative.

22. The refugee must be outside his or her country of origin and possess a well-founded fear of persecution and this persecution must be based on one of the following 5 factors i.e. political opinion, religion, race, nationality or membership of a particular social group. The 4th category i.e. nationality has been left undefined by the convention. The UNHCR handbook attempts to fill this void:

> "The term 'nationality' is not to be understood only as 'citizenship'. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race'. Persecution for reasons of nationality may consists of adverse attitudes and measures directed against a national (ethnic or linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to a well founded fear of persecution." (Source: para 74, http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf).

23. Apart from the convention, there are other human rights instruments to which India is a party State that proscribe refoulement and influence the treatment of refugees, principle among them being Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, the Genocide Convention, 1948, the International Covenant on Civil and Political Rights, 1966, Convention on the Elimination of all Forms of Discrimination Against Women, 1979, International Covenant on Economic Social and Cultural Rights, 1966, Convention on the Rights of Child, 1989 and most importantly the Universal Declaration of Human Rights,1948.

24. It may not be out of context to reiterate India's reluctance to become a party to the Convention and Protocol. Merely highlighting the Euro

Centric approach of these instruments is no longer sufficient to deny to thousands of refugees in India a National Legislation in order to protect their rights. It is difficult to understand that India, inspite of adopting a Constitution which was entirely western centric/Euro Centric and which was almost entirely influenced by European and American traditions and concepts, would reject the convention on refugees just a couple of years thereafter. Keeping in mind the large influx, and presence of refugees on our soil, it is time that India becomes a State Party to the aforesaid Convention. The Hon'ble Supreme Court has, in a catena of verdicts held that foreigners shall enjoy the same fundamental rights as those available to citizens of India.

Well Founded Fear of Persecution

25. Counsel for convict had vehemently remonstrated that the convict herein has a 'well-founded fear of persecution' in the eventuality of his deportation to Sri Lanka.

The following paras of the affidavit filed by the convict echoes his perturbation:

> "4 ….If I deported to the Sri Lanka, the Sri Lankan Army will put me in jail without any enquiry on the suspect of militancy/terrorism they will kill me and it is also very important to mention herein that I came to India for the purpose of only to save my life. (sic)
>
> 5. ...The Hon'ble Court may consider the present situation of Sri Lanka as per UN Panel report so far 40,000 common people has been killed by the Sri Lankan Army and there is no hope, no guarantee to secure my life in Sri Lanka.(sic) "

26. It was asserted that the Sinhalese are in a majority in Sri Lanka and are perpetrating atrocities against the Tamilian minority. The convict has filed an affidavit in this regard alongwith a CD and the latest report dated 31st March 2011 of the United Nations titled "Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka". An extract thereof at page no. 116 would be of utmost relevance:

> **"4. Ongoing ViolAtions by the Government**
>
> 428. Nearly Two years after the end of the fighting, the root causes of the ethno nationalist conflict between the Sinhalese and Tamil populations of Sri Lanka remain largely unaddressed and human rights violations continue. There are consistent reports of such activities, some committed by agents of the State or state sponsored paramilitaries; these include arbitrary detention without trial, abductions and disappearances, killings, attacks on the media and other threatening conduct "

27. The convict has also filed a book titled "What Is To Be Done About This" by Penny Cuic Publication Edited by J. Prabakaran which contains a pictorial representation of the atrocities committed on Tamilians in Sri Lanka. The Court's attention has been invited to the following excerpt from this book wherein Mr. Justice V.R. Krishna Iyer, former Judge of the Supreme Court of India has penned down his anguish and pain in the following words:

> "The pictures in the book sent to me projects the horrendous injuries noxious by inflict. The gory scene when presented through the photos and pictures robs my sleep. Can man even be so beastly with little babies, raping girls, mutilating men and women and massacre numbers?"

28. The book also quotes the words of the Nobel Peace Prize winner and Nazi concentration camp survivor Professor Eile Wiesel:

> "The Tamil people are being disenfranchised and victimized by the Sri Lankan authorities. This injustice must stop. "

29. There is no universally accepted definition of persecution. However, it can be inferred that a threat to life or freedom constitutes persecution. Although, it is common to think of persecution in terms of human rights violations involving imprisonment or violations of the physical integrity of the individual such as torture, there is nothing in any definition that would restrict persecution in this manner. Protection against refoulement should also be granted if the person is a member of a group against whom there exists a pattern of persecution.

30. The problem determining the nature of the evidence required to establish a 'well-founded fear of persecution' remains, i.e. what constitutes a 'good reason' or 'well founded reason to fear persecution', and how does such evidence differ from that required to establish a 'clear probability' that persecution willoccur.

31. One would argue that in order to enjoy complete protection and to prevent deportation, the refugee would have to establish a 'clear probability' of persecution upon return. However, in INS Vs. Cardoza Fonseca, 480 U.S. 421 (1987) it was held

    as under: "A moderate interpretation of the 'well-founded fear' standard would indicate

    that as long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility." (emphasis mine)

32. The UNHCR has commented:

> "A substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied is in asylum claims in order to establish well foundedness. This jurisprudence largely supports the view that there is no requirement to prove well foundedness beyond reasonable doubt or even that persecution is more probable than not. To establish 'well foundedness' persecution must be proved to be reasonably possible." (Note on Burden and Standard of Proof in Refugee Claims para no. 17, December 16, 1998 available http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf

33. Helene Lambert in "Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue", Vol. 48 International & Comparative Law Quarterly page 515 has rightly observed that the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights strengthens the findings of 'substantial grounds', thus, contributing to lowering the standard of proof.

34. A 'well-founded fear of persecution' also includes within its ambit inter alia fear of being subject to torture. India, being a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, should ideally be bound by its international commitment to follow the principle of non refoulement. Article 3 (1) of the Convention reads as under:

> "No State Party shall expel return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

35. In arriving at a conclusion that there are substantial grounds for believing that the individual faces a danger of torture, conditions that may be taken into account would include criteria such as the individual's ethnic background, his or her alleged political affiliation, his or her history of past detention or torture. In addition to the specific situation of every case, the general circumstances of the country of return should also be considered. Article 3 (2) of the aforesaid Convention would be relevant in this regard which is reproduced as hereunder:

> "For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

36. A reading of the aforesaid provisions, decision and comments of the

Convention, Cardoza Fonseca case and of the UNHCR respectively coupled with the evidence filed by the convict has established the fact that he has a reasonable fear of being persecuted in the eventuality of his deportation to Sri Lanka.

Persecution and Article 21 of the Indian Constitution

37. Notwithstanding the fact that India has neither signed nor ratified the United Nations Convention on Refugees, 1951 or its Optional Protocol relating to Status of Refugees, 1967 which contain the principle of non refoulement, yet the following deliberations would make it abundantly explicit that this basic human right is implicit in Article 21 of the Indian Constitution.

38. Article 21 of the Constitution of India reads as under:

> "Article 21. Protection of Life and Personal Liberty.
>
> No person shall be deprived of his life or personal liberty except according to procedure established by law."

Thus not mere animal existence but the right to live with dignity is envisaged by the mandate of Article 21.

39. Article 21 is the procedural magna carta protective of life and liberty. The right to life within the meaning of Article 21 means the right to live with human dignity and the same does not merely connote drudgery. It takes within its fold some finer graces of human civilization, which makes life worth living. The right to life embraces not merely physical existence but the quality of life as understood in its richness and fullness by the ambit of the Constitution.

40. In Louis De Raedt Vs. Union of India, AIR 1991 SC 1887, the Hon'ble Supreme Court has held that the right to life under Article 21 is available to citizens and non citizens alike. Further in NHRC Vs. State of Arunachal Pradesh, 1996 (1) SCC 742 it was held that every person is entitled to equality before the law under 'equal protection of laws' and that the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise.

41. In Francis Coralie Mullin Vs The Administrator, Union Territory of India 1981 SCC (1) 608 it was observed that any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to life and it would be prohibited by Article 21.

42. Simon M.S. Kagugube has aptly concluded his article 'Cardoza Fonseca and the Well Founded Fear of Persecution Standard' (ILSA International Law Journal Vol. 12 (1998) pages 85 to 115) in the

following words:

> "Persecution constitutes a fundamental challenge to basic ideals of the essential dignity of the human person. Whenever we fail to adequately respond to that challenge, more than just the immediate well-being of the refugee is at stake. An essential part of the humanity of the rest of our community is also compromised."

43. It is no longer res integra that persecution is the effective denial of an opportunity to pursue a dignified existence. Right to live with dignity is a fundamental right enshrined in the Constitution and this principle has been upheld in a plethora of judgments of the Hon'ble Supreme Court of India discussed herein above.

    Thus, it can be inferred that persecution jettisons the right to live with dignity and is thus, violative of Article 21 of the Constitution of India.

    Constitutional Validity of the Foreigners Act, 1946 and Government Order F.No. 25019/3/97 f.iii Dated 2.7.1998 in So Far as it deals with Refugees

44. How a judge would interpret and apply constitutional tenets would greatly depend on which philosophy of constitutional interpretation he believes in. This Court believes in adopting the liberal interpretation so as to keep the faith of the common man that Courts are indeed the last bastion when it comes to protection of fundamental rights.

45. At the outset, it is hereby clarified that this Court, in no way intends to transgress into the boundaries which are in the domain of the higher Courts of the land. But circumstances have arisen, which make it imperative for the Court to consider the matter in the light of judgments of the Hon'ble Supreme Court of India, and to have some deliberations on this aspect.

    In Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta & Others, 1955 AIR SC 367 a 5 Judge Bench of the Hon'ble Supreme Court discussed the constitutionality of the Foreigners Act, 1946 and held it to be valid. However, the issue that was raised in front of the Hon'ble Supreme Court was with respect to expulsion and extradition of a German foreigner against whom a warrant of arrest was issued in West Germany in connection with a number of frauds. However, the constitutional validity regarding the inclusion of a refugee within the term 'foreigner' in the Foreigners Act has hitherto not been raised nor addressed.

46. The Foreigners Act defines a 'foreigner' as hereunder:

"Section 2 (a) "foreigner" means a person who is not a citizen of India."

47. This all encompassing definition includes within its ambit 'refugees' also. However, it is common knowledge that a refugee is a distinct category from that of a illegal migrant or a tourist, and thus should be treated differently. It has already been discussed that refugees are victims of circumstances and their peculiar condition should be understood in a humane way. In this Court's perception, there has been no reasonable classification in including refugees within the strata of foreigners. Subjecting refugees, illegal migrants and tourists to a similar law does not augur well for the mandate of Article 14 of the Constitution of India in as much as this act has not made any reasonable classification of these categories of people and has not applied the principle of intelligible differentia. Moreover, the fundamental principle of right to life has been completely overlooked as there is no mention of exceptional circumstances, like persecution under which a foreigner may not be refouled. These two aspects have hitherto not been brought to the notice of the Hon'ble Supreme Court of India and as such, this Court felt the need to have some deliberations on this.

48. The categorisation of refugees in the strata of 'foreigners' and not making any distinction between them and illegal migrants and tourists, deprives the refugees of the privileges under myriad international instruments.

49. While expounding the concept of Article 14, the Hon'ble Supreme Court in Harnam Singh Vs. Regional Transport Authority, AIR 1954 SC 190 held that equal protection of laws means equal subjection of all persons to the law and amongst equals, the law shall be equal and equally and administered. Can illegal migrants and tourists be considered 'equal' to refugees?

50. It is no longer res integra that reasonable classification is inherent in the very concept of equality and that:

    (i) The classification must be founded on an intelligible differentia which distinguishes persons or things that a grouped together from others left out of the group, and;

    (ii) The differentia must have a reasonable nexus to the object sought to be achieved by the statute.

51. There should be equality of treatment under equal circumstances. It is well settled that Article 14 of the Constitution will be violated not only if equals are treated unequally, but also if unequals are treated equally.

52. In State of Andhra Pradesh Vs. Nalla Raja Reddy, AIR 1967 SC 1458

it was held that a statutory provision may offend Article 14 of the Constitution both, by finding differences where there is none and by making no difference when there is one.

53. In the 11 Judge Constitutional Bench case of T.M.A. Pai Foundations Vs. State of Karnataka, (2002) 8 SCC 481, the Hon'ble Supreme Court observed that implicit in the concept of equality is the concept that persons who are in fact unequally circumstanced cannot be treated on par.

54. The leitmotif discernible from the aforesaid judgments lead to the irresistible inference that since refugees on one hand and tourists and migrants on the other, are distinct categories, the law which treat them at par is prima facie unconstitutional.

The Constitutionality of the Act (and Government Order) can also be challenged as the right to live with dignity entrenched in Article 21 gets impinged when a person is subject to persecution, or he has a well-founded fear of persecution. It is on these two counts that the constitutionality of Foreigners Act, 1946 and the Government Order F.No. 25019/3/97 F.III dated 2.7.1998 is assailable. However, since this Court does not possess the requisite competence to adjudicate upon this aspect, it would be inappropriate to expatiate on this topic any further.

The Jus Cogens Nature of Non Refoulement

55. Jean Allain in his article 'The jus cogens nature of non-refoulement', 13 Int'l J. Refugee L. 533 (2001) has attempted to demonstrate that non refoulement is a peremptory norm of international law. That is, it is a norm of jus cogens. No derogation

from it is permissible. At page 538 of the article, the author has remarked:

"At present, it is clear that the norm prohibiting refoulement is part of the customary international law, thus, binding on All StAtes, whether or not they Are PArty to the 1951 Convention."

> "…..Perhaps the most important forum for identifying the value attributed to the norm of non refoulement is in the Conclusions adopted by the Executive Committee of the programme of the United Nations High Commissioner for Refugees (UNHCR). Such Conclusions reflect the consensus of States, acting in an advisory capacity where issues of protection and non refoulement are addressed internationally. Their pronouncements carry a disproportionate weight in the formation of custom, as they are the States most specifically affected by issues related to non

refoulement…..

The first tentative mention of the norm of non refoulement as jus cogens was broached by the Executive Committee in Conclusion No. 25 of 1982, where the states members determined that the principle of non refoulement 'was progressively acquiring the character of a peremptory rule of international law'. (Executive Committee Conclusion No. 25, 'General Conclusion on International Protection', 1982: '(b) Reaffirmed the importance of the basic principles of international protection and in particular the principle of non refoulement which was progressively acquiring the character of a peremptory rule of international law.') By the late 1980s, the Executive Committee concluded that 'all states' were bound to refrain from refoulement on the basis that such acts were 'contrary to fundamental prohibitions against these practices'. (Executive Committee Conclusion No. 55, 'General Conclusion on International Protection', 1989, '(d) Expressed deep concern that refugee protection is seriously jeopardized in some States by expulsion and refoulement of refugees or by measures which do not recognize the special situation of refugees and called on all States to refrain from taking such measures and in particular from returning or expelling refugees contrary to fundamental prohibitions against these practices.') Finally in 1996, the Executive Committee concluded that non refoulement had acquired the level of a norm of jus cogens when it determined that the 'principle of non refoulement is not subject to derogation'. (Executive Committee Conclusion 79, 'General Conclusion on International Protection,', 1996: '(i) Distressed at the widespread violations of the principle of non refoulement and of the rights of refugees, in some cases resulting in loss of refugees lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum seekers have been refouled and expelled in highly dangerous situations; recall that the principle of non refoulement is not subject to derogation.') As such, the member States of the Executive committee those – States whose interests are most specifically affected by the safeguarding of international protection and prohibiting refoulement – concluded by consensus that the norm of non refoulement was in fact a norm of jus cogens from 'which no derogation is permitted'."

56. India became a member of the Executive Committee of the High Commissioner's Programme (EXCOM) in 1995. The EXCOM is that of the organisation of the United Nations which approves and supervises material assistance programme of the UNHCR. Membership of

EXCOM indicates particular interest and greater commitment towards redressal of refugee related matters. The principle of non refoulement has found expression in various meetings of EXCOM where it has been unanimously reiterated that the fundamental humanitarian principle of non refoulement is of such fundamental importance that this principle be observed 'both at the border and within the territory of the State' with respect to 'persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised as refugees.'

57. This creates a paradoxical situation as India sits on the EXCOM and allows the UNHCR to operate on its territory, but refuses to sign the legal instrument that brought the organisation into existence.

58. It is not in dispute that the deliberations of the meetings of EXCOM are not binding on member States, however, time and again State parties and other countries attending the meetings of EXCOM have reiterated their commitment towards upholding the rights of refugees and have acceded to the fact that the principle of non refoulement is an essential part of the customary international law which ought to be followed in letter as well as in spirit by all States for whom human life is of paramount importance. Thus, it cannot be gainsaid that non refoulement has assumed the character of a peremptory norm.

Whether India Is Bound By the Customary International Law of Non Refoulement

59. An interesting question arises viz. to what extent the provisions of international covenants/conventions can be read into domestic law. Article 51 (c) of the Constitution of India casts a duty on the State to endeavour to "foster respect for international law and treaty obligations in the dealing of organised people with one another."

60. In Ktaer Abbas Habib Al Qutaifi & Others Vs. Union of India & Others, 1999 Cri LJ 919, the Hon'ble High Court of Gujrat dealt in extenso this aspect and from the conspectus of facts discussed therein, laid down inter alia the following principles for enforcement of humanitarian law:

> "4. The international covenants and treaties which effectuate the fundamental rights guaranteed in our Constitution can be relied upon by the Courts as facets of those fundamental rights, and can be enforced as such."
>
> "6. The principle of 'non refoulement' is encompassed Article 21 of the Constitution of India and the protection is available, so long

as the presence of the refugee is not prejudicial to the national security." and

"8. Where no construction of the domestic law is possible, Courts can give affect to international conventions and treaties by a harmonious construction."

61. In this case the Hon'ble High Court stayed the deportation to Iraq of two Iraqi nationals against whom a case u/s 309 of the IPC was registered and who were let off after a days imprisonment. They had remonstrated before the Court not to return them as they feared they would be persecuted in their country of origin. The Court invoked the principle of non refoulement which is part of the customary international law, and stayed their deportation.

62. In Ms. Zothansangpuii Vs. State of Manipur, Civil Rule No. 981 of 1989 Order dated 20.9.1989, the petitioner was convicted on her plea of guilt under the Foreigners Act as well as the Passport Act. The convict contended before the Court that she had a reasonable apprehension that she would be persecuted as a result of terror let loose by the military authority in Burma. Although, the judgment of Hon'ble Guwahati High Court has not explicitly mentioned or elaborated upon the principle of non refoulement, yet it can be inferred that these principles were considered by the Judges when they ordered a stay on deportation.

63. In Malvika Karlekar Vs. Union of India, Crl. WP No. 243 of 1988, Hon'ble Supreme Court stayed the deportation of Burmese refugees.

64. In Ktaer Abbas Habib (supra) the Hon'ble High Court of Gujrat quoted an excerpt from "The Refugees in International Law" written by S. Goodwin Gill, which is reproduced as hereunder: "The evidence relating to the meaning and scope of non refoulement in its treaty sense (sic) also amply supports the conclusion that today the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent."

65. In Vishakha Vs. State of Rajasthan, 1997 (6) SCC 241 it was held that "(14). ....It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. "

66. The Hon'ble Supreme Court in this case observed that in the absence of legislative measures, there is a need to find an effective alternative mechanism to fulfill the felt and urgent need of protecting women from

sexual harassment at the work place. Invoking provisions of Article 51 (c), Article 253 and perusing Entry 14 of List I of the 7th Schedule to the Constitution of India, the Court held that "(7) In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 (I) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.

67. The Hon'ble Supreme Court had further quoted in para no. 11 from the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region wherein the objectives of Judiciary inter alia are "(a) To ensure that all person are able to live securely under the rule of law. ... ..." Basically, there should be no reason why international conventions and norms cannot be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of the equality in all spheres of human activity.

68. In Zambia, a similar issue was discussed by a UNHCR Senior Protection Officer, Karolina Lindholm Billing who had, while making submissions on the Revised Immigration and Deportation Bill, 2010 to the parliamentary committee on national security and foreign affairs, stated that there should be an inclusion of an effective remedy against the expulsion or deportation order which would allow asylum seekers and refugees to challenge deportation orders in the Court of law. (http://www.postzambia.com/postread_article/php?articleId=6943) Section 33 of the Penal Code of Zambia was discussed, which makes deportation compulsory in case of foreigners in general "upon conviction of any offence, except minor traffic offences". This provision, according to her was not in line with the spirit of the United Nation Convention of Refugees, 1951 and its Optional Protocol, 1957 which requires deportation to be ordered only when the crime is sufficiently grave in nature. The presence of the foreigner should raise a reasonable apprehension that the security of the country would be jeopardized.

69. A similar analogy is sought to be drawn in the present matter as, in this Court's perception traveling on a forged document cannot be so severe a crime that can be equated with more heinous acts like

sedition, murder, rape, dacoity or other offences which may affect the integrity of our country.

70. In the matter of Gurunanthan & Others Vs. Government of India, Writ Petition No. 6708 of 1992 order dated 27.3.1994 the Hon'ble High Court of Madras expressed its unwillingness to let any Sri Lankan refugee to be forced to return to Sri Lanka against his will. In Gurunanthan's case the repatriation process was stayed as it was not voluntary. It was held that when there was an international organisation to ascertain the voluntariness of consent it is not for the Court to decide whether the consent was voluntary or not. It also directed the Government to transmit this order in Tamil to the camps as well as an order that the refugees will not be sent back against their will.

71. India is a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide and ratified it on 27.08.1959. This Convention bans acts committed with the intent to destroy, in whole or in part, a national ethnic, racial or religious group. It declares genocide a crime under international law whether committed during war or peacetime and binds all signatories of the convention to prevent genocide. By deporting the convict herein, there is every apprehension that he will become a victim of genocide, and thus the State of India would have failed to live up to its commitment of preventing genocide under the convention.

72. India signed the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment on 14.10.1997. It forbids countries to return a refugee to his country if there is a reason to believe that he or she will be tortured, and requires host countries to consider the human rights record of the person's native country in making this decision. The evidence brought on record paints a poor picture of the treatment of Sri Lankan Tamils in Sri Lanka. Thus, it would be against the spirit and letter of the Convention to refoule the convict herein when his human rights are likely to be jeopardized.

73. India became a signatory to the Convention Against Torture on 14.10.1997 but has yet not ratified it. Even though the implications of signing and ratifying a treaty vastly differ, yet being a signatory to an instrument imposes upon the Contracting State certain obligations. It is common knowledge that a State does not express its consent to be bound by a treaty unless it ratifies it. However, the State that signs a treaty is obliged to refrain in good faith, from acts that would defeat the object and purpose of the treaty. The concomitant analogy that can be deciphered from the aforesaid philosophy is that India should refrain from refouling a hapless refugee who has a reasonable fear of

being subject to torture due to his return to his country origin.

74. In view of the foregoing discussion, this Court holds that the principle of non refoulement is a part of customary international law, and binds India, irrespective of whether it has signed the convention on refugees or not in as much as it is a party to other Conventions which contain the principle of non refoulement.

Urgent need for a National Legislation which stresses upon the aspect of non refoulement and lays down provisions with respect thereto.

75. This part of the order of the Court draws upon a thoroughly researched article titled 'Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future' written by a Senior IAS Officer Sh. Prabodh Saxena, Joint Secretary, Department of Economic Affairs, Ministry of Finance, Government of India published in International Journal of Refugee Law, June 18, 2007. The officer has challenged set dogmas and has stressed the need to have in place a legislation which would cater to the needs of thousands of victims of circumstances. Even the NHRC and Law Commission of India have, in their successive reports, stressed the need for a national legislation on refugees.

76. The need for enaction of a comprehensive legislation to deal exclusively with the problems of refugees has arisen since time immemorial, and finally, pursuant to extensive deliberations a Model National Law: The Refugee and Asylum Seekers (Protection) Bill, 2006 had been drafted. The process was initiated at the Third South Asian Informal Regional Consultation on Refugee Migratory Movements, where a 5 member working group was constituted to draft a model refugee protection law for the South Asia Region. The first draft of this proposed law was present at the 1997 SAARC Law Seminar in New Delhi, modified and then adopted by the 4th Annual Meeting of the Regional Consultation at Dhaka, Bangladesh in 1997. The Refugee and Asylum Seekers (Protection) Bill, 2006 has drawn its fundamentals from the Convention on Refugees, 1951, the Optional Protocol, 1967, the Organization of African Unity Convention Governing the Specific Aspects of Refugees Problem in Africa, 1969 (OAU Convention), the Cartagena Declaration on Refugees, 1984 and the Bangkok Principles. It has also benefited from various conclusions of the EXCOM on different aspects of refugee protection.

77. Presently, the refugees are dealt under the Foreigners Act, 1946 and the rules framed thereunder. Refugees are treated as foreigners under the extant laws of our country. However, it would be extremely

important to understand that a refugee cannot be placed the same platform on which illegal migrants, tourists and other 'foreigners' are placed. Tourists and illegal migrants come on their own volition in search of better livelihood or pleasure related purposes whereas refugees are victims of circumstances and have been compelled to leave their country of origin. The categorisation of refugees in the strata of 'foreigners' and not making any distinction between them and illegal migrants and tourists, deprives the refugees of the privileges available to them under the Geneva Convention and other Conventions and treaties.

78. It is unfortunate that in spite of having an impressive record of welcoming refugees, we do not have a national law in place in order to cater to the specific needs of this class. An important distinction needs to be made between persons who, on their own volition and in order to earn a livelihood or to explore the world, reach the shores of another country on one hand, and between a refugee who, under compulsion and duress, has no option but to take shelter in another country. They are a victim of circumstances. They do not throng the shores of another country for any pleasure or for any kind of economic gain. They take chances as they do not have choices.

79. The drafting of the Refugee And Asylum Seekers (Protection) Bill, 2006 was a welcome step in this direction. It is unfortunate that despite it been enacted after due deliberations and after various rounds of consultations, by eminent jurists including the Former Chief Justice of India Sh. P.N. Bhagwati, this Bill has not seen the light of the day. A perusal of some of the provisions would make it clear that if this Bill would have been enacted, it would have gone long way in securing certain rights for the refugees. The preamble to the Bill addresses the need for protection of refugees as is explicit from the following lines:

> "To provide for the establishment of an effective system to protect refugees and, by providing necessary social and economic protection both before and after the date of asylum."

80. Further, a bare perusal of the following lines of the preamble would reveal the humane facet which is expected to be inculcated in our legislation:

"WHEREAS, the Constitution requires treating all persons in a fair and just manner consistent with the guarantees of equality fairness and due process of law;

AND WHEREAS, India has a long tradition and experience of dealing with refugees in a responsible and humane way;

AND WHEREAS, India has acceded to all major international human rights instruments and respects international law and human rights norms including the principle of non refoulement;

AND WHEREAS, India recognises the rights of Refugees And Asylum Seekers to live A dignified life free from persecution." (emphasis mine).

81. It would be apposite to peruse the following provisions of this Bill in order to understand the significance and ramifications of its enactment. Chapter 2 of this Bill has defined the term 'refugee':

> "4. Persons who are refugees. Subject to the provisions of this Act, a refugee is a person who,
>
> (a) is outside his country of origin And is unAble or unwilling to return to, or is unAble to unwilling to AVAil himself of the protection of, thAt country becAuse of A well founded feAr of persecution on account of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion; or
>
> (b) owing to external aggression, occupation, foreign domination, serious violations of human rights or other events seriously disrupting public order in either a part or whole of his country of origin, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin:
>
> ... ..."

The convict herein has established such a well-founded fear of persecution.

82. Most importantly Section 7 of this Bill would make it explicit that a refugee who senses a fear of persecution ought not to be expelled/deported/removed/refouled to the country from where such fear arises. Section 7 of this Bill is reproduced as hereunder:

> "7. General prohibition against refusal of entry, expulsion, extradition, deportation, return etc. and provisions for removal from india. (1) notwithstanding anything contained in this act or any other law for the time being in force, no person may be refused entry into India, expelled, extradited, deported or returned to any other country or be subject to any similar measure if, as a result of such refusal, expulsion, extradition, deportation, return or other measure, such person is compelled to return to or remain in a country where:
>
> (a) he may be subjected to persecution on account of race,

religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion, or,

(b) his life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, serious violations of human rights or other events seriously disrupting public order in either part or whole of that country.

(2) Subject to sub section (1) of this section, a refugee or asylum seeker may be removed from India only if,

(a) he has been convicted by a final judgment of a crime against peace, a war crime or a crime against humanity and constitutes a danger to the community; or

... ..."

The non obstante clause in Section 7 would have overridden the provisions of the Foreigners Act, 1946 and the Government Order. Had the Bill been enacted, the convict refugee herein would not have been deported.

83. There have been a plethora of instances wherein the Indian Courts have tried to evolve a humane and compassionate approach to redress individual problems, however, in the absence of a long term, consistent and uniform solution by the way of enactment of a national legislation, their treatment would be subject to, and would depend upon the individual outlook, social inclinations and other idiosyncrasies which would make it difficult for the subordinates courts to follow. India needs to live up to its humanitarian goals. The need for a refugee law is immediate. The uniform treatment of refugees is a must as long as India continues to accept asylum seekers across its porous borders.

Conviction and Sentence: After Trial Vs. After Plea Bargaining

84. The Foreigners Act, 1946 was enacted before India attained her independence whereas the benevolent provisions of plea bargaining were incorporated in 2006 in the Code of Criminal Procedure, 1973 vide an amendment in 2006. The legislature could not have foreseen that one day our country would emulate the West and introduce plea bargaining in our laws. The very basis of ushering this concept was to reduce the tremendous backlog under which our judiciary is reeling. In case an accused pleads guilty to the commission of an offence, his sentence is reduced significantly if he opts to avail the benefit of Chapter XXI A of the CrPC. It is this ingenuity in the law that the accused willingly admit their guilt in order to avoid a long drawn out legal battle and to receive a swift sentence which may necessarily not

result in imprisonment.

85. It has been observed that persons committing the offences for which the accused has been charged with and convicted for, suffer a sentence of imprisonment for a period already undergone in judicial custody, and imposition of some fine. The average period of detention usually varies from 15 to 20 days. It is pertinent to note that the convict herein has already been incarcerated for close to 6 months. The fact that he has already spent a long time behind bars while awaiting trial needs to be considered while sentencing him.

86. A question comes to one's mind is that: should the convict be punished twice over, for his offence? Should he be penalized by the Court and by the Government also? If that be so, the convict would not have approached the Court to plead guilty to his offence rather he would have faced the trial, which would inevitably go on for another few years. By that time, the conditions in his country would have ameliorated and his return would not have posed a risk to his life. Had the convict known that he would be deported pursuant to entering a plea of guilt, he probably would have not preferred a plea bargain.

87. It has already been laid down by the Hon'ble Supreme Court in Louis De Raedt (supra) that Indian and non-citizens are to be treated equally as far as Article 21 is concerned. Would it be fair to deport an already incarcerated individual? Doesn't it appeal toone's conscience that the convict had already spent 6 months in prison and that further deporting him would be nothing short of prolonging and continuing his agony? The very idea of deporting the convict herein to his country of origin where he has a well-founded fear of persecution would not be in consonance with the principles of natural justice.

88. There has to be a discernible distinction between sentencing an individual after a protracted and contested trial on one hand, and sentencing him after he has entered his plea of guilt. The punishment meted out cannot be the same under both circumstances. Even the legislature had this distinction in mind whilst amending the CrPC and introducing the concept of plea bargaining. Since the convict has pleaded guilty on his own volition, an order on deportation should not form a part of the order on sentence.

Final Order:

89. When the substance of justice cannot be secured by 'legal justice', in order to achieve this solemn purpose 'natural justice' is to be called in aid of 'legal justice'. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law and helps

fill the void therein. Natural justice principles are ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is substance of justice which has to determine its from.

90. S. Augender in "Questioning the Universality of Human Rights" published in (1 & 2) Indian Sociological Journal (2002) at page 80 has given an all-encompassing definition of Human Rights:

> "A human right is a universal moral right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human simply because he is a human."

The right against refoulement is an important facet of 'human rights'. The convict has a right against non refoulement as this right is owed to him simply because he is a human.

91. How can the Court become a party to the persecution of an individual? The Court can not retrograde itself to the position of a mute spectator. It is high time that this Bill (or another one drafted in similar lines) sees the light of the day and becomes a living document by being enacted. By doing so, lives of thousands of refugees in our country can be affected for their betterment, in as much as valuable rights can be conferred. Our commitment to adherence to international law can be fulfilled if we enact this law. The principle of non refoulement is a cornerstone of basic human rights. By handing over a person to a nation where he fears persecution, would make us nothing short of abettors in that persecution.

92. This Court is aware that this ex aequo et bono order seeks to fill the casus omissus left by the legislature, but it derives inspiration from the following famous words of Retd. Hon'ble Justice Sh. P.N. Bhagwati spoken at a Common Wealth Conference on "Judicial Interpretation in Constitutional Law" by which he succinctly defined the role of, and expectations from a judge:

> "I do not agree with the conventional view which has long held the field in common law countries that judges merely declare the law, they are simply living oracles of law; they no longer make or invent law. Law making is an inherent and inevitable Part of the judicial process. Even where A judge is concerned with the interpretation of A Statute, there is ample scope for him to

develop And mould the law. It is he who infuses life and blood into the dry skeleton provided by the legislature and creates a living organism Appropriate And Adequate to meet the needs of the society and thus by making and moulding the law, he takes part in the work of creation."

93. On concluding, this Court is reminded of the following verses from the poem 'Refugee Blues' by W.H. Auden whereby he has captured the emotions that a refugee experiences:

> Say this city has a million souls, Some live in mansions, some live in holes:
>
> Yet there is no place for us, My dear, there is no place for us,
>
> Once we had a country and we thought it fair, Look in the atlas and you will find it there: We cannot go there now,
>
> My dear, we cannot go there now.

94. The convict has been living in a refugee camp since the last 20 years and is dependent upon grants given by the Government. He has no independent source of income. The subsistence allowance doled out to him is just sufficient enough to make two ends meet. In these circumstances, levying of fine would be harsh upon him and thus, the convict is hereby sentenced to imprisonment already undergone.

95. The convict herein has already been incarcerated for a period of approximately 6 months. He has a family comprising of his wife and 2 young sons. If this Court accedes to the plea of the Ld. APP, then it would tantamount to irreversible fragmentation of this refugee family. Breaking a family unit forever was never in the contemplation of the laws of our land. Keeping this factor in mind coupled with the reasons hereinabove discussed in extenso, this Court orders that Chandra Kumar convict herein shall not be deported. He is directed to report back to the Tahsildar, Sri Lankan Refugee Camp, 62, Gummidipoonidi Taluk, Thiruvallur District, Tamil Nadu forthwith.

Announced in the open Court on 20.9.2011.

(Arul Varma)

Metropolitan Magistrate

(Special Court 2), Room No. 210,

Dwarka Courts, New Delhi.

METROPOLITAN MAGISTRATE, PATIALA HOUSE COURT, NEW DELHI

State v. Abdiqani Osman Abdi

FIR No. 173/14

PS: IGI Airport

Coram : Ld. Mr. Ajay Garg, Metropolitan Magistrate

Date : 19.09.2014

Present : Ld. APP for the State.

1. Accused Abdiqani Osman Abdi in person with counsel.

   Heard

2. Accused is having Refugee Status and therefore, Section 14 Foreigner Act is not attracted against him.

3. Accused submits that he wants to plead guilty for the remaining offence punishable U/sec. 420,467,468 & 471 IPC.

4. Statement of accused recorded separately wherein he has pleaded guilty for the said offences. As accused has voluntarily pleaded guilty, he stands convicted for the offence punishable U/sec.420, 467,468 & 471 IPC.

   Heard on sentence.

5. Convicts submit that he remained in custody for about 110 days during investigation and trial and he is a student of MCA and is victim of circumstances. He undertakes not to indulge in any unlawful activity in future and request for a lenient view.

   Considered.

6. Taking into consideration the entire facts and circumstances and as the convict is victim of circumstances and foreign national, he is sentenced to imprisonment for the period: already undergone by giving benefit U/s 428 Cr.P.C. and further subject to fine of Rs. 25,000/- each. Fine stands deposited vide receipt no. 396180.

7. Let jamatalashi of the convict be released to him through FRRO after due identification and as per rules/procedure. Surety of accused

stands discharged. Documents, if any, pertaining to surety be released to him after due identification.

8. File be consigned to Record Room.
9. Copy of order be given dasti.

(Ajay Garg)
A.C.M.M.-01/NEW DELHI/19.09.2014
Additional Chief Metropolitan Magistrate
Patiala House Court New Delhi

JUVENILE JUSTICE BOARD II NEW DELHI

State v. Firoz Khan
FIR No. 351/14
PS. I.G.I. Airport

Coram : Ld. Mr. Murari Prasad Singh, Principle Magistrate
Date : 18.04.15

Present : Ld. APP for the State.
Sh. Belover Huten, Sr. Protection Officer from SLIC.
Counsel Sh. Sanjeev Malik for the JCL.
Ms. Noor Begum bua of the JCL.
JCL Firoz Khan produced from Majnu ka Tila.

1. One member has not been appointed.
2. The JCL is of Burmese origin. The JCL states that he does not wish to go back to the country of his origin as persecution of Rohangiya Muslims is going on over there. Therefore, he seeks refugee status in India. Sr. Protection officer from SLIC states that needful regarding granting of refugee status would be undertaken by UNHCR. He states that the JCL needs to visit the officer of UNHCR on 24 of April, 2015. The superintendent Majnu Ka Tila is directed to arrange for the visit of JCL to the office of UNHCR at C -543A, Vikas Puri, New Delhi 110018 on 24.04.2015.
3. Copy of this order be given to Sr. Protection Officer from SLIC. Copy of this order be sent to the Superintendent of Place of Safety at Majnu ka Tila.
4. Put up on 07.05.2015.

(V.K. Pandey)
Member
JJB-II, Delhi Gate

(Murari Prasad Singh)
Principal Magistrate
Delhi Gate,
New Delhi/18.04.15

JUVENILE JUSTICE BOARD II NEW DELHI

State v. Firoz Khan
FIR No. 351/14
PS. I.G.I. Airport

Coram : Ld. Mr. Murari Prasad Singh, Principle Magistrate
Date : 07.05.2015

Present : Ld. APP for State.
JCL produced from Majnu ka Tila.
Ms. Noor Begum, Bua of the JCL.
Mr. Belover and Ms. Divya from SLIC.
LAC Sh. D. K. Gupta.

1. One Member has not been appointed.
2. One Member Sh. V. K. Pandey is not sitting presently.
3. The juvenile has been granted refugee status by UNHCR. Copy of the refugee l-card has been placed on the file. The copy of the refugee l-card supplied to the juvenile. The juvenile with his guardian shall visit SLIC Office at C-543A Vikas Puri, New Delhi collect the I-card. JCL be released if not wanted in any other matter. Copy of this order be given to Mr. Belover.

(Murari Prasad Singh)
Principal Magistrate
JJB-II, Delhi Gate,
New Delhi/07.05.2015/H

IN THE COURT OF JUDICIAL MAGISTRATE

MURSHIDABAD

WEST BENGAL

Bittu Das and Anr v State

3rd Court Bmp. Msd.

G.R. 219 of 2015

Coram : Ld. Mr. Indrajit Deb, Judicial Magistrate

Date : 02.06.16

1. Today is the date fixed for production and appearance.
2. Two (2) accused persons namely Bittu Das @ somnath and Rup Kr Saha on court bail are present by filing hazira. Five remaining accused persons in J/C namely Nuresha Khatun, Md Alam, Jalal Ahmed, Abdul Karim, Hamid Hossain are not produced today.
3. Ld. Lawyer for the above named accused persons, five in nos, who are in J/C moved their petition under Section 239, Cr.P.C. dated 28.3.16 which has not been disposed of earlier.
4. Heard Ld. Lawyer for the accused persons. who, inter-alia, submitted that the petitioners are Rohingya Muslims who have fled from their country due to fear of persecution, who are registered as mandate refugee with United Nations High Commissioner for Refugee (UNHCR), India and is presently inmates of the Berhampore Central Correctional Home, West Bengal. The petitioners are misrepresented as a foreigner and charged under Section of Foreigners Act, 1946 whereas they are registered as mandate refugees under United Nations High Commissioners of Refugee (UNHCR), India having its registered office at Delhi. The UNHCR, India in its letter dated 17th February, 2015 has addressed the Joint Secretary(F), Ministry of Home Affairs, copy supplied to Superintendent, Berhampore Central Correctional Home that the petitioners are recognized refugee and will be grateful if they are released and allowed to remain in India.
5. The petitioners relied upon the following decisions —

   Premanand & Anr Vs State of Kerala 2013(3) KU

   Vishaka Vs State of Rajasthan, 1997

   Ktaer Abbas Habib Al Qutaiff vs Union of India, 1999 Cri.L.J. 919

   Anthony OmandiOsino vs FRRO, W.P.(Cri.) 2033/2015

6. All these decisions stressed upon the point of special status of refugees and to consider them not as foreigners only, but has to consider their status in the light of mandate of United Nations Conventions to which India has ratified. In the Article of the UN Convention for Refugees 1951 "....owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

7. So, refugee though included within the wider definition of foreigner as per foreigners act, but they have special status and for their safety they should not be deported to their original country.

8. From perusal of the documents filed I find that UNHCR issued identity cards in favour of all the five accused persons named above. Myanmar Rohingya Refugee Committee, Jammu and Kashmir, India also issued certificate and letter that the accused persons are resident of Jammu and Kashmir for the past two years before their arrest. I also find that UNHCR, New Delhi issued certificates in their favour that they are refugees and they should be protected from arbitrary detention and forced return.

9. In 1982, Myanmar passed a new citizenship law that did not recognize Rohingyas as "one of the national races" and required them, as well as anyone else who sought citizenship, to submit "conclusive evidence" of their ancestral links to the country. This put the onus of proof on the applicant and left the decision entirely in the hands of government authorities.

10. Sheikh Abdul Aziz vs State NCT of Delhi case, based upon the direction of the High Court, the Government determined the status of the accused as stateless. The court then issued the rule that the accused persons are to be issued identity certificates on the basis of which they could apply for long term visas.

11. But in the present case, the accused persons already have such identity cards issued by UNHCR valid in India and on the basis of which they could apply for visas to be enable to stay in India. They have not entered India or Bangladesh as emigrant for economic reasons but they were forced to leave their country and they are not recognized by their home country as its residents.

12. As such, I think they are not in the sense foreigners as per the definition of Foreigner as per Foreigners in wider connotation of the term. So, I

think these five accused persons should be discharged and released from this case as early as possible.

13. Hence, it is, ORDERED

That the petition under Section 239 of Cr.P.C. be considered and allowed on contest but without cost.

All these five accused persons, namely-Nuresha Khatun, Md Alam Jalal Ahmed, Abdul Karim, Hamid Hossain, are discharged of the case under Section 239 of Cr.p.c. as the charge against the accused persons found to be baseless which is discussed in the foregoing paragraphs in the body of the order.

Accordingly, issued release warrant at once.

Sd/-

(Indrajit Deb)

METROPOLITAN MAGISTRATE, NEW DELHI

State v. Tshibangu Kalala

FIR No : 288/15

PS : Palam Village

Coram	: Ld. Mr. Rohit Gulia, Metropolitan Magistrate
Date	: 12.01.2017.
For Petitioner	: Ld. APP for the State.
For Respondent	: Ld counsel Sh Fazal Abdali.

ORDER ON SENTENCE

1. Arguments heard on the point of sentence. Ld. Counsel for the convict has submitted that the convict is national of Democratic Republic of Congo and he has fled from his country due of fear of persecution and he is staying in India for his survival. Further, it is submitted by the counsel for the convict that convict is mandate refugee with United Nations, High Commissioner For Refugee (UNHCR), India and is having issued UNHCR card no 305-12C 00983 which is valid till 21.02.2018. It is further submitted that convict is misrepresented as a foreigner under Foreigners Act whereas he is recognized as a refugee under the mandate of UNHCR. It is submitted that there is no other criminal case pending against the convict and has prayed that a lenient view should be taken against him while passing order on sentence.
2. Ld. APP, on the other hand, has submitted that the convict was found without any legal documents for his stay in India and offence against him has been proved beyond reasonable doubt and has prayed for the maximum punishment to the convict.
3. I have heard the submissions and have perused the record. Perusal of the record shows that the convict was found without any valid document for his stay in India. Therefore, convict is sentenced to the period of custody already undergone.
4. However, whether convict is liable for deportation is to be consider at this stage. Ld counsel for the convict has submitted that he is a mandate refugee with UNHCR, India and has been issued card by

UNHCR which is valid till 2018 and has submitted that the convict cannot be deported. Ld counsel for the convict has relied upon the following judgments of Hon'ble Supreme Court and High Court:

Premanand & Anr Vs State of Kerala 2013 (3) KU;

Vishaka Vs State of Rajasthan, 1997;

Ktaer Abbas Habib Al Qutaiff Vs Union of India, 1999 Cri. L. J. 919;

Anthony OmandiOsino Vs FRRO, W P (Crl) 2033/2015.

5. All these decisions have stressed upon the point of special status of refugee and to consider them not as Foreigner only, but has to consider their status in the light of mandate of UN conventions to which India has ratified.

6. In the Article of the UN Convention for Refugees 1951:

> "owing to well-founded fear of being prosecuted For reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

7. So, convict though included within the wider definition of foreigner as per Foreigners act, but he has special status and for his safety he should not be deported to his original country. Hence, considering the above mentioned facts and circumstances, I am of the considered opinion that the convict shall not be deported to his original country.

8. Copy of the order on sentence be given to convict.

9. File be consigned to record room.

(Rohit Gulia)

MM-01, Dwarka Courts,

New Delhi

12.01.2017

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS

State of Maharashtra v Thiotros Girme Gaien

Judgment. RCC No. 1/2011

CNR NO: MHPU04-000552-2011

Coram	: Ld. Mr. P. T. Gotey, Judicial Magistrate
Date	: 16.01.2018
For Petitioner	: A. K. Pacharne for the State.
For Respondent	: Sanjay K. Gandhi for the accused.

Offence Punishable Under Sections 14 of the Foreigner's Act

JUDGMENT

1. The accused is facing trial for the offence punishable under sections 14 of the Foreigner's Act.

   Prosecution case is summarized as under –

2. That the informant police hawaldar Ajay Gangaram Pawar has lodged the FIR against the accused on 05/07/2010 alleging that the accused is Foreigner and he was found residing illegally at P-31, Ragvilas society, Koregaon Park, Pune. As per secret information police Hawalwar Ajay Pawar along with the other employees have visited the above address of the accused and on inquiry with the accused he was not having passport, visa and residential permit. The accused is residing in India since 1992. On the basis of FIR crime no. 3324/2010 is registered against the accused.

3. Investigation of the said crime is carried out by API S.A.Mahadik During investigation, he arrested the accused, recorded statements of concerned witnesses and after completion of investigation submitted charge-sheet against the accused for the offence punishable under sections 14 of the Foreigner's Act.

4. The charge is framed against the accused at Exh 11. Contents of the charge were read over and explained to the accused to which he pleaded not guilty and claimed to be tried vide his statement recorded at Exh.12. The prosecution has examined in all two witnesses.

Statement of the accused as required by section 313 of the Code of Criminal Procedure is recorded at Exh.22. Defence of the accused is of total denial. As per his defence he is refugee and also having passport, visa and residential permit. He has filed on record those verified documents, however, he has not examined any defense witness.

5. Heard leaned APP Shri. Pacharne for the State and learned advocate Shri. Sanjay K. Gandhi for the accused. Considering the charge, prosecution evidence and submissions of both parties following points arise for determination. I recorded my reasoned findings against them as follows

Sr. No.	Points	Findings
1.	Does the prosecution prove that, accused being foreigner entered in India without valid passport, visa and residing at Koregaon Park without residential permit and thereby committed an offence punishable under section 14 of Foreigners Act 1946? What Order?	.....No.
2.	What Order?	As per final order

REASONS

BOTH POINTS TOGETHER:

6. In order to prove the guilt of accused prosecution has examined following witnesses.

1.	Ajay Gangaram Pawar	Witness	Exh. 14
2.	Shankar Aana Mahadik	Witness	Exh. 31

7. As per evidence of Ajay Pawar (Pwl) on 05/07/2010 he was working as Police Head Constable, at Special branch, Foreigner's registration department. On that date he has received the information that the citizen of Eritrea country is residing illegally at Koregaon Park. He has produced information to police inspector Prakash Shah. "Thereafter, he along with the other employees went to the society as stated in the information were the accused is found. They inquired about the accused about his passport, visa and residential permit. However, the accused was not having anything. Thereafter, they brought the accused at their office. The senior officers of police have also inquired

about the accused. The accused is residing at Koregon park since 1992. He used to change his residence. Therefore, Ajay Pawar (Pw1) has lodged the report against the accused (Exh.15).

8. The report of Ajay Pawar (Pwl) is taken by Mahadik (Pw2), the then API serving at Koregaon Police chowky. On the basis of report printed FIR (Exh.20) is registered. Mahadik (Pw2) has arrested the accused and submitted the report to senior police inspector vide Exh.21. He has recorded the statements of witnesses and submitted the charge sheet against accused.

9. As per the case of prosecution the accused is the citizen of Eritrea country but residing illegally in India without passport, visa and residential permit. It is admitted by Ajay Pawar (Pwl) that he has not prepared any panchanama at the place where the accused was residing. So also , the statement of neighbors also not recorded. He has also not inquired about the entry of the passport of the accused in their office. So also, he has not inquired about the accused at the office at Embassy at Eritrea. Mahadik (Pw2) has also not recorded the statements of neighbors of accused. He has also not inquired about the accused at the Embassy of Eritrea.

10. As per the defence of the accused he is refugee having the identity card issued by United Nations High Commissioner for Refugees. So also, he has filed on record Refugees certificate, verified copy of his passport as well as residential permit. On his perusal it appears that the accused is residing in India since 1992 as refugee and having passport as well as residential permit extended time to time.

11. Ld. APP Shri Pacharne submitted that the accused being citizen of Eritrea found illegally residing at Koregoan park without passport, visa and residential permit. He further submitted that at the time of inquiry by Ajay Pawar (Pwl) no documents were found with the accused. He further submitted that the burden with the accused to prove his innocence as it is within his knowledge. He further submitted that the prosecution has proved the offence through the evidence of prosecution witnesses. Accordingly, he prayed for conviction of the accused.

12. On the other hand Id. advocate Shri Gandhi submitted that the accused is a refugee and having passport, visa and residential permit. He further submitted that the police have shown all the documents at the time of inspection. However, Ajay Pawar (Pwl) has lodged false report. He further submitted that no doubt the accused is a foreigner but he being the refugee his protected from the legal action under the passport act. He has relied on the Judgment of Kerala High Court in

case of Premanand and another Vs. State of Kerala reported in 2013 (3) KLJ 543. In this case it was held that:

> 'Where a person is forced to leave his mother country for the reason of being persecuted for one or other reason stated under the above definition, and takes refugee in our country a number of factors have to be taken into account in considering the applicability of the laws like Foreigners Act and the Orders thereunder against such person though he too falls within the definition." foreigner "as not as citizen of India. He stands on a different footing from a foreigner or any illegal emigrant who entered the country without valid passport or travel document. Though the definition ' foreigner' under the Foreigners Act takes in a refugee also the circumstances under which he was forced to leave his mother country and given the status of refugee on entry into the country, necessarily have to be country and given the status of refugee on entry into the country, necessarily have to be given due consideration taking note that every single situation pertaining to refugees is given due consideration taking note that every single situation pertaining to refugees replete with human rights as well. But all the same too much humanitarian consideration in the case of refugees is also not possible without having regard to the considerations of national security. We cannot overlook the security aspects involved, more so in the present scenario where external agencies with the aid of anti national elements inside the country are making attempts of destablise the foundation of the republic. A dispassionate view having regard of the security considerations and also human rights issues involved has to be taken in matters connected with the refugees by the law enforcement agencies and more so by the courts when any issue relating to them arise for consideration.'

13. No doubt as per the oral evidence of prosecution witnesses the accused was found residing at Koregaon park on 05/07/2010. However, he accused has filed on record verified copies of his passport, residential permit, refugee certificate and identity card. The residential permit of accused is extended by time to time by the local police. He is refugee. Therefore, as per the ration laid down in the case of Premanand (cited supra) stands on different putting from a foreigner or any illegal emigrant who entered the country without valid passport or travel document even though he falls within the definition of foreigner.

14. It is also pertinent to note that both the witnesses have not inquired about the documents of accused at the office of special branch of police. So also, they never inquired with the Embassy of Eritrea. The

accused has discharge his burden by showing that he is refugee . He cannot be forced to go to Eritrea. Therefore, he cannot be held guilty for the offence punishable of 14 of the Foreigners Act. The prosecution is fail to prove the offence leveled again accused. Accordingly, I answer point no. 1 in the negative. I hold the accused not guilty and in answer point no. 2 pass following order.

ORDER

1. Accused Thiotros Girme Gaien is acquitted of the offence punishable under section 14 of the Foreigners Act vide section 248(1) of Code of the Criminal Procedure.
2. His bail bond stands cancelled.
3. The accused is directed to furnish personal bond and surety bond of Rs.10,000/- vide section 437A of the Code of Criminal Procedure.

(Dictated and pronounced in open court)

Date: 16/01/2018

Place: Pune

(P. T. Gotey)

Judicial Magistrate First Class,

(Court No.3) Pune

IN THE COURT OF THE CHIEF JUDICIAL MAGISTRATE
IMPHAL WEST, MANIPUR

The State of Manipur v. Mohammad Faisal Khan

Cril. (P) Case No. 24 of 2018

Ref: F.I.R. No. 26 (1) 2018 Sjm – Ps, U/S 14 Foreigners Act

Coram : Ld. Mr. Lamkhanpau Tonsing, Judicial Magistrate

Date : 19.02.2018

ORDER

A fine of Rs. 2000/- (Rupees two thousand) only is paid over vide T.R. No. 256822.

B.C to deposit the same into State Account.

With accused/convict Mahommad Faisal Khan @ Lay Zaw Myint, having paid the fine of Rs. 2,000/- and having undergone the sentence imposed of 15 days since his remand into custody of 31/01/2018 till date, he be immediately released from custody, as no Deportation Order can be passed against the accused/ convict who is a holder now of a valid card of the United Nations High Commissioner for Refugees being Ref No. 305-15C01701, individual No. 305-00102335 and as such under the mandate of International Law relating to Refugees and UNHCR, if his custody is not required in any other case.

Announced.

Thus disposed.

Send extract to S.P/MCJ-Sajiwa for compliance.

Cril. Asst. take step.

Sd/-

(Lamkhanpau Tonsing)

C.J.M., Imphal West

Memo No. CJM/IW/2018/150

Dated, 19th February, 2018.

SRI S.L. TRIPURA,
JUDICIAL MAGISTRATE 1ST CLASS,
KHOWAI, WEST TRIPURA JUDICIAL DISTRICT.

State of Tripura v. Smt. Dilwara Begam & ors

Case No. TLM P.S. - 37/2018

Coram : Ld. Mr. S.L. Tripura, Judicial Magistrate

Date : 24.05.2018

For the petitioner : Mr. S. Debbarma, Ld. APP.

For the respondent : Mr. P.K. Paul, Id. Advocate.

1. Ld. APP is present.
2. Ld. Counsel Mr. P.K. Paul has appeared on behalf of the accused persons in custody.
3. At present before this court there are five accused persons namely Smt. Dilwara Begam, Smt. Asneda, Md. Hakim Ali, Md. Hiarol Amin and Md. Saif Ullah.
4. In respect of those accused persons in custody at present Ld. Counsel submitted certificate of granting of refugee status by UNHCR to Smt. Dilwara Begam, Smt.Asneda , Md. Hakim Ali, Md. Hiarol Amin and Md. Saif Ullah.
5. Binding it self by the observation made by the Hon'ble Apex Court in Keshabananda Bharari Vrs. State of Kerala, Velore Citizens Welfare Forum Vrs Union of India, Vishakha and others Vrs. State of Rajasthan & others, Apparel Export Promotion Council Vrs. A.K. Choopra, though this country is not signatory of 1951 convention, as India is a member of Executive Committee of UNHCR since 1995 and hosting of refugees are being allowed the above mentioned accused persons under custody to be discharged from this prosecution.
6. Supply a copy of this order to each accused for their future reference.
7. Also supply a copy of this order to Jailor Incharge of Khowai Sub Jail.
8. Make necessary entry in Police register.

IN THE COURT OF CHIEF JUDICIAL MAGISTRATE
NORTH 24 PARGANAS, BARASAT

State v Mohd. Joshim

GR 2381 OF 2018 (GR 4816 of 2018)

(Arising out of Habra PS case No. 050/2018 dtd 10.07.2018

u/s 14 Foreigners Act)

Date : 22.08.2019

1. Today is fixed for production of the accused person from JC and report
2. Accused person namely Md. Joshim is produced from JCR Report is received. Now the case record is taken up for hearing the petition u/s 239 Cr.P.C.
3. Heard both sides.
4. It appears that the charge sheet in connection with this case has been fixed against the accused persons u/s 14 Foreigners Act and this accused person is in custody since 11.07.2018.
5. Perused the verification report submitted by the ASI, Prabir Kumar Paul of Habra Police Station, from which it reveals that the aforesaid accused is found recognised refugee under the mandate of United Nations High Commissioner for Refugees (UNHCR).
6. Hence, charge against the accused person appears to be groundless.
7. Considering the observations noted above, this court is of the view that is a fit case for allowing the petition u/s 239 CrP.C.

   Hence, it is

ORDERED

That the accused person namely Md. Joshim is hereby discharged from this case at once under sec 239 Cr.P.C. and accordingly, the Superintendent of Dum Dum Central Correctional Home is directed to release the afore-mentioned accused persons at once.

Let a copy of this order be sent to the Superintendent of Dum Dum Central Correctional Home for his information and compliance.

Dic by me

CJM, North 24 Parganas

Chief Judicial Magistrate

North 24 Parganas

II. ACCESS TO ASYLUM

In numerous instance the Lower Courts in India have recognized the right to seek asylum and have provided opportunities to asylum seekers to approach the UNHCR as per the relevant laws of the country. It is also pertinent to also mention that right to seek asylum is one of the most basic human rights, the Universal Declaration of Human Rights enshrines in Article 14 that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

The table below lists cases relating to access to asylum that was recognised by the Courts, following by a summary and the orders.

NAME OF CASE	COURT and DATE OF ORDER	SUMMARY OF ORDERS/JUDGEMENTS
State vs Shabir Ahmed and Ors	Addt. Sessions Judge, Jammu 30 December 2013	The Court granted permission for attending the office of UNHCR India for getting their registration cards as per rules.
State vs Anwar Farooq	Juvenile Justice Board, Delhi 7 May 2015	The court granted a release order and further directed to arrange visit to UNHCR office for granting of refugee status.
Md. Saiyad & ors vs State	Judicial Magistrate, Khowai, Tripura 27 November 2018	Convicts were granted refugee status and had undergone their conviction period, therefore, the Superintendent Police was requested by the Court to shift them to UNHCR, New Delhi. On a subsequent petition, the coordinator of Rohingya Community approached the Court for handing the refugees to him since the SP did not take any initiative to shift the convicts to UNHCR.

IN THE COURT OF ADDL SESSIONS JUDGE, JAMMU

State v. Shabir Ahmed & Ors

Fir No.150/13 Offences

Under Section 14-A Foreign Act And 2/3 of Passport Act

Coram : Ld. Mr. Sanjay Gupta, Addl. Sessions Judge

Date : 30.12.2013

In the matter of:

An application for directing the Superintendent of District Jail Amphalla Jammu to permit the applicants/accused for attending the office of UNHCR India at Vikas Puri Delhi on 23.1.2014 & 24.1.2014 for getting their registration card under rules.

ORDER

1. The accused namely Nurul Amin, Shabbir Ahmad and Salim who are facing trial in FIR No.150/13 under section 14(A) Foreign Act and 2/3 Passport Act have filed present application for directing the Superintendent District Jail Amphalia to permit Nurul Amin and Salim for attending UNHCR India at Vikas Puri Delhi on 23.1.2014 and permit Shabbir Ahmad for attending on 24.1.2014 for getting their registration card under rules. In this application it has been stated that Nurul Amin and Salim have applied in UNHCR India at Vikas Puri Delhi on 23.1.2014 and Shabbir Ahmad has applied on 24.1.2014 for getting their registration card under rules and in this regard appointment slips have been issued to them. As per slips Nurul Amin and Salim have to appear on 23.1.2014 and Shabbir Ahmad has to appear on 24.1.2014 at New Delhi in office. Photocopies of slips have been attached.
2. Keeping in view, contents of application Incharge District Jail may take them to UNHCR India at Vikas Puri Delhi office on said dates under rules after verifying the authenticity of slips. Copy of Order is forwarded to concerned Incharge District Jail for compliance.

JUVENILE JUSTICE BOARD II DELHI

State v. Anwar Farooq
FIR No. 350/14
PS. I.G.I. Airport

Coram : Ld. Mr. Murari Prasad Singh, Principle Magistrate
Ld. Mr. V.K. Pandey, Member
Date : 18.04.15
Present : Ld. APP for the State.
Sh. Belover Huten, Sr. Protection Officer from SLIC.
Counsel Sh. Sanjeev Malik for the JCL.
Ms. Noor Begum khala of the JCL.
JCL Anwar Farooq produced from Majnu ka Tila.

1. One member has not been appointed.
2. The JCL is of Burmese origin. The JCL states that he does not wish to go back to the country of his origin as persecution of Rohingya Muslims is going on over there. Therefore, he seeks refugee status in India. Sr. Protection officer from SLIC states that needful regarding granting of refugee status would be undertaken by UNHCR. He states that the JCL needs to visit the officer of UNHCR on 24 of April, 2015. The superintendent Majnu Ka Tila is directed to arrange for the visit of JCL to the office of UNHCR at C-543A, Vikas Puri, New Delhi 110018 on 24.04.2015.
3. Copy of this order be given to Sr. Protection Officer from SLIC. Copy of this order be sent to the Superintendent of Place of Safety at Majnu ka Tila.

Put up on 07.05.2015.

(V.K. Pandey) (Murari Prasad Singh)

JUVENILE JUSTICE BOARD II DELHI

State v. Anwar Farooq
FIR No. 350/14
PS. I.G.I. Airport

Coram : Ld. Mr. Murari Prasad Singh, Principle Magistrate
Date : 07.05.2015
Present : Ld. APP for State.
JCL produced from Majnu ka Tila.
Ms. Noor Begum, Mausi of the JCL.
Mr. Belover and Ms. Divya from SLIC.
LAC Sh. D. K. Gupta.

1. One Member has not been appointed.
2. One Member Sh. V. K. Pandey is not sitting presently.
3. The juvenile has been granted refugee status by UNHCR Copy of the refugee I-card has been placed on the file. The copy of the refugee l-card supplied to the juvenile. The juvenile with his guardian shall visit SLIC Office at C-543A Vikas Puri, New Delhi collect the I-card. JCL be released if not wanted in any other matter. Copy of this order be given to Mr. Belover.

(Murari Prasad Singh)

JUDICIAL MAGISTRATE 1ST CLASS
KHOWAI, KHOWAI JUDICIAL DISTRICT

Md. Saiyad and Ors v State

Case No. Crl. Misc 03 of 2017

Coram	: Ld. Ms. D. Bhattacharya, Judicial Magistrate
Date	: 27.11.2018
For Petitioner	: Record is put up today by the prayer of Ld.Counsel
	: Mr. S.K.Paul.
	Ld.A.P.P is present.
For Respondent	: Ld.Counsel Mr. S.K. Paul appeared on behalf of the three convicted person namely, Fatema Akter.

Heard both the sides.

1. In respect of the convicted person Ld.Counsel submitted certificate of granting Asylum seekers for refugee status of the accused and hence prayed for her release from the said home and for her shifting to New Delhi, Refugee Camp.
2. In the said petition it appears that the convict under gone her conviction period and presently stays at "Mahatma Gandhi Protective Home", Narsinghar, Agartala after completion of her sentence.
3. Under the above circumstances, S.P, West Tripura is requested to make necessary arrangement at the earliest for shifting the above mentioned convicted person to the United Nations High Commissioner for Refugee, New Delhi.
4. Superintendent /In-charge of "Mahatma Gandhi Protective Home", Narsinghar, Agartala is directed to hand over the said above mentioned convict to the Escorts of S.P, West Agartala for their shifting to UNHCR, New Delhi. separate petition submitting thereby that on 09.10.2018 this court passed an order asking S.P, West Tripura to make necessary arrangement for shifting the convicted persons from "Mahatma Gandhi Protective Home", Narsinghar, Agartala to UNHCR, New Delhi but till today S.P, West Tripura did not take any initiative to shift the said convicts and as such coordinator of Rohingya namely,

Mahammad Shaqir approached Tripura to take the custody of the convicts and hence, Ld. Counsel also prayed for direction from the court to the S.P to hand over all the convicts to the said coordinator.

5. Heard and considered.

6. In this regard, S.P, West Tripura is directed to comply the order of this court regarding shifting of the convicted persons from the home to UNHCR, New Delhi and regarding the petition of the Ld.Advocate for handing over the convicts to the coordinator of Rohingya is to be taken up by S.P, West Tripura after discussion with the Administration and do the needful as per law.

7. Supply copy of this order to the convicted person and also S.P, West Agartala.

As dictated D. Bhattacharya

JUDICIAL MAGISTRATE 1ST CLASS
KHOWAI, KHOWAI JUDICIAL DISTRICT

Md. Saiyad and Ors v State

Case No. Crl. Misc 03 of 2017

Coram : Ld. Ms. D. Bhattacharya, Judicial Magistrate

Date : 09-10-2018

1. Record is put up today by the prayer of Ld. Counsel Mr. S.K.Paul.
2. Ld. A.P.P is present.
3. Ld. Counsel Mr. S.K. Paul appeared on behalf of the three convicted persons Md. Saiyad Karim, Md. Tarek and Jabeda Khacun by executing Vokalatnarna.
4. Heard both the sides.
5. In respect of these convicted persons Ld.Counsel submitted certificate of granting refugee status by UNHCR to Md. Sayad Karim and Asylum seekers for refugee status of Md. Tarek and Jaboda Khatun and hence prayed for their release.
6. In the said petition it appears that the convicts under gone their sentence passed on 12.07.2017 and presently all the convicts stay at "Mahatma Gandhi Protective Horde", Narsinghar, Agartala after completion of their sentence.
7. Under the above circumstances, S.P. West Tripura is requested to make necessary arrangement at the earliest for shifting the above mentioned convicted persons to the United Nations High Commissioner for Refugee, New Delhi.
8. Superintendent /In-charge of "Mahatma Gandhi Protection Home", Narsinghar, Agartala is directed to hand over the above mentioned convicts to the Escorts of S.P, West Agartala for their shifting to UNHCR, New Delhi.

III. BAIL

Release on bail is important for refugees and asylum seekers. While bail is a matter of right in bailable-offences under Section 436 Criminal Procedure Code (CrPC), with respect to non-bailable offences the discretion lies upon the officer in charge of the police station or the Magistrate, under Section 437 CrPC. Denial of bail most often than not leads to further psychological and physical sufferings among refugees and asylum seekers. The courts in several cases have released asylum seekers on bail. The table below outlines some of the bail cases which is followed by a summary and the orders/ judgements.

NAME OF CASE	COURT and DATE OF ORDER	SUMMARY of ORDERS/ JUDGEMENTS
Mohd Younis & Anr vs State of Telengana	Metropolitan Magistrate Cyberabad Telengana 21 June 2016	Refugees accused u/s 420, 468, 471 IPC and 14 of the Foreigners Act. Since petitioners were the sole bread earners in their family and they assured to abide by any conditions of the court, the bail petition was allowed.
Rizanna Begum vs The State of Telengana	Sessions Judge Cyberabad Telengana 2 February 2018	Anticipatory bail was granted for offences u/s 420, 465, 468, 471 of IPC and 12 of Indian Passport Act.
The State of Manipur vs Mohammad Saifullah	Judicial Magistrate Moreh Manipur 30 October 2018	The accused herein were arrested under section 14 of the Foreigners Act; since the statutory period of 180 days of judicial custody lapsed therefore released on bail u/s 167 of Cr.P.C

State of Manipur vs Narul Hakim	Judicial Magistrate Moreh, Manipur 5 February 2019	Accused arrested under section 14 of the Foreigners Act; since the statutory period of 180 days of judicial custody lapsed therefore released on bail u/s 167 of Cr.P.C
State of Manipur vs Sabir Ahamed	Judicial Magistrate Moreh, Manipur 5 February 2019	Accused arrested under section 14 of the Foreigners Act; since the statutory period of 180 days of judicial custody lapsed therefore released on bail u/s 167 of Cr.P.C
State of Manipur vs Md. Kalimula	Judicial Magistrate Moreh, Manipur 5 February 2019	Accused arrested under section 14 of the Foreigners Act; the statutory period of 180 days of judicial custody lapsed therefore released on bail u/s 167 of Cr.P.C

OFFICE OF THE XIV METROPOLITAN MAGISTRATE, CYBERABAD AT L.B. NAGAR.

Mohd. Younis and Anr v. State of Telengana

Bail Order in Crl. M.P. No. 1751/2016

in

C.r. No. 272/2016

Coram : Ld. Mr. T. Suhasini, Metropolitan Magistrate

Date : 21.06.2016

This petition coming before me for hearing in the presence of Sri A. Ramesh Babu, Advocate for the Accused and the Learned APP for the respondent/ Complainant and upon perusal of the material records, on record, and the matter having stood over for consideration till this day this court delivered the following.

BAIL ORDER

1. This is a petition filed U/s 437 Cr.p.c by the petitioners who are accused No.1 and No.2 herein in Cr.No.272/2016 of PS Pahadishareef for the offences punishable under section 420, 468, 471 IPC and Sec 14 of Foreigners Act, praying this court to enlarge the accused No.1 and 2 on bail as they are remanded to Judicial custody on 05-06-2016.

2. Notice given to APP. Heard both sides.

   Now, the point for determination is whether petitioner/Accused is entitle for bail as prayed for?

3. Brief facts of the case is that, on 04-06-2016 at about 16:30 hrs the complainant Sri K.Narsing Rathod, Sub-Inspector of Police, received credible information that, from Burma Éducation Dream School at Royal colony, Balapur village, Saroqmnagar (M), R.R. Dist, were the accused no.1 and 2 came to Hyderabad siñce last 5 months from Bangladesh and got UNHCR card MRC No 06485, the A1 came to baba nagar Hyderabad and taking shelter at Royal colony by doing English teacher job from last 3 months at Burma Education Dream School and the A2 belongs to Burma .... Stationalist he came to Hyderabad for the last 4 years and staying at baba nagar and doing labour work since last 5 months and organized Human to Humanity Helping Foundation

vide Reg No. 854 of 2015 since last 5 months both the accused close yontacted each other and preplanned and prepared ID proofs for frequently travelling in the trains and flights for Burmas Nationalist students for travelling to Hyderabad to Calcutta for the rights as per the confession, Sub-Inspector of Police seized UNHCR card of Bangladesh and school ID card from their position and thereby the accused A1 and A2 cheated arid created forged ID proofs on the name of the Burma Education Dream School. Hence tequested for necessary action.

4. On the basis of above complaint, the police registered the case in Cr. No. 272/2016 against the petitioners.

5. The counsel for the accused contented that, accused are the permanent resident of the mentioned address, and they are not connected with the said offence and the police has falsely implicated the accused in this case. It is further submitted that, the entire family is depend upon them and they are the sole earners in the family now the entire families are strives for food. The petitioners would contended that, they hails from respectful family and they are ready to abide any condition of this court

6. Perused the FIR, complaint, remand report, C.D part II, Prima ..: facie the allegations against the petitioner /Accused No.1. The investigation is completed. All the material witnesses has examined only charge sheet has to be filed. Since the witnesses are official witnesses, and there is no chance of tampering in the evidence, If tie accused is enlarged on the bail. Hence basing on the facts and circumstance of the case petition is allowed furnishing two sureties for a sum of RS.25,000/- (Rupees twenty five thousand) and the surety shall be of local residents and further the accused is directed to appear before the DCP Shamshabad on every day between 10.00 a.m. to 12.30 p.m. till filing the change sheet.

Typed to dictation and Pronounced by me in the open court on this the day of 21st day of June, 2016.

CYBERABAD, RANGA REDDY DISTRICT AT L.B.NAGAR, HYDERABAD

Rizanna Begun v. The State of Telangana

Cd.M,P. No.377 of 2ala in Cr. No 36 of 2018

Coram	: Ld. Mr. V. Vara Prasad, Addl.Metropolitan Sessions Judge
Date	: 02.02.2018
For Petitioners	: M/s.Ratna Law Chambers, Advocates for petitioner/A2
For Respondent	: APP to Respondent/Complainant
Offence(s)	: 420, 455. 468, 471 of Indian Penal Code Section 12 (1) (b) of Indian Passport Act 1967

This petition filed under section 438 Cr.P.C coming before me for hearing and this Court delivered the following Order

ORDER

1. This bail petition filed by petitioner/A2 seeking anticipatory bail for the offence

   under sections 420,465,468,471 of Indian Penal Code, Section 12 (1) (b) of Indian Passport Act, 1967.

2. Notice is given to APP.

3. The Sub-Inspector of Police of PS RGI Airport lodged a complaint before PS RGI stating that, while he was duty on 18/1/2018 at about 9:00 PM, he received information that, a person by name Inayuthullah belonging to Burma Nation (Mayanmar) without any VISA he came down to India. He holds fake Voter ID Card, Aadhar Card, in his possession and for his family members. Himself and his family members having Fake Indian Passports, with them they went to Saudi Arabia and later he again return from Saudi. Al was at RGI Airport to receive his family members from RGI Airport. Immediately SIP went to Arriaval Station and throughly enquired him and found Emergency Certificate with him.SIP Collected Photostat Copy of Passport L1286446. A1 does not have Indian Citizenship. A1 taking advantage of Fake Identity Proofs

and Al travelling lo abroad countries.

4. Basing on the complaint of SIP, Inspector of Police registered this crime and took up the investigation.
5. The counsel for petitioner contends the matter for granting anticipatory bail and requested the Court to grant anticipatory bail to Petitioner/A2, in the event of arrest by the respondent/Police-RGI Airport, as prayed for.
6. APP opposed the bail,
7. Heard both sides,
8. On hearing on both sides, perusal of records, in the above circumstances, this Court does find any ground to grant anticipatory bail to petitioner/A2, as prayed for.
9. Petition is dismissed, accordingly.

Typed to my dictation and pronounced by me in the open Court on this the 2nd day of February, 2018.

XIV Addl.Metropolitan Sessions Judge,

Cyberabad, R. R District, L. B. Nagar

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, MOREH

The State of Manipur v Mohommad Saifullah

Cril. Misc.(B) Case No. 65 of 2018

Ref : F.I.R No. 27(4) 2018 MRH-P.S.

U/s: 366-B/370/417/419/471 IPC, 14 F. Act & Section 5 PITA Act

Coram : Ld. Mr. Lamkholal Kipgen, Judicial Magistrate

Date : 30.10. 2018

ORDER

1. By this application the above named accused /Petitioner prays for enlarging him on bail upon the lapse of statutory period u/s 167 (2) CrPC.
2. Register it as Cril Misc (B) Case.
3. Perused the records.
4. Heard the Ld. APP and the moving counsel.
5. Records show that the accused was remanded to P.C. on 08.4.2018 further P.C. on 13.4.2018 and then J.C. on 20.4.2018. Since then he has been languishing in jail.
6. Charge sheet is yet to be submitted.
7. Counting from the first date of remand, it is evident that the accused has undergone detention for 206 days as on the date of registration of this application. The statutory period of detention stipulated in section 167(2) CrPC is 180 days (as amended in the State of Manipur). In the result, this Court holds that the accused is entitled to default bail as he has undergone detention exceeding the stipulated period. In the premises, the accused is enlarge on bail on his execution of P.R. bond of Rs, 50,000/- (Rupees fifty thousand) and two sureties of like amount to the satisfaction of this Court.
8. The sureties shall be local and known to the accused. This shall be reflected in the affidavit accompanying the bonds. Needless to say that the affidavit shall also reflect that the surety have never stood as surety for any other accused in other cases. Upon released the accused shall appear before this Court on dates specified.
9. Disposed as above.

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, MOREH

State of Manipur v. Narul Hakim

Cril Misc. (Bail) Case No. 9 of 2019

Ref: FIR No. 23(03)2018 MRH-P.S.

U/S: 14 of F. Act

Coram : Ld. Mr. Arshad Sheed Shah, Judicial Magistrate

Date : 05.02.2019

ORDER

1. This application is filed by the accused person who is in judicial custody in relation to the above referred F.I.R. Case praying for releasing him on bail.
2. Register it as Cril. Misc. (Bail) Case.
3. The Court has heard the Ld. L.A.C. for the accused person and the Ld. A.P.P. for the State. Also the court has perused the bail application filed and the relevant materials on record.
4. It has been submitted by the Ld. L.A.C. that the statutory period of 180 days of judicial custody which is permissible by section 167 of the Code of Criminal Procedure, 1973 during the stage of investigation of a case have already lapse and that the accused person is entitled to be released on bail under Section 167(2)(a)(ii) of the Code of Criminal Procedure, 1973. The Ld. L.A.C. further submits that the accused is ready to produce necessary bonds if released on bail.
5. It has been learned from the records available that the accused person was arrested along with two others on the allegation of being a foreign national who infiltrated into India from Bangladesh to proceed to Malaysia via Manipur through Moreh without any required documents and for staying in the state of Manipur without any valid documents. The accused person was put to judicial custody on 31/03/2018.
6. It is seen that the statutory period of 180 days for judicial custody during the period of investigation as provided in Section 167 of the Code of Criminal Procedure, 1973 has already lapse and according to section 167(2)(a)(ii) of the Code of Criminal Procedure, 1973, the accused person is entitled to be released on bail if he is prepared to and

does furnish bail.

7. The provision of section 167 (2) (a) (ii) of the Code of Criminal Procedure, 1973 is a mandatory provision and this court is bound to follow it and the police has failed to file the investigation report/challan in the court within the statutory period provided by Section 167 of the Code of Criminal Procedure, 1973. Therefore, this court of the view that the accused person can no longer be confined in prison while the investigation is still going on and hence, the application filed by the Accused person is fit to be accepted.

8. The accused is granted bail on the following conditions:-

    1. Accused should furnish a bail bond of Rs. 50,000/- with a surety of same amount who should be a permanent resident of Manipur.
    2. The accused should cooperate with the police in investigation of the referred F.I.R. Case
    3. Accused should appear before the Court on specified dates.
    4. Accused should not temper or influence with evidences or witnesses.
    5. Accused should not commits similar type of offence.
    6. Accused should not leave Manipur without prior permission of the Court.

The bail application is allowed.

The Cril Misc.(B) Case is disposed accordingly.

Sd/-

(Arshad Sheed Shah)

Judicial Magistrate First Class,

Moreh

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, MOREH

State of Manipur v. Sabir Ahamed

Cril Misc. (Bail) Case No. 11 of 2019

Ref: FIR No. 23(03)2018 MRH-P.S.

U/S: 14 of F. Act

Coram : Ld. Mr. Arshad Sheed Shah, Judicial Magistrate

Date : 05.02.2019

ORDER

1. This application is filed by the accused person who is in judicial custody in relation to the above referred F.I.R. Case praying for releasing him on bail.
2. Register it as Cril. Misc. (Bail) Case.
3. The Court has heard the Ld. L.A.C. for the accused person and the Ld. A.P.P. for the State. Also the court has perused the bail application filed and the relevant materials on record.
4. It has been submitted by the Ld. L.A.C. that the statutory period of 180 days of judicial custody which is permissible by section 167 of the Code of Criminal Procedure, 1973 during the stage of investigation of a case have already lapse and that the accused person is entitled to be released on bail under Section 167(2)(a)(ii) of the Code of Criminal Procedure, 1973. The Ld. L.A.C. further submits that the accused is ready to produce necessary bonds if released on bail.
5. It has been learned from the records available that the accused person was arrested along with two others on the allegation of being a foreign national who infiltrated into India from Bangladesh to proceed to Malaysia via Manipur through Moreh without any required documents and for staying in the state of Manipur without any valid documents. The accused person was put to judicial custody on 31/03/2018.
6. It is seen that the statutory period of 180 days for judicial custody during the period of investigation as provided in Section 167 of the Code of Criminal Procedure, 1973 has already lapse and according to section 167(2)(a)(ii) of the Code of Criminal Procedure, 1973, the ac-

cused person is entitled to be released on bail if he is prepared to and does furnish bail.

7. The provision of section 167 (2) (a) (ii) of the Code of Criminal Procedure, 1973 is a mandatory provision and this court is bound to follow it and the police has failed to file the investigation report/challan in the court within the statutory period provided by Section 167 of the Code of Criminal Procedure, 1973. Therefore, this court of the view that the accused person can no longer be confined in prison while the investigation is still going on and hence, the application filed by the Accused person is fit to be accepted.

8. The accused is granted bail on the following conditions:-

    1. Accused should furnish a bail bond of Rs. 50,000/- with a surety of same amount who should be a permanent resident of Manipur.
    2. The accused should cooperate with the police in investigation of the referred F.I.R. Case
    3. Accused should appear before the Court on specified dates.
    4. Accused should not temper or influence with evidences or witnesses.
    5. Accused should not commits similar type of offence.
    6. Accused should not leave Manipur without prior permission of the Court.

The bail application is allowed.

The Cril Misc.(B) Case is disposed accordingly.

Sd/-

(Arshad Sheed Shah)

Judicial Magistrate First Class,

Moreh

THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS, MOREH

State of Manipur v Md. Kalimula

Cril Misc. (Bail) Case No. 10 of 2019

Ref: FIR No. 23(03)2018 MRH-P.S.

U/S: 14 of F. Act

Present : Ld. Mr. Arshad Sheed Shah, Judicial Magistrate

Date : 05.02.2019

ORDER

1. This application is filed by the accused person who is in judicial custody in relation to the above referred F.I.R. Case praying for releasing him on bail.
2. Register it as Cril. Misc. (Bail) Case.
3. The Court has heard the Ld. L.A.C. for the accused person and the Ld. A.P.P. for the State. Also the court has perused the bail application filed and the relevant materials on record.
4. It has been submitted by the Ld. L.A.C. that the statutory period of 180 days of judicial custody which is permissible by section 167 of the Code of Criminal Procedure, 1973 during the stage of investigation of a case have already lapse and that the accused person is entitled to be released on bail under Section 167(2)(a)(ii) of the Code of Criminal Procedure, 1973. The Ld. L.A.C. further submits that the accused is ready to produce necessary bonds if released on bail.
5. It has been learned from the records available that the accused person was arrested along with two others on the allegation of being a foreign national who infiltrated into India from Bangladesh to proceed to Malaysia via Manipur through Moreh without any required documents and for staying in the state of Manipur without any valid documents. The accused person was put to judicial custody on 31/03/2018.
6. It is seen that the statutory period of 180 days for judicial custody during the period of investigation as provided in Section 167 of the Code of Criminal Procedure, 1973 has already lapse and according to section 167(2)(a)(ii) of the Code of Criminal Procedure, 1973, the accused person is entitled to be released on bail if he is prepared to and

does furnish bail.

7. The provision of section 167 (2) (a) (ii) of the Code of Criminal Procedure, 1973 is a mandatory provision and this court is bound to follow it and the police has failed to file the investigation report/challan in the court within the statutory period provided by Section 167 of the Code of Criminal Procedure, 1973. Therefore, this court of the view that the accused person can no longer be confined in prison while the investigation is still going on and hence, the application filed by the Accused person is fit to be accepted.

8. The accused is granted bail on the following conditions:

    1. Accused should furnish a bail bond of Rs. 50,000/- with a surety of same amount who should be a permanent resident of Manipur.
    2. The accused should cooperate with the police in investigation of the referred F.I.R. Case
    3. Accused should appear before the Court on specified dates.
    4. Accused should not temper or influence with evidences or witnesses.
    5. Accused should not commits similar type of offence.
    6. Accused should not leave Manipur without prior permission of the Court.

The bail application is allowed.

The Cril Misc.(B) Case is disposed accordingly.

Sd/-

(Arshad Sheed Shah)

Judicial Magistrate First Class,

Moreh

IV. REFUGEE CHILDREN

There have been instances where refugee children have been detained for non-possession of valid travel documents. The Juvenile Justice Boards considering their miserable situation, age and future have ordered restoration to their respective families. Further, under Section 29 (5) of Juvenile Justice Board (Care and Protection of Children) Act, 2000, the Child Welfare Committee is empowered to function as a bench of 1st class magistrate. Along with the Juvenile Justice Board orders, the following list has also incorporated some the Child Welfare Committee restoration orders.

The table below lists the cases and a summary of the orders and judgement followed by the orders.

NAME OF CASE	COURT and DATE OF ORDER	SUMMARY OF ORDERS/JUDGEMENTS
Minara Begum and 14 ors	Juvenile Justice Board Calcutta 19 November 2014	Ordered restoration to their respective families/to do necessary acts as they deem fit for the best interest of these children.
Samsur Alam and 10 others	Juvenile Justice Board, North 23 Parganas West Bengal 19 November 2014	Accused to be treated as a Child in Need of Care and Protection rather than Children in Conflict with Law. Ordered restoration of the child to their respective family or to do necessary acts as they deem fit for the best interest of these children.
Safi Akhtar	Juvenile Justice Board, Calcutta 11 August 2017	Accused to be treated as a Child in Need of Care and Protection rather than Children in Conflict with Law. Ordered restoration of the child to her respective family/to do necessary acts as they deem fit for the best interest of her.

Ohida and Ors vs State of Tripura	Sessions Judge North Tripura Dharmanagar 7 November 2019	The court ordered the Child Welfare Committee, North Tripura and the Child Welfare Police Officer, North Tripura to hand over the 7 children in conflict with law to the Central Child Welfare Committee, New Delhi to take further necessary action.
Child Restoration Cases	Child Welfare Committee 24 Parganas North West Bengal 9 December 2014	Restoration to their respective families.
Case No. 271 /CWC-1E/02-2018	Child Welfare Committee, Imphal East 11 September 2019	Ordered for handing over of custody of three minor asylum seekers to applicant know to the minors.

JUVENILE JUSTICE BOARD
CALCUTTA

Minara Begum and Ors

Date : 19.11.2014

1. Today is fixed for examination of the JCL boys U, s. 251 C.P.C.
2. The JCL boys namely;
    1. Munsur Alam S/o. Abu Alam, 2. Saiyat Hussain S/o.Abdul Shkur, 3. Safi Alam S/o. Ll.kadir Hossain, 4. Idris Ali S/o.Abdur Sukur, 5. Nazir Ahmed S/o. Abu Alam have been produced from Dhrubasram Aryadaha. They are taken into our safe custody.
3. JCL Girls namely
    1. Minara Begam, 2. Rasida Begam, 3. Zamila Begam, 4. Samira Begam all daughters of Abu Alam , 5. Umal Fazal, 6. Anunara Begam, 7.Ramida Begam and .Nuran kir Begam all daughters of Sayad Hussain are produced from Sanlap Horne and they are taken into our safe custody.
4. From the report of the Police U/s.173 Cr.P.C it appears that the allegation is that these JCL boys and girls along with their parents entered into the territorial jurisdiction of India without any valid documents and after investigation, the 1.O came to the conclusion that these JCL boys and girls entered into India from Myanmar through Bangladesh by crossing the Indo-Bangladesh border with the help of some other persons and as such the lo stated that these JCL boys and girls have committed the offence punishable U/s. 14A(B) of Foreigners Act. and they need to face the enquiry before the JJB.
5. Before going into process of telling the JCL boys and girls about the substance of accusation against them U/s.251 Cr.P.C, we thought it necessary to hear from them why they entered into India without any valid documents. On being asked the JCL boys and girls stated to us that they resided at Myanmar and they belong to “ROHINGA” community which is the minority community in their country. There was Civil War in their country and their community was being attacked by the majority community of their country and their life were at stake. To save their life and limb, their parents decided to leave Myanmar

along with the children and under compulsion to save life and limb they crossed the border of Myanmar into Bangladesh and tried to reside there but there also they were being attacked by local people for which they were compelled to move towards the border of India. They managed to cross the border of India in half-starved condition with all misery and suffering and unfortunately, they were caught by the Police.

6. The JCL boys and girls cried at the time of telling their stories and prayed to be returned to their family.

7. Considering these heart melting stories of the JCL boys and girls, we thought that although the boys and girls have done wrong but another aspect should be considered by us, i.e. they are not offenders by choice rather they are the victim of circumstances and their circumstances compelled them to move to India leaving their motherland.

8. The GOLDEN thread of two principles that runs throughout the JJ Act are Principle of presumption of innocence and the best interest of the child.

9. It means that children be they of any nation has to be presumed innocent of any malafide or criminal intent upto the age of 18 years and all decisions regarding the children should be based upon the primary consideration that they are to be in the best interest of the child and shall help the child thereby to develop his or her full potential.

10. Even after considering the fact that these JCL boys and girls are admittedly the Foreign Nationals and crossed the Indian border without valid documents still we are of the opinion that they are to be treated as. CHILDREN IN CARE AND PROTECTION because they have been thrown out of their motherland and they are away from their relatives for nearly 1 12 years and during this period they have undergone immense mental trauma for being away from their parents.

11. So, we are of the opinion that these JCL boys and girls are victim of the circumstances and they are to be treated as the CNCP not the JCL and accordingly we direct the Superintendent of Dhrubasram and Sanlap to produce these JCL boys and girls before CWC Barasat.

12. Chairman and Members of CWC Barasat are requested to help the children for restoration to their respective families or to do necessary acts as they deem fit for the best interest of the children.

13. Accordingly, the children are to be produced before CWC on 03.12.2014.

14. D.A is directed to send the record to CWC Barasat within 10 days of the passing of this order.

15. Copy of order be sent to DCPO, North 24 Pgs for her information.

Principle Magistrate
Juvenile Justice Board
Salt Lake City Sector- I
Calcutta

JUVENILE JUSTICE BOARD

NORTH 24 PARGANAS

WEST BENGAL

Samsur Alam and Ors

Date of order : 19.11.2014

1. Today is fixed for examination of the JCL boys U, s. 251 C.P.C.
2. The JCL boys namely;
    1. Samsur Alam S/o. Abul Hassan, 2. Rafique S/o.Abu Munaf, 3. Adu Harim S/o. Mohamato Hossain, 4. Nur Ahmad S/o. Izahar Hossain have been produced from Dhrubasram Aryadaha. They are taken into our safe custody.
3. JCL Girls namely
    1. Mazuma Begam D/o Abul Hossain, 2. Jihada Begam D/o Izahar Hossain, 3. Munuwara Begam D/o Adu Munaf, 4. Sahnuara Begam D/o Mohamafa Hossain, 5. Rafiya Begum D/o Saita Ahmad, 6. Amotulla Begam D/o Md. Ali, 7. Anuara Begam D/o of Izahar Hossain are produced from Sanlap Horne and they are taken into our safe custody.
4. From the report of the Police U/s.173 Cr.P.C it appears that the allegation is that these JCL boys and girls along with their parents entered into the territorial jurisdiction of India without any valid documents and after investigation, the 1.O came to the conclusion that these JCL boys and girls entered into India from Myanmar through Bangladesh by crossing the Indo-Bangladesh border with the help of some other persons and as such the lo stated that these JCL boys and girls have committed the offence punishable U/s. 14A(B) of Foreigners Act and they need to face the enquiry before the JJB.
5. Before going into process of telling the JCL boys and girls about the substance of accusation against them U/s.251 Cr.P.C, we thought it necessary to hear from them why they entered into India without any valid documents. On being asked the JCL boys and girls stated to us that they resided at Myanmar and they belong to "ROHINGA" community which is the minority community in their country. There was Civil War in their country and their community was being attacked

by the majority community of their country and their life were at stake. To save their life and limb, their parents decided to leave Myanmar along with the children and under compulsion to save life and limb they crossed the border of Myanmar into Bangladesh and tried to reside there but there also they were being attacked by local people for which they were compelled to move towards the border of India. They managed to cross the border of India in half-starved condition with all misery and suffering and unfortunately, they were caught by the Police

6. The JCL boys and girls cried at the time of telling their stories and prayed to be returned to their family.

7. Considering these heart melting stories of the JCL boys and girls, we thought that although the boys and girls have done wrong but another aspect should be considered by us, i.e. they are not offenders by choice rather they are the victim of circumstances and their circumstances compelled them to move to India leaving their motherland.

8. The GOLDEN thread of two principles that runs throughout the JJ Act are Principle of presumption of innocence and the best interest of the child.

9. It means that children be they of any nation has to be presumed innocent of any malafide or criminal intent upto the age of 18 years and all decisions regarding the children should be based upon the primary consideration that they are to be in the best interest of the child and shall help the child thereby to develop his or her full potential.

10. Even after considering the fact that these JCL boys and girls are admittedly the Foreign Nationals and crossed the Indian border without valid documents still we are of the opinion that they are to be treated as. CHILDREN IN CARE AND PROTECTION because they have been thrown out of their motherland and they are away from their relatives for nearly 1 12 years and during this period they have undergone immense mental trauma for being away from their parents.

11. So, we are of the opinion that these JCL boys and girls are victim of the circumstances and they are to be treated as the CNCP not the JCL and accordingly we direct the Superintendent of Dhrubasram and Sanlap to produce these JCL boys and girls before CWC Barasat.

12. Chairman and Members of CWC Barasat are requested to help the children for restoration to their respective families or to do necessary acts as they deem fit for the best interest of the children.

13. Accordingly, the children are to be produced before CWC on 03.12.2014.

14. D.A is directed to send the record to CWC Barasat within 10 days of the passing of this order.
15. Copy of order be sent to DCPO, North 24 Pgs for her information.

Principle Magistrate
Juvenile Justice Board
Salt Lake City Sector- I
Calcutta

JUVENILE JUSTICE BOARD, CALCUTTA

Safi Akhtar

Case Ref 267/16 dated 18.03.16

P.S. Bongaon

Date : 11.08.2017

1. Today is fixed for production and plea. The CCI Safi Akhtar is produced today from Sanlaap.
2. The record is taken up for examining the CCL Safi Akhtar under section 251 Cr Pc.
3. One petition is filed by Mrs. Nuntaz Begum for release and restoration of the ccl, Let it be kept with the record.
4. Perused the case record.
5. The substance of the accusation is read over and explained to the CCI that on 17.03.2016 the special PTLG party apprehended few Myanmar citizen including the ccl without any valid documents. They failed to disclose their identity for which all including the ccl were booked under Sec 14 (B) of Foreigners Act.
6. The ccl stated that her mother and father have UNHCR cards for staying in India but she was not aware of the consequences and was accompanying her father and prays for mercy,
7. We think that it is necessary to hear from her as to why they entered into India without any valid documents. On being asked the col girl stated to us that they resided at Myanmar and belongs to "ROHINGA" community which is a minority community in their country. There was Civil War in their country and their community was attacked by the majority community of their country and their life were at stake. To save their life and limb, her parents decided to leave Myanmar along with their children and under compulsion to save life and limb they crossed the border of Myanmar into Bangladesh and tried to reside there but there also they were being attacked by local people for which they were compelled to cross the border of India in half-starved condition with all misery and suffering and unfortunately, they were caught by the police.

8. The ccl girl wept at the time of telling their stories and prayed to be reunited with her family.

9. Considered.

10. We are of the view that the ccl belong to Rohingya minority community whose entire villages were been razed, killing hundreds of people and displacing over 80,000 people. Therefore, the case of the ccl need to be considered more sympathetically rather than pedantically.

11. The ccl is under safe custody from 18.03. 16 till date that is over 15 months since neither her guardian nor any fit person came forward to claim the child in spite of the fact that the Board has taken repeated steps on its own initiative to call up the mother of the ccl over mobile so that she can talk/ communicate with her number of times.

12. We are further of the view that the ccl entered the Indian territories and has suffered a lot since the time she got separated from her family/ father. More of pathos rather than infliction of adversary treatment is needed to be given to the child for the best of her interest based upon the principle presumption of innocence.

13. Keeping in tune with the sufferings she has already met, it is a high time that she be reunited with her family. We are of the view that the ccl is more of a child in need of care and protection rather than a ccl in a strict or broader sense. It is her family vis-vis her parents need to have safe-guarded and protected their daughter's interest in accordance with law which they have failed to do so, resulting in the apprehension and safe custody of the child.

14. We do unanimously hold, that the ccl Safi Akhtar be treated as a child in Need of Care and Protection rather than a ccl and be handed over to CWC Barasat , North 24 Pgs. For catering to the best of interest of the child and her reintegration with her family.

15. The Chairman and Members of CWC Barasat, north 24 Pgs are requested to help the child for restoration to her family in accordance with law or to do the necessary acts they deem fit for the best interest of the child.

16. Accordingly, the child be produced before CWC on... 16/08/2017.

17. D.A. is directed to send the copy of the order sheet to CWC Barasat with in the above date.

18. Copy of the order be also send to DCPO, DSWO, North 24 Pgs AND Sanlaap for their information.
19. Inform all concern.

Principle Magistrate
Juvenile Justice Board
North 24 Parganas
Salt Lake City Sector- I
Calcutta

SESSIONS JUDGE
NORTH TRIPURA, DHARMANAGAR

Ohida and Ors v. State of Tripura

Criminal Appeal 08 of 2019

SI. No. 03

Coram	: Ld. Mr. G. Sarkar, Sessions Judge
Date	: 07.11.2019
For petitioner	: Mr. T.K. Paul, Adv
For respondent	: P.P. is present for the state

1. Ld. P.P is present for the state. Ld. Advocate Mr. T.K. Paul is present on behalf of petitioner. Heard Ld. Advocate of petitioner at length.
2. Judgment is prepared in separate sheets of paper.
3. Pronounced the order of judgment in the Open Court of Law. The operative portion of order runs as follows:

> "In the result, this Court set-aside the judgment dated 11-10-2019 passed by Ld. Principal Magistrate, North Tripura, Dharmanagar against the appellants under section 3 of the Passport (Entry into India) Act, 1920 and Rule 6 of the Passport (Entry into India) Rules, 1950 directing the appellants to be sent to the special home for 09 months and the period of their stay till the date in the observation home is to be set off from the period of nine months and the appellants are discharged accordingly.
>
> The Child Welfare Committee, Dharmanagar, North Tripura and the Child Welfare Police Officer, Dharmanagar, North Tripura are directed to arrange for safe deportation of the said children to Central Child Welfare Committee, Govt. of India, New Delhi for handing over the 7-children-conflict with law to take further necessary action observing all formalities in accordance in law.
>
> Inform all concerned accordingly.
>
> Also inform to the Commissioner, office of UNHCR (UNHCR Representation in India, B-2/18, Vasant Vihar, New Delhi-110057, India).

Copy of the judgment be supplied to Ld. Counsel representing the appellants.

Send back the L.C. Record along with a copy the judgment and order."

Make entry in the concerned T.R.

Dictated.

CHILD WELFARE COMMITTEE – RESTORATION ORDERS

CHILD WELFARE COMMITTEE
SECTION 29 OF JUVINILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Empowered to function as a Bench of 1st Class Magistrate under section 29(5) of the Act
24 Parganas North, West Bengal

Memo No. 1926/CWC/24 Pgs.(N) Date: 09/12/2014
Ref: Basirhat P.S. Case No. 769. Dt 02/06/2013, U/S 14(A)(B)/14 (C) Foreigners Act.

RELEASE/RESTORATION ORDER
One ZobeDa Khatoon, D/o Abdul Hakim
Resident of Myanmar P. Add : Tehsil, Narwal Kiryani Talab, District Jammu, near Police Station: Trukuti Nagar, Jammu **appeared before the Child Welfare Committee**
And verbally prayed for release and handling over named Md Rafiqye

Aged 13 yrs **Who is kept in** Kishalaya Home, Barasat
since 03/12/2014

Child Welfare Committee is satisfied after inquiry that Zubeda Khatoon **Is the** Mother, **of the Child** Md. Rafique
And opined for the release and restoration of Md. Rafique **this dayi**.e 09th Dec 2014

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

Inform:
Superintendent of
Child line

Kishlaya Home, Barasat, orth 24 pgs.
Sec. D.C.P S. North 24 Pgs
Directror pf Social Welfare, Salt Lake
UNHCR through Nilotpal Datta (Advocate)

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

CHILD WELFARE COMMITTEE
SECTION 29 OF JUVINILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Empowered to function as a Bench of 1st Class Magistrate under section 29(5) of the Act
24 Parganas North, West Bengal

Memo No. 1921/CWC/24 Pgs.(N) Date 09/12/2014
Ref: Basirhat P.S. Case No. 782, Dt.30/05/13, U/S 14(A) (B)/14 (C) Foreigners Act.

RELEASE/RESTORATION ORDER

One Salma Khatun (Mother)
Resident of Sadula Sheur (Burma), Present. Add :M/s Chowdhary Trading Co. prop:- Tapan Chowdhary Sec. 02 Durga Nagar.Opp. BSF Camp Gali. No.02. Akhnooz Rd. Jammu **appeared before the Child Welfare Committee**
And verbally prayed for release and handling over named Nazir Ahamed and Mansur Alam

Aged 12 & 15yrs **Who is kept in** Kishalaya Home, Barasat
since 03/12/2014

Child Welfare Committee is satisfied after inquiry that Salama Khatun
Is the Mother, of the Child Nazir Ahamed and Mansur Alam
And opined for the release and restoration of Nazir Ahamed and Mansur Alamthis dayi.e 09th Dec 2014

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

Inform:
Superintendent of
Child line

Kishlaya Home, Barasat, orth 24 pgs.
Sec. D.C.P S. North 24 Pgs
Directror pf Social Welfare, Salt Lake
UNHCR through Nilotpal Datta (Advocate)

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

CHILD WELFARE COMMITTEE
SECTION 29 OF JUVINILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Empowered to function as a Bench of 1st Class Magistrate under section 29(5) of the Act
24 Parganas North, West Bengal

Memo No. 1924/CWC/24 Pgs.(N) Date: 09/12/2014
Ref: Basirhat P.S. Case No. 796. Dt 02/06/2013, U/S 14(A)(B)/14 (C) Foreigners Act.

RELEASE/RESTORATION ORDER

One Eizahan Hossain s/o Sh. Abdul Hakim
Resident of Myanmar P. Add : Tehsil, Narwal Kiryani Talab, District Jammu, near Police Station: Trukuti Nagar, Jammu **appeared before the Child Welfare Committee**
And verbally prayed for release and handling over named Nur Ahmad

Aged 14 yrs **Who is kept in** Kishalaya Home, Barasat
since 03/12/2014
Child Welfare Committee is satisfied after inquiry that Eizahan Hossain
Is the Father, **of the Child** Nur Ahmad
And opined for the release and restoration of Nur Ahmad **this dayi**.e 09th Dec 2014

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

Inform:
Superintendent of
Child line

Kishlaya Home, Barasat, orth 24 pgs.
Sec. D.C.P S. North 24 Pgs
Directror pf Social Welfare, Salt Lake
UNHCR through Nilotpal Datta (Advocate)

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

CHILD WELFARE COMMITTEE
SECTION 29 OF JUVINILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Empowered to function as a Bench of 1st Class Magistrate under section 29(5) of the Act
24 Parganas North, West Bengal

Memo No. 1922/CWC/24 Pgs.(N) Date: 09/12/2014
Ref: Basirhat P.S. Case No. 782. Dt 30/05/2013, U/S 14(A)(B)/14 (C) Foreigners Act.

RELEASE/RESTORATION ORDER

One Azumaher & Dil Mohammad
Resident of Jammu Golpoli, Jammu-Myanmar Rohingya Refugee Committee, J&K State India P. Add: ... Chanderi Tehsil, P.s. Nuh, District Mewat **appeared before the Child Welfare Committee**
And verbally prayed for release and handling over named Safi Ala, Idrish Ali, Saiyad Hossin

Aged 12, 15, 12 yrs **Who is kept in** Kishalaya Home, Barasat
since 03/12/2014
Child Welfare Committee is satisfied after inquiry that Azumaher & Dil Mohammad **Is the** Mother and Elder Brother, **of the Child** Safi Ala, Idrish Ali, Saiyad Hossin
And opined for the release and restoration of Safi Ala, Idrish Ali, Saiyad Hossin **this dayi**.e 09th Dec 2014

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

Inform:
Superintendent of
Child line

Kishlaya Home, Barasat, orth 24 pgs.
Sec. D.C.P S. North 24 Pgs
Directror pf Social Welfare, Salt Lake
UNHCR through Nilotpal Datta (Advocate)

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

CHILD WELFARE COMMITTEE
SECTION 29 OF JUVINILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Empowered to function as a Bench of 1st Class Magistrate under section 29(5) of the Act
24 Parganas North, West Bengal

Memo No. 1925/CWC/24 Pgs.(N) Date: 09/12/2014
Ref: Basirhat P.S. Case No. 796. Dt 30/05/2013, U/S 14(A)(B)/14 (C) Foreigners Act.

RELEASE/RESTORATION ORDER

One Abdul Hossain, s/o Sh. Oshiulkh (UNHCR REF- 305-13C02334) Rohingya Refugee Nationality of Myanmar
Resident of Kiriyani talab, Narwal Jammu Pin 181152/180006 **appeared before the Child Welfare Committee And verbally prayed for release and handling over named** SansuAlam @ SamsuAlam

Aged 15 yrs **Who is kept in** Kishalaya Home, Barasat
since 03/12/2014
Child Welfare Committee is satisfied after inquiry that Abdul Hossain **Is the** Father, **of the Child** SansuAlam @ SamsuAlam
And opined for the release and restoration of Nur Ahmad **this dayi**.e 09th Dec 2014

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

Inform:
Superintendent of
Child line

Kishlaya Home, Barasat, orth 24 pgs.
Sec. D.C.P S. North 24 Pgs
Directror pf Social Welfare, Salt Lake
UNHCR through Nilotpal Datta (Advocate)

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

<Sd/->
Member
Child Welfare Committee
North 24 parganas
Govt. of West Bengal

BEFORE THE CHILD COMMITTEE, IMPHAL EAST DISTRICT

Case No. 271 /CWC-1E/02.2018

IN THE MATTER OF :-

1. Roshida Bibi (15 Yrs).d/o(L) AmiduRahman of Morona Village, Buthiduang Township. Rakhine State, Myanmar;
2. Zuhara Bibi (14 Yrs). d/o (L)Alim Miya &(L) RojiyaKatu of BagunaAlleiywa Village,Buthiduang Township. Rakhine State, Myanmar;
3. Arizan Bibi (13 yrs) d/o (L) Noorhokeng (L) Hasina of Kazaba Village,Buthiduang Township. Rakhine State, Myanmar;

...Minors.

AND IN THE MATTER OF :-

Application dated 11.09.2019 submitted by one Md. Azimuddin (61 yrs), s/o Ahmad Fozalof Bo Gu Na Village Traci, Buthiduang Township, Rakhine State. Myanmar and Presently staying at 9/19/9, Royal Colony Balapure. Hyderabad. Telangana - 500005 praying for restoring the above namedminors to his custody,

ORDER

11.09.2019

An application dated 11 09.2019 is submitted by one Md. Azimuddin (61 yrs), s/o Ahmad Fozal of Bo Gu Na Village Traci, Buthiduang Township, Rakhine State. Myanmar and Presently staying at 9/19/9, Royal Colony Balapure. Hyderabad. Telangana - 500005 praying for restoring the named minors to his custody.

The applicant himself is present in person and Mr. Rakesh Meihoubom, Advocate and Legal Aid Counsel appointed on behalf of the three minor girls by the Manipur Slate Legal Services Authority, Imphal vide Order dated 30.04.2018, is also present. The three minor girls are also produced by the Superintendent of the Open Shelter Home, KhuraiThongamLeikai, Imphal East, where they are presently staying.

The application mentions the circumstances leading to the Rohingyas of Myanmar being persecuted and killed in their own country as a result of which many fled from their homes seeking asylum in the neighboring countries and seeking refugee status under the United Nations High Commission for Refugees (UNHCR). New Delhi. The three minors ore also victims of the moss exodus and they have been certified by the UNHCR as asylum seekers and their process for grant of Refugee Status Determination (RSD)

is going to be completed soon after attending a Personal interview at the office of the UNHCR. New Delhi. Requisite documents in this regard are enclosed along with the sold application.

Regarding the matter of entrusting the custody of the three minors, the applicant produces a letter of recommendation doled 25.04.2019 issued by the Village Tract Administration Office of Bo Gu Na Village TractButhiduang Township, Rakhine State. Myanmarstating that the applicant is either related or known to the three minors and he is a fit person for handing over the custody of the three minors. The family member lists of the respective families of the three minors along with their family photographs are also found enclosed along with the application.

It may be recalled that the present case arose when the above named 3 (three) minor girls were intercepted by Jiribam P.S. from BabuparaJiribam Bazar on 01.02.2018 while carrying out frisking and checking duty in front of CID(SB)/FCP Office. Jiribam in an Imphal bound passenger vehicle coming from Fulertol, Cachar, Assam and accompanied by one Nasir Ali (45 yrs). s/o (14 Nasib Ali of Sigirbond Part-IV West, P.S. Lakhipur, Cachar District. Assam.

At the time of interception of the minor girls. they were found possessing Aadhar Cards issued in the names of - (if Harijan Bibi (24 yrs). d/o Nur Hakim of Sonamura, Dhanpur, West Tripura; (ii) Fatima Begurn (24 yrs). d/o MohammadSonamura, Dhanpur, West Tripura. West Tripura: and (iii) JoharBibi (14 yrs), d/o Ali Mia Sonamura, Dhanpur West Tripura.However, on cross-checking the Aadhar Cards, they were found to be forged documents and the, physique and outward appearance also suggests that they are minors. A regular police case has been registered in connection with the incident being FIR No. 07(02)2018 JBM-PS u/s 370/471/120-B IPC as the minors are suspected to be the victims of child trafficking.

Upon their production before the Child Welfare Committee, Imphal East on03.02.2018, they have been placed in the Open Shelter Home. KhuraiThongamLeikai, Imphal East run by Society for Progressive Development (SPD) pending inquiry. Attempts to communicate with the minors in Hindi. English, Manipuri or even in Bengali, thinking that they may be Bangladeshis, have proved futile. There are strong indications, however, during the inquiry process that they may be of Myanmarese origin belonging to the Rohingyacommunity of Myanmar. Accordingly, the Centre for Myanmar Studies, Manipur University lent their kind assistance in identifying the three minor girls and they are all confirmed to be domiciles of Rakhine State, Myanmar.

Efforts were also taken up for their repatriation process and the logistics as well as other issues for handing over and taking over are being worked out

with the authorities of the United Nations High Commissioner for Refugees (UNHCR). In this regard. Shri Meihoubam Rakesh, Advocate and Legal Aid Counsel has been most kind in lending his assistance towards bringing the repatriation process to its logical conclusion.

Coming back to the present context. all the documents produced by the applicant ore in order. The applicant also interacted with the three minor girls and they are all known to each other. UNHCR has also endorsed the toot that the application seeking refugee status of the three minor girls are under consideration and their interview has been fixed on 13.09.2019.

Considering all these facts and circumstances as well as the materials produced. this Committee is of the opinion that the applicant is a fit person for entrusting the core and custody of the three minor girls. Therefore, the three minor girls - (are handed over into the core and custody of the applicant Md. Azimuddin (61 yrs) on his executing an Undertaking in the prescribed format under the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Rules framed thereunder. The Suprintendent of Open Shelter Home, KhuraiThongamLeikai, Imphal East is to take necessary steps for releasing the three minor girls into the custodyol the applicant.

The safe passage of the three minor girls in thecustody at applicant may be granted by the concerned authorities in their to and fro journey at all transit points.

The District Child Protection Unit, Imphal East. is to conduct a follow-up of the case after three months from today and submit a report regarding the status of the three minor girls on or before 12.12.201 9.

Let copies of this order be furnished to the Principal Secretary (SW), Govt. of Manipur; the Director (SW), Manipur; Deputy Director (SW), Nodal Officer (ICPS), Manipur; and Shri Meihoubam Rakesh, Legal Aid Counsel for kind information. Let copies of this order be also furnished lo the DCPU Imphal East: Open Sheller Home. KhuraiThongomLeikai, I/E: and the applicant himself for kind information and necessary compliance.

(Sd/-)	(Sd/-)
Members	Chairperson
CWC, IE	CWC, IE
(Stamp) Member CWC, IE	(Stamp) Chairperson CWC, IE

Copy to:-

1. The Principal Secretary (SW). Govt. of Manipur;
2. The Director (SW). Manipur;
3. The Deputy Director (SWI. Nodal Officer (ICPS). Manipur;
4. The DCPO, District Child Protection Unit. ImphalEast;
5. Shri Meihoubam Rakesh. Advocate & Legal Aid Counsel:
6. The Project Coordinator, Open Shelter Home. KhuraiThongomLeikar
7. The applicant; and
8. Guard file.

FORM 20

[Rule 18(B) &19(7)]

THE PARENT OR GUARDIAN OR 'FIT PERSON'

I, Md. Azimuddins/o Ahmad Fazal, resident of Ba Gu Na Village Buthiduang Township. RakhineStateMyanmar and presently staying at 9/19/9, Royal Colony Balapure. Hyderabad. Telangana - 500005 do hereby declare that I am wiling to lake charge of (name of children) (i) Ms. Arizan Bibi (14 yrs); (ii) Ms. Roshida Bibi (16 yrs); and (iii) Ms. Zuharo Bibi (15 yrs) under the orders of the Child welfare Committee, Imphal East subject to the following terms and conditions:-

1. I if his/her conduct is unsatisfactory shall at once inform the Committee.
2. I shall do my best for the welfare and education of the said child as longas he/she remains in rny charge and shall make proper provisions for his/her maintenance.
3. In the event of his/her illness. he/she shall have proper medical attention in the nearest hospital,
4. I agree to adhere to the conditions that may be imposed by the Committee from time to time and also to keep the Committee informed about the compliance with the conditions,
5. I undertake to produce him/her before the Committee is and when required
6. I shall inform the Committee immediately if the child goes out of my charge or control,

Dated this 11th day of September, 2019.

(Sd/-) (Sd/-) Applicant

Members (Sd/-) Signed before Chairperson

CWC, IE CWC, IE

(Stamp) Member CWC, IE (Stamp) Chairperson CWC, IE

V. OTHER CASES

There are some cases which falls in this category due to its diverse nature. The table below deals with the summary followed by their orders and judgments.

NAME OF CASE	COURT and DATE OF ORDER	SUMMARY OF ORDERS AND JUDGEMENTS
State vs Mahmood Gajol	Session Judge Maharajganj Allahabad 4 June 1994	The accused an Iraqi refugee under the mandate of UNHCR was registered u/s 419, 420, 467, 471 IPC and sections 3/6 of Passport Act and section 14 of the Foreigners Act. The Court considering his refugee status and in virtue of the instruction by the High Court that cases against under trials belonging to foreign country should be disposed at the earliest directed the CJM to expedite the hearing and dispose it of at the earliest.
State vs In Re Eva Massar Musa Ahmed	Metropolitan Magistrate, New Delhi 26 October 1995	Accused a Sudanese refugee voluntarily agreed and thereby booked under Section 14 of the Foreigners Act, 1946. On humanitarian ground and considering that she has been granted refugee status by UNHCR and her application has been accepted for resettlement to Canada as a refugee under the Women at Risk Programme, the Court took a lenient view and sentenced her to imprisonment for the days already spent in custody and a minor fine.
State vs Kishan Chand And Habib Iranpur	Metropolitan Magistrate New Delhi 31 May 1996	Accused an Iranian refugee was charged under sections 7 (1) and 14 of Foreigners Act, 1946. Accused submitted that he is a refugee mandated by UNHCR in New Delhi. The court sentenced the accused to 1 month of rigorous imprisonment (setting off the period of confinement already undergone) and a minimum fine. Further, directed that on completion of the sentence he is handed over into the custody of UNHCR.

State vs Asghar Nikookar Rahimi	Judicial Magistrate Alandpur Chennai 17 July 1998	Accused an Iranian refugee voluntarily agreed to the charges against him u/s 12 (A) of the Passport Act. Although, the minimum sentence is prescribed under the Act, the Court held that Courts' have a discretionary power to grant lesser sentence than the prescribed minimum sentence if the nature of the offence in the opinion of the Court is very meagre. On humanitarian grounds, therefore, the period of his stay already in prison was treated as a punishment and a minimum fine was imposed.
State vs Gafoor Zarin & ors	Metropolitan Magistrate Mumbai 23 July 2001	Accused persons were convicted u/s 465, 468, 471, 420 of IPC for which they pleaded guilty. Considering that both the accused were given refugee status by UNHCR and have been in custody since the last 5 months, the Court passed SI for 5 months for each offence (setting off the period of confinement already undergone) and a minimum fine.
State vs Majad Abdul Raheman Darendash	Metropolitan Magistrate New Delhi 4 January 2003	The accused pleaded guilty for the charges framed against him u/s 14 of Foreigners Act, r/w s. 5 of Registration of Foreigners Act and rule 7 (3) (ii) of Foreigner's Order 1948 for which he was convicted and sentenced to SI and minimum fine. Further, the Court held that after his release from jail the police should consider his refugee status and act accordingly.
People's Union for Civil Liberties on behalf of Mostafa Basheer	Karnataka State Human Rights Commission 25 July 2017	This case relates to a refugee who sought for extension of Visa to complete studies; held that since he has been granted refugee status by UNHCR, FRRO may examine if his Visa can be extended till he gets his degree

Noor-Ul-Kadar vs Shriram General Insurance And Ors	National Lok Adalat Jammu 14 July 2018	A Rohingya refugee registered under the UNHCR was a victim of an accident. The National Lok Adalat awarded a compensation of Rs 2, 30, 000 to the refugee.
The State of Manipur vs Kushida Begum & Anr	Judicial Magistrate Jiribam Manipur 02 May 2019	Accused u/s 14 of Foreigners Act; since accused are daily wage workers and as such difficult to appear for every appearance, the Court dispensed the appearance of the petitioners till Charge Sheet/Final Report is submitted by the investing officer of the case.
Yasmeen (D/O Sh Noor Mohd) vs Shriram General Insurance And Ors	Motor Accident Claims Tribunal Jammu 22 October 2019	The petitioner, a Rohingya refugee under the UNHCR mandate, filed an application to the Court seeking directions to the CMO Jammu for constitution of the Medical Board to determine permanent disability of his minor daughter caused by a road accident. The Court considering the Motors Vehicle Act and prima facie evidence allowed the prayer.

IN THE COURT OF SH. M.P. SINGH, SESSIONS JUDGE,

MAHARAJGANJ

S.T.No. 6 of 1994

State v. Mahmood Gajol

U/SS 419, 240, 467, 471 I.P.C and 3/6 P.P Act & 14 Foreigner Act, P.S Sonauli,

Distt . Mahrajgaj.

Coram : Ld. Mr. M.P. Singh, Sessions Judge

Dated : 04.06.1994

ORDER

1. I have heard the counsel for the accused on the question of charge and also on the legality or otherwise of the committee order passed by judicial magistrate Mahrajgaj on 6.4.94. The accused is an Iraki National. He was found roaming about in India with a forged passport by the sonauli police of Distt . Mahrajgaj. A case against him under the passport Act as well as u/ss 419, 420, 467 and 471 I.P.C was registered. He was sent up for trial to the court of Chief Judicial Magistrate. The Chief Judicial Magistrate, however, transferred the case to the court of Judicial Magistrate. After several dates Judicial Magistrate Mahrajgaj by the impugned order committed the case to the court of sessions for trial despite the fact that all the offences for which he was charge sheeted by the police were triable by a Magistrate 1st class. The ground upon which the case was committed to this court is that Magistrate considered himself unable to award adequate punishment to the accused. He relied upon Sec 240(1) Cr.P.C in which before framing charge, the court has to see if the offence is trials by him, if the offence apparently has been committed and if he is competent to award sufficient punishment. There is nothing in Sec 240(1) Cr.P.C to mommot the case at that stage to the court of sessions. Sufficiency or otherwise of punishment shall only come into consideration after the evidence reaches to the conclusion that the offence committed is so grave and requires severe punishment, which he could not inflict, he has every liberty to commit the case to the court of sessions. In this case by the ti me this order of the committal was passed, no evidence etc. was recorded. So far as the question of jurisdiction is concerned,

all the offences are triable exclusively by Magistrate 1stclass. When the offences were exclusively triable by the magistrate 1st class, he should have tried, he should have recorded evidence and only after concluding that the case is one of conviction he could commit it to the court of sessions on the ground that the punishment he thought proper to award was so severe as to deprive him of the jurisdiction to award.

2. Section 323 Cr.P.C authorises a magistrate to commit a case but only after recording some evidence or confession if offered and coming to the definite conclusion that the case is one of conviction and the sentence which should be awarded is too severe to be inflicted to that court.

3. I therefore, looking to the fact that all the offences are triable by magistrate 1st class and also to the fact that at this stage it cannot be said that the case shall and into conviction only, send the case back to the court of chief Judicial Magistrate Mahrajgaj for expeditious disposal of the case, according to law. I may mention here that the accused has been admitted as refugees by United Nations Organisation. A letter to that effect was shown to me by his counsel. There is an instruction also of the Hon. High Court to the effect that cases against under trials belonging to foreign country should be disposed of at the earliest. Hence I expect that the learned C.J.M will expedite the hearing of the case and dispose it of at the earliest in view of the above facts and circumstances.

4. The accused shall be produced before the C.J.M on 8.6.94.

(M.P Singh)

Dated: Mahrajganj.

Sessions judge: Mahrajgaj

June 4, 1994

IN THE COURT OF RAVINDER DUDEJA, METROPOLITAN MAGISTRATE, NEW DELHI

State v. In Re Eva Massar Musa Ahmed

FIR No-278/95

U/S 14 Foreigners Act

P.S. K.M. Pur

Coram : Ld. Mr. Ravinder Dudeja, Metropolitan Magistrate

Date : 26.10.1995

Judgement

a) the serial number of case.

b) the date of commission of offence: 18-7-95

c) the name of complainant :S.P.Tyagi F.R.R.O

d) the name of accused :Miss Eva Masar Musa Ahmed

e) the offence complained of against accused :S 14 Foreigners Act

f) the plea of accused :pleaded guilty

g) the final order: Conviction u/S.14 Foreigners Act

h) the date of such order : 26-10-95

i) Brief statement for reasons of decision

1. The case of persecution is that accused Miss Eva Masar Musa Ahmed is a Sudanese National. She entered into India on 20-3-91 at Bombay Airport. On 18-7-95 on enquiry she produced a Sudanese Passport No 038888 which has expired on 28- 10-84. She could not produce any residential permit /registration certificate/ stay visa in India valid or any other valid document to prove her stay in Delhi/ India valid. A case u/s 14 Foreigner's Act was registered. Accused was arrested and after investigation charge-sheet u/s 14 Foreigner's Act was filed against her.

2. After due compliance of Section 207 CrPC charge under section 14 Foreigners Act was framed against accused to which she pleaded guilty and did not claim trial.

3. I am satisfied that plea of guilt made by accused is voluntary and has

been made without any pressure or coercion. Accordingly I hold her guilty u/s 14 Foreigner's Act and convict her.

4. I have heard learned defence counsel on the point of quantum of sentence. It is submitted that convict has fled persecution from her country of origin which is presently embroiled in civil and ethnic war. The convict had been tortured and was gang raped by rival ethnic and fundamentalist groups as she had converted from Islam to Christianity. It is submitted that convict had to take a temporary refuge in India as her life was in jeopardy. Convict has already been granted a status of refugee by UNHCR and her application has been accepted for resettlement to Canada as a refugee under the women at Risk Programme. It is prayed, that sympathetic view be taken against accused. The offence committed by convict is grave in nature. However keeping in view the peculiar circumstances under which the offence has been committed, I am of the view that a lenient view is warranted. The accused has spent almost ten days in custody I therefore sentence the convict with imprisonment already undergone by her in custody & in addition to this sentence, I impose a fi ne of Rs 2500/ U/s14 Foreigner's Act in default of payment of which convict shall undergo S.I for 3 days. Copy of judgement be given to the convict free of cost. File be consigned to R.R.

Announced in open court on 26-10-95.

Ravinder Dudeja

MM New Delhi

METROPOLITAN MAGISTRATE, NEW DELHI

State v. Kishan Chand And Habib Iranpur

Criminal Case No.66/96.

Date : 31.05.1996

For Petitioners : Public Prosecutor on behalf of the State,

For Respondents : Ms. Sumbul Rizvi Khan on behalf of the co-accused,
Accused Habib Iranpur present under Judicial direction
Accused Kishan Chand present in person

1. The accused have been arrested u/secs. 7(1) and 14 Foreigner's Act, 1946. The Charge Sheet has now been presented before the Court under the same sections
2. Arguments heard. Accused Kishan Chand pleads not guilty to the above charge and seeks discharge. Accused Habid Iranpur clearly pleads guilty to the above charge. Therefore, accused Habib Iranpur is charged by this Court for commission of the offences u/secs.7(1) & 14 of the Foreigner's Act, 1946.
3. On the point of punishment, heard arguments from counsel of the Accused Habib Iranpur. Counsel for the accused states that the accused Habib is registered as a Refugee with the United Nations High Commissioner for Refugees (UNHCR) since he is from Iran and has sought refugee in India. Hence from the Refugee Certificate issued by UNHCR, Habib is entitled to stay in India till 19.10.96.
4. By mistake he had wrongly stated his citizenship hence he pleads to be treated sympathetically. Under the circumstances, accused Habib is sentenced to 1month of rigorous imprisonment and a Fine of rs.200/- in the alternative the accused shall undergo further rigorous imprisonment of 7 days. Since the said accused is presently in judicial custody, the confinement already undergone in judicial as well as Police custody shall be set off with the sentence so awarded.
5. It is further directed that on completion of the sentence, the accused Habib be handed over into the custody of United Nations High Commissioner for Refugees (UNHCR) at 14 Jorbagh, New Delhi

6. The trial of Accused Kishan Chand shall continue. To come up on 3.9.96.

Signed

Senior Civil Magistrate

DISTRICT MUNSIF CUM JUDICIAL MAGISTRATE COURT ALANDPUR

State v. Asghar Nikookar Rahimi

C.c. No.151/98

Cr.No.660/96

Coram : Ld. Mr. S. Ethiraj, Judicial Magistrate

Date : 07.04.98

For Petitioner : Asst. Public prosecutor for the government

For Respondent : Ms. P. Selvi

ORDER

This case was taken up on file on 7.4.98. The Asst. Public prosecutor for the government and the learned advocate Ms. P. Selvi for the accused appeared before me. Heard the arguments of both sides and after considering the documents, I am pronouncing this final

Following is the abstract of the charge sheet:

1. On 15.11.1996 at 6 a.m. when the complainant was on duty at the Chennai Anna International Airport in the Immigration Section checking the passports of the air passengers, the accused, who was to board the British Airways aircraft B.A. 035 bound for London, submitted his Passport N.H.843616 issued by the Iranian government. The complainant found out that the photograph affixed in Page 2 of the passport was not that of the holder of the passport but that the photograph of the accused was affixed there' and that the said passport and the accused has no connection whatsoever; and that the accused claimed that the passport belonging to another person, as his own and had affixed his photograph on the passport and was caught by the complainant, when he was attempting to board the flight to London and the accused was handed over to the Airport Police Station; and since it was understood that the accused accepted the charges under Section 12 (1)(A) of the Passport Act; a charge sheet has been filed against him.
2. Copies of all documents were given free of cost to the accused as per Section 207 of the criminal Procedure Code.
3. When the accused was informed in English, about the contents of the

charge sheet, the accused accepted his guilt. The charge sheet under Section 12(1)(A) of the Passport Act was translated into English, explained to the accused in English and questions were asked in English. The accused accepted the above charges in English. Since the accused stated that he does not know Tamil and that he can speak and understand English, the charges against him were translated into English and made known to the accused.

4. The accused stated that he is willingly agreeing to the charges against him and an admission of guilt memo was fi led on his behalf. Since it was brought to my notice that the accused was not under anyone's instigation to plead guilty, and since his acceptance of the charges were voluntary, and since the admission to plead guilty was willingly submitted by the accused, and since the accused has stated before this Court that he is pleading guilty to the offence; I hereby declare that the accused is guilty of an offence under Section 12(1)(A) of the Passport Act. The accused was informed, in English, about the Punishment to be imposed on him. The accused stated that for 10 weeks he was kept under judicial custody and this may be imposed as a punishment on him, and that he is an Iranian refugee and that he does not have the money to pay the fine; and that his dependents are living as refugees in London and requested that the period in which he was under judicial custody may be treated as a punishment and to issue orders imposing minimum fine only.

5. The learned advocate who represented the accused , argued that a punishment, lower than the penalty imposed under Section 12(1) (A) of the Passport Act may be imposed on the accused and has cited, as examples, the following judgements:

    1. 1986Crl.LJ 876-Suhasini Baban Kate vs State of Maharashtra-page 876
    2. AIR 1973 SC1457-BC Goswami vs Delhi Administration-page1457
    3. 1993Crl.LJ Urmila Agnihotri vs State and another-page 950
    4. 1997 SCC (Cri)214-Kaka Singh vs State of Haryana-Page214

    1986 Crl.L.J.876(Bombay High Court) V.S.KOTWAL, J.Suhasini Babab Kate, Petitioner V. State of Maharashtra, Respondent D/-9-7-84, Criminal Revn. Appln. No. 253 of 1984

6. Having regard to all these features as also having regard to the nature of the incident, in my opinion, it is unnecessary to send the lady back to jail and she can be released on the sentence already undergone in the interest of justice. It is true that under the Act the

minimum sentence prescribed is to the tune of one month. However, is similarly situated circumstances when the accused was tried for an offence under the Prevention of Food Adulteration Act wherein also a minimum sentence is prescribed, as reported in Umrao Singh Vs. State of Haryana(1981)3 SCC91.(1981CriLJ1704) the Supreme awarded a sentence less than the one that was prescribed and in fact the accused therein was released on the basis of the sentence already undergone.

AIR 1973 Supreme Court 1457(V60 C332)

B.C.Goswami vs. Delhi Administration (Dua J)(Prs.1-5)S.C.1457 (From Delhi: AIR1970Delhi95)

K.K.Mathew and I.D.Dua, JJ, B.C.Goswami, Appellant V. Delhi Administration, Respondent.

Criminal Appeal No.23 of 1970.D/-4.5.1973

"In considering the special reasons the judicial discretion of the court is as wide as the demand of the cause of substantial justice.

10. The sentence of imprisonment imposed by the High Court for both these offences is one year and this sentence is to run concurrently. The only question which arises is that under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act the minimum sentence prescribed is rigorous imprisonment for one year and there must also be imposition of fine. The sentence of imprisonment can be for a lesser period but in that event the Court has to assign special reasons which must be recorded in writing. In considering the special reasons the Judicial discretion of the Court is as wide as the demand of the cause of substantial justice".

"1993 Crl.L.J.950, (Delhi High Court), Dalveer Bhandari J.

Smt. Urmila Agnihotri, Petitioner, Vs. State and another, Respondents.

Crl. Revn. No. 205 of 1991, D/-6.2.1992

Customs Act (52 of 1962), Sc.132,135-offence of smuggling-sentence-Reduction of- Non consideration of advanced age of accused, her multiple ailments and her husband's serious ailment by trial court sentence reduced to already undergone(para6) On the special and exceptional facts and circumstances of this case, particularly the advanced age of the petitioner, her multiple ailments, her husband's serious ailment, in my opinion the ends of justice would meet it the penalty of fi ne is enhanced from Rs 25000/ to Rs.75,000/-but because of the facts and circumstances enumerated above the sentence of imprisonment is reduced to the one already undergone."

"Supreme Court Cases (Criminal)1997 Supreme Court Cases (cri)214

(Before G.N.Ray and Faizanuddin, JJ)

Kaka Singh Appellant Vs. State of Haryana Respondent.

Accused on bail and sett led in life-sentence reduced to the period already undergone, Viz., more than seven months-Terrorist and Disruptive Activities (Prevention) Act, 1985,S.6 (1) Arms Act, 1959,S.25. (Paras 2,3 and 4)"

7. The laws mentioned in the above judgements, a minimum penalty has been mentioned for the offences under the law. It was stated that even though the minimum sentence is prescribed under the Act for a particular offence, the Court is having the discretionary power to grant lesser sentence than the prescribed minimum sentence if the nature of the offence, in the opinion of the Court is very meagre. Since the accused in this case is an Iranian refugee and the incident happened on 15-12-96 and on the government side it was stated that the charge sheet was filed after that and since it was understood that he was in prison for nearly 2 1/2 months from 1996;since the accused has not been able to return to his home country for the past 3 years, and since upon scrutiny of his petition it was noted that the accused is an Iranian refugee, and since he is young at age and since he has pleaded guilty to the charges and has requested for leniency in punishment and on behalf of the accused it was requested that an opportunity may be given to him to be a good citizen in future, I feel that the period of his stay in prison may be treated as a punishment and a fi ne may be imposed and order accordingly.

8. So the accused is an offender, under Section 12(1)(A) of the Passport Act and taking into consideration the information contained in his petition, I order that the accused may undergo rigorous imprisonment of 2 months and pay a fine of Rs.10,000/- failing which to undergo another two months of imprisonment under Section 12(1)(A) of the Passport Act. I order that the period of imprisonment from 15.11.96 to 21.1.197 is to be considered as punishment, for the accused and the said period shall be set off under Section 428 of the criminal Procedure Court. Total fine amount is Rs.10,000/

In this case, no properties were acquired.

This order was dictated by me to the stenographer, typed by the stenographer, corrected by me, and was delivered in the court on this day 17 July 1998.

Sd/-S. Ethiraj

Judicial Magistrate, Alandur

Enclosures: Nil

IN THE COURT OF METROPOLITAN MAGISTRATE, 22ND COURT, ANDHERI, MUMBAI

State v. Gafoor Zarin and ors

269/P/2001

(Judgement U/sec .355 of Cr.P.C.)

Coram : Ld. Mr. A.M Garde, Metropolitan Magistrate

Date : 23.07.2001

1. The Serial Number of the Case: 269/P/2001
2. The date of Commission of Offence: 08-02-2001
3. The offence complained of: U/sec.465,468,471,419,420,r/w.34 of Indian Penal Code.
4. The plea of the accused: Accused pleaded guilty
5. The date of such an order: 23-7-2001.

REASONS

Charge is under section 465,468,471,419,420 r/w 34 of the Indian Penal Code. Both accused pleads guilty to the charge. Their plea is voluntary. Both are in custody for last five months. The advocate for the accused persons produces documents to the effect that, that the accused persons have been given refugee-status by the U.N. concerning all these I proceed to pass the following order:

ORDER

Accused are convicted of the offence under section 465,468,471,420 of IPC and for each offence they are sentenced to suffer S.I. for 5 (five) months for each offence and to pay a fine of Rs 50/-(Rupees fifty) for each offence counts indefault to suffer further S.I. for one day on each count.

Substantive sentence for all the offences to run concurrently. Set off be given to the accused for the period already undergone in custody.

(A.M.Garde)
Metropolitan Magistrate,
22nd Court, Andheri, Mumbai.
23-7-2001

IN THE COURT OF METROPOLITAN MAGISTRATE, 14TH COURT, GIRGAUM, MUMBAI.

State v. Majad Abdul Raheman Darendash

C.C. NO. 66/P/2002 (LAC No. 207/2002)

Coram : Ld. Mr. N.V. Nhavkar, Metropolitan Magistrate

Date : 04.01.2003

ORDER

1. Accused produced today wished to plead guilty for the charge framed against him in this case for the offence punishable u/sec. 14 of Foreigner's Act of 1946, r/w sec. 5 of Registration of Foreigner's Act 1939 and rule 7(3) (ii) of Foreigner's Order 1948. He had made an application through an Advocate that leniency be shown to him in the sentence. Accused in interrogated for the reason for which he pleading guilty for the said offence. He submitted that he was knowing that the Visa had expired the accused is accorded refugee status by the United Nation High Commission of Refugee on 12.11.2002. The leniency is prayed on the ground that he is in dramatic, play write, and poet well known for his work in Iraq and he had to left Iraq as he earned displeasure of the Iraqi Government. Having regard to the submission made by the accused himself and Advocate appearing for him following order is passed.

2. The accused in convicted on his pleading guilty for the offence punishable u/sec.14 of the Foreigner's 1946 r/w sec. 5 of Registration of Foreigner's Act 1939 and rule 7(3) (iii) of Foreigner's Order 1948. He is sentence to suffer Simple imprisonment for the period of 11 (eleven) months and to pay fi ne of Rs. 500/- (Rs. Five Hundred only) and i.e. to suffer simple imprisonment for the period of 1(one) month. Set of is applicable. The valuables and any other property recovered from the accused be returned to him. The accused being a foreign national the date of his release after he suffering the sentence be informed to D.C.P., SB-II, CID, Immigration Mumbai by the Jail Authority. After his release from jail the police to consider the refugee status of the accused and act accordingly.

Mumbai
(N.V. NHAVKAR)
DT. 04/01/2003
Metropolitan Magistrate,
14th Court, Girgaum, Mumbai

KARNATAKA STATE HUMAN RIGHTS COMMISSION

People's Union for Civil Liberties on behalf of Mostafa Basheer
HRC No.4319/10/31/2017-(B3)

Date : 25.07.2017

From:

The Registrar,

Karnataka State Human Rights Commission,

Bengaluru.

To:

The Foreigner's Regional Registration Office,

5th Floor, A-Block,TTMC, BMTC bus Stand Building,

Shanthinagar, Bangalore.

Sir,

Sub: HRC No. 4319/10/31/2017-(B3)

The above complaint has come up for consideration on 25/07/2017 and on consideration of the same, the Commission passed the following:

ORDER

Perused the complaint & the annexed documents.

People's union for Civil liberties Karnataka has filed this complaint alleging that one Mostafa Basheer Najm, Citizen of Iraq came to India on a student Visa in Nov.2011 to pusue his B.Pharma at Oxford College of Pharmacy, Bangalore. Extended His Visa has been on his refugee status till 30.4.2017. The said Mostafa is unable to successfully complete all his examinations and is likely to appear for re sit examination scheduled to be held in November 2017, sought for extension of Visa, is rejected by FRRO, Bangalore. Therefore This complaint is filed for extension of Visa. The commission, on consideration of the complaint passed the following order.

> "Register. If he has been granted refugee status by UNHCR (this can be verified) FRRO may examine if his Visa can be extended for 6 to 8

months when he will get his degree."

Sd/-20.07.2017

(Meera C Saksena)

Acting Chairperson

Send a copy of complaint and annexed documents to the Authorised officer Foreigner's Regional Registration office, 5th Floor, A Block, TTMC, BMTC Bus stand building Shanthinagar, Bangalore for necessary action.

The complaint is accordingly disposed of.

A copy of complaint is sent herewith for necessary action.

Yours faithfully

Assistant Registrar

K.S.H.R.C.

NATIONAL LOK ADDALAT JAMMU

Noor-Ul-Kadar v Shriram General Insurance and ors

File No. 177/C

Quorum	: Ld. Mr. M.S. Parhar, Adl. Sessions Judge Ld. Mr. Jatinder Singh Jaswal
Date	: 14.07.2018
For Petitioner	: Mr. Sajid Mali Adv
For Respondent	: Mr. Baldev Singh for Shri Ram General Insurance Co.

Parties have settled their claim/dispute through the mediation; negotiation and conciliation and agreed for settlement of the claim of Rs. 230000/- as full and final compensation including interim award, if any, towards the satisfaction of the petitioner's claim. Signatures of the representative parties qua settlement of the claim are recorded:

Signature of petitioner/counsel for the Petitioner/s.

IN THE COURT OF THE JUDICIAL MAGISTRATE FIRST CLASS; JIRIBAM, MANIPUR

The State of Manipur v. Kushida Begum and Anr

CRIL.MISC.CASE NO.13 OF 2019

Ref:- FIR No. 51 (11)2018 JBM.. PS.

U/S 14 A (b) Foreigner Act.

Coram : Ld. Mr. Shubham Vashist, Judicial Magistrate

Date : 02.05.2019

ORDER

1. This is an application filed by the above named accused/ petitioner praying for dispensing with his personal appearance before this Court til Charge Sheet/Final Report is submitted by the I.O. of the case.
2. Register it as Cril. Misc. Case.
3. Ld. APP for the state is Present.
4. Applicant along with the Ld. Counsel present.
5. Allegation in brief is that the accused were suspected to be illegal immigrant and have enter into Indian Territories without any valid document, the accused were released on bail on 20-04-2019.
6. Ld. Counsel for the petitioner submitted that the accused are the citizen of Myanmar. Moreover, the accused has been residing temporary at Imphal which is far from the Hon'ble court. Further submitted by the Ld counsel that the accused no. 1 namely Khusida begum father expired on 30-4-2019 at Hyderabad Refugee camp.
7. In Free Legal Aid committee vs State of Bihar AIR 1982 SC 1463 it was held that whenever the accused is released on bail by the magistrate he need not to be required to appear before the court until the charge-sheet is filed and the process is issued by the court.
8. I have perused all the application and its stated that the accused persons are daily wages workers and as such it is difficult to appear before the court on every appearance date fixed by this Court due to long distance. I have considered the matter and accepted the prayer of the accused person/petitioner.
9. Hence, the personal appearance of the accused person/petitioner is

dispense till Charge Sheet/Final Report is submitted by the I.O. of the case.

10. Issue summons to the accused person/Petitioner as and when the I.O. of the case submits Charge Sheet/Final Report.
11. This Cril. Misc. Case is accordingly disposed off.

Sd/-

(Shubham Vashist)

Judicial Magistrate First Class, Jibibam, Manipur

PRESIDING OFFICER MOTOR ACCIDENTS CLAIMS TRIBUNAL (ADDITIONAL SESSIONS JUDGE, ANTI-CORRUPTION) JAMMU

Yasmeen v. Shriram General Insurance and ors

Case No. JKJMMU20051882019

File No: 173 Claim Petition.

Coram : Ld. Mr. C.L. Bavoria, Addl. Sessions Judge

Date : 22.10.2019

For Petitioners : Mr. Ajay Gandotra and Mr.Aditya Gandotra

For Respondents : Mr.Jugal Kishore and Mr.Dinesh Singh Slathia

ORDER

1. No any witness of the petitioner is present. Evidence affidavit of PW Noor Mohd. and PW Sakeena Khatoon has been filed by the counsel for the petitioner Same shall form part of the file. Copy of the same has been supplied to the collinsel for respondent No.. Counsel for the petitioner is directed to present these two witnesses on next date of hearing for their cross examination.
2. An application has been filed on 30.09.2019 by the petitioner/applicant seeking directions to Chief Medical Officer Jammu for constitution of the Medical Board to determine permanent disability of Yasmeen minor daughter of the petitioner is pending for its disposal. The non-applicant/respondent No. 1 Insurance Company did not file objection to this application and on the last date of hearing closed the right to file the objection, the application was posted for hearing arguments.
3. I have heard the learned counsels present for contesting parties in the application, perused the application and gone through the file and gone through the file and the document, placed on record.
4. The petitioner /applicant have stated in the application that the petitioner is the registered Rohingya refugee having migrated from Myanmar. On 9.4.2018 his daughter Yasmeen aged about 8 years had suffered grievous injuries in road traffic accident and was admitted to GMC, Jammu under Medco Legal case No. 3427, MRD No. 885661 and owing to the injuries caused she has been permanently disabled. He had applied for issuance of her disability certificate but was told

by the CMO Jammu to apply on line, where after he applied online but the particulars as contained in the format do not accept the particulars of the injured. The CMO has otherwise also refused to issue the disability certificate being told that the injured is Rohingya refugee having migrated from Myanmar. Along with the application he has enclosed the application containing endorsement of the office of CMO Health and Family Welfare Jammu, the copy of the refugee card issued by UNHCR in favour of the injured and her father the applicant/ petitioner and sought intervention of this tribunal for issuing an appropriate direction to the CMO Health and Family Welfare, Jammu for constitution of Medical Board for examining the Yasmeen minor daughter of the petitioner and issuance of the certificate accordingly.

5. The perusal of the documents placed on file, the certified copy of the FIR No.101 of 2018 P/S Bahu Fort dt. 09.04.2018, police challan No.80/2018 dt. 08.07.2018, Medico Legal report of GMC Hospital, Jammu dt. 06.07.2018 and other documents related to the medical treatment of the petitioners reveals that the injured Yasmeen under Medico Legal case NO. 3427, MRD No. 885661 as a ise of Road traffic accident was admitted and received medical treatment at GMC Jammu and the documents the photo copy of the application, refugee certificate and endorsement recorded by the CMO, Jammn are sufficent to established that the petitioner being refuges their particular as contained in the format are not accepted on line.

6. Under the provision of M.V. Act a person victim of the road traffic accident can file petition under the provision of M.V. Act for the injuries sustained and claim compensation. The grant or refusal of compensation depends upon the proof of various aspects including the nature of the injuries sustained and the percentage of disablement if any resulted. The petition is pending at the stage of petitioner's evidence and in the absence of any opinion on the disability if any sustained to the injured when the documents aforementioned are sufficient to suggest prima facie at this stage that the above named injured was admitted and has received treatment at GMC Hospital Jammu, there is a genuine ground been made out for allowing the prayer.

7. Accordingly, the Chief Medical Officer Health and Family Welfare, Jammu is directed to constitute a Medical Board, for examining and to access the percentage of disablement resulted if any to the said Yasmeen minor daughter of the petitioner Noor Mohd. R/O Burma Myanmar at present Narwal, Jammu and issued the certificate accordingly. The petitioner is directed to present the Yasmeen before the CMO, Jammu along with the necessary documents for the purpose.

8. Let a copy of this order be forwarded to the CMO Health and Family Welfare, Jammu through the applicant/petitioner for compliance The CMO is directed to submit the compliance report with in a period of one month from the date of this order.

Put up main claim petition for petitioner's evidence on 20.11.2019.

Announced

22.10.2019

(C.L.Bavoria)

Presiding Officer, MACT

(Addl. Sessions Judge Anti-Corruption)

Jammu.

I attest to accuracy and integrity of the document

Digitally signed by

Nirmal Kumari

Location: Jammu

PRESIDING OFFICER MOTOR ACCIDENTS CLAIMS TRIBUNAL (ADDITIONAL SESSIONS JUDGE, ANTI-CORRUPTION) JAMMU

Yasmeen v. Shriram General Insurance and ors

Case No. JKJMMU20051882019

File No: 173 Claim Petition.

Coram : Ld. Mr. C.L. Bavoria, Addl. Sessions Judge

Date : 03.12.2019

For Petitioners : Mr. Ajay Gandotra and Mr.Aditya Gandotra

For Respondents : Mr.Jugal Kishore and Mr.Dinesh Singh Slathia

ORDER

1. Ld. Counsel for the petitioner is present. Nemo present for the respondents. The petitioner namely Yasmeen aged around 8 years through her father Sh. Noor Mohd has filed this claim petition u/s 166 and 140 M.V. Act and is pending for evidence of the petitioner side. The compensation has been claimed on account of injuries sustained in a motor vehicular accident under the jurisdiction of Police station Bahu Fort Jammu to the petitioner minor Jasmeen aged around 8 years. The case of the petitioner is that on 09.04.2018 at about 18.30 am when the petitioner was returing home and standing on the road side near Radisson Hotel near Narwal crossing, she was hit by the offending truck bearing Registration No. JKO2AG-2395 due to driving of the said truck by respondent no. 3 rashly, negligently and carelessly. In the accident the petitioner sustained multiple grievous bodily injuries and fracture of supra public rim on right side and abdominal injuries and from the place of accident she was removed to GMCH Jammu and admitted there vide MLC No. 3427 and MRD No. 8851 16 dated 09.04.2018.
2. I have perused the file and gone through the documents placed on record to consider the prayer for grant of interim compensation on the plea of "No Fault Liability as envisaged u/s 140 M.V. Act.
3. The grant of compensation u/s 140 MV Act is under the theory of No Fault Liability". The provisions of the said section provide an immediate relief to the victim of the Motor Vehicle accidents. Under

the said section it is to be shown at least that the victim has received the injuries or that deceased has died due to the accident in which the offending vehicle was involved. There has to be some proof about the accident and the involvement of the offending vehicle in the accident. Claim under Section 140 of the Act cannot be defeated on the ground that the owner has committed the breach or the insurer has a defence in terms of Section 149 of the Act, which requires determination after leading evidence. In terms of sections 140, 141, 158(6) and 166(4) read with the Rules (supra), the Claims Tribunal is required to satisfy itself while determining the petition under section 140 of the Act in respect of the following points.

i. The accident has arisen out of the use of motor vehicle;

ii. The said accident resulted in death or permanent disablement;

iii. The claim is made against the owner and insurer of the Motor Vehicle involved in the accident"

4. The respondent no.1 The Shriram General Insurance, company in para 6 of his objection has admitted the offending vehicle bearing registration no. JKO2AG-2395 owned by respondent no.2, was insured with the respondent no.1 at the time of accident for the period w.e.f 25.12.2016 to 24.12.2018 and as per the copy of policy on record the said vehicle is insured vide insurance policy no.1003/31/18/466815.

5. In support of their contention the petitioners has placed on record the disability certificate, certified copies of police challan and other documents certifying that the petitioner Jasmeen has received injuries on 09.04.2018 at about 18:30 am in the road accident. The particulars of the accident are confirmed as per the documents on record, the certified copy of Police final report and the disability certificate. From Wiese documents it prima-facie established the involvement of the offending vehicle (Truck) No. JKO2AG-2395 in question in the accident on 09.04.2018 the date of occurrence and with regard to the occurrence a case FIR No. 101/2018 dated 09.04.2018 registered initially for offence u/s 279/337 RPC in Police Station Bahu Fort, has finally culminated into the filing of a final Report/charge sheet before the competent court of 1st-Additional Munsiff (Forest) Magistrate Jammu u/s 279/337/338 RPC against the accused-driver respondent no.3 herein for causing injuries to the petitioner Jasmeen. It is further established that on 09.04.2018 at around 18:30 hrs the above named petitioner sustained grievous injuries in the accident caused with the offending at Narwal crossing due to rash and negligent driven of the said Truck by the respondent no.3.

6. In view of the above stated circumstances, all the conditions requisite

for allowing the claim of the petitioner u/s 140 M.V. Act as such are fulfilled and therefore interim compensation award for an amount of Rs.25,000/- on the ground of "no fault liability" is passed in favour of the petitioners and against the respondent-owner of the offending vehicle for his vicarious liability for the negligent act of his drivel-respondent no.2, which shall be satisfied by respondent no.3 Shriram General Insurance, company Jammu for its liability, within a period of 30 days from the date of this order, failing which the company shall be liable to pay the said interim compensation 7% interest rate per annum from the date of the passing of this order. Let a copy of this order be provided to the respondent No.1 through its counsel for compliance. The said direction of interim award shall be subject to the outcome of the main petition and recoverable from the petitioner in case he/she is not found entitled to the same. Accordingly, the petition filed to the extent under section 140 Motor Vehicle Act is disposed of.

7. Put up main petition on 19.12.2019 for petitioners evidence.

Announced
03.12.2019

Presiding officer, MACT
(Addl. Sessions Judge Anti-Corruption)
Jammu.