

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(CRL) No.1884/2015**

Reserved on: 02.11.2015

Date of Decision: 21.12.2015

DONGH LIAN KHAM & ANR. Petitioner s
Through: Mr.Colin Gonsalves, Senior Advocate with
Ms.Divya Sunder Rajan, Mr.Fazal Abdali
and Ms.Divya Jyoti Jaipuria, Advocates.

versus

Union of India & ANR. Respondents
Through: Mr.Ajay Digpaul, CGSC with Ms.Rishika
Katyal, Advocate.

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

Crl.M.A No.12618/2015

Exemption allowed subject to just exemptions.

The Application is disposed of accordingly

WP(CRL) No.1884/2015

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 run 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

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