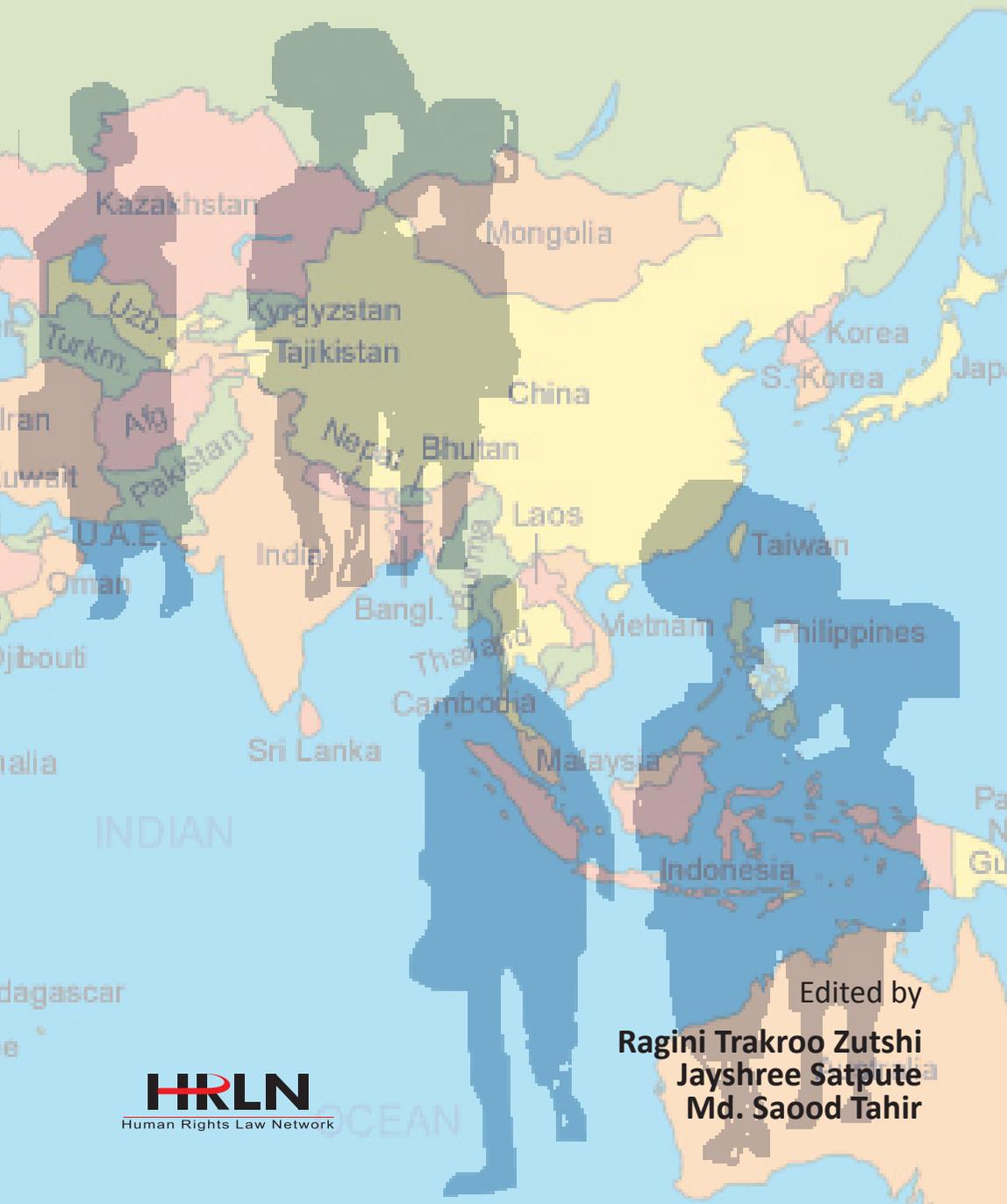


REFUGEES AND THE LAW



Edited by
Ragini Trakroo Zutshi
Jayshree Satpute
Md. Saood Tahir

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Second Edition

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HRLN

Human Rights Law Network
New Delhi
December 2011

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– Refugees Rights Initiative Team, HRLN

PREFACE

This book holistically analyses refugee law, international, foreign, and domestic, aiming to inform practitioners concerned with humanitarian issues of the increasing need for a broader conceptual framework. This framework needs to account not only for the impact of Government policies and laws, but also for the complicated realities on the ground.

Refugee law has become inextricably linked with the larger question of human rights and humanitarian law, as well as other fields of international law, such as State responsibility and peace maintenance. This poses a dilemma for refugee lawyers. On the one hand, it is crucial to systematically structure the emerging range of norms, recommendations and guidelines directed at a broad class of individuals who have lost, or are in danger of losing, the protection of their country of origin. On the other hand, this widening ambit of refugee law should not be obtained either at the expense of the traditional asylum rules for those fleeing from a well-founded fear of persecution, or at the risk of losing the specificity of the refugee condition.

The definition of a refugee articulated in the 1951 Convention Relating to the Status of Refugees is of paramount importance. Subscribed to by many nations, it has been imported into domestic legislation as the basis upon which asylum and other protection decisions are made. A Convention Refugee is a person who is outside his country because he reasonably believes that his civil or political status puts him at risk of inviting serious harm in his country and that his own government cannot or will not protect him. The emphasis is on the element of genuine risk or fear. According to the 1951 Convention, the refugee claimant must have “a well-founded fear of persecution” against which the State of origin is unwilling or unable to offer protection.

Yet, this legal definition of a refugee often conflicts with the social and cultural interpretation of refugee status. The term is generally used in a broader, looser sense, signifying a person in flight seeking to escape political conditions or economic circumstances found to be intolerable, regardless of the destination.

International refugee law rarely determines the manner in which governments respond to involuntary migration. States superficially acknowledge the importance of upholding the right of people to seek asylum. However, in practice, they devote considerable resources to keep refugees away from their borders.

While the presence of refugees in their territories has legal consequences for host States, the UNHCR is the primary agency tasked to address refugee concerns on behalf of the international community. Nevertheless, all States ought to play a protective role, regardless of their reluctance to take up the cause of refugees.

The definition of a refugee, which was formulated in the 1951 Convention and modified in the 1967 Protocol, has evolved in practice. While this definition does not in fact address the entire gamut of concerns that induce involuntary migration, a liberal interpretation of the Convention can go some distance in meeting the needs of those who are most at risk. It is not a case of substituting one legal regime with another – rather, there is the acknowledgement that the sheer magnitude and complexity of the contemporary refugee problem cannot be adequately tackled from the narrow base of the international system of protection that has been inherited. This book uses domestic and foreign case law to illustrate the gradual emergence of an enlightened approach to the refugee question in recent decades.

While the problem of refugees is a global phenomenon, developing countries continue to bear a major brunt of the massive influx. These countries, particularly those in South Asia, find themselves overwhelmed by the externally imposed burden, as scarce resources and energies get diverted from their primary responsibility of meeting the developmental needs of their own people. Most do not have national legislation on refugees, nor have they ratified the 1951 Convention or its 1967 Protocol. Ironically, it is these countries that shoulder some of the largest and most protracted refugee caseloads in the world.

Such is the case for India, which is neither a party to the 1951 Convention nor the 1967 Protocol, and has not passed domestic legislation dealing specifically

with refugees. The refugee influx began with the partition of India in 1947, and by the start of 2010, the country had hosted nearly 450,000 refugees from within and outside the region. While India has acceded to the ICCPR and ICESCR, it has reserved the right to apply its own national laws in relation to foreigners. Thus, in the Indian context, the fate of refugees is essentially determined by the laws applicable to foreigners in general – specifically, by the protection available to them under the Indian Constitution, unless a specific provision is made, as in the case of the Ugandan and Tibetan refugees.

This begs the question whether refugees, as a special class of aliens, possess rights over and above those granted to aliens in general. Moreover, to what extent does the existence of refugees, defined by international law as a special category of aliens, impose legal obligations on the Indian government in the absence of any domestic legislation on the subject? Indeed, the answers to these questions crucially depend on administrative attitudes, and the degree to which the Indian judiciary gives precedence to customary international law. The international legal status of a refugee necessarily carries certain legal implications, the most important of which is the obligation of the country of asylum to respect the principle of *non-refoulement*.

The predominant concerns deal with domestic enforcement. In recent times, the Indian courts have widened the scope of the existing laws to give justice to, and make allowances for, refugees. The allied legislation available and the precedents set by the judiciary in this field go a long way towards filling the void created by the lack of refugee-specific law. The building blocks of refugee law and the need for national legislation have been elaborated upon in this work. Many unreported and reported judgements have been cited, bringing out the intricacies of refugee protection in India.

An attempt has also been made to understand the gender dimension of the refugee problem: refugee women are particularly vulnerable to violations of protected rights. However, it is difficult to obtain information about the specific needs of refugee women, as they may not have the authority or willingness to speak for themselves. Moreover, their protection problems often involve sensitive issues, such as sexual assault, which they may be reluctant to reveal. Greater responsiveness to the special needs of refugee women can help reduce the protection risks in refugee camps and settlements.

Furthermore, around half the world's refugees are children. In conflict situations, children are increasingly becoming not only accidental victims of refugee influxes but also deliberate targets. On account of their dependence, vulnerability, and development needs, children require special attention and protection.

Refugee children share certain universal rights with humanity at large, and have additional rights as children, such as the entitlement to international protection and assistance from UNHCR. How these rights are to be interpreted is an important concern for practitioners—regardless of whether they are individual specialists, NGOs or international organisations.

While this book mainly focuses on the foundations and framework of international refugee law, it also analyses the relationship between domestic law and refugee protection. Standards are required to grant asylum, meet protection requirements in the country of asylum, safeguard legitimate rights, and ensure the proper discharge of duties – and the need for such standards point to the urgent need for national legislation for refugees. A refugee-specific national law will reduce the ambiguity surrounding refugee protection and will go a long way in bridging the gap between stated administrative positions and ad hoc policy decisions.

Hence, this book is also an exercise in comparative law: in surveying a range of foreign judgements on refugee protection, this book aims to compare the legal provisions of different countries, and suggest possible steps that can be adopted. In particular, this book highlights the recent trajectory of the international and domestic legal system towards refugee rights, arguing that the emergence of human dignity as a fundamental human right in legal discourse is the key towards advancing the international refugee agenda. Given that it is nearly impossible to eliminate all push factors instigating refugee movement, this book ultimately argues that a new cosmopolitan approach is necessary, and States ought to re-think their strategies in relation to this evolving refugee situation.

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LIST OF ABBREVIATIONS

AALCO	Asian-African Legal Consultative Organisation
AAPSU	All Arunachal Pradesh Students' Union
AIR	All India Reporter
AMRS	Application for Mandate Refugee Status
ASEAN	Association of South-East Asian Nations
CATIP	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CHT	Chittagong Hill Tracts
CRC	Convention on the Rights of Child
Cr.LJ	Criminal Law Journal
Cr.PC	Code of Criminal Procedure
DC	District Collector
DEVAW	Declaration on the Elimination of Violence Against Women
DHRICL	Declaration of the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live
ECHR	European Court of Human Rights
EcmHR	European Commission on Human Rights
ECnHR	European Convention on Human Rights
ECOSOC	Economic and Social Council of United Nations
ERC	Emergency Relief Coordinator
ExCom	Executive Committee of UNHCR
FC	Federal Court

FIR	First Information Report
FRRO	Foreigners' Regional Registration Office
GLJ	Gujarat Law Journal
IAR	Immigration Appeal Reports
IB	Interrights Bulletin
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPG	International Convention on the Prevention and Punishment of the Crime of Genocide
ICRC	International Committee of the Red Cross
ICSPA	International Convention on the Suppression and Punishment of the Crime of Apartheid
IDPs	Internally Displaced Persons
ILO	International Labour Organisation
IMDTA	Illegal Migrants (Determination by Tribunal/Tribunals Act
IOM	International Organisation for Migration
IPC	Indian Penal Code
IRO	International Refugee Organisation
NHRC	National Human Rights Commission
OAS	Organisation of American States
OAU	Organisation of African Unity
OCHA	Office for the Coordination of Humanitarian Affairs
PARinAC	Partnership in Action
PILSARC	Public Interest legal Support and Research Centre
SAARC	South Asian Association for Regional Co-operation
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
SLIC	Socio-Legal Information Center

UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations International Children's Educational Fund
UNRWA	United Nations Relief and Works Agency
VHAD	Voluntary Health Association of Delhi
WFP	World Food Programme
WHO	World Health Organisation
YMCA	Young Men's Christian Association

I

**REFUGEES: DEFINITION,
RIGHTS AND PROTECTION**

1

REFUGEES: DEFINITION, RIGHTS AND PROTECTION

“Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safe and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum.”

— Sadoko Ogata

A person becomes a refugee due to circumstances beyond her control. India is host to numerous individuals who seek protection from serious human rights violations in their country of origin. In the absence of a national law regulating the legal status of refugees in India, they have been recognised as refugees either by the Government of India (as in the case of Tibetans, Sri Lankans and Chakmas from Bangladesh) or by the United Nations High Commissioner for Refugees (UNHCR), the UN agency responsible for the international protection of refugees. Despite India not being a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, refugees are somewhat protected in India. Notwithstanding the various constraints faced by South Asia, including the lack of available resources and the security concerns that refugees tend to generate, India has, to some extent, conformed to the international standards regarding refugees.

In order to fully comprehend the Indian context, it is crucial to introduce the relevant international instruments, and the main principles of international refugee law and practice.

1.1 DEFINITION OF A REFUGEE: CRITERIA USED

While a refugee may be commonly defined as a person who flees socioeconomic and political insecurity, the term “refugee” is more specific and narrow in definition in international law. Article 1(A)(2) of the 1951 United Nations Convention Relating

to the Status of Refugees (hereafter the 1951 Convention) defines a refugee as 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, is unwilling to avail himself of the protection of that country.”

Various criteria, when fulfilled, result in the claimant’s recognition as a refugee. Many of these criteria have been internationally acknowledged and form the basis for determining refugee status. The 1951 Convention is clear in its definition of who constitutes a refugee. The various terms used in the Convention have been broadly interpreted and are briefly discussed below.

1.1.1 Well-Founded Fear of Being Persecuted

An asylum-seeker has to demonstrate that she has fled her country owing to a well-founded fear of being persecuted. The applicant must therefore furnish sound reasons for fearing individual persecution. It may be assumed that a person’s fear is well-founded if she has already been a victim of persecution on one of the grounds enumerated in the 1951 Convention. The word “fear” refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution. The fear must be well-founded; the first criteria for determining what is “well-founded” is a *subjective element* relating to the perceptions, emotions and experiences of the refugee claimant, and the second is an *objective element*, which may be assessed from the general situation in the country of origin.

1.1.2 Persecution

Though the emphasis of the 1951 Convention is on individualised persecution, there is no universal definition of “persecution”. Serious human rights violations are indicative of persecution. Discrimination of a serious nature on grounds of race, nationality, religion, and membership of a particular social group can also amount to persecution; discrimination, however, is not sufficient on its own to constitute persecution. Bona fide prosecution in the country of origin is generally not considered as persecution except when the punishment for a prosecutable offence is excessive and against international human rights standards.

Under the 1951 Convention, a person must demonstrate a well-founded fear of persecution for one or more of the following reasons:

- Race
- Religion
- Nationality
- Membership of a particular social group
- Political opinion

1.1.3 Race

Discrimination on the basis of race, ethnicity, caste, colour, or creed is widespread, and this often results in strife of such severity that those targeted are compelled to flee persecution. The example of South African blacks fleeing the apartheid regime in their country of origin is often cited as a classic case of flight from persecution on the ground of race. Another example is that of the Ugandan citizens who fled persecution from the regime of Idi Amin in 1972 and sought refuge in India.¹ Similarly, thousands of Sri Lankan Tamil refugees in India have fled persecution based on their ethnic background.

1.1.4 Religion

Religious persecution can assume various forms: prohibiting a person from worshipping in private or public, forbidding membership of a religious community, even adopting discriminatory measures against certain people because of their religious beliefs. The Bahais fled Iran as a result of the discrimination they faced in their country of origin due to their religion. More recently, two Pakistani Sikhs were executed by the Taliban because they refused to convert to Islam.² Following the attack, a reported sixty Sikh families (and likely many more) settled in Amritsar, Punjab, seeking asylum.³

1.1.5 Nationality

Nationality is also used as a justification for persecution. Nationality is interpreted, in a broad sense, to include the origins and membership of particular ethnic,

- 1 The Government of India enacted the Foreigners from Uganda Order, 1972, in exercise of its powers under Section 3 and 3-A of the Foreigners Act, 1946.
- 2 Pakistani Taliban behead 2 Sikhs, THE TIMES OF INDIA, February 21, 2010, <http://timesofindia.indiatimes.com/world/pakistan/Pakistani-Taliban-behead-2-Sikhs/articleshow/5600667.cms>.
- 3 Sikh refugees demand Indian citizenship, Wednesday, February 24, 2010, <http://news.oneindia.in/2010/02/24/sikhrefugees-demand-indiancitizenship.html>.

religious, cultural and linguistic groups. There is a degree of overlap between the various grounds of persecution, and factors often cumulatively contribute to a well-founded fear of persecution.⁴ For instance, in the 1980s Iraq passed a decree stating that the Faili Kurds were no longer to be considered Iraqi citizens – under the false distinction that they were Iranian nationals.⁵ Without the right to citizenship, many such persons fled (and indeed, many were forcibly removed) from Iraq and sought refuge in neighbouring countries.

1.1.6 Membership in a Social Group

Membership in a social group may also be used as a ground of persecution for refugee status under the 1951 Convention. It is considered to be a catch-all provision, which may include any group of persons, or an individual associated with a particular group, who demonstrate common characteristics (e.g., similar backgrounds, sexual orientation, habits or social status). These common characteristics must be immutable and fundamental to a person's identity such that the person should not be able to change it. A 'particular social group' may also refer to a person's family, trade union, social organisation, sexual orientation, or gender.

In the past several decades, the UNHCR Executive Committee (ExCom) has repeatedly recognised the prevalence of refugee women and girls in the world's refugee populations.⁶ ExCom has also recognised that women who faced inhumane treatment for having transgressed the social mores of their society could be considered as a "particular social group" and given refugee status within the 1951 Convention definition.⁷

In October 1993, ExCom adopted Conclusion No. 73 on Refugee Protection and Sexual Violence. It recognised that asylum-seekers who have suffered sexual violence should be treated with particular sensitivity. Furthermore, it recommended the establishment of training programmes designed to ensure that

4 GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 46 (1983).

5 Elizabeth Campbell, "The Faili Kurds of Iraq: Thirty Years Without Nationality," *Refugees International, World Bridge Blog*, April 2, 2010, <http://www.refugeesinternational.org/blog/faili-kurds-iraq-thirty-years-without-nationality>.

6 See, e.g., UNHCR ExCom Conclusion No. 39 (1985), which noted that refugee women and girls constituted the majority of the world's refugees and that many of them were exposed to special problems.

7 *Id.*

those involved in determining refugee status are adequately sensitised to issues of gender and culture.⁸

The conclusions adopted by ExCom each year are not binding on State Parties. Though recommendatory in nature, they do have considerable persuasive value in practice. In the Indian context, examples include women from Afghanistan who fled persecution by the Taliban forces because of gender-based threats.

1.1.7 Political Opinion

Political opinion refers to opinion on any matter in which the machinery of the State, or government, is engaged. Government's persecution based on political opinion occurs when that opinion is viewed as an actual or perceived threat to that government or its institutions. A situation may also arise where the refugee does not have a political opinion in opposition to the government or State entity, but is imputed to hold such views. This concept of imputed behaviour is accounted for in the refugee definition. An example of political opinion persecution is found in Tibetan refugees in India, who faced both political and ethnic persecution by the Chinese government, forcing them to flee the region they had regarded as autonomous.

1.1.8 Persecution by Non-State Agents

The 1951 Convention is not limited to those who fear persecution from State agents alone. It also includes persecution by non-State agents due to the non-availability of State protection. Governments are often unable to suppress large-scale human rights violations, or are reluctant to do so because they are colluding with those responsible, for political and diplomatic reasons. Where protection is unavailable, persecution within the convention may result.

1.1.9 Outside the Country of Nationality or Habitual Residence

Movement of persons in "refugee-like" situations from one part of the country of origin to another safer part of the country of origin does not give rise to a claim for refugee status.⁹ It is a general requirement that an asylum-seeker who has a

8 Similarly, in 2003, ExCom passed Conclusion No. 98, on Protection from Sexual Abuse and Exploitation, though this was more pointedly aimed at the sexual abuse and exploitation women are often subject to in refugee camps, often after being given refugee status. These situations are discussed more in Chapter 10, *infra*, on Refugee Women.

9 Hyndman, Jennifer, *Refugee Under International Law With a Reference to the Concept of Asylum*, 60

nationality must be outside the country of his nationality to claim refugee status, and there are no exceptions to this rule. There has to be the non-availability of protection in another region within the country of origin for refugee status to be legitimately considered. If there is an area within the country of origin where the person would be safe from persecution, he will be expected to go there unless it is unreasonable for him to do so. International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.¹⁰

Persons who are habitual residents of a country but do not have any nationality can also qualify for refugee status provided they have left their country of habitual residence or are unable to return to it for reasons contained in the definition. Therefore, if a Stateless person is able to return to such a country, he will not be able to claim refugee status.

1.2 GENERAL PRINCIPLES FOR DETERMINING REFUGEE STATUS

1.2.1 Inclusion Clause

A person is a refugee in accordance with the 1951 Convention as soon as she fulfils the criteria contained in the definition above. It also contains provisions whereby a refugee under the Convention might cease to be a refugee. Similarly, it provides for groups of people who, while meeting the criteria for refugee status, are not granted refugee status because they are either already under the protection of another UN agency or are not considered in need of, or deserving of, international protection. The cessation and exclusion clauses are considered below.

1.2.2 Exclusion Clauses

The 1951 Convention details three groups of people who fulfill refugee status requirements but are not considered to be refugees under international law.

AUSTRALIAN LAW JOURNAL 149 (1986) (Austl.).

10 UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1992 (orig. 1979), para. 88, <http://www.unhcr.org/3d58e13b4.html> [hereinafter 1951 Convention Handbook].

Persons already receiving UN protection or assistance

Article 1D States that the Convention shall not apply to persons already in receipt of assistance from a UN organ or agency other than the UNHCR. This category includes refugees under the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and similar organisations which may be set up in the future. However, once such assistance ceases, and if the criteria for refugee status remain fulfilled or the cessation clauses do not apply, these persons become entitled to refugee status.

Persons not considered to be in need of international protection

Article 1E states that those persons who are granted most of the rights enjoyed by nationals (except citizenship) in the country where they have been received shall not be given the protection of the 1951 Convention. The Convention does not define the specific rights that must be granted by the receiving State. However, the person's status must be equivalent to that of a national and he must be protected against deportation.

Persons not deemed to be deserving of international protection

Article 1F identifies three subgroups not deemed to be deserving of international protection.

1. *Those who have committed crimes against peace, war crimes or crimes against humanity:* This clause bars those who have committed the following types of crimes:

- *Crimes against peace* including planning, preparing, initiating, or waging a war of aggression or a war in violation of international treaties, agreements or assurances; or participating in a common plan or conspiracy for any of the foregoing.
- *War crimes* involving violation of the laws or customs of war as noted under the Geneva Conventions, including murder, ill-treatment or deportation for slave labour, or for any other purpose, of civilian population of or in occupied territory; the murder or ill-treatment of prisoners of war; the infliction of unjustified public or private property damage; wanton destruction of cities, towns or villages; or any devastation not justified by military necessity.

where some form of persecution may be prevalent; she thus makes a claim for refugee status. Under the F (II) exclusion clause, the smuggler would not qualify as a refugee since she has engaged in a serious non-political crime in her country of origin and her flight is from prosecution and not persecution.

- A Sri Lankan militant crosses over into India, as one of the many refugees entering Tamil Nadu. She intends to carry out terrorist activities on Indian territory. This person cannot be accepted as a refugee along with other genuine Sri Lankan refugees because her intended activities go against the humanitarian nature of the refugee status and therefore the exclusion clauses apply.

The exception to this rule is torture. If a person has committed a serious non-political crime but faces torture on return, she is liable not to be deported as the torture factor will override the criminal considerations.

1.2.3 Cessation Clauses

Article 1C of the 1951 Convention provides for six instances in which a person recognised as a refugee will cease to have such a status. The first four instances refer to a change in the refugee's situation. These include voluntarily reavailing herself of national protection; having lost nationality, voluntarily reacquiring her nationality; acquiring a new nationality; or voluntarily re-establishing herself in the country where persecution was feared. The last two cessation clauses refer to situations where the circumstances under which refugee status was granted cease to exist and the refugee can no longer refuse to avail of the protection of the country of her nationality. The exception to this is a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of her former habitual residence.

1.3 REFUGEES AND OTHER FOREIGNERS

1.3.1 Economic Migrants

Refugees are often confused with economic migrants. A foreigner who has left her country of origin solely to improve his economic prospects is not a refugee, as there is no element of persecution compelling departure from the country of origin. An economic migrant normally leaves his country voluntarily to seek a better life. Should he elect to return home, he would continue to receive the protection

of his government. The same migrant may be considered to be a refugee only if he is able to prove that he was denied employment in his country of origin on account of his race, religion, nationality, etc., and that it amounted to persecution. Refugees flee their country of origin due to the threat of persecution, and cannot return safely to their homes.

The two following examples differentiate an economic migrant from a refugee:

- A person from B, a developing country, enters A, a developed country, in order to seek employment. She is denied employment opportunities and is asked to leave country A or face deportation. She applies for refugee status on the basis of lack of employment opportunities in her country of origin. She cannot be granted this status since she is unable to prove any specific threat of persecution against her. The lack of employment opportunities in country B is a general feature, affecting all citizens irrespective of race or other status. This person is considered to be an economic migrant and cannot qualify as a refugee under these circumstances.
- A group of migrants from country C enter country D and claim refugee status. They allege that they were denied employment opportunities in their country of origin since they belong to a particular religious group that is being persecuted in country C. These migrants may be considered refugees if it is established that the denial of employment opportunities is a form of persecution.

1.3.2 Internally Displaced Persons (IDPs)

A person must be outside her country of origin—or in case of a Stateless person, outside her country of former habitual residence—in order to be recognised as a refugee. This requirement is based on the concept of alienage,¹³ where the person is considered to be in need of international protection only if he is unable or unwilling to avail himself of the protection of his country due to a well-founded fear of persecution.

Those who are forced to leave their place of residence as a result of persecution, human rights violations, or civil and ethnic strife, but who have remained in their country of origin or habitual residence, are referred to as “internally displaced persons” (IDPs). Such persons are often not afforded the international protection

13 James Hathaway, *The Law of Refugee Status* 29-33 (1991).

given to refugees. Accordingly, the safety of these persons lies with the national government, and any intervention would be considered interference in the internal affairs of the respective States. Kashmiri pandits who were forced to flee the disturbance and violence in the state of Jammu and Kashmir is an example of IDPs in India.

An “externally displaced person” is displaced from his country, where he would normally enjoy the protection of that State, to another country for reasons falling outside the refugee definition provided by the 1951 Convention. There could be other factors that would put his life, safety or freedom at risk.

1.3.3 Refugees *Sur Place* (Tourists, Travellers and Temporary Residents)

In many cases, flight from the country of origin to the country of asylum will form an integral part of the refugee’s case history. However, actual flight from the country of origin is not a precondition for the grant of refugee status. This category of refugees is referred to as refugees *sur place*. These are persons who have entered the host country for reasons unrelated to questions of well-founded fear of persecution, such as education, medical treatment or tourism. However, subsequent developments render their return to the country of origin problematic. The conditions in the person’s country of origin may change suddenly, placing the person’s life and liberty in danger upon return—for example, a military coup or ethnic strife. A person’s political activities in the host country may also make it unsafe for her to return, because of political opposition. In this case, refugee status is determined on the basis of individual apprehension of persecution.

Generally, if a person faces a risk of persecution on return, the reasons why he originally arrived in the country of asylum become irrelevant. The individual may have departed from her country of origin without impediment, travelled on a valid passport, and still have a claim to refugee status. This is illustrated by the example given below.

- Students from country Y come to country Z for higher studies on valid student visas. While in country Z, country Y becomes embroiled in ethnic turmoil. Some of the students express fears of persecution on the basis of their ethnicity. Accordingly, they apply for refugee status.
- A tourist from country X was visiting country Y with her family. She was a high-ranking official in her country. However, while touring country Y,

the government in country X was overthrown by a military dictator, who assassinated most of the high-ranking officials of the previous regime. The visiting tourist and her family feared for their lives and liberty on their return to country X. They applied for refugee status in country Y, pending an improvement in the volatile situation in their country of origin.

1.3.4 Convention and Mandate Refugees

A Convention Refugee is a person recognised under the 1951 Convention and its 1967 Protocol. This person is recognised and protected by a State that is party to the Convention.

Mandate refugees include all those persons who qualify as refugees under the mandate of the UNHCR. The definition of a mandate refugee has been drawn from the Statute of the UNHCR by the General Assembly and the Economic and Social Council (ECOSOC) resolutions covering a wider group of persons finding themselves in refugee-like situations. Internally displaced persons are such persons of concern to UNHCR.

1.3.5 Temporary Protection

Temporary protection regimes are sometimes established by States to protect persons in refugee-like situations until conditions in their country of nationality are deemed benign enough to allow for safe repatriation. This is frequently used in cases of mass influx where individual determinations of refugee status are not possible. In such cases, refugees are recognised on a *prima facie* basis, depending on the person's nationality and membership of a particular social or ethnic group. These regimes, when formalised, contain sunset clauses; repatriation is ultimately expected when the country where they came from is safe to return to. However, if the cause of the displacement persists, States normally allow a limited number of persons to remain permanently.

1.3.6 Stateless Persons

Stateless persons are defined by Article 1 of the 1954 Convention Relating to the Status of Stateless Persons as those who are not considered to be nationals of any State under the operation of its law. This unusual phenomenon may occur when a person loses or is deprived of an existing nationality, or when she is born a Stateless person and is unable to acquire a nationality through marriage, naturalisation or

any other means. The obligation of States towards Stateless persons are covered by this Convention.

1.4 NON-REFOULEMENT

A fundamental principle of refugee law is *non-refoulement*. Article 33 of the 1951 Convention states:

“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.”

This principle is the most direct, and powerful, means for protecting the life, liberty and other basic human rights of a refugee as it ensures that he will not be returned to a country or frontier where his life or liberty would be violated. It is applicable to refugees as well as to asylum-seekers. Customary international law incorporates this core meaning but extends the principle of *non-refoulement* to include displaced persons who do not enjoy the protection of the government of their origin.

Various human rights instruments include an explicit prohibition of refoulement if a person is at risk of suffering human rights violations. Taken together, these instruments protect any person from being forcibly returned to a country where he or she is at a risk of torture, enforced disappearance, or extra-legal, arbitrary or summary execution.

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in Article 3 that:

1. 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.
2. For the purpose 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.

The term torture is defined in Article 1 of the Convention as including “any act by which severe pain or suffering, whether physical or mental, is intentionally

inflicted on a person” at the instigation of a public official for such purposes as obtaining information, punishment, intimidation or coercion.

The International Convention for the Protection of All Persons from Enforced Disappearance in Article 16 states that:

1. No State Party shall expel, return (“*refouler*”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose 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 or of serious violations of international humanitarian law.

An enforced disappearance in human rights law is the “arrested, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.¹⁴

The UN Principles on the Effective Prevention and Investigation of Extra Legal Arbitrary And Summary Executions provide in Principle 5 that

1. No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.

Crossing a border without valid identification and travel documents is not grounds for refusing the asylum-seeker entry to the country of asylum or for deporting her to the country she came from. Neither are such documents a precondition to qualify for the refugee status. In fact, refugee claimants may have no alternative but to enter illegally in an attempt to flee from persecution. The application of the principle of *non-refoulement* is independent of any formal determination of the refugee status by a State or an international organisation. *Non-refoulement* is

14 International Convention for the Protection of All Persons from Enforced Disappearance, adopted December 20, 2006, UN Doc. A/61/488, C.N.737.2008, art. 2, available at <http://www2.ohchr.org/english/law/disappearance-convention.htm>.

applicable as soon as certain objective conditions prevail. The very existence of involuntary return should shift the burden of proof to the returning State when the facts indicate the possibility of harm befalling those returned. Moreover, a State may be liable for breach of the duty of *non-refoulement* regardless of notions of fault—either directly for the acts and omissions of its officials, or indirectly where its legal and administrative systems fail to provide a remedy or guarantee that is required by an applicable international standard.

The binding obligations associated with the principle of *non-refoulement* are derived from conventional and customary international law. While this principle may not necessarily entail asylum, admission, residence or indeed any particular solution, it does enjoin some action on the part of a State that returns or has the effect of returning refugees to territories where their lives or freedom may be threatened.

The 1951 Convention's refugee definition is not an absolute guarantee of protection, and *non-refoulement* is not an absolute principle. "National security" and "public order", for example, have long been recognised as potential justifications for derogation.¹⁵ Article 33(2) of the 1951 Convention expressly provides that the benefit of *non-refoulement* may not be claimed by a refugee when there are reasonable grounds for regarding him as a danger to the security of the country or when he has been convicted of a serious crime, constituting a danger to the community of that country. The exceptions to *non-refoulement* are thus framed in terms of the individual. In contrast to the 1951 Convention, the 1969 Organisation of African Unity (OAU) Convention declares the principle of *non-refoulement* without exception. No formal concession is made to overriding considerations of national security, although in cases of difficulty in continuing to grant asylum, "appeal may be made directly to other member States through the OAU." Provision is then made for temporary residence pending resettlement, although its grant is not mandatory under Article 2 of the OAU Convention.

The core meaning of *non-refoulement* requires States not to return refugees in any manner whatsoever to territories in which they face the possibility of persecution. However, States may deny admission in ways not obviously amounting to breach of the principle. For example, stowaways and refugees rescued at sea may be

15 League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, available at <http://www.unhcr.org/refworld/docid/3dd8cf374.html>.

refused entry; refugee boats may be towed back out to sea and advised to sail on; or asylum applications can be sent back to a transit or a “safe third” country. Without violating the principle of *non-refoulement*, the State where a stowaway asylum-seeker arrives may require the ship’s master to keep the stowaway on board and travel on to the next port of call; or it may call upon the flag State to assume responsibility where the next port of call is unacceptable; or it may allow temporary disembarkation pending resettlement elsewhere. In the absence of rules regulating the appropriate States to consider the asylum claims, the situation is comparable to that of refugees in orbit.

UNHCR’s 1998 ExCom Conclusion No. 53 emphasised that like other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin. Without prejudice to any flag State responsibilities, they should, whenever possible, be allowed to disembark at the first port of call with the opportunity to have their refugee claim determined, provided that this does not necessarily imply durable solutions in the country of the port of disembarkation. State practice has not yet given rise to any rule on the treatment of stowaway asylum-seekers. In reality, the discretion of the coastal State may be limited by the particular facts of the case. If the flag State refuses to accept any responsibility for resettlement and if the ship’s next port of call is in a country where the stowaway asylum-seeker’s life or freedom may be threatened, then the practical effect of refusing disembarkation is *refoulement*. The nominal authority of the flag State to require diversion to a safe port, which would be controversial anyway where a charter party is involved, can hardly be considered a practical alternative, or the “last opportunity”, to avoid *refoulement*. The paramount consideration remains the refugee status of those on board. A refusal to take account of their claims—either on the basis that they have not “entered” State territory or on the (disputed) ground that they are the responsibility of the flag or any other State— would not suffice to avoid liability for breach of the principle of *non-refoulement*.

Asylum-seekers have been escaping by sea for years—the most recent examples being Cubans, Haitians and Indo-Chinese. As with stowaways, several options are open to the State where those rescued arrive. It may absolutely refuse disembarkation and require the ship’s masters to remove them from the jurisdiction. Or it may make disembarkation conditional upon satisfactory guarantees as to resettlement, care and maintenance—to be provided by the flag or other States or by international organisations.

The duty to rescue those in distress at sea is firmly established in both treaty and general international law. In such situations, the responsibility of the first port of call has to be emphasised, given the inescapable but internationally relevant fact of the refugee's presence within the territory of the State. As with stowaways, effective solutions ought in principle to be attainable through a weighing of competing interests. This should take into account not only the prospects, if any, of local integration, but also notions of international solidarity and burden sharing, as well as the extent to which refusal of disembarkation may lead in fact to *refoulement* or to other serious harm to the asylum-seekers.

1.5 INTERNALLY DISPLACED PEOPLE (IDP)

There are millions of people around the world who are currently internally displaced due to a variety of reasons, which might include civil war or ethnic and religious persecution through government policies. Internally Displaced Persons (IDPs) are victims of human rights violations and are refugees in all but name. Since the 1951 Convention defines refugees as "being outside their country of nationality ...or of habitual residence," IDPs do not enjoy the same rights as refugees. Their plight may be every bit as serious as that of individuals who cross borders, yet the Convention definition of refugee status excludes IDPs from the scope of global protection. The strict insistence on the territorial criterion has prompted concern that there is a mismatch between the definition and the human suffering that results from involuntary migration. The Convention does not recognise the existence of social, legal and economic barriers that make it impossible for all to escape to international protection.

As of December 2009, according to the Internal Displacement Monitoring Centre,¹⁶ there were approximately 27.1 million IDPs in 54 countries, reflecting an increase of 10.1 million IDPs since 1997. In 2009 alone, 6.8 million people from 23 different countries were reported as internally displaced, nearly half of who were in Pakistan.¹⁷ Other countries with large numbers of people newly displaced in 2009 were DRC (one million), Sudan (530,000), Somalia (400,000), the Philippines

16 The Internal Displacement Monitoring Centre (IDMC) was established by the Norwegian Refugee Council in 1998, upon the request of the United Nations, to set up a global database on internal displacement.

17 IDMC, Internal Displacement: Global Overview of Trends and Developments in 2009 (May 2010), available at [http://www.internal-displacement.org/idmc/website/resources.nsf/\(httpPublications\)/54C1580B097E58BAC12577250071030F?OpenDocument](http://www.internal-displacement.org/idmc/website/resources.nsf/(httpPublications)/54C1580B097E58BAC12577250071030F?OpenDocument).

(400,000), Colombia (290,000), Sri Lanka (up to 280,000) and Ethiopia (200,000).¹⁸ The question of IDPs is also a politically sensitive one for sovereign States. Since they are indicative of a State's failure to protect its citizens, governments are often unwilling to admit to the presence of such populations in their territory. Regardless of the exact figures, it is clear that the number of IDPs is higher than that of refugees.

At present there is no binding international treaty or convention regarding IDPs, and there is no internationally agreed upon definition of who is an IDP. Achieving such a definition is essential—both for accurate statistics and for taking comprehensive and coherent action. The UN's current working definition of who is an IDP is phrased thus:

*"[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border."*¹⁹

This definition has been described as being both too broad and too narrow. The definition should essentially help identify persons who are of concern to the international community—those who are basically in refugee-like situations within their own countries, with their own governments unwilling or unable to protect and assist them.

What should make internally displaced persons of concern to the international community is the coercion that impels their movement; their subjection to human rights abuse as a result of their being uprooted; and the lack of protection available within their own countries.

Determining when internal displacement has ended should include whether the return or relocation is reasonably viable and whether basic security and survival are assured.

1.5.1 Sovereignty and IDPs

One of the fundamental purposes of UN is to promote and encourage "respect for human rights and fundamental freedoms," according to the UN Charter Article

¹⁸ Id.

¹⁹ Representative of the Secretary-General on Internally Displaced Persons, Guiding Principles on Internal Displacement (1998), E/CN.4/1998/53/Add.2, <http://www.unhcr.org/43ce1cff2.html>.

1(3).²⁰ Yet, the Charter prohibits the UN from “intervening in matters which are essentially within the domestic jurisdiction of any State.”²¹ International human rights law has to contend with, and reconcile, the opposing tendencies of State-centered guarantees of sovereign equality and nonintervention, and the individual-centered commitment to human rights.

Protecting the human rights of refugees because they have crossed an international border, while ignoring the plight of IDPs because they have not, violates the fundamental principle that human rights are inherent in the individual and should not depend on the accident of location. However, the principle reason for the absence of a special regime for IDPs is the understanding that States are responsible for the nationals inside their own territory. From an international law perspective, the primary responsibility for the protection of, and assistance to, IDPs rests with the territorial State, by virtue of its sovereignty and the principle of non-intervention.²² But it is not as if sovereignty cannot be trumped in favour of human rights under any circumstances. In contrast to the doctrine of absolute sovereignty, which brooks no constraint on the action of States, Article 2(4) of the UN Charter prohibits the threat or use of force in international relations. States are also required to abide by voluntarily undertaken international obligations. The post-1945 period has seen a larger number of obligations assumed in the sphere of human rights, with appropriate mechanisms to promote adherence to them.

Whether humanitarian assistance violates the principles of sovereignty and non-intervention has been a matter of considerable discussion. In international law, the term “humanitarian” has seldom been delineated with the precision accorded to concepts such as “human rights” or “refugees.” Humanitarian assistance can be defined as activities that encompass the full spectrum—from the supplemental feeding of infants during famines to longer-term measures such as the strengthening of indigenous social and institutional coping mechanisms to avoid future crisis. The most significant issue relating to the law of humanitarian assistance is whether the consent of the host State is a precondition in this regard. In December 1991, the United Nations General Assembly adopted Resolution 46/182, which lays down in an annex the guiding principles for the provision of

20 See also U.N. Charter art. 55 (“the UN shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms”); U.N. Charter art. 56 (committing members “to take joint and separate action in cooperation” with the UN to promote the objectives of Article 2(7)).

21 U.N. Charter art. 2(7).

22 Guy S. Goodwin-Gill, *The Refugee in International Law* 264 (1996).

emergency humanitarian assistance. The resolution *inter alia* states that such assistance must “be provided with the consent of the affected country and in principle be on the basis of an appeal by the affected country.”²³ It further states that “humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality.”²⁴

1.5.2 Guiding Principles on Internal Displacement

In April 1998, the Representative of the UN Secretary-General on IDPs presented to the UNHCR a set of *Guiding Principles on Internal Displacement*.²⁵ The Commission, in a unanimously adopted resolution, took note of these principles. Though they are not legally binding on States, the significance lies in the fact that the *Guiding Principles* consolidate into one document all the international norms relevant to IDPs, otherwise dispersed across many different instruments.²⁶ Moreover, the principles reflect, and are consistent with, existing international human rights and humanitarian law. In restating existing norms, they also seek to address grey areas and gaps. An earlier study found seventeen areas of insufficient protection for IDPs and eight areas of clear gaps in the law as reported in the compilation and analysis of legal norms.²⁷ For example, no norm could be found explicitly prohibiting the forcible return of IDPs to places of danger. Nor was there a right to restitution of property lost as a consequence of displacement during armed conflict or a right to compensation for its loss. The law, moreover, was silent on the internment of IDPs in camps. Special guarantees for women and children were needed.²⁸

The *Guiding Principles* are standards for States, providing guidance to the representative in implementing its mandate, particularly addressing States facing situations of internal displacement; all other authorities, groups and persons in their relations with IDPs; and intergovernmental and non-governmental organisations when addressing internal displacement. The document is a highly persuasive compilation and consolidation of the existing international regime on the subject. Thus, it constitutes an important tool for addressing the protection

23 G.A. Res. 46/182, Annex I para. 3, U.N. Doc. A/RES/46/182 (Dec. 19, 1991).

24 *Id.* at Annex I para. 2.

25 *Supra* note 8.

26 Roberta Cohen, The Guiding Principles on Internal Displacement New Instrument for International Organisations and NGO's, 2 *Forced Migration Review* 31, 31-33 (1998).

27 Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR, Vol. 2 (June 1, 2007), available at <http://www.unhcr.org/455c460b2.html>.

28 Cohen, *supra* note 15, at 31.

and assistance needs of IDPs as well as contributing to the prevention of internal displacement in the future. Though the principles are not binding in a legal sense, they aim to provide practical guidance to all those dealing with IDPs.

The number of IDPs far outnumbers those who have achieved refugee status. Impracticalities in granting assistance, organising support and maintaining missions are some of the reasons why this large group garners insufficient attention. A comprehensive approach to the global refugee problem is a must for both pragmatic and ethical reasons, but also to tackle the difficulties of IDPs.

The plight of the IDPs is often due to their own government's actions or tacit acquiescence. The problem, therefore, cannot be resolved without considering the question of how far sovereignty continues to restrain international humanitarian efforts. The resolution of this dilemma would be the key imperative for forging a meaningful solution to the problem of IDPs.

A prerequisite for forging an effective institutional framework for the protection of IDPs is inter-agency cooperation. The UN High Commissioner for Human Rights (UNHCHR), the UNHCR, the Emergency Relief Coordinator (ERC), the Office for the Coordination of Humanitarian Affairs (OCHA), the UN Development Programme (UNDP), the UN Children's Fund (UNICEF), the World Food Programme (WFP), the World Health Organisation (WHO), the International Organisation for Migration (IOM), the International Committee of Red Cross (ICRC), and other related organisations must collaborate and evolve frameworks of cooperation to provide protection and development assistance to IDPs. UNHCR extends protection or assistance to certain groups that were not included in the original mandate but whom the UN Secretary General or the UN General Assembly have requested the agency to assist. They include asylum-seekers; Stateless persons; former refugees who have returned home; and internally displaced persons.²⁹ IDPs are the fastest growing group of uprooted persons in the world.

Generally, in the past decade, there has been a significant rise in the number of IDPs: movements have included both those going home because of improved conditions, as well as newly uprooted populations in conflict zones. Of the estimated 27 million IDPs, UNHCR officially provides assistance to 14.4 million in 22 countries, including those in the countries with the largest populations of IDPs: Colombia, Iraq, and Sudan.³⁰

29 UNHCR – Who We Help, <http://www.unhcr.org/pages/49c3646c11c.html>.

30 UNHCR – Internally Displaced People, <http://www.unhcr.org/pages/49c3646c146.html>.

Table 1.1: IDPs (due to conflict and violence) from 2005 to 2009³¹

	End of 2005	End of 2009
Afghanistan	153,152	297,000
Bosnia and Herzegovina	183,400	114,000
Colombia	2,000,000	3,300,000
Dem Rep Congo	1,664,000	1,900,000
India	600,000	500,000
Iraq	1,300,000	2,764,000
Pakistan	20,000	1,230,000
Philippines	60,000	188,000
Russian Federation	265,000	80,000
Serbia and Montenegro	247,000	225,000
Somalia	400,000	1,500,000
Sri Lanka	341,175	400,000
Sudan	5,355,000	4,900,000
Total	12,588,727	17,398,000

1.6 DURABLE SOLUTIONS

UNHCR promotes three durable solutions for refugees after emergency and humanitarian needs have been met. They are *voluntary repatriation*, involving voluntary return to the country of the refugee's nationality or habitual residence; *local integration* in cases where the conditions allow refugees to integrate within the country of asylum; and *resettlement to a third country* when repatriation and local integration are not durable and secure solutions. These three alternatives may be resorted to under various optimum conditions. Durable solutions are discussed in greater detail in Chapter 13 of this handbook.

31 IDMC, Internal displacement: Global overview of trends and developments, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/3A5E6438584C3011C12577610043445B/\\$file/IDMC_IDP-figures_2001-2009.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/3A5E6438584C3011C12577610043445B/$file/IDMC_IDP-figures_2001-2009.pdf).

2

REFUGEE PROTECTION AND HUMAN RIGHTS

There is a strong link between human rights and refugee protection. Refugee flow and population displacements are driven in large part by the gross violation of human rights. The rights of these displaced populations (such as *non-refoulement*) are also fundamental human rights. The right to seek asylum, the right to protection in the country of asylum (especially of vulnerable groups such as women and children), and the right of voluntary repatriation all raise issues relating to international human rights.

While refugee protection has been recognised by the international community, it has often taken a back seat to other pressing issues. However, in the past decade, refugee concerns have moved to centre stage, probably because this period has seen some of the most serious cases of human rights violations and mass displacement. Though the basic human rights instruments have been in existence since 1950, the contexts in which they are used today are very different. Compared to the post-World War II era, refugee rights are being addressed with new concerns in mind.

2.1 UN HUMAN RIGHTS MECHANISMS AND REFUGEES

The United Nations is an inter-governmental body whose member States have agreed to various standards and mechanisms for protecting civil, political, economic, social and cultural rights and to enforce human rights compliance through the UN itself. Apart from the UNHCR, the United Nations has a complex yet effective system of protecting refugee rights. Although the system has been designed to protect human rights in general, these mechanisms can be effective in protecting refugee interests too given that refugee rights are human rights. Indeed,

they can on occasion be even more effective than the 1951 Convention, especially in countries that are not signatories to the Convention. The main human rights mechanisms within the UN system are briefly discussed in the following sections.

2.1.1 Human Rights Treaties and Treaty Bodies

The adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) in 1966 transformed two important sets of human rights into binding conventional instruments. Both the covenants have been ratified by over 160 States.³² Together with the 1948 Universal Declaration of Human Rights, they are commonly known as the International Bill of Human Rights. Other important UN human rights treaties include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1984 Convention against Torture, the 1981 Convention on the Elimination of All Forms of Discrimination against Women, and the 1989 Convention on the Rights of the Child. Under many of these conventions, a committee (or a treaty body) has been established, which monitors the human rights record of the various State Parties and requires them to file a detailed periodic report. ICCPR, for instance, also allows for an individual petitioning system through its first optional protocol, which enhances the individual's right to redressal outside her national system. The instruments that have been ratified by India are discussed in detail in the following chapter.

2.1.2 Charter-Based Organs and Institutions

Major UN organs dealing with human rights include the Commission on Human Rights created by the Economic and Social Council (ECOSOC) in 1946, which subsequently established the Subcommission on Prevention of Discrimination and Protection of Minorities in 1947, the Commission on the Status of Women, and the High Commissioner for Human Rights. These bodies supervise State compliance with the human rights provisions of the UN Charter.

Commission on Human Rights (now the Human Rights Council)

The Commission on Human Rights, replaced by the Human Rights Council in 2006, consists of 47 member States, which holds regular sessions every year in

32 United Nations Treaty Collections, Status of Treaties (MTDSG), Chapter IV Human Rights, <http://treaties.un.org/pages/ParticipationStatus.aspx>.

Geneva. Special sessions can also be held if the majority of the members find them necessary.

The mandate of the Council is extremely broad, and various issues relating to the protection of human rights may be discussed. Its work is mainly carried out through working groups and rapporteurs, with mandates to investigate a wide range of human rights violations³³ or particular countries.³⁴ The Commission was often seen as a political body where foreign policy can dictate State actions as much as human right concerns, which led to the reconstitution of the body as the Human Rights Council. Among the changes, the Council introduced a new Universal Periodic Review mechanism which will assess the human rights situations in all 192 UN Member States.³⁵ While it does not often address specific refugee protection concerns, general issues that affect refugee protection can be emphasised.

Resolutions 1235 and 1503

ECOSOC Resolution 1235 of 6 June 1967 and Resolution 1503 of 27 May 1970 laid the groundwork to allow the Council to take action in cases involving serious human rights violation. Resolution 1235 permits the Council to undertake a thorough study if a consistent pattern involving serious violation of human rights is determined and to report their findings to ECOSOC. Resolution 1503 provided the foundation for the current Complaint Procedure used “to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental

33 Special rapporteurs or working groups have been established for a number of issues, also known as themes. Current themes that affect refugee issues are the special rapporteurs on enforced or involuntary disappearances; extrajudicial, summary or arbitrary executions; extreme poverty; right to food; freedom of opinion and expression; freedom of religion or belief; human rights defenders; independence of judges and lawyers; internally displaced persons; migrants; minority issues; racism, racial discrimination, xenophobia and related intolerance; contemporary forms of slavery; promotion and protection of human rights while countering terrorism; torture and other cruel, inhuman or degrading treatment or punishment; trafficking in persons; safe drinking water and sanitation; violence against women; and many others. They can take action and report on situations, regardless of whether or not a State is a signatory to an international human rights treaty. Many of the rapporteurs have commented on the refugee situation in relation to their thematic mandate as well as re-emphasised various issues like the right of non-refoulement.

34 Current special rapporteurs exist for Cambodia, Democratic People’s Republic of Korea, Myanmar and Palestinian territories occupied since 1967. Special independent experts have been established for Burundi, Haiti, Somalia and Sudan. These rapporteurs have to report to the Council every year and can also discuss the protection of refugees in these countries.

35 UNHCR, Universal Periodic Review, <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

freedoms occurring in any part of the world and under any circumstances.”³⁶ Two working groups (the Working Group on Communications and the Working Group on Situations) are tasked with examining the communications and deciding whether or not these communications should be forwarded to the Council under Resolution 1235.

Other Relevant UN Mechanisms and Bodies

The Commission on the Status of Women conducts studies, prepares reports and makes recommendations on human rights and related issues concerning women. It is composed of 45 governmental representatives.

The High Commissioner for Human Rights was established in 1994. The High Commissioner’s functions include the prevention of human rights violations and the protection of human rights.

The Security Council of the UN, under Article 39 of Chapter VII of the UN Charter, can act when it determines there is a “threat to the peace, breach of peace or an act of aggression.” Further, the gravest instance of human rights violations have been determined to be coextensive with “international crimes” for which individuals may be held accountable before international tribunals. The Security Council, for instance, has used this power by establishing two tribunals—in Rwanda (1994) and the former Yugoslavia (1993)—to respond to the massive violation of human rights. These courts are the first of their kind since the tribunals set up at Nuremberg and Tokyo to try war criminals after World War II. They are competent to prosecute persons responsible for serious violation of international humanitarian law, genocide and acts defined as crimes against humanity—whether or not they are committed in the exercise of the official duties.

There are also various specialised agencies with their own constitutions and institutional structures—like the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Within their individual mandates, these organisations often address refugee-related issues. The UNHCR (UNHCR), as described previously, is the specialised agency that deals with refugees. Before examining the role of UNHCR in protecting refugees, a brief background of the current international regime of refugee law is provided below.

36 Human Rights Council, Res. 5/1 (June 18, 2007), available at <http://www2.ohchr.org/english/bodies/hrcouncil/>.

2.2 CODIFICATION OF REFUGEE LAW

The 1951 Convention and its 1967 Protocol govern refugee status at the international level. These two legal instruments have been adopted within the framework of the UN. As of October 2008, 147 countries were parties to one or both of these instruments: 144 countries are party to the 1951 Convention, 144 countries are party to the 1967 Protocol and 141 countries to both, with the most recent ratification being Montenegro on 10 October 2006.³⁷ The Convention and Protocol are applicable only to persons who are refugees as defined therein. The determination of refugee status is incumbent upon the contracting State in whose territory the refugee finds herself at the time of application for recognition of refugee status. These international refugee treaties also provide for cooperation between the contracting States³⁸ and the office of UNHCR. Apart from these two instruments, various regional bodies have taken initiatives to protect refugee rights. The Organisation of African Unity (OAU) has written the Convention Governing the Specific Aspects of Refugee Problems in Africa, a regional convention, while the Organisation of American States (OAS) has put together the Cartagena Declaration. Europe too has formulated various regional agreements addressing refuge, Statelessness and related concerns. In addition, many countries have enacted legislation to govern matters relating to refugees in their countries.

2.2.1 Development of International Refugee Law

The conviction that the international community of States has a duty to protect refugees and find solutions to their problems dates from the time of the League of Nations. When the League was established in 1920, the world was still coping with the aftermath of World War I, the Russian Revolution and the collapse of the Ottoman Empire, which had produced mass movements of people in Europe and Asia Minor.

Fridtjof Nansen, a Norwegian and a renowned Arctic explorer, believed that the League of Nations provided an unprecedented opportunity for establishing peace and promoting reconstruction in a devastated Europe. Between 1920 and 1922, he undertook four vast humanitarian operations: First, on behalf of the newly formed League, he organised the repatriation of half a million prisoners of war from 26 countries, mainly in southeastern Europe and the USSR. Next, after a devastating famine struck the USSR during the winter of 1921, Nansen was asked to supervise

37 UNHCR – State Parties to the 1951 Convention and its 1967 Protocol, available at <http://www.unhcr.org/3b73b0d63.html>.

38 See, e.g., 1951 Convention, supra note 6, art. 35.

a massive relief effort for some 30 million people who were threatened with starvation.

In the autumn of 1921, in order to provide a focal point for the coordination of relief efforts, the League of Nations appointed Nansen as the first High Commissioner for Refugees. Nansen's next two major operations were conducted as a part of his High Commission responsibilities.

In addition to prisoners of war, World War I and its turbulent aftermath left 1.5 million refugees and displaced people scattered across many countries. One of the fundamental problems facing refugees and displaced people was their lack of internationally recognised identity papers. So the new High Commissioner introduced the "Nansen passport", the forerunner of today's convention travel document for refugees. It enabled thousands to return home, or settle in other countries, and represented the first in a long and still evolving series of international legal measures designed to protect refugees.

But Nansen's work was not complete with this innovation. A war between Greece and Turkey in 1922 caused several hundred thousand Greeks to flee from their homes in eastern Thrace and Asia Minor to Greece. Charged with finding a solution to this colossal dislocation, Nansen proposed a population exchange. Consequently, half a million Turks moved in the other direction, from Greece to Turkey, with the League of Nations providing compensation to help both the groups to reintegrate. This ambitious and controversial scheme took eight years to complete.

In 1922, Nansen was awarded the Nobel Prize for his work on behalf of refugees and displaced people. He died on 13 May 1930 at his home near Oslo. His name lives on as one of the great humanitarian innovators of the twentieth century—a powerful reminder to humankind of its moral duty to protect and assist refugees and other displaced persons.

Over the following years, the League of Nations established a succession of organisations and agreements to address new refugee situations as they emerged. The League defined refugees in terms of specific groups of people who were judged to be in danger if they were returned to their home countries. The list of national categories was progressively expanded to take in, amongst others, Assyrians, Turks, Greeks, Armenians, Spaniards, and Austrian and German Jews. Starting with the problem of identity papers and travel documents, measures to protect refugees became more comprehensive as time progressed. They covered a wide range of matters of vital importance to their daily lives, such as the regularisation of their personal status, access to employment and protection against expulsion.

When the UN replaced the League of Nations in 1945, it recognised from the outset that the task of caring for refugees was a matter of international concern. In keeping with its charter, the community of States should assume collective responsibility for those fleeing persecution. Accordingly, the General Assembly of the UN during its first session, held at the beginning of 1946, adopted a resolution that laid the foundations for activities by the UN, in favour of refugees. This resolution stressed that refugees or displaced persons who had expressed valid objections to returning to their country of origin should not be compelled to do so.

The UN established a new body, the International Refugee Organisation (IRO). Its mandate was to protect those refugee groups that had been recognised by the League of Nations. The UN also created a new category to include the roughly 21 million refugees scattered throughout Europe in the wake of World War II.

Initially, IRO's main objective was repatriation. However, the political buildup to the Cold War tilted the balance towards resettlement of those who had "valid objections" to returning home. Such objections included persecution, or fear of persecution, because of race, religion, nationality or political opinions. The UNHCR replaced the IRO in 1951.

2.2.2 1951 Convention Relating to the Status of Refugees and the 1967 Protocol

The protection of refugees remains UNHCR's *raison d'être*. Protection lies at the heart of the organisation's efforts to find lasting solutions to the plight of refugees and provides the context in which it carries out relief activities.

Key to UNHCR's protection activities is the 1951 Convention, which was drawn up in parallel with the creation of UNHCR. It is a legally binding treaty and a milestone in international refugee law. In terms similar to the UNHCR Statute, it defines in Article 1(2) a refugee as a person who, "owing to a 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."

The Convention also clearly establishes the principle of *non-refoulement* in Article 33. It states that no person may be returned against her will to a territory where she may be exposed to persecution. The Convention sets standards for the

treatment of refugees, covering issues such as their legal status, employment and welfare. It proposes, as a minimum standard, that refugees should at least receive the treatment that is generally accorded to aliens.³⁹

The scope of the Convention, however, was originally confined to people who had become refugees as a result of events that had occurred before 1 January 1951. Signatory States were given the option of limiting its geographical application to Europe. In contrast, UNHCR was given a general competence under its statute to deal with refugee problems wherever they might arise, irrespective of date or location, as long as those concerned had a well-founded fear of persecution.

Subsequent decades demonstrated that the movement of refugees was by no means a phenomenon confined to World War II and its immediate aftermath. As new refugee groups emerged, it became increasingly necessary to adapt the Convention in order to make it applicable to the evolving refugee situation. In 1967, a Protocol was introduced which abolished the 1951 cut-off date, making the Convention truly universal. For the sake of convenience, the 1967 Protocol has been referred to as “amending” the 1951 Convention when in fact, it does no such thing. The Protocol is an independent instrument—not a revision within the meaning of Article 45 of the 1951 Convention.

2.2.3 Regional Initiatives

The Organisation of African Unity (OAU) decided as early as 1963 that a regional refugee treaty was needed to take into account the special characteristics of the situation in Africa. The resulting 1969 OAU Convention governing specific aspects of the refugee problems in Africa expanded the definition of a refugee. Article 1 of the OAU Convention incorporated the earlier definitions and added:

The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

For the first time, the legal term “refugee”, *albeit* at regional level, was extended to individuals forced to leave their countries owing to aggression by another State and/or as a result of an invasion. This definition directly addresses the cause of mass refugee influxes by emphasising objective conditions in the country of origin.

³⁹ 1951 Convention, *supra* note 6, art. 7(1). See also art. 5, 6, 13, 18, 19, 21 and 22(2).

In 1984, the Central American nations, joined by Mexico and Panama, adopted a declaration that built upon the OAU definition. It incorporated the additional criterion of “massive violation of human rights.” Although not formally binding, the Cartagena Declaration on Refugees has become the basis of refugee policy in the region. It has been incorporated into the national legislation of a number of States.

Section III of the Cartagena Declaration provides the following definition:

In view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee... Hence the definition or concept of a refugee to be recommended for the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety, or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

On the occasion of the tenth anniversary of the Cartagena Declaration, member governments met in Costa Rica and adopted the San José Declaration. It reaffirmed the Cartagena principles and updated regional policies on the prevention of refugee situations and the promotion of durable solutions.

The extended refugee definitions of the OAU Convention and the Cartagena Declaration have brought international protection to a large number of people who may not be covered by the 1951 Convention but who are forced to move for a complex range of reasons, including widespread human rights abuses, armed conflict and generalised violence. The extended definitions have particular importance in situations of massive influx, where it is generally impractical to examine individual claims for refugee status.

The Asian–African Legal Consultative Organisation (AALCO) formulated the Bangkok Principles on the Status and Treatment of Refugees in 1966.⁴⁰ These principles were revised in 2001 at AALCO’s fortieth session in New Delhi. The Revised Bangkok Principles, which are declaratory and nonbinding in character, are aimed at inspiring member States to enact national legislation for refugee

40 Asian-African Legal Consultative Organisation (AALCO), Principles Concerning Treatment of Refugees, Asian-African Legal Consultative Committee (“Bangkok Principles”), 31 December 1966, available at <http://www.unhcr.org/refworld/docid/3de5f2d52.html>.

protection. Article 1 of the Principles defines a refugee as:

A person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group leaves the State of which he is a national, or the country of his nationality, or, if he has no nationality, the State or country of which he is a habitual resident or being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection and also to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The broadening of the refugee definition in response to regional considerations has provided much needed flexibility to international action on behalf of people forced to flee their countries. However, it has also introduced a new complexity in that a person recognised as a refugee in a particular region may not necessarily be considered one elsewhere.

2.3 ROLE OF UNHCR IN REFUGEE PROTECTION

The UNHCR was established pursuant to a decision of the General Assembly of the UN on 14 December 1950. According to the statute, the High Commissioner for Refugees is called upon to provide international protection and assistance to refugees falling within the competence of the office, under the auspices of the UN.

In effect, a person who meets the criteria of the UNHCR Statute qualifies for the protection of the UN provided by the High Commissioner, regardless of whether or not she is in or from a country that is a signatory to the 1951 Refugee Convention or its 1967 Protocol. Nor is it necessary that she be recognised by the host country as a refugee under these instruments. As a result of its protection mandate on behalf of refugees, UNHCR has been called the largest operational UN human rights agency.

The mandate of UNHCR is purely humanitarian and non-political; its concern is the protection, safety and welfare of refugees. The core functions assigned to UNHCR by its 1950 Statute involve “providing international protection” and “seeking

permanent solutions to the problem of refugees by assisting Governments... to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.” These two aspects of UNHCR’s mandate are inseparably interlinked, the pursuit of durable solutions being the ultimate aim of international protection. UNHCR’s efforts to find durable solutions to improve the plight of refugees stem from the needs and rights of the individual.

UNHCR further serves as the “guardian” of the 1951 Convention and the 1967 Protocol pursuant to Article 35 of the former and Article 2 of the latter. Contracting States undertake to cooperate with UNHCR in its supervision of the application of the provisions of these instruments. An important function of the office is to promote refugee law, which includes encouraging accession to the international instruments that protect refugees, as well as the adoption of legislation to give effect to their provisions in national legal orders.

While the definition of a refugee according to the UNHCR Statute, as well as the international instruments, emphasises individual persecution, the work of the office has evolved to take into account the changing nature of refugee flows in recent decades. In a typical contemporary scenario, UNHCR provides protection and assistance to groups of refugees fleeing combinations of persecution, conflict and widespread violation of human rights. In such circumstances, UNHCR usually bases its interventions on a general assessment of the conditions in the country giving rise to refugees rather than on an examination of each person’s individual claim to refugee status.

When UNHCR was first established, material aspects of refugee relief were seen to be the responsibility of the government that had granted asylum. However, since many of the world’s more recent major refugee flows have occurred in less developed countries, UNHCR has acquired the additional role of providing material assistance for refugees, returnees and, in specific instances, displaced people. This has become one of its principal functions, along with protection and the promotion of solutions.

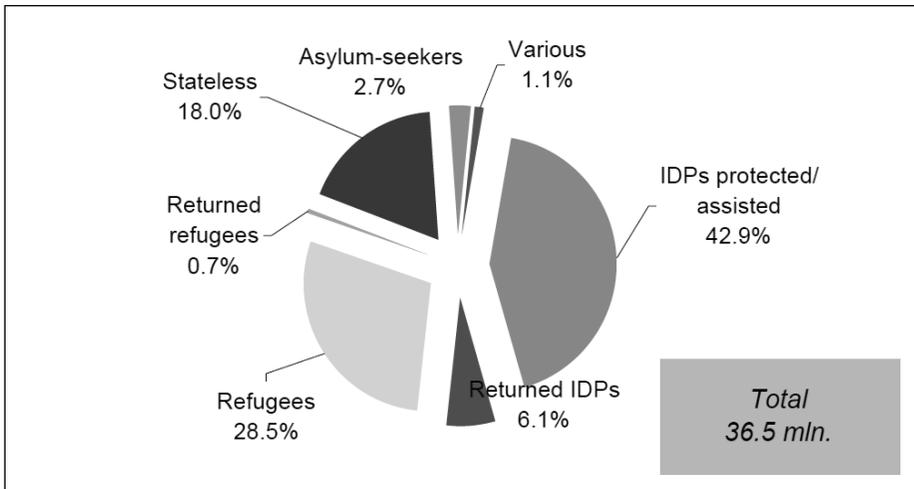
Initially, UNHCR’s mandate was limited to people outside their country of origin. Over time, however, as part of its duty to ensure that voluntary repatriation schemes are sustainable, it has become involved in assisting and protecting

returnees in their home countries. In recent years, the General Assembly and the Secretary General of the UN have called on UNHCR to protect or assist particular groups of internally displaced people who have not crossed an international border but who are in refugee-like situations in their home countries. In November 1991, for example, the Secretary General asked UNHCR to lead the efforts to provide humanitarian assistance to victims of the conflict in the former Yugoslavia. By April 1994, the UNHCR was providing massive humanitarian relief to roughly 2.8 million internally displaced persons, refugees and other vulnerable groups in Bosnia-Herzegovina.

By the end of 2009, the total population of concern to UNHCR increased from 20.8 million in 2005 to 36.46 million. Refugees, and those in refugee-like situations, constitute only 28.5% of the total population of concern to UNHCR. Internally displaced persons protected or assisted by UNHCR are the largest group under the Office's mandate, accounting for nearly 43%, followed by Stateless persons with 18%.⁴¹ By the end of 2009, the global number of refugees reached an estimated 10.4 million persons. Any decreases in the refugee population are often the result of refugees having access to durable solutions, in particular voluntary repatriation. The total population of concern to UNHCR, however, is not totally reflected in these figures, either because a significant number of Stateless people have not been systematically identified, or statistical data is unavailable despite renewed efforts on the part of UNHCR. With over 4.7 million persons, Pakistan is currently, as of 2009, the country hosting the largest population of concern to UNHCR. Approximately half of that population is refugees, and the other half internally displaced persons. Thailand is the second largest host country with some 3.6 million persons of concern, followed by Colombia (3.3 million), the Democratic Republic of Congo (2.36 million) and Iraq (2.0 million). At the end of 2009, Afghan and Iraqi refugees constituted nearly half the world's refugees, with refugees from Afghanistan numbering nearly 2.9 million, and refugees from Iraq reaching over 1.7 million.⁴²

41 UNHCR, 2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, available at <http://www.unhcr.org/4c11f0be9.html> (hereinafter 2009 Global Trends Report). The data are generally provided by Governments, based on their own definitions and methods of data collection.

42 *Id.*

Figure 2.1: Total population of concern to UNHCR by category, end-2009

Credit: UNHCR Statistics, Selected Tables of 2009 Global Trends Report, <http://www.unhcr.org/4c7bb60f9.html>.

2.3.1 Promoting and Safeguarding Refugee Rights

In order to promote and safeguard the rights of refugees, the UNHCR has stated in its Handbook on Procedures and Criteria for Determining Refugee Status that it actively attempts to do the following:

1. Encourage governments to subscribe to international and regional conventions and arrangements concerning refugees, returnees and displaced people; and ensure that the standards they set out are effectively put into practice;
2. Promote the granting of asylum to refugees, ensuring that they are admitted to safety and protected against forcible return to a country where they have reason to fear persecution or other serious harm;
3. Ensure that applications for asylum are examined fairly and that asylum-seekers are protected, while their requests are being examined, against forcible return to a country where their freedom or lives would be endangered;
4. Ensure that refugees are treated in accordance with recognised international standards and receive an appropriate legal status including, wherever possible,

the same economic and social rights as nationals of the country in which they have been granted asylum;

5. Secure lasting solutions for refugees either through voluntary repatriation to their countries of origin or, if this is not feasible, through the eventual acquisition of the nationality of their country of residence;
6. Help reintegrate refugees returning to their home country in close consultation with the governments concerned and monitor the amnesties, guarantees or assurances on the basis of which they have returned home;
7. Promote the physical security of refugees, asylum-seekers and returnees—particularly their safety from military attacks and other acts of violence—and the reunification of refugee families.⁴³

43 *Supra* note 2.

II

**INDIA AND REFUGEES:
OBLIGATIONS, LAWS AND
POLICIES**

3

INDIA AND INTERNATIONAL CONVENTIONS

3.1 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The concept of providing international protection to refugees and viewing it as a solution to human rights abuses was developed with the establishment of the UN. The UN Charter proclaims in its preamble that the primary purpose of the UN is “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”¹ Under Articles 55 and 56 of the Charter, member States pledge themselves to take action in cooperation with the UN to achieve this purpose. Article 13(1) of the Charter also confers powers on the General Assembly to initiate studies and make recommendations to assist in the realisation of human rights. It confers similar powers on ECOSOC. In addition, ECOSOC may set up commissions for the promotion of human rights. Under this authority, the UN Human Rights Council oversees compliance by member States with the United Nations Charter-based human rights obligations. The UN has developed a multifaceted and coherent system of monitoring the implementation of human rights in various States.

Some important international instruments include:

- 1948 Universal Declaration of Human Rights
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination

1 U.N. Charter art. 1, para. 3.

- 1966 International Covenant on Civil and Political Rights
- 1966 International Covenant on Economic, Social and Cultural Rights
- 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid
- 1979 Convention on the Elimination of All Forms of Discrimination against Women
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- 1985 Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live
- 1989 Convention on the Rights of the Child
- 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Other international instruments and documents relating to refugees, Statelessness and internally displaced persons include:

- 1951 Convention Relating to the Status of Refugees
- 1967 Protocol Relating to the Status of Refugees
- 1966 Principles Concerning the Treatment of Refugees
- 1954 Convention Relating to the Status of Stateless Persons
- 1961 Convention on the Reduction of Statelessness
- 1971 Protocol No. 1 Annexed to the Universal Copyright Convention, Concerning the Application of That Convention to Works of Stateless Persons and Refugees
- 1957 Agreement Relating to Refugee Seamen
- 1973 Protocol to the Agreement Relating to Refugee Seamen
- 1957 International Convention Relating to Stowaways
- 1967 United Nations Declaration on Territorial Asylum

The four 1949 Geneva Conventions provide, *inter alia*, standards for the humane treatment of prisoners and civilians during armed conflict. The Additional Protocols to the Geneva Conventions, signed in 1977, relate to the protection of victims of international and domestic armed conflict.

3.2 INDIA'S INTERNATIONAL OBLIGATIONS

India is a signatory to a number of international instruments dealing with human rights, refugee issues and other related matters. Some of the important human rights instruments are briefly discussed below.

3.2.1 Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights (UDHR) was passed by the General Assembly of the UN in 1948. The declaration was established “as a common standard of achievement for all peoples and all nations.” It states that human rights and fundamental freedoms should be universally recognised and observed by all member States.

It is pertinent to note that the UDHR is not a treaty. It was agreed by the drafters that its provisions would be further elaborated on in treaties that would create binding legal obligations for the States that are signatories to them. However, this does not diminish the importance of the Declaration, as its purpose was to provide an authoritative understanding of the human rights guaranteed in the UN Charter. It is also the most well-known UN catalogue of human rights, its significance being consistently reaffirmed in various resolutions of the General Assembly. Many national constitutions and other domestic laws have made references to the UDHR or have actually incorporated its provisions.²

The rights and freedoms set forth in the UDHR apply to everyone, 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.² While the Declaration provides for the rights and freedoms of all human beings (thereby including refugees), there are specific provisions that address refugee protection, such as Articles 13, 14 and 15. Given that the UDHR is now considered *jus cogens*, these rights are universally accepted and enforced by all State Parties, regardless

2 Self-Study Module 5, Vol. I: Human Rights and Refugee Protection, p. 46 – 47 (Dec 15, 2006), available at <http://www.unhcr.org/45a7acb72.html>.

of whether they have signed the 1951 Convention or the 1967 Protocol. Other important rights that the Declaration advocates are the right to life, protection of the law, movement and employment, as well as rights against torture, slavery, and arbitrary arrest and detention.

Table 3.1 lists the articles contained in the instruments comprising the International Bill of Rights that are relevant to refugee protection.

**Table 3.1: International Bill of Human Rights:
Articles Relevant to Refugee Protection**

Right/Protection	UDHR	ICESCR	ICCPR
<i>Category 1</i>			
Life	3		6
Torture	5		7
Slavery	4		8
Ex post facto prosecution	11(2)		(15)
Recognition as a person	6		16
Thought, conscience and religion	18		18
<i>Category 2</i>			
Arbitrary arrest and/or detention	9		9, 10
Equal protection of law	7		3, 26
Children	25(2)		24
Minorities			27
Fair criminal proceedings	10, 11		14
Personal/family privacy	12, 25	10	17, 23
Internal movement/residence	13		12(1)
Leave and return to country	13		12(2) – (4)
Opinion/expression/assembly/association	18 – 20		19 – 22
Trade union membership	20	8	22
Partake in government	21		25(a)
Access to public employment	21		25(c)
Vote in genuine elections	21		25(b)

Right/Protection	UDHR	ICESCR	ICCPR
Category 3			
Work	23	6	
Just conditions of employment	23	7	
Food/clothing/housing	25	11(1)	
Medical care	25	12	
Social security	22	9	
Basic education	26	13 – 14	
Cultural expression	27	15	
Category 4			
Private property	17		
Unemployment protection	23		

3.2.2 International Covenant on Civil and Political Rights (ICCPR)

India ratified the ICCPR on 10 April 1979. The provisions of this covenant that can be specifically applied to refugees include Articles 12(2), 12(4) and 13. Article 12(2) states that each person shall be free to leave any country, including her own. This is of course subject to any restrictions that are provided by law. Article 12(4) states that no one shall be arbitrarily deprived of the right to enter her own country.

Of greater importance is Article 13, which states that aliens (including refugees) who are lawfully residing in the territory of a State Party may be expelled only in pursuance of a decision reached in accordance with law. The refugee has the right (unless issues of national security are involved) to be allowed to submit reasons against her expulsion, have the case reviewed and be represented before a competent authority. This right is important in the refugee context as it relates to Article 33 of the 1951 Convention. The article establishes the right of *non-refoulement*—the right against expulsion of a refugee to the frontiers of a territory where her life or liberty would be threatened.

In addition to the above provisions, the ICCPR discusses the right to life and the right against torture, slavery and arbitrary arrest. It also addresses the right to equal protection of the law, fair criminal proceedings, access to public employment and the right to opinion, expression, assembly and association—all important in determining every bodied rights including the rights of refugees.

The ICCPR also provides for the establishment of the Human Rights Committee, which began functioning in 1976. The committee is composed of 18 members, elected by State Parties to serve in their individual capacity. It meets three times a year in Geneva and New York. State Parties (including India) are required to submit an initial report to the Committee a year after becoming a signatory to the covenant, and thereafter, periodic reports whenever the Committee so requests (usually every four years). These reports are then discussed and examined in public meetings. While the ICCPR does not directly deal with asylum and refugee protection, it can within its mandate refer to the asylum policies of signatory States if such a need arises.

3.2.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

India ratified the ICESCR on 10 December 1979. This covenant provides for the right to work, just conditions for employment, medical care and basic education, amongst other related rights. Article 2(3) states that developing countries, with due regard to human rights and their national economy, may determine to what extent they can guarantee the economic rights of non-nationals. By implication, this means the social and cultural rights envisaged in the ICESCR are available to all persons legally residing in the territory of the State Party.

Arguably, one of the most important rights that the Covenant secures is the right to self-determination contained in Article 1(1). In the refugee context, this would imply that the country of asylum, if it is a signatory to this covenant, must allow persons residing in its territory to practice their own culture and social habits as well as to educate themselves and pursue economic activities, imposing only the reasonable restrictions provided for in the instrument.

The Committee on Economic, Social and Cultural Rights deals with the rights enumerated in this Covenant despite the fact that the latter does not provide for such a committee. The committee meets twice a year in Geneva to consider State reports. States are required to submit an initial report within two years of ratifying the covenant and every five years thereafter. The committee consists of 18 experts who are elected by the State to serve in their individual capacity. The committee can make “Concluding Observations” on the reports, including concerns and recommendations to the State Party submitting the report.

3.2.4 Convention on the Rights of the Child (CRC)

India ratified CRC on 11 December 1992. This Convention establishes the various rights pertaining to children, including the freedom of expression, association, education, religion, medical care, privacy, legal access to courts and the right against sexual exploitation.

Specific to the refugee context, the Convention provides that a child seeking refugee status (either unaccompanied or otherwise) shall receive appropriate protection and humanitarian assistance in the enjoyment of rights set forth in the Convention and other international human rights or humanitarian instruments. In other words, a State that is party to the CRC but is not a signatory to any instrument relating to refugees, and which has not enacted any national legislation on this subject, is still obliged to provide adequate protection and assistance to the refugee child. Article 22(2) also provides for the State Party to cooperate with UN, or any related organisation, to protect and assist such a child and to trace the parents or other family members of the refugee child in order to facilitate family reunification.

Article 7 of the CRC discusses the child's right to a nationality on birth. State Parties have to ensure that this right is implemented in accordance with their national laws and obligations under the relevant international instruments in this field, especially where the child would otherwise be Stateless.

The Committee on the Rights of the Child was established under this convention and began working in 1991. It consists of 18 experts elected by State Parties to serve in their individual capacity, who meet three times a year in Geneva. State Parties are required to submit an initial report within two years of becoming signatories to the convention and every five years thereafter. Individual petitioning is not permitted under this convention.

3.2.5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)³

India ratified CEDAW on 9 July 1993. From a close examination of this instrument, it is evident that many of the articles confer rights on women that already exist in other legal instruments, such as ICCPR, ICESCR, ICERD and CAT. However,

3 Convention on the Elimination of All Forms of Discrimination Against Women, Dec 18, 1979, available at <http://www2.ohchr.org/english/law/cedaw.htm> (hereinafter CEDAW).

these rights have been emphasised keeping in mind that despite these various instruments, discrimination against women continues to exist. Of course, there are special provisions recognising the additional and important role that women hold in the State, the community and the family.

The Convention requires that State Parties ensure the protection of women from sexual exploitation,⁴ their proper medical care,⁵ and their right to education and employment.⁶ These rights are extremely important in the refugee context, since refugee women are especially vulnerable. In addition, Article 9 addresses the right of women to change or retain their nationality. The concern is that after marriage to an alien, a woman may be rendered Stateless, acquire a new nationality against her own volition or automatically have her nationality changed. In this context, many countries ensure that the woman's nationality does not automatically change after marriage or under other such circumstances.

Similarly, Article 9(2) allows women equal rights with men in respect of the nationality of their children. Article 15 again ensures that the law concerning movement of persons and the freedom to choose one's residence and domicile should be equally accorded to men and women.

CEDAW also establishes a committee that consists of 23 experts serving in their individual capacity. State Parties are required to submit an initial report within one year of becoming a signatory to the Convention, and then periodic reports to the committee every four years. While an individual petitioning mechanism has not been incorporated, the committee can study the issue of refugee women.

3.2.6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁷

India signed the Convention Against Torture on 14 October 1997, but has yet to ratify it. Two important articles relating to refugees under this Convention are Articles 2 and 3.

Article 2 calls on State Parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture. The regime envisaged under this

4 Id. at art. 6.

5 Id. at art. 12.

6 Id. at art. 10-11.

7 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec 10, 1984, available at <http://www2.ohchr.org/english/law/cat.htm> (hereinafter CAT).

convention is strict in that there are no exceptions to the obligation imposed on the State Party. This makes it one of the most effective human rights instruments. CAT has often been used where the 1951 Convention has failed.

Article 3 of the CAT is one of the most important provisions in international human rights law relating to refugees. It is one of the few articles, apart from Article 33 of the 1951 Convention, to provide for *non-refoulement*. The provision states that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that she would be in danger of being subjected to torture. To determine whether there are such grounds, competent authorities are required to take into account various relevant considerations, such as consistent patterns of gross, flagrant or mass violation of human rights. Given that refugees often flee from persecution in the form of torture, this provision is extremely relevant in protecting their rights of *non-refoulement*. Various judgements have been given by international judicial bodies, including the European Court of Human Rights that prohibit the *non-refoulement* of persons to countries where they have been tortured, or anticipate possible torture or other cruel, inhuman or degrading treatment or punishment.

The Convention established a Committee against Torture in 1988, which consists of 10 members elected by State Parties to serve in their individual capacity. The committee receives State reports (an initial report needs to be submitted a year after becoming a signatory to the convention; thereafter, a report needs to be submitted every four years). It has started accepting individual communication only recently. However, individual petitioning can only be done if the State Party makes a formal declaration under Article 22 of the Convention. The committee has opined on various cases that are considered to be at the cutting edge of international human rights law.

3.2.7 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁸

ICERD was ratified by India on 3 December 1968. It defines racial discrimination as follows:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of

8 International Convention on the Elimination of All Forms of Racial Discrimination, Jan 4, 1969, available at www2.ohchr.org/english/law/pdf/cerd.pdf [hereinafter ICERD].

*nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*⁹

While the Convention does not prevent a State from discriminating between citizens and non-citizens residing within its territory, it does not allow a State to violate the human rights of non-nationals. ICERD sets out a regime against discrimination—a factor that creates refugees in the first place, as well as problems for the refugees when in the country of asylum.¹⁰

The Convention also establishes a Committee on the Elimination of Racial Discrimination, which began working in 1965. It is composed of 18 experts elected to serve in their individual capacity. The committee considers State Party reports twice a year in Geneva; State reports are due one year after acceding to the Convention, and every two years thereafter. The committee can make concluding remarks regarding the national practices of a country and recommend appropriate changes. ICERD expects State Parties to include information on non-citizens as well, since it may reflect State practices pertaining to racial discrimination. Individual complaints are entertained upon the State Party making a declaration under Article 14, submitting to the jurisdiction of the committee for this purpose.

Table 3.2 lists some of the rights guaranteed by the instruments discussed above, which are relevant to refugees.

Table 3.2: Other International Instruments: Rights Relevant to Refugees

Right	CRC	ICERD	CAT	CEDAW
Torture			2	
Sexual exploitation	34			6
Expression, thought, conscience, religion	12–14, 30	5(d)(vii)5(d)(viii)		
Non-refoulement			3	
Legal assistance/access to courts	37(d)			

⁹ Id. at art. 1, para. 1.

¹⁰ E.g., South Africans who fled as a result of the racial discriminatory policies adopted during apartheid. See s. 1.1.3, *supra*, on persecution based on race.

Right	CRC	ICERD	CAT	CEDAW
Child	3			
Refugee children	22			
Association/peaceful assembly	15	5(d)(ix)		
Enter/depart from a country		5(d)(ii)		
Movement/residence		5(d)(i)		
Nationality	7	5(d)(iii)		9
Employment		5(e)(i)		11
Social security	26, 27	5(e)(iv)		
Medical care	24, 25			12
Education	28, 29	5(e)(v)		10
Privacy	16			

3.2.8 Convention on the Prevention and Punishment of the Crime of Genocide (CPCG)¹¹

CPCG was ratified by India on 27 August 1959. The Convention makes genocide a crime under international law and allows perpetrators of the crime to be punished, regardless of whether they are acting in a public or private capacity. It must be kept in mind that the act of genocide has always resulted in massive refugee flows—some so large that the international community has been severely stretched in its attempts to cope with them.

From a legal standpoint, while this convention does not directly relate to refugee protection, it certainly deals with mechanisms that prevent the problem of refugees from arising in the country of origin. The perpetrators of the crime of genocide and related crimes are now being held accountable; the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are prime examples of this.

A further development in the effort to bring war criminals to justice is the creation of the International Criminal Court (ICC), which is competent to try genocide,

11 Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948, available at <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html> (hereinafter CPCG).

crimes against humanity and crimes of war, as well as various related crimes. The Rome Statute, the ICC's founding treaty, was adopted in 1998 and ICC's jurisdiction commenced on July 1, 2002. Until now 139 countries have signed and 113 countries have ratified the ICC treaty but countries such as India, United States, China and Pakistan have neither signed nor ratified the said treaty.

3.2.9 International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPA)

ICSPA was ratified by India on 22 September 1977. It was adopted in light of the post-colonial structure of many African States. This was especially true in South Africa where apartheid was not only practised but also endorsed by State policy which resulted in a massive refugee influx to India.

3.2.10 Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live

The Declaration was adopted by the UN General Assembly on 13 December 1985.¹² While this is not a binding instrument, it nevertheless articulates the various rights and obligations of the State and of foreigners. For instance, Article 4 States that aliens shall observe the laws of the State in which they reside and respect the customs and traditions of the people in that State. Article 5 states that aliens shall be treated according to the domestic and relevant international obligations of the State in which they reside. Furthermore, aliens are protected against arbitrary arrest or detention; are given the right to be equal before the courts and other judicial and administrative authorities; have freedom of thought, opinion, conscience and religion; and have the right to retain their own language, culture and tradition. Aliens also have the right (subject to various restrictions) to leave the country. Article 7 speaks of expulsion only in accordance with the law and reflects the spirit of Article 13 of ICCPR.

3.2.11 Other Obligations

India has ratified, through the General Assembly, the United Nations Declaration on Territorial Asylum on 14 December 1967, which strengthens her obligations of protection, asylum and *non-refoulement*.

India explicitly accepted the principle of *non-refoulement* while affirming the Bangkok Principles in 1966. The Bangkok Principles embody the recommendations

¹² G.A. Res. 40/144, U.N. Doc. A/RES/40/144 (Dec 13, 1985), available at <http://www.un.org/documents/ga/res/40/a40r144.htm>.

of the 8th Session of the Asian-African Legal Consultative Organisation, which were formulated for the guidance of member States regarding the status and treatment of refugees. The principles contain provisions relating to repatriation, right to compensation, grant of asylum and minimum standards of treatment in the State of asylum. They emphasise that the concept of *non-refoulement* has generally been accepted as a principle of customary international law, making it binding on India and other countries, even if they have not ratified the 1951 Convention.

India is also a party to the International Labour Organisation's Convention No. 118, which provides for social security to refugees and Stateless persons in addition to other persons in the territory of the signatory State. Additionally, India has been a member of ExCom since 1995. ExCom, a body composed of 79 member States, oversees UNHCR's budget and advises the Commissioner on refugee protection.¹³ In order to be a member of ExCom, the member State must have demonstrated interest in and devotion to the solution of refugee problems.¹⁴ ExCom holds an annual session in Geneva every October, which approves programmes for the next calendar year and sets the financial targets needed the implementation. ExCom has a standing committee that meets at least four times a year, with the precise number of meetings being determined by the requirements of good governance.

3.2.12 International Human Rights Instruments Ratified by South Asian States

Table 3.3 shows the extent to which South Asian States have signed, acceded and ratified the main human rights instruments. It is clear that India has played a leading role in the protection of human rights in the region.

Table 3.3: International Human Rights Instruments Ratified by South Asian States

Instrument	Pakistan	Bangladesh	Bhutan	India	Maldives	Nepal	Sri Lanka
International Covenant on Economic, Social and Cultural Rights	3 Nov 2004	5 Oct 1998		10 Apr. 1979		14 May 1991	11 Jun. 1980
International Covenant on Civil and Political Rights		6 Sept 2000		10 Apr. 1979	19 Sept 2006	14 May 1991	11 Jun. 1980
Optional Protocol to the International Covenant on Civil and Political Rights					19 Sept 2006	14 May 1991	03 Oct. 1997

13 UNHCR – Executive Committee, <http://www.unhcr.org/pages/49c3646c83.html>.

14 UNHCR – How to Apply for ExCom Membership, <http://www.unhcr.org/pages/49dca6506.html>.

Instrument	Pakistan	Bangladesh	Bhutan	India	Maldives	Nepal	Sri Lanka
International Convention on the Elimination of All Forms of Racial Discrimination	21 Sep. 1966	11 Jun. 1979	26 Mar. 1973(S)	03 Dec. 1968	24 Apr. 1984	30 Jan. 1971	18 Feb. 1982
Convention on the Prevention and Punishment of the Crime of Genocide	12 Oct. 1957	5 Oct 1998		27 Aug. 1959	24 Apr. 1984	17 Jan. 1969	12 Oct. 1950
Convention on the Rights of the Child	12 Novs 1990	03 Aug. 1990	01 Aug. 1990	11 Dec. 1992	11 Feb. 1991	14 Sep. 1990	12 Jul. 1991
Convention on the Elimination of All Forms of Discrimination against Women	12 Mar. 1996	08 Nov. 1984	31 Aug. 1981	09 Jul. 1993	01 Jul. 1993	22 Apr. 1991	05 Oct. 1981
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment		5 Oct 1998		14 Oct 1997 (S)	20 April 2004	14 Oct. 1991	03 Jan. 1994
International Convention on the Suppression and Punishment of the Crime of Apartheid	27 Feb. 1986	05 Feb. 1985		22 Sep. 1977	24 Apr. 1984	12 Jun. 1977	18 Feb. 1982

Note: A date indicates ratification, while an (S) indicates that the nation is solely a signatory to the treaty.

4

REFUGEES IN INDIA

4.1 INTRODUCTION

India has received a large number of refugees due to her unique geography, liberal democratic polity and multi-ethnic society. In addition, India is surrounded by countries whose conditions produce refugees. This has resulted in the flight of refugee groups, who enter India via her porous borders to seek protection. These groups are motivated by the desire to cross an international border merely to reach a safe zone where their lives and liberty may be secure.

Refugees enter and stay in India legally and illegally. They may legally arrive in the country with a valid passport, on an Indian visa or an entry permit, like any other foreigner. Refugees sometimes enter the country with relevant travel documents that are forged or fabricated. In other instances, they surreptitiously cross the vast, unmanned Indian borders by road or sea, without appropriate travel documents. It should be reiterated that asylum-seekers under international law need not possess valid travel documents in order to claim refugee status—i.e., the refugee claim would be considered whether or not the applicant has valid travel documents.¹⁵

When refugees enter India illegally, it is possible for the government to waive the travel rules and regulations regarding their entry and stay in the country. Such waiver may be express or implied by the conduct of the government in permitting the privileged group of refugees into India. The Tibetans are one such example of refugees who entered India without any travel documents but who have been allowed to reside in the country and even use travel documents issued by the Government of India.

¹⁵ See 1951 Convention, *supra* note 6, at art. 31.

Once in India, legally or illegally, refugees may face a problem residing in the country. This is because either their travel or stay documents (Indian visa, for instance) have expired, or they are unable to renew them, or they were never able to acquire any documents to begin with. Occasionally, Foreigners Regional Registration Office have refused to issue or renew residential permits because the refugees did not have valid passports. Again, this should not exclude them from being treated as refugees under international law.

Varying treatment has been accorded to different groups of refugees with respect to their stay in India. The policies that govern different refugee groups are rarely formalised as written rules; they can be inferred from the actions of the government. This may create some ambiguity in the minds of lawyers who are accustomed to dealing with codified rules and regulations. It is therefore very important for lawyers practising refugee law to keep abreast of the latest developments in this field.

Refugees in India can be classified as mandate and non-mandate refugees. Those who are under the protection of UNHCR are known as mandate refugees. Most of the refugees in India are non-mandate refugees. They are under the direct protection of the Indian government, which prefers to discuss refugee issues at a bilateral level with the countries concerned.

4.2 MANDATE REFUGEES IN INDIA

4.2.1 Afghan Refugees

Following the Soviet intervention in Afghanistan in December 1979, a large number of Afghan Sikhs and Hindus, along with ethnic Afghans, took refuge in India. The second major influx of Afghan refugees began in 1991–92, after the fall of the Najibullah regime. The arrival of the third batch of refugees was simultaneous with the Taliban takeover in Afghanistan. Although the Indian government does not officially treat them as refugees, UNHCR recognises them as such under its mandate and assists them. According to UNHCR records, as of 31 August 2010 (please update these statistics), there were 9,068 Afghan refugees living in India, who are classified as refugees under the mandate of UNHCR, with another 2,134 seeking asylum.¹⁶ Of these, 3% refugees are ethnic Afghans and the rest of the

16 UNHCR Newsletter New Delhi, vol. 10 issue 4 (Jul/Aug 2010), available at <http://www.unhcr.org/4c98b2c89.html>.

refugees are Hindu and Sikh Afghans. The Indian government has issued most of the Afghan Nationals valid residential permits, thus allowing them to stay in the country until a durable solution is found.

4.2.2 Iranian Refugees

Iranian refugees fled their country following the Islamic revolution in 1979, which led to the downfall of the Shah of Iran and the emergence of the Islamic fundamentalist government under the leadership of Ayatollah Khomeini. Prior to these developments, many Iranian students were studying in India in various educational institutions. Following the political upheaval, they could not return to their country of origin and claimed refugee status. They had come to India on valid travel documents and subsequently became mandate refugees *sur place*. Some of the Iranians fled in opposition to the last political regime, while others have done so on grounds of religious intolerance.

4.2.3 Sudanese, Somalian and Iraqi Refugees

Small numbers of Sudanese, Somalian and Iraqi visitors have been arriving in India since the 1960s for purposes of education, travel, and minor business dealings. When strife in their countries resulted in persecution, some of those already in India continued to stay and sought protection from the government, fearing persecution on their return. As the situation in these countries is further deteriorating refugees are still trickling, and they are considered to be mandate refugees in India by UNHCR. As of 31 August 2010, there were 1,083 mandate refugees of other (non-Afghan, non-Myanmar) nationalities including Sudanese, Somalis, and Iraqis.¹⁷

4.2.4 Refugees from Myanmar

In 1989, the Myanmar Military Junta government started suppressing the pro-democracy movement, provoking around 3,000 Burmese refugees to cross into Indian territory. Responding to this influx at the Indo-Myanmar border, a spokesperson of the Ministry of External Affairs of the Government of India stated that, in accordance with well-accepted international norms defining refugee status, no genuine refugee from Myanmar would be turned back. He added that the troops on the Indo-Myanmar border had been strictly instructed not to return

17 Id.

any refugee to Myanmar. These refugees were camped in Mizoram. Further, in the case of two Burmese students who hijacked a Thai airliner to India, the government refrained from deporting them either to Myanmar or Thailand.

Today, when the political situation is unlikely to change, refugees from Myanmar continue to come into India through Mizoram. While some of them are content with crossing the border into that State, many have come to New Delhi and have been recognised as mandate refugees by UNHCR. As of 31 August 2010, the UNHCR has registered 4,057 refugees from Myanmar, with another 4,484 seeking asylum.¹⁸

The total number of refugees in India registered with UNHCR as of 31 August 2010 is 14,208, with another 6,932 seeking asylum.¹⁹

4.3 NON-MANDATE REFUGEES IN INDIA

4.3.1 Refugees during Partition of India

The creation of India and Pakistan in 1947 caused one of the world's largest population displacements in recent history. Nearly 8.5 million people migrated from India to Pakistan and 6.5 million from Pakistan to India. Indeed, some estimates indicate that the figure of displaced persons may have been as high as 25 to 30 million. These refugees were in immediate need of food, shelter, medical aid and money. The Indian government efficiently settled them. Despite being in a nascent stage, it took necessary legislative and administrative measures to address the problem. The former included the promulgation of various acts of Parliament, such as the Rehabilitation Finance Administration Act, 1948, and the Displaced Persons (Claims) Act, 1950. On the administrative side, a Special Ministry for Refugees was created in the Central Government, with branches in the States. It was their responsibility to look into problems relating to transport, communication, livelihood and agricultural land.

Some acts of Parliament referred to these persons as "displaced persons". A displaced person, according to these acts, is "a person, who, being displaced from any area (now forming part of Pakistan) on account of civil disturbances or fear of such disturbances, has settled and is engaged or intends to engage in

18 *Id.* /.

19 *Id.*

any business or industry in India.” Other pieces of legislation referred to them as “evacuees”. Given that some of these laws were made as early as 1947 (when the 1951 Convention had not come into force), Parliament did not pay attention to the nomenclature. Regardless of the terminology, the desired objective of assisting these displaced persons was met.

4.3.2 Refugees from Tibet

India faced another refugee influx in 1959 following the Chinese invasion of Tibet leading to political unrest. The Government of India granted political asylum to the Dalai Lama, the political and spiritual head of the Tibetan people. After a preliminary screening procedure, Tibetans were registered as refugees and given registration certificates. These certificates of identity enabled them to be gainfully employed, engage in economic activities, and even travel abroad and return to India at will. Many refugees were settled near the hill stations of northern India, since the mountainous landscape was similar to their original environment in Tibet. Others were relocated to the distant Indian states of Karnataka and Orissa. The Indian government implemented schemes for the rehabilitation of Tibetan refugees in agricultural settlements and also through self-employment. They enjoy basic amenities like education and health care.

Tibetan refugees fled their country of origin in order to save their lives, religion and culture, thereby amounting to flight due to fear of persecution. Thus, they are refugees in the political sense, and most of the benefits derived from the refugee status are made available to them. Tibetan refugee inflows have not ceased, and there are an estimated 10,00,000 Tibetans in India today.

In exercise of the powers conferred by Section 3 of the Registration of Foreigners Act, 1939, and Section 3 of the Foreigners Act, 1946, the Central Government issued S.R.O.1108, dated 26 December 1950, regulating the entry of Tibetan nationals into India. The order states:

Any foreigner of Tibetan Nationality, who enters into India hereafter shall

- 1. At the time of his entry into India, obtain from the officer in-charge of the police post at the Indo-Tibetan frontier, a permit in the form specified in the annexed schedule;*
- 2. Comply with such instructions as may be prescribed in the said permit;*
- 3. Get himself registered as a foreigner and obtain a certificate of registration.*

4.3.3 Bangladeshi Refugees

1971 East Pakistani Refugees

A major consequence of the 1971 Indo-Pak War was a massive exodus of nearly 10 million refugees from East Pakistan into Indian territory. The Indian government established camps in order to accommodate these refugees and provide them with food and medical care. UNHCR also offered relief by undertaking mountain operations on the Indian and Pakistani sides of the border.

Bangladesh was recognised as an independent and separate State by India on 6 December 1971. Subsequently, the Governments of India and Bangladesh made arrangements for the return of refugees. It was agreed that Bangladesh would take back all its nationals who had arrived in India after 25 March 1971. While most of them returned, nearly 100,000 people chose to stay back and were integrated with the local population. This subsequently gave rise to great unrest in Assam. The “outsider” question was partially resolved by the Assam Accord of 1985.

Chakmas from Bangladesh

Chakmas belong to the Tibet-Burmese language family. Most of them migrated from Myanmar to the Chittagong Hill Tracts (CHT) region, now in Bangladesh. They have been fighting for developmental autonomy since the British period. The Kaptai Dam Project (1957–62)—which deprived 100,000 tribals of their land (40 percent was arable) following the submergence of over 5,400 acres of agricultural land—heightened this discontent. As a result, over 40,000 Chakmas left for India and settled in many parts of the north-east region, including Arunachal Pradesh.

Due to the Islamisation of Bangladesh, and also because of a scheme for the settlement of Bengali Muslims in CHT, a conflict arose between the Chakmas and these settlers. In 1979, about 18,000 Chakma tribals fled to the Indian border from CHT and entered Mizoram. By June 1986, the number of Chakmas who had surreptitiously entered India to seek refuge reached 24,000. Though repatriation of some Chakma refugees did take place, government figures tabled in Parliament indicate that there were 51,000 Chakmas in India in 1994.

There are varied reasons for the flight of the tribal Chakma refugees. These include elements of both persecution, based on ethnicity, and a man-made disaster. The immediate cause of flight, however, was the conflict between the Muslim

settlers and the indigenous people. Therefore, the obligation to protect them was primarily humanitarian.

The Indian government established camps for the Chakma refugees. Most of them were settled in the states of Assam and Tripura and were granted citizenship by the Central Government in due course. Other Chakmas were settled in parts of North-East Frontier Agency, now Arunachal Pradesh. They were allotted some land after consultation with the local tribals. The Central Government also sanctioned grants for their rehabilitation and promised to grant citizenship to the remaining refugees. Controversy between the Chakmas, the state administration, the local population and the Central Government has persisted over the years and been the subject of three cases that have reached the Supreme Court. There is considerable resentment among the indigenous people who feel they have been wronged by the grant of land by the government to refugees in the tribal areas. The influx of refugees, IDPs and economic migrants into tribal areas has, in some instances, reduced the local population to a minority, generating much anger.

4.3.4 Sri Lankan Tamil Refugees

Sri Lanka gained its independence on 4 February 1948. Ethnic conflict between the Tamil minority and the Sinhalese majority started soon after the independence order was promulgated in and took a violent turn in July 1973. Tamil homes and business establishments in Colombo were systematically destroyed, after which the violence gradually spread to other towns in Sri Lanka. The Tamils sought refuge in camps or fled to Jaffna—a Tamil stronghold in the north. Since the government was unable to guarantee the safety of their lives and property, many of them decided to seek refuge in India. More than 1, 25,000 people have crossed over to India since July 1983 and have been granted refugee status in and around Tamil Nadu. Many of these refugees are given identity documents and a small amount of financial assistance, along with subsidised food grain. They are generally permitted free movement, although there is mandatory physical attendance a few times a month. Specific permission may be granted for travel outside the area. Sri Lankan refugees are permitted to work mostly as unskilled labour; no formal work permits are issued. The government also provides basic health and education facilities. In cases where the refugee is considered to be a threat to national security, the refugee is detained under the Foreigners Act, 1946, for illegal entry and stay in

India. There have been such instances despite the issuance of refugee identity documents by the administration.

Around 54,000 Tamil refugees have been repatriated to Sri Lanka following an agreement between the Sri Lankan and Indian governments. Others have been repatriated with the assistance of UNHCR. However, due to the unstable political conditions in Sri Lanka, there has been a further influx of refugees into India. While many returnees moved into camps for internally displaced persons, several others have returned to India. UNHCR interviews those who wish to return and verifies the voluntary nature of their repatriation from India.

The Sri Lankan government and UNHCR signed a Memorandum of Understanding on 31 August 1987 under which UNHCR agreed to provide rehabilitation assistance to refugees and the displaced in Sri Lanka. Pursuant to this agreement there has been some return to Sri Lanka. Due to the fluid situation in the country the repatriation has, however, not been sustainable. There have also been periods when repatriation was in progress when a ceasefire was announced, like in 2005, only to be disrupted by violence soon after. Since 2006, with the changing situation and deteriorating security situation, there has been a steady flow of refugees into India.

Though the reasons for their flight have elements of both persecution and human rights violations, Sri Lankan Tamils are humanitarian refugees since their flight is motivated by the unstable situation in their country. They are recognised as refugees by the Government of India and are taken care of accordingly. As of 31 August 2010, there is an estimated 72,000 Sri Lankan refugees in India.²⁰

20 Id.

Figure 4.1: Refugee Movements from Neighbouring Countries into India

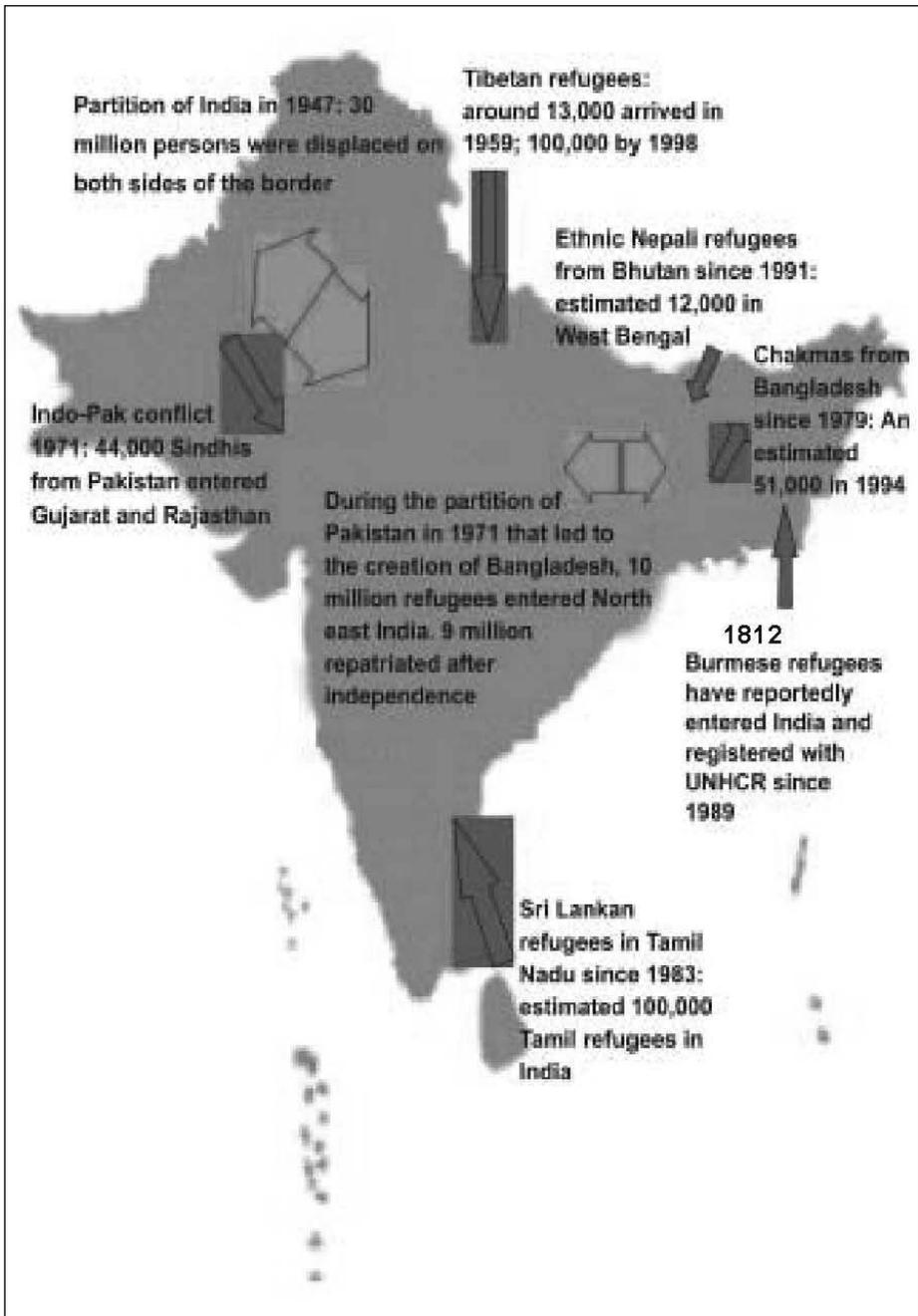


Figure 4.2: Refugee Movements from Non-neighbouring Countries into India



4.3.5 Sindhi Refugees from Pakistan

In the wake of the 1971 conflict with Pakistan, about 44,000 Sindhi refugees came to India, entering mainly through Rajasthan and Gujarat. This was in addition to those who crossed over from East Pakistan-present day Bangladesh. These refugees have integrated very well into the local Sindhi community in India.

4.3.6 Bhutanese Refugees

Since March 1991, ethnic Nepali Bhutanese nationals have entered the district of Jalpaiguri in West Bengal due to persecution. They enjoyed free movement between Nepal and Bhutan and were thus influenced by the ethnic and cultural lifestyle of Nepal. In 1989, the Bhutanese government introduced the policy of *driglam Nam Zha* (revival of traditional Bhutanese culture), which was viewed by the Nepali Bhutanese as an attempt to suppress their culture. They launched a civil movement, which was resisted by the government. Fearing arrests, unlawful detention and torture, the Nepali Bhutanese escaped to India.

The Indian government has neither acknowledged presence, provided relief nor extended any assistance to Bhutanese refugees. They are mostly staying in the north-eastern states and in West Bengal. Reports indicate that the local people provide shelter to these refugees. They earn a living through self-employment in animal husbandry and find work in agriculture and the informal sector. The Indian government has not yet formulated any policy statement regarding the Nepali Bhutanese.

4.3.7 Ugandan Refugees

Some Ugandan citizens of Indian origin came to India as refugees following the repressive and racial policies pursued by Idi Amin in 1972. While some of them settled in India, others left for England. In this case, the Government of India passed the Foreigners from Uganda Order, 1972, and assisted in their rehabilitation.

Though humanitarian considerations have generally guided India's policy on refugee assistance, there is no formal refugee assistance policy, and various refugee groups have been accorded. It is necessary to codify the refugee assistance policy in order to make it predictable and consistent. Having refugee-specific legislation

can put an end to the *ad hoc* treatment of different refugee groups. The principle of equality before the law and the sense of fair play imply that there must be one yardstick for dealing with similar problems. There should not be different policies and laws governing the treatment of various refugee groups.

5

LAWS RELATING TO REFUGEES IN INDIA

India does not have specific legislation that is applicable to all the refugees in the country. Due to the lack of such a statute, the judicial system is forced to invoke laws that are applicable to foreigners in general, such as the Foreigners Act, 1946. The exception to this rule is the legislation that has been passed regarding specific groups of refugees, like the Tibetans. Laws have also been enacted relating to large-scale refugee movements during the partition of India in 1947 and the partition of Pakistan in 1971. These acts regulate the movement of refugees and address issues relating to their rehabilitation and the award of compensation. The concept of “refugee law” in the Indian judicial system has evolved over a period of time. This chapter takes a brief look at the refugee-specific legislation that has been passed since India’s independence. It also examines the national legislation which regulates the stay of foreigners and refugees in India as well as the constitutional rights which are applicable to refugees.

5.1 LAWS FOR REFUGEES, EVACUEES AND DISPLACED PERSONS

A number of legislative measures dealing with refugees were passed and issued under the Seventh Schedule of the Constitution of India. Although many of them have lost their importance in the current context, they provide useful legislative precedents. Given below is the legislation that was enacted following the partition of India and before the Indian Constitution came into effect:

- East Punjab Evacuees (Administration of Property) Act, 1947
- UP Land Acquisition (Rehabilitation of Refugees) Act, 1948

- East Punjab Refugees (Registration of Land Claims) Act, 1948
- Mysore Administration of Evacuee Property (Emergency) Act, 1949
- Mysore Administration of Evacuee Property (Second Emergency) Act, 1949

Once the Constitution of India came into operation, the following acts were passed relating to refugees, evacuees and displaced persons:

- Immigrants (Expulsion from Assam) Act, 1950
- Administration of Evacuee Property Act, 1950
- Evacuee Interest (Separation) Act, 1951
- Displaced Persons (Debts Adjustment) Act, 1951
- Influx from Pakistan (Control) Repelling Act, 1952
- Displaced Persons (Claims) Supplementary Act, 1954
- Displaced Persons (Compensation & Rehabilitation) Act, 1954
- Transfer of Evacuee Deposits Act, 1954
- Foreigners Law (Application & Amendment) Act, 1962
- Goa, Daman & Diu Administration of Evacuee Property Act, 1969
- Refugee Relief Taxes (Abolition) Act, 1973²¹

All these laws, to some extent, have a bearing on the wider implications of the term “refugees.”

5.2 INDIAN CONSTITUTIONAL LAW

Article 21 of the Constitution declares that no person, whether a citizen or an alien, shall be deprived of her life or personal liberty except in accordance with a procedure established by law that must be fair.

The Constitution of India expressly incorporates the concept of common law, which means that prior judicial decisions help define the current state of the law. The courts themselves have gone further and elevated the power of judicial

21 List of legislation compiled by Prof. V. Vijayakumar, Professor of Refugee Law, National Law School of India University, Bangalore.

review to the status of one of the basic structures of the Constitution, thus making this precept unamendable.²²

Article 51 asserts that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another. Article 51 is a directive principle of State policy, indicating the spirit in which India approaches her international relations and obligations.

The Indian system is a common law system. Article 253 of the Constitution clearly states that, "Parliament has 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 country or countries or any decision made at any international conference, association or other body." Read with entry 14 of the union list of the Seventh Schedule, which declares that is a Union power to "enter into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries," there is a clear understanding that the power to enter into treaties carries with it the right to encroach on the State list to enable the Union to implement a treaty. Therefore, any law made in accordance with this Article that gives effect to an international convention shall not be invalidated on the ground that it contains provisions relating to the State subjects.

In *Nilabati Behera vs State of Orissa* (1993 (2) SCC 746), a provision in the ICCPR was referred to in support of the view that the right to compensation should be a guaranteed right, and available as a public law remedy under Article 32, which is distinct from private law remedy in torts. The court held that "[a]ny 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." Thus, there is no reason why these international conventions and norms cannot be used for construing and substantiating the fundamental rights expressly guaranteed in the Constitution of India.²³

There is a common misconception prevailing in Indian legal circles that international conventions are not enforceable in Indian courts unless a statute is enacted.²⁴

22 Mrs. Indira Gandhi vs. Raj Narain, 1975 (SC) AIR 2299.

23 Colin Gonsalves, *The Somewhat Automatic Integration of International Refugee Conventions in Indian Law*, *Bulletin on International Humanitarian Law and Refugee Law*, Vol. 3 issue 2, 247-254 (1998).

24 *Id.*

This misconception is based on the American and English position, but ignores the specificities of the Indian Constitution. The clearest discussion on the issue is found in *Maganbhai Ishwarlal Patel vs Union of India* (1969 (3) (SC) AIR 783).

Making of law... is necessary when (international) treaty or agreement operates to restrict the rights of the citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measures are needed to give effect to the agreement or treaty.

Thus, if the use of executive power restricts or infringes the rights of citizens or others, or modifies any laws, that exercise of power must be supported by legislation. Where there is no such restriction or infringement of rights or modification of laws, the executive is competent to exercise power and international commitments are automatically enforceable in the state's courts.

In *Maganbhai Ishwarlal Patel vs Union of India*, the Supreme Court relied on Article 73(1) of the Constitution. This article states:

Subject to the provisions of the Constitution, the executive power of the Union shall extend:

- a) To all matters with respect to which Parliament has power to make laws; and*
- b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.*

The Court also relied on Article 253 of the Constitution, which empowers Parliament to make laws for implementing a treaty, agreement or convention. A common misconception is that this article implies that unless such a statute is enacted, the treaty, agreement or convention cannot be enforced. The Supreme Court rejected this argument, saying that it proceeded from a misreading of Article 253. While the article confers upon Parliament a certain power, it does not seek to circumscribe the extent of the power conferred by Article 73.

Our Constitution makes no provisions making legislation as a condition of entering into an international treaty either in times of war or peace. The Executive is qua the State competent to represent the State in all matters in international forum and may by an agreement, convention or treaty incur obligations which in international law are binding upon the State.

The decision of the Court means that if an international instrument or resolution augments the rights of the citizens, it is directly enforceable. However, if the instrument or resolution restricts the existing rights of the citizens it requires the enactment of a statute before it can be enforced.

In *Gramophone Company of India Limited vs Birendra Pandey* (1984 (SC) AIR 677), the Supreme Court held:

There can be no question that nations 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 the 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.

In *Apparel Export Promotion Council vs A.K. Chopra* (1999(1)(SC) 756), the Supreme Court also reiterated the same principle and held that in cases involving violations of human rights, the Courts must forever remain aware of the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.

The position is thus quite clear. If an international convention runs counter to an Indian statute, it cannot be relied upon. If, however, the convention does not clash with any Indian law, then it must be accommodated and absorbed into domestic law.

The Supreme Court relied on the decision of Lord Denning in *West Rand Central Gold Mining Company vs. The King* (1905(2) KB 391):

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

The same proposition was also advanced by Chief Justice Lord Latham in *Politics vs The Commonwealth*. He held there was no doubt that if international law conflicted with national law, the former must yield to the latter; the main task however was to interpret statutes, as far as the language permits, to not be inconsistent with international law. It is therefore not a question of the power

of the Commonwealth Parliament to legislate in breach of international law, but whether in fact it has done so. This was stated in almost identical language by the Supreme Court of India in *Tractoro Export vs Tarapore and Co.* (1970 [3] SCR 53).

In *People's Union for Civil Liberties vs Union of India* (1997 (3) SCC 433), the Supreme Court held:

The provisions of the Covenant which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can certainly be relied upon by the courts as facets of those fundamental rights and hence enforceable as such.

There is therefore a clear enunciation of the principle that since fundamental rights are capable of an ever-expanding definition, international instruments may be incorporated into fundamental rights and enforced in this manner.

This was upheld by the Supreme Court in the case of *Vishaka vs State of Rajasthan*.²⁵ The court affirmed this principle and observed that:

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 (g), and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and contents thereof, to promote the object of the constitutional guarantee.

Referring to CEDAW, the Supreme Court further held that international convention and norms are to be read into fundamental rights in the absence of an enacted domestic law when there is no inconsistency between them. The court also approvingly referred to the decisions of the High Court of Australia in *Minister for Immigration and Ethnic Affairs vs Teoh* ((128) Aus LR 353). The High Court recognised the concept of legitimate expectation in the context of observance of international law, in the absence of a contrary legislation provision and even in the absence of a Bill of Rights in the Australian Constitution.

The position therefore is that even if a treaty, convention or resolution is not ratified or agreed to by India, the courts are still at liberty—provided there exists

25 1997 [6] SCC 241.

no Indian law to the contrary—to incorporate these conventions, treaties and resolutions into Indian law and thereby enforce them.

There are several provisions of international covenants that would be relevant to refugees, if utilised by the courts. First, there is the UDHR, Article 14(1) of which states: “Everyone has the right to seek and enjoy in other countries asylum from persecution.”

Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose, before the competent authority or a person or persons especially designated by the competent authority.

Article 22 of the CRC states:

State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether accompanied or unaccompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are parties.

For this purpose, State Parties shall provide, as they consider appropriate, co-operation in any effort by United Nations and other competent intergovernmental organisation cooperating with the United Nations to protect and assist such a child and to trace the parents or other members of the family or any refugee child in order to obtain information necessary for reunification with his or her family. In case where no parents or other member of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Neither the Citizenship Act, 1955, nor the Foreigners Act, 1946, deals with the issue of refugees. Refugees, as compared to other persons who enter the country illegally, are a distinct group because they are governed by the “doctrines of necessity.” They have been compelled to enter the country or to reside in the country because of a well-founded fear of persecution in their country of origin.

If there exists a “reasonable apprehension,” or a “well-founded fear of persecution,” or “a clear and present danger,” as in the case of *National Human Rights Commission vs State of Arunachal Pradesh* (1996 [1] SCC 742), foreigners would be entitled to the protection of Article 21 of the Constitution, and the state government would be required to act impartially and carry out its legal obligations to safeguard the life, health and wellbeing of foreigners. In this case, the All Arunachal Pradesh Students Union (AAPSU) had issued a “Quit India” notice to all alleged foreigners, including Chakmas living in the state, with the threat of use of force if its demands were not met. The Supreme Court held that since the constitutional rights under Articles 14 and 21 are available even to non-citizens, “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 or persons e.g. The AAPSU, to threaten the Chakmas to leave the state.” The court recognised that the “Quit India” notice amounted to a threat to life and liberty as understood by Article 21 and that the Chakmas could not be evicted from their homes except in accordance with the law. However, the decision was limited to threats of expulsion posed by AAPSU activists. It did not enter into a discussion as to whether expulsion notices issued by the Central Government would constitute violation of the rights to life and liberty of the refugees.

In *Khudiram Chakma vs. State of Arunachal Pradesh* (1994 Supp [1] SCC 615), the Supreme Court approvingly quoted commentary on the UDHR in the context of refugees:

Article 14 of the Universal Declaration of Human Rights, which speaks of the right to enjoy asylum, has to be interpreted in the light of the instrument as a whole; and must be taken to mean something. It implies that although an asylum-seeker has no right to be granted admission to a foreign State, equally a State which has granted him asylum must not later return him to the country whence he came. Moreover, the Article carries considerable moral authority and embodies the legal prerequisite of regional declarations and instruments.

Dr. Malvika Karlekar vs Union Of India (Criminal Writ Petition No. 583 of 1992), an unreported judgement of the Supreme Court dated 25.9.92 directed the authorities to check whether the defendants’ refugee status determination was pending and further stopped their deportation till the same was determined. Similar orders, dated 11.9.1990, were passed by the Guwahati High Court in *Ms.*

Zonthansangpuii vs State of Manipur (Civil Rule No. 1981 of 1989 and No. 515 of 1990).

Various high courts have also granted relief to refugees. In exercise of the powers granted under Article 226 of the Constitution, read with Article 21, the Guwahati High Court in *U. Myat Kayew and another vs State of Manipur and another* (Civil Rule No. 516 of 1991), on 26.11.1991, allowed the petitioners—who had entered India without valid travel documents and who were lodged in Manipur Central Jail—to be released on interim bail after furnishing personal bonds in order to enable them to approach UNHCR, Delhi, to seek refugee status. The petitioners had participated in the movement of democracy in Myanmar (Burma) and then fled to India for refuge. They voluntarily surrendered to the authorities and were taken into custody. Cases were registered against them under Section 14 of the Foreigners Act for illegal entry. The court did not insist on local sureties, as the petitioners were foreigners and such sureties would not be easily available. The Punjab and Haryana High Courts have passed similar orders.

Clearly, while India is not a signatory to either the 1951 Convention on the Status of Refugees or the 1967 Protocol, the principles of international law relating to refugees must be taken as incorporated directly into Indian constitutional law via Article 21. This obligation becomes even clearer in view of the fact that India has acceded to the ICCPR, the CRC, and CEDAW. None of the provisions of the Foreigners Act, 1946, the Registration of Foreigners Act, 1939, the Passport (Entry into India) Act, 1920, or the Passport Act, 1967, deals in any manner with refugee law.

There is therefore no current domestic law in conflict with international conventions, treaties and resolutions relating to refugees. Section 3(1) of the Foreigners Act does not grant an absolute right to the Indian government to expel foreigners from Indian territory. It is not the right but the exercise of this right that is in question. The right has to be exercised in a reasonable manner. In the context of refugees, reasonableness is to be determined by international refugee law. That is how the various courts have granted relief to refugees in certain circumstances. It is in this spirit that the Guwahati High Court in the case of *Boghy vs. Union of India* (Civil Rule No. 1847 of 1989) ordered the temporary release of a Burmese so that the petitioner could apply for refugee status to the UNHCR office in Delhi.

Indian courts have thus achieved via judge-made law what the government has been unable or unwilling to do. Today, international refugee law stands somewhat integrated into Indian law via Article 21 of the Constitution, irrespective of the government's decision whether to accede to the 1951 Convention and the 1967 Protocol.

In addition to Article 21, provisions of the Indian Constitution that have a bearing on refugees are found in Articles 5 to 11, 14, 20, 22, 25(1), 27, 28(3), 51(c) and 253; List I, entries 14, 18 and 19; and List III, entry 27. These provisions deal with citizenship; naturalisation; aliens (excluding enemy aliens); extradition; displaced persons; fundamental rights of all people within the territory of India (including refugees); the rights of persons in criminal proceedings; and the power of Parliament to recognise international treaties. Different levels of assistance and facilities—e.g., pertaining to educational opportunities, camp conditions, employment opportunities, voluntary repatriation—have been extended to special groups of refugees like Tibetans, Chakmas, Sri Lankans and Afghans. The right to life under Article 21 has been given an expansive meaning by the courts²⁶ to cover the due process of law, i.e., the right not merely to an animal existence but a “right to live with human dignity.” This right as applied to refugees in detention includes the right to the bare necessities of life, including medical aid and food.

These provisions of the Indian Constitution indicate that the acknowledged rules of natural justice in the common law systems applicable to all civilised societies also apply in India, even to refugees.

5.3 LAWS GOVERNING FOREIGNERS, ILLEGAL MIGRANTS AND ENTRY INTO INDIA

5.3.1 Passport (Entry into India) Act, 1920, and Passport Act, 1967

The Passport (Entry into India) Act, 1920 deals with the question of passports for persons entering and leaving India. Section 3 allows the Central Government to make rules requiring persons entering India to be in possession of a passport. The rules pertain to prohibiting the entry of persons who are not in possession of a passport, prescribing the authority that can issue and renew passports, and establishing the conditions that need to be complied with in order to obtain a

26 See *Luis de Readt vs. Union of India*, 1991 (3) SCC 554; *Khudiram Chakma vs. Union of India*, 1994 Supp (1) SCC 614; *Chairman, Railway Board and Others vs. Chandrima Das and Others*, 2000 (2) SCC 465.

passport. The Act provides for exemptions, either absolutely or partially, of any persons or class of persons from any provisions of the rules. It allows for a police officer not below the rank of a sub-inspector and any authorised officer of the Customs Department to arrest a person who contravenes any rule or order made under Section 3.

The Central Government has used its power under Section 3 to enact the Passport (Entry into India) Rules, 1950. Of particular importance is Rule 6, which states *inter alia* that any person who attempts to enter India on a forged passport or visa shall be punishable with imprisonment for a term that may extend to three months, or a fine or both.

The 1920 Act is important in the context of refugees, given that they may enter and attempt to leave the country without a passport or with a forged one. It is an accepted principle of refugee law by Article 31 of the 1951 Convention, that contracting states shall not impose penalties on account of the illegal entry or presence of refugees in the country. Often, refugees do not enjoy the protection of their country and therefore cannot get a valid passport. Some refugees may leave their country in such turmoil that they would not have had the time to either travel with their passports or get one issued by the concerned authority. In this respect, refugees under Indian law have not been exempted from entering India with travel documents as provided for under Section 3(c) of the 1920 Act. In practice, however, the administrative policy of the Indian government has operated to let certain groups of refugees enter the country without the required documentation. This is because Article 21 of the Indian Constitution encompasses the principle of *non-refoulement*.

The Passport Act, 1967 deals with the issuance of passports and other travel documents regulating the departure of Indians and other nationals from India. The act sets out the different types of passports that can be issued to various categories of persons, the application procedure for a passport and other travel documents, and details of the circumstances in which passports and other travel documents may be refused by the issuing authority. It further defines the power of state authorities to arrest persons who *inter alia* knowingly furnish any false information or suppress any material information, with a view to obtaining a passport or travel document, and the penalties which may be imposed for such offences.

Under Section 20 of the Act, the Central Government may also issue passports and travel documents to persons who are not citizens of India but for whom it is in the public interest to confer such documents. This provision has allowed many Tibetan refugees in India to travel abroad. Articles 27 and 28 of the 1951 Convention state that contracting States shall issue identity papers to refugees in their territory who do not possess valid travel documents and also issue temporary travel documents for the purpose of allowing them to travel outside their territory. By providing travel documents to the Tibetans, India has complied in part with these articles of the 1951 Convention.

5.3.2 Registration of Foreigners Act, 1939

The Registration of Foreigners Act, 1939 provides for the registration of foreigners in India. It is based on the provisions of the Foreigners Act, 1864, the British Aliens Registration Act, 1914, and the British Aliens Order, 1920. The Act empowers the Central Government to make rules regarding the procedure for foreigners to report to a prescribed authority about their presence, movements, departure and proof of identity. Under the Act, rules can be made requiring persons managing hotels and boarding houses to report the name of any foreigner and her particulars to the concerned authorities. Persons managing or controlling any vessel or aircraft may be required to provide information regarding any foreigner entering or intending to depart from India.

Section 4 of this Act states that the burden of proof in determining whether a person is a foreigner or not shall lie upon the person herself. This policy contradicts the Indian Evidence Act, 1872, which ensures that the burden of proof lies on the opposing party. The same analogy can apply in case of refugees. The onus is on the applicant to establish her case. However, practical considerations and the trauma experienced by a person in flight impose a corresponding duty upon whoever must ascertain and evaluate the relevant facts and credibility of the applicant.

The rules regulating the entry and stay of foreigners in India are laid down under Section 3 of the Registration of Foreigners Act. Every foreigner who arrives in India must furnish true particulars of herself, her place of stay in India and the purpose of her visit, as given in Rules 4, 4-A and 5 of the Registration of Foreigners Rules. The foreigner must provide proof of identity when asked to do so, under Rule 8; and produce a registration certificate whenever required, under Rule 9.

In addition, hotel owners must register and report the presence of a foreigner on their premises, under Rule 14; and masters of vessels have a similar and added obligation to regulate foreigners traveling from and to India on their vessels, under Rule 16.

Rule 6 requires a foreigner to inform the registration officer of her presence in India and obtain a certificate of registration from the officer. On departure, she must surrender this certificate, in compliance with Rule 15. The form that the certificate should take is prescribed by the rules.

5.3.3 Foreigners Act, 1946

Due to the lack of a refugee-specific statute, the judicial system is constrained to enforce, with regard to refugees, laws that are applicable to foreigners in general. The Foreigners Act, 1946 addresses the entry, presence and departure of foreigners to and from India. Section 3(1) of the act allows the Central Government to

make provision either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.

Section 3(2) sets out the types of restrictions that may be placed on a foreigner's stay in India—ranging from requiring her to enter or depart India at certain specified times, to prohibiting her from associating with specified persons. These orders apply equally to refugees, unless any provision to the contrary has been specified by the Central Government.

The range of orders prescribed that prohibit, regulate and restrict the entry of foreigners into India are as follows:

- A foreigner shall not enter India or shall enter India only at such times and via such routes as may be prescribed.
- A foreigner shall not depart from India or shall depart from India only at such times and via such routes as may be prescribed.
- A foreigner shall not remain in India or any such prescribed area; and if she is required to remain in India by order, she shall pay the cost of her maintenance and removal from India pending such removal.

- A foreigner shall comply with conditions which require her to reside in a particular place; impose restrictions on her movements; furnish proof of her identity to such authority as may be required and prescribed; allow her photograph and finger impression to be taken; and furnish specimens of her handwriting and signature to such authority as may be prescribed.
- A foreigner shall allow herself to be medically examined by such authority as may be required.
- A foreigner may be prohibited from associating with persons of a particular description.
- A foreigner may be prohibited from engaging in activities as may be specifically defined.
- A foreigner may be prohibited from using and possessing articles of a specific description.
- The conduct of a foreigner can be regulated in any particular manner as may be prescribed.
- A foreigner shall enter into a bond, with or without sureties, for due observance of, or as an alternative to, the enforcement of specified restrictions or conditions.
- The authority also has the power to arrest, detain or confine any foreigner for non-compliance with any such condition. The authority can also make provisions for any matter that may be prescribed and also for such incidental and supplementary matters as may, in the opinion of the central government, be expedient or necessary for the purpose of this act.
- Any prescribed authority may, with respect to any foreigner, make orders under any of the provisions mentioned above.

The Foreigners Act confers a host of other powers on the government. Section 3-A allows the Central Government to exempt some foreigners from coming within the purview of the Act in certain cases. The right to expel is conferred by Section 3(2)(c) on the Central Government. The right of the executive to remove foreigners from India has been upheld by the Supreme Court in various judgements.²⁷ The right to enforce an order of expulsion, and also to prevent any breach of it, and the right to use force as may be reasonably necessary “for the effective

27 Luis de Readt, id.; Sarbanand Sonowal vs. Union of India (2005) 5 SCC 665.

exercise of power” is also conferred by Section 11(1). Section 11 further allows any specifically authorised authority or police officer to use force, if necessary, to secure compliance with, prevent the breach of or ensure the effective exercise of any order or direction made under the act.

In *Hans Muller Nuremberg vs. Superintendent Presidency Jail* (1955 [SC] AIR 367), the Supreme Court stated that implicit in the right of expulsion are a number of ancillary rights, which include the right to prevent any breach of order and the right to use force and to take effective measures to fulfill these objectives.

Section 12 of the Foreigners Act allows any previously delegated authority under the act to authorise, conditionally or otherwise, any authority subordinate to it to exercise such power on its behalf, provided it is in writing and is not contrary to any previously delegated authority.

In *The State of Assam vs. Katwas Khan* (1989[2] GLJ 338), the Under secretary to the Assam Government, Passport Department, directed the Superintendent of Police to serve a notice on the accused, asking him to leave Assam within 15 days from the date of receipt of the notice. The Guwahati High Court held:

As a matter of fact, the power to make a deportation order has been delegated to the Government of Assam. A notice of deportation, commonly called a “quit notice”, emanating from the level of the Government of Assam, Passport Department, to the Superintendent of Police to serve notice to a particular person/foreigner was not a delegation of power under Section 12 of the Act. The letter did not indicate that the Government delegated the power to the Superintendent of Police, as it was a notification by the state government by virtue of Section 12 delegating the power to act under Section 3(2). The delegation of the authority must be specific and express. Hence it was held that the notice issued by the Superintendent of Police was without jurisdiction.

Section 13 states that any person who attempts or abets the contravention of any provision of the Foreigners Act, or fails to comply with any direction given in pursuance of any order passed under the Act, shall be regarded as having contravened its provisions. The orders referred to in this section are those that the Central Government may pass in exercise of the powers conferred under Section 3 of the Act.

Section 14 lays down the penalties given for contravention of any provision or order made under the Foreigners Act. An offender may be imprisoned for up to five years and also heavily fined. Any bond furnished under Section 3 may also be

retained; and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the court why such penalty should not be paid.

As was held in *Kallan Khan vs. State* (1961 [All] AIR 261; 1961 [1] Cr. LJ584), in order to attract the penalties provided in the Foreigners Act, it is necessary that there must be some contravention of the provisions of the Act itself or of any order made thereunder or any directions given in pursuance of the Act or the order. If the allegation is that Para 7 of the Foreigners Order, 1948, has been contravened, it must be proved either that the person concerned had omitted to obtain a permit as required by that paragraph or that had overstayed the period provided in that permit.

Para 7 of the order states as under:

Restriction of Sojourn in India

1. *Every Foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920, shall obtain from the Registration Officer having jurisdiction, either at the place at which the said foreigner enters India or at the place at which he presents a registration report in accordance with Rule 6 of the Registration of the Foreigners Rules, 1939, a permit indicating the period during which he is authorised to remain in India, if any, specified in the visa. In granting such permit, the said Registration Officer may restrict the stay of the foreigner to any of the places specified in the visa.*
2. *Every foreigner to whom the provision of sub-paragraph (1) does not apply shall obtain a permit indicating the period during which he is authorised to remain in India from the Registration Officer to whom he presents a registration report in accordance with Rule 6 of the Registration of Foreigners Rules, 1939.*
3. *Every foreigner to whom a permit is issued under sub-paragraph (1) or sub-paragraph (2):*
 - i. *shall not, if the permit indicates the place or places for stay in India, visit any other places unless the permit is extended by the Central Government to such other place:*
 - ii. *shall, if the permit indicates the place or places for stay in India, report in person or in writing his arrival at, and departure from, any such place to the Registration Officer having jurisdiction at such place, within twenty four hours after the arrival or, as the case may be, before his intended departure, and;*

- iii. shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period; and at the time of the foreigner's departure from India, the permit shall be surrendered by him to the Registration Officer having jurisdiction at the place from which he departs.*

5.3.4 Foreigners Order, 1948

The Foreigners Order, 1948 was passed in exercise of the powers conferred by Section 3 of the Foreigners Act, 1946, and in suppression of the Foreigners Order, 1939. It provides for the appointment of civil authorities by the state government, which have the power to grant or refuse permission to a foreigner to enter India. This must be done from the appointed port or any other place of entry. Leave to enter shall be refused if the civil authority is satisfied that the foreigner

- has no valid passport or visa or has not been granted exemption from such possession; or
- is of unsound mind or mentally defective person; or
- is suffering from some loathsome or infectious disease, which in the opinion of the medical officer in the port is likely to prejudice public health; or
- has been sentenced in a foreign country for an extradition offence; or
- has been prohibited from entering either under an order issued by a competent authority or by the Central Government.

The civil authority may attach such conditions on entry as are in the interest of public safety and may prohibit the entry of any foreigner into India. If a foreigner is refused leave to enter, she may be detained at some place approved by the civil authority and may, if she has come by sea, be placed temporarily on shore for that purpose. During such detention, the foreigner shall be deemed to be in legal custody and not to have entered India. In the case of a refugee, the same rules apply unless an exemption has been made.

Para 5 deals with the power to grant permission to leave India. It states that no foreigner shall leave India

- other than at such port or other recognised place of departure on the borders of India as a registration officer having jurisdiction at that port or place may

appoint in this regard, either for foreigners in general or for any specified class or description of foreigners; or

- without the leave of civil authority having jurisdiction at such port or place.

The said permission can be refused if

- The foreigner has not complied with the formalities of departure prescribed under the Registration of Foreigners Rules, 1939.
- The foreigner's presence is required in India to answer a criminal charge.
- The foreigner's departure will prejudice the relations of the Central Government with a foreign power.
- The foreigner's departure has been prohibited under an order issued by a competent authority.

Notwithstanding the above, a civil authority may prohibit the departure of a foreigner where it is satisfied that such departure would not be conducive to the public interest. As per para 5(3)(a) whenever such an order is passed, the authority has to report the matter forthwith to the Central Government which may cancel or modify the order in such manner as it thinks fit.

Hence, an exit permit is an essential document to facilitate the departure of a foreigner from India. It does not however have the effect of extending the period mentioned in the visa. The exit permit only authorises a person to depart from the country within the period mentioned in the permit, via the route referred to therein.

Para 7 deals with the restriction of residence in India. Every foreigner who enters India on the authority of a visa shall have to obtain a permit from the concerned registration officer. This authorises her to remain in India for an extended period, and also indicates to her the places in India where she may be permitted to stay.

In *Khalil Ahmed vs. State of U.P.* (1962 [All] AIR 383), it was contended that Para 7 of the Foreigners Order, which was made in pursuance of Section 3 of the Foreigners Act, 1946 was a piece of delegated legislation and was therefore invalid. In order to appreciate such contentions, the court referred to Section 3 of the Foreigners Act and held:

The Legislature has clearly specified the matters in respect of which orders may be made under Section 3 of the Act of the Central Government. It

is only a piece of conditional legislation and, consequently, the power conferred on the Central Government cannot be said to be in excess of Section 3 of the Act. Paragraph 7 has been made to regulate and resist the movement of foreigners sojourning in India, in the interest of the security of the State and also to ensure the personal safety of the foreigner concerned. Hence, this paragraph is not invalid.

5.4 VIOLATION OF CRIMINAL LAW: INDIAN PENAL CODE, 1860

The Indian Penal Code (IPC), 1860 applies equally to nationals, refugees and other foreigners. A refugee may be charged under Sections 418, 419, 420, 468 and 471 of the IPC when, for example, she has attempted to mislead Indian authorities by using fraudulent travel documents. A refugee may travel on a completely counterfeit document; she may use a genuine document where she changes the relevant information; or she may obtain a genuine document by false means. Unfortunately, the concerned state authorities often do not consider the compelling factors that may have brought the refugee to India. In many instances, the gravity of the circumstances compels the refugee to obtain a false passport or a forged visa for entry into India. Her country might not have infrastructure in place to issue her valid documents, may not have been willing to provide her with genuine documents or she may not have had the time to obtain them.

Refugees are commonly detained for violating the following provisions of the IPC: cheating by impersonating (Section 416); cheating and dishonestly inducing delivery of property (Section 420); forgery (Section 463); and making and using forged documents (Section 464).

These offences are interrelated. A refugee may be charged with all of these offences if she has forged a passport, visa or residential permit. Refugees detained for illegal entry into India who also possess travel documents that may be forged, false or fabricated would attract the provisions of the above sections of the IPC and may be prosecuted for the same.

5.5 PROTECTION OF HUMAN RIGHTS ACT, 1993

The Protection of Human Rights Act, 1993 provides for the establishment of a National Human Rights Commission, State Human Rights Commissions and Human Rights Courts with the purpose of protecting human rights in the country. Section

3 of this Act deals with the National Human Rights Commission (NHRC), which is based in Delhi. It consists of a chairperson who is a former Chief Justice of the Supreme Court, a former Justice of the Supreme Court and a former Chief Justice of a High Court. Additional members of the Commission include the chairpersons of the National Commission for Minorities, the National Commission for Schedule Castes and Tribes, and the National Commission for Women, as well as two other members who have knowledge and experience in matters relating to human rights.

Article 12 lists the functions of NHRC. These include the power to inquire *suo moto* into a petition presented to it, the right to intervene with the court's approval in any judicial proceedings involving an allegation of human rights abuse, the right to study treaties and other human rights instruments and make recommendations for their effective implementation, and the power to promote research in the field of human rights. Under Section 13 of the Act, the Commission has the powers of a civil court under the Code of Civil Procedure, 1908 when inquiring into a complaint. Chapter V of the Act establishes the State Human Rights Commissions, and Chapter VI establishes the Human Rights Courts.

The NHRC has taken an interest in issues relating to refugees. For example, the Commission acting on a petition received from Chakma refugees residing in the state of Arunachal Pradesh, alleging that they had been threatened by the All Arunachal Pradesh Student Union to leave the country, moved the case to the Supreme Court, indicating that there was *prima facie* evidence to support the claim of the refugees.²⁸ The Court, after considering the evidence, directed that the Chakmas be protected by the state government and that all those eligible and interested in applying for Indian citizenship should be dealt with according to the relevant laws.

28 National Human Rights Commission vs. State of Arunachal Pradesh, 1996 (SC) AIR 1234.

6

REFUGEE POLICY OF THE INDIAN GOVERNMENT

6.1 INTRODUCTION

Various countries protect refugees in their territory by enacting refugee legislation based on internationally recognised principles. They often have a procedure for identifying refugees and addressing subsequent protection issues and durable solutions. Having enacted legislation, population movements across national boundaries are better controlled and concerns of national security are better addressed. Although the 1951 Convention provides a definition of refugees (i.e., the criteria used to determine the refugee status), each contracting state can establish the procedure that it considers most appropriate with regard to its particular constitutional and administrative structure.²⁹

Nevertheless, there are certain minimum standards under the Geneva Convention that the contracting states need to observe while deciding whether or not asylum-seekers should be granted refugee status. The UNHCR's ExCom Conclusion No. 8 suggested the following minimum standards:

- Competent officials who deal with matters pertaining to immigration and border control should have clear instructions for dealing with asylum-seekers. They should respect the principle of *non-refoulement* and should refer the asylum-seekers to a higher authority with the jurisdiction to determine refugee status.
- Asylum-seekers should receive guidance as to the procedures to be followed.
- Asylum-seekers should be examined by a single central authority.

²⁹ 1951 Convention Handbook, *supra* note 5, at para. 189.

- Asylum-seekers should be given the necessary facilities, including the services of a competent interpreter, for submitting their case and be given the opportunity to contact UNHCR.
- Those whose cases are rejected should be allowed a reasonable period of time during which an appeal for a reconsideration of their applications can be made.
- Asylum-seekers should be permitted to remain in the country while their cases are being considered.

The lack of guidelines and procedure in a State can result in the authorities forcibly returning refugees to their country of origin, where they may be persecuted. This is in violation of the internationally recognised principle of *non-refoulement*. To avoid violating this important norm, it is therefore imperative for a State to have a clear and uniform policy and procedure for the determination of refugee status.

Although India has not signed the 1951 Convention, she has on various occasions extended protection to refugees in her territory; however, there is no consistency in the procedure for determining refugee status. While India has taken care of large-scale refugee influxes from neighbouring countries and recognised them on a *prima facie* basis, others have been treated as ordinary foreigners. This recognition is not based on any law but on ad hoc policies. UNHCR mandate refugees are not considered to be “refugees” under Indian law.

Since the Indian government has no uniform procedure for determining refugee status and providing assistance to refugees, there is no Central Government body that deals with refugees. Instead, various departments under the central and state governments handle the cases of refugees recognised on an *ad hoc* basis by the Government of India. A review of the administrative practices suggests that India has gradually evolved a broad policy towards certain groups of refugees. It must be pointed out however that various gaps still exist in the mechanisms for dealing with refugee protection. This is because the Indian government has not enacted a specific national law on refugees or signed any international instrument relating to refugees.

6.2 LACK OF A UNIFIED AND CONSISTENT REFUGEE POLICY

The administration dealing with refugees includes the Ministry of Home Affairs, the Ministry of External Affairs and other related departments of the central and

state governments. Under Section 3 of the Foreigners Act, 1946, the administration formulates different policies for various groups of refugees. Since there is no central agency dealing with refugees in India, it is also possible that different administrative bodies deal with the same issue in various ways. However, in routine matters, the Centre communicates its policies to the Home Ministry in the states, which in turn communicate the same to the concerned departments. At times, this system may not be effective. There could be a lack of communication between the departments, resulting in delayed decisions, with refugees languishing in detention all the while. Consider the following two examples:

- Two Afghan refugees recognised by UNHCR were arrested while trying to exit India for Afghanistan via the Attari border at Amritsar in May 1994. They were tried and convicted for the offence and duly completed their sentence in mid 1995. However, they continued in detention at the transit camp of the Amritsar Central Jail. Attempts for their release were sought by UNHCR with the Ministry of Home Affairs and the Ministry of External Affairs in New Delhi. Finally, a Criminal Writ Petition was filed on behalf of the said refugees in the Punjab & Haryana High Court at Chandigarh. Consent for their release was granted by the Ministries but due to a lack of communication and subsequent confusion regarding the instructions from the Central Government to the Punjab State Department of Home Affairs, release of the refugees took a considerable length of time. They were eventually released only in March 1997 following a judgement by Justice S.S. Sudhalkar in February 1997. By that time the refugees had been illegally detained in the Transit Camp of the Jail for two years, despite the fact that orders for their release had been issued much earlier by the Central Government.³⁰
- A Burmese refugee, later recognised by UNHCR, was arrested in 1994 for entering India without any travel documents. He was detained at the Calcutta Central Jail where he completed his sentence in July 1995. He continued to be detained in jail illegally for more than 6 months until his release was secured with the intervention of the Central Government in February 1996. However, his release was not secured on a written order or direction but after a telephone conversation between officials from the Central Government and the State Home Department.³¹

30 Shah Ghazai vs. State, Criminal Writ Petition No. 499 of 1996, Punjab and Haryana High Court, Chandigarh.

31 State vs. Benjamin Tang Neng, Case No.1253 of 1994, Calcutta.

In some instances, as in the example given below, the Central Government may issue clear directives to the states and delegate its powers under Section 3 of the Foreigners Act, 1946.

- In the case of a Sudanese refugee, the policy regarding Sudanese nationals who had been students in India was expressly recorded by the Central Government in explicit directives to the State of Maharashtra.³²

In other instances, the state and Central Governments have differed in their policy towards refugees in the concerned state. In *National Human Rights Commission vs State of Arunachal Pradesh* (1996 [SC] AIR 1234), the Central Government was willing to entertain applications for citizenship from approximately 4,012 Chakmas who were settled in Arunachal Pradesh. However, the state government refused to forward their applications and in fact stood by as repressive measures were taken against the refugees in an attempt to evict them.

6.3 BROAD TRENDS IN THE POLICIES TOWARDS REFUGEES

Discussed below are the broad trends that emerge from a study of the policies towards refugees in the areas of concern to them.

6.3.1 Entry into India

The Indian government has followed a fairly liberal policy of granting refuge to various groups of asylum-seekers. Past experience indicates that entry into India for most refugee groups is somewhat in line with the international principles of protection and *non-refoulement*. Such entry is generally not determined by reasons of religion, race, nationality, gender or other similar grounds. India has granted refuge to Buddhists; Tibetans; Hindu and Christian Sri Lankan Tamils; Muslims, Sikh and Hindu Afghans; and Christian Burmese among other refugees in recent years.

Afghan refugees, who entered India via Pakistan without any travel documents, were allowed entry at the India-Pakistan border until 1993. Most of the refugees had entered India at the Attari border near Amritsar in Punjab. Subsequently, the government altered its policy of permitting Afghan refugees to freely enter India via Pakistan.

³² State vs. Lawrence Loro Kamilo, Criminal Writ Petition No. 189 of 1996, Bombay High Court at Nagpur Bench.

Sri Lankan Tamil refugees have regularly been crossing the sea to enter the south Indian state of Tamil Nadu. The Government of India has a specific policy regarding these refugees. They are permitted entry even if the refugees have no travel documents. Thus, the Coast Guards all along the southern coastline are attentive to fishing trawlers, ships and boats containing refugees fleeing the conflict in Sri Lanka.

6.3.2 Work Permits

Refugees are generally not allowed to work in India. Some do find employment in the informal sector without facing any objection from the administration. Work in the informal sector many times leads to further victimisation of a refugee because of the unaccountability of the employer. Work in the formal sector is not possible due to lack of work permits. Many refugees are self-employed and work from their homes; some are supported by their community. Tibetan refugees, as a special case, have been granted loans and other facilities for self-employment. Sri Lankan Tamils are granted freedom of movement within the camp areas, enabling them to find casual labour. Chakma and Afghan refugees also engage in minor forms of gainful employment. The majority of refugees faces serious financial hardship in India because they are either are not able to get a job because of lack of skills (like language) or are exploited at the hand of the local goons.

6.3.3 Fundamental Freedoms

Refugees normally have the freedom to move around the country with the restrictions applicable to any other foreigner. They are also allowed to practice their religion and follow their culture. In the case of refugees whose entry into India is either legal or is subsequently legalised, there is limited interference by the administration regarding these basic freedoms. Refugees have access to the health and education facilities in India, and no discrimination is made against them on the basis of their refugee status. However, refugees who enter India illegally or overstay the permitted period have strict restraints on their movement in accordance with the legislation relating to foreigners, such as the Foreigners Act, 1946, the Foreigners Order, 1948, and the Passport Act, 1967. Provisions of the Foreigners Act apply to all—no distinction is made in law between asylum-seekers and other aliens. However, courts have been lenient with regard to the imprisonment terms and fine amounts imposed in view of the special situation

of refugees. In case of Tibetan refugees to whom the Government of India has issued travel documents has to get exit from the local police station after giving travel details before leaving and has to get entry from the police station at the destination town.

The principle of *non-refoulement* has arguably acquired the status of *jus cogens*—a peremptory norm of general international law accepted as such by the international community as a whole. However, many refugees have been deported because they do not possess valid travel documents. The non-observance of this principle is therefore a violation of customary international law. This violation is distinctly due to the lack of a refugee-specific statute. As a result, the concerned authorities have no choice but to subject refugees to laws that are applicable to foreigners in general, thereby intentionally or unintentionally ignoring the unique predicament of refugees. Judicial decisions have somewhat tempered this position. Courts at all levels have stayed deportation orders in several cases, pending a decision on refugee status and citizenship application.³³

6.4 AUTHORITIES THAT A REFUGEE MAY ENCOUNTER IN INDIA

The entry, stay and exit of refugees to and from Indian territory is fraught with legalities, particularly in the case of those who are not officially recognised as refugees by the Indian government.³⁴ They may encounter different administrative authorities depending on the place from which they enter India, where they are detained and which law they have violated.

6.4.1 Border Control Authorities

Border authorities in the country consist of the Border Security Force, the Indo-Tibetan Border Police, the Indo-Nepal Border Police and the Assam Rifles. They are usually the first representatives of the Indian system that refugees encounter when they enter or exit the country by land routes. Vast tracts of terrain in the border states are treacherous, making it difficult to physically guard the entire international border of India. These gaps in the border are often used by refugees to illegally enter and exit Indian territory.

33 N.D. Pancholi vs. State of Punjab, Criminal Writ Petition No. 243 of 1988, Supreme Court of India; Khy Htoon vs. State of Manipur, Civil Rule No. 515 of 1990, Guwahati High Court.

34 Tibetan refugees, Sri Lankan Tamil refugees and Chakma refugees are recognised as refugees by the Government of India and special arrangements have been made for them.

If a refugee is caught while entering illegally, the authorities usually return or deport her across the border. Alternatively, the refugee may be interrogated and detained at the border.

If caught while illegally exiting India, the refugee may be detained for investigation and subsequently handed over to the local police for further action. In cases where the refugee is found in possession of invalid or fake travel documents or in cases of violation of any other law of the country, the border authorities may detain the refugee. After initial investigation, the matter may be referred to the area police for further investigation and detention of the refugee and the registration of a First Information Report (FIR). The police lodge the accused refugee in the area prison and produce her in the local district court for trial. Two examples given below illustrate the procedures followed.

An Iranian refugee, registered with UNHCR, was detained while illegally exiting India for Nepal via the Sonauli border in District Maharajgunj, Gorakhpur, Uttar Pradesh. The refugee was travelling on forged and fabricated travel documents. He was detained by the border authorities who discovered that his travel documents were forged. They handed the refugee over to the area Police station at Sonauli for investigation and registration of FIR. He was subsequently interned at the Gorakhpur District Jail.³⁵

Two Afghan refugees were apprehended by the authorities at the Attari border at Amritsar, Punjab while attempting to exit India illegally for Afghanistan via Pakistan. They were handed over to the area police in Gharinda, District Amritsar for investigation and registration of FIR and were subsequently interned at the Amritsar Central Jail.³⁶

In the case of certain refugee groups that are recognised by the Government of India, a specific policy of such recognition is followed. Instructions to this effect are dispatched by the Government to the concerned border authorities.

A refugee may also be detained without the registration of an FIR. This situation may arise when she has come from a country that does not share a peaceful border with India. In such a case, the refugee may be suspected of being a spy or a terrorist entering Indian borders with the deliberate and mala fide intent to cause

35 State vs. Mehmud Ghazaleh, FIR No. 50 of 1993 (filed under Sections 419, 420, 468 and 471 of the IPC, read with Sections 3 and 6 of the Passport Act and Section 14 of the Foreigners Act).

36 Shah Ghazai vs. State, Criminal Writ Petition No. 499 of 1996, Punjab and Haryana High Court, Chandigarh. FIR No. 42 of 1994 (filed under Sections 3, 34 and 20 of the Passport Act).

harm to the stability and integrity of the country. Her detention will consequently not be recorded until the authorities realise their mistake or concerned refugee and human rights groups intervene. Often, such processes take a long time. Meanwhile, the refugee continues to languish in illegal detention; she may also suffer torture. Fortunately, such cases are few and far between.

Similar is the case of 65 Pakistani nationals, including women and children, who came to India with valid document, seeking refuge on the grounds of religious persecution.³⁷ The asylum-seekers are facing blasphemy cases against them in Pakistan for their faith, for which they could be sentenced to life imprisonment or even to death. Soon after their arrival, many of the asylum-seekers conducted a demonstration against the Pakistani government, burning effigies of Pakistani leaders as well as their own passports. After the protest, they were arrested and are currently lodged at the Tihar Jail, New Delhi.³⁸ Those arrested include 7 children, and 5 babies who have since been born in prison. The Union of India, without answering the petitioners' request for asylum, moved to withdraw the charges against the Pakistani nationals and instead deport them directly to Pakistan. A petition has been filed before the Delhi High Court asking for consideration of their refugee status; the matter is under consideration as of October 2010, and awaiting a decision from the High Court.

6.4.2 Immigration/Custom Authorities

In cases where the refugee is detected entering or exiting the country via established seaports and airports without valid travel documents, she is immediately detained by the immigration or authorised custom officers and an investigation is conducted.

In cases of illegal entry, the immigration authorities often seek to immediately deport the refugee to the country where she last came from. This is in violation of the principle of *non-refoulement*. Pending deportation, the refugee is kept in a detention cell in the immigration section of the airport or seaport where the basic conditions of living are usually unsatisfactory. She has to buy her own meals.

37 Saifullah Bajwa vs. Union of India and Others, Criminal Writ Petition No. 1470 of 2008, Delhi High Court.

38 FIR No. 67/2007 was registered at the Parliament Police Station, New Delhi (filed under Section 420 of the IPC, Section 14 of the Foreigners Act, Section 12 of the Passport Act, and Section 5 of the Registration of Foreigners Act).

When deported, the cost of the transport ticket is borne by the refugee, often rendering her completely destitute. The plight of such refugees is illustrated by the examples given below.

A Palestinian refugee travelled to Kathmandu from New Delhi illegally. He was caught and deported from Kathmandu to New Delhi by the authorities in Nepal. He was sent back to Nepal and was once again deported to New Delhi, thus amounting to four trips in two days. All expenses were taken from his own resources. He was subsequently detained at the Immigration lounge of the International Airport at New Delhi for over 25 days. His food expenses were met with his diminishing personal resources and he also met the cost of his final deportation to Bangladesh.³⁹

An Iranian refugee, recognised by UNHCR, was apprehended at the Bombay International airport en route to Canada. He was detained at the immigration lounge of the airport for travelling under an assumed name, on a false passport. His detention lasted over a month. He was released only on the intervention of the Bombay High Court.⁴⁰

If a refugee violates any law, she is treated like any other criminal in India. The authorities hand over the accused refugee to the area police who register an FIR against her. She is then taken into police custody and is subsequently produced in the local sessions court, where she is committed to the local prison to await trial. An example is given below.

A 17-year-old Sri Lankan Tamil refugee was separated from his family in Madras and came to Delhi, where he received information that his father was in London. In an attempt to reach London, the refugee sought out a travel agent, who in turn fabricated a passport, fooling the refugee. The forgery was detected at New Delhi International Airport, and the refugee was handed over by the Custom Authorities to the area police for investigation and the registration of a FIR. The refugee was produced before the concerned Metropolitan Magistrate who remanded him in judicial custody in Tihar jail.⁴¹

In instances where the Immigration or Custom Authorities suspect discrepancies in the travel documents of a refugee when she enters the country, they may send the documents for further investigation to the local Foreigners Regional Registration

39 Majid Ahmed Abdul Majid Mohd vs. Union of India, Criminal Writ Petition No. 60 of 1997, Delhi High Court.

40 Syed Ata Mohamadi vs. State, Criminal Writ Petition No. 7504 of 1994, Bombay High Court.

41 State vs. Winston Venojan, FIR No. 438 of 1993 (filed under Sections 419, 420, 468 and 471 of the IPC).

Office (FRRO). The refugee is directed to tender appearance at the local FRRO. If she does not appear at the FRRO, an FIR can still be lodged against the refugee, which can then lead to her arrest.

6.4.3 The Police

There are instances when refugees initially enter India with valid travel documents that subsequently expire or where discrepancies in the travel documents are not detected by the border control or immigration authorities but by the police. The refugees may be arrested on expiry of the documents or when the said discrepancy is detected. Often, refugees fail to renew their visas or residential permits with the local FRRO. Consequently, random checks are routinely conducted by the local police at places commonly frequented by foreigners and refugees, such as hotels, restaurants, religious places and markets. Given that refugees are usually fleeing a volatile situation, they often do not have valid travel documents with them as required by the Foreigners Act. Refugees taken care of by the government are normally not required to hold valid passports and related documents. However, the government has become strict with some mandate refugees, including ethnic Afghans, Somalians and Sudanese, requiring them to maintain a valid passport and residential permit. As there is no uniform policy of the government on the grant of residential permits to refugees, many refugee groups are without residential permits.

Those refugees who do not comply with the mandatory requirement to obtain and renew residential permits are sometimes arrested and produced before the local sessions court. The court may order them to be detained in the local prison pending trial, as in the following case:

A Sudanese refugee registered with UNHCR was arrested by the Kotla Mubarakpur Police in New Delhi because her passport had expired. An FIR under section 14 of the Foreigners Act 1946 was filed. She was produced before the court of the concerned Metropolitan Magistrate who remanded her in judicial custody. She was eventually released upon pleading guilty.⁴²

The police normally do not consider any claims of refugee status made by the refugee. Moreover, under Section 3 of the Foreigners Act, 1946, the administrative authorities may issue 'Leave India Notices' to those refugees who have failed to

42 In Re Eva Masar Musa Ahmad FIR No. 278 of 1995, MM, New Delhi.

extend their travel permits or who are given deportation orders by the court. In such cases, the refugee may even be forcibly deported if she fails to comply with the notice. However, a writ petition can be filed at the concerned court to stay the notice, as was done in the following case:

Two Afghan Sikhs of Indian origin had fled persecution in Afghanistan and were registered as refugees with UNHCR. They were issued Leave India Notices by the FRRO to leave India within 7 days of receipt of the notice. A Criminal Writ petition was filed in the Punjab & Haryana High Court at Chandigarh and interim stay of the Leave India Notice was obtained.⁴³

6.4.4 Foreigners Regional Registration Office (FRRO)

Under the Foreigners Act, all foreigners in India are required to register themselves with FRRO in their area of residence. The FRRO registers the name of the foreigner in its records and issues the person a residential permit. Since India has no refugee-specific legislation or a refugee policy, the authorities often follow an ad hoc policy. Some groups of refugees are issued residential permits, while others are denied. Afghan and Burmese refugees are among the groups which are issued permits allowing them to stay in India. However, refugee groups like the Iranians, Iraqis and Sudanese have not been granted such documents.

Where the Government of India has recognised the claim of refugee status of a particular group of refugees, there is subsequently minimal interference in the lives of the refugees. This is the case even though there may be no official declaration or grant of refugee status to that group. However, there are instances where even refugees recognised by the Indian government, and who were issued valid refugee identity documents, were later prosecuted for illegal entry or overstay.⁴⁴

43 Gurinder Singh and Karamjit Singh vs. State, Criminal Writ Petition No. 871 of 1994, Punjab and Haryana High Court, Chandigarh.

44 The National Human Rights Commission had taken up the cause of a number of Sri Lankan Tamil refugees who have been prosecuted in this manner. The Government has subsequently had them discharged.

III

LEGAL DIMENSION: CASE LAWS, JUDGEMENTS AND COMPLICATIONS

7

LEGAL RECOURSE AND REFUGEE CASE LAW

Chapter 5 highlighted the laws that refugees commonly come into conflict with. The punishment assigned for violation of these laws may vary from case to case depending on their particular circumstances. Great care must be taken in presenting a case before a judge. The lack of refugee legislation in India can create further ambiguity if the cases are not coherently presented.

Regardless of the specifics of the case, the arguments must broadly correspond to those that are applicable to foreigners. However, the statutory framework consisting of the Foreigners Act, 1946, the Registration of Foreigners Act, 1939, and the Passport Act, 1920, may place the judiciary in a legal straitjacket since a decision based on these acts can fail to take into account the special condition of refugees. Notwithstanding the lack of proper legislation, it is commendable that Indian courts have appreciated the circumstances of refugees and have, within the limitations of law, used their discretionary powers for the benefit of refugees.

7.1 CASE LAW RELATING TO REFUGEE-SPECIFIC LEGISLATION IN INDIA

Various laws were enacted subsequent to the partition of India in 1947 and that of Pakistan in 1971. While the case law that emerged related specifically to this legislation, it nevertheless reflects the early response of the Supreme Court to the issue of refugees. The court had to address questions on the logistics of disbursement and the partition of property, which it did within a humanitarian framework.

The Supreme Court in *Chief Settlement Commissioner, Punjab vs. Om Prakash* stated that many laws have termed a person as a “displaced person” or a “refugee” only

if she has migrated to India as a result of disturbances or a fear of disturbances or the partition of the country.¹ On examining these definitions, the Court also held that if a person had died before these disturbances took place or she had never migrated to India as a result of such disturbances, she could not come within the definition of a displaced person or a refugee under the relevant statutes.

In *Ebrahim Aboobakar vs Tek Chand* (1953(SC) AIR 298) the Supreme Court, after examining the Administration of Evacuee Property Act, 1950, stated that the object of the scheme of the Act left little doubt that it was intended to provide for the administration of evacuee property, which was ultimately to be used for compensating the refugees who had lost their property in Pakistan. The Act contained elaborate provisions as to how the administration was to be carried out.² On examining the facts of this case, the Court held that the custodian was to receive dominion over the property only after a declaration was made to this effect. If the evacuee were to die before the declaration, the custodian would not be able to take possession after the death of the alleged evacuee when the

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- 1 *See also* UOI vs. Pratap Singh, 1969 (SC) AIR 33. Elaborating on this point, the Court restated the various definitions under the different laws. Section 2(b) of the East Punjab Evacuees (Administration of Property) Act, 1947, defines an evacuee as “a person ordinarily resident in or owning property or carrying on business within the territories comprised in the province of East Punjab, who on account of civil disturbances, or fear of such disturbances, or the partition of the country (i) leaves, or has since the first day of March 1947, left the said territories outside India or (ii) cannot personally occupy or supervise his property or business.”
 - 2 Subsequent to this Act, Notification No. 4892/S of 8 July 1949 issued by the custodian stated that a “ ‘displaced person’ means a land holder in the territories now comprised in the province of West Punjab or a person of Punjabi extraction who holds land in the Provinces of North-Western Frontier Province, Sind or Baluchistan or any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country.” In addition, Section 2(d) of the East Punjab Refugees (Registration of Land Claims) Act, 1948, states that “ ‘refugee’ means a landholder in the territories now comprised in the Province of West Punjab, or who or whose ancestor migrated as a colonist from the Punjab since 1901 to the Provinces of North-West Frontier Province, Sind or Baluchistan or to any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country.” Section 2(c) states that a “ ‘displaced person’ means a landholder in the territories now comprised in the province of West Punjab or a person of Punjabi extraction who holds land in the Provinces of North-West Frontier Province, Sind or Baluchistan or to any State adjacent to any of the aforesaid Provinces and acceding to the Dominion of Pakistan and who has since the 1st day of March, 1947, abandoned or been made to abandon his land in the said territories on account of civil disturbances, or the fear of such disturbances, or the partition of the country.”

property would have passed into the hands of the heirs. In this way, the court prohibited the custodian from taking possession of the disputed property.

The position of the courts reflects the political mood of the country. A number of cases pursued in West Bengal were delayed subsequent to the refugee influx from East Pakistan in 1971. The strain on the government was recognised by the Supreme Court in a number of cases. For example, in *Samaresh Chandra Bose vs District Magistrate Burdwan* (1973 (SC) AIR 2481), the petitioner was detained under Section 3 of the Maintenance of Internal Security Act, 1971.³ Subsequently, there was a delay of 22 days before the government could consider his representation. The state government explained that the reason for the delay was that its machinery had come under strain. The officers of the Home Department were preoccupied with the influx of refugees from East Pakistan and the Pakistani aggression. Accepting this explanation, the court stated:

It is a matter of public history of which judicial notice can be taken... that for several months preceding the Indo-Pak war which began on December 3, 1971, there was a continuous influx of refugees (running into several millions) from what was then known as East Pakistan and is now free Republic of Bangladesh and that on our eastern border the situation was anything but normal. Indeed, this unprecedented influx of refugees from the very nature of things could not but give rise to colossal problems affecting inter alia the law and order situation and maintenance of security in the State of West Bengal.

Thus, the Court was able to recognise both the need for refugee claims to be processed quickly by the state government and the limitations of the State machinery during a national crisis.

7.2 REFUGEE'S DEFENCE: BROAD ARGUMENTS THAT CAN BE MADE

Defence arguments in a refugee matter should establish that a violation of human rights has occurred, or is likely to occur, in the country from where the refugee has fled. This is the basis of the refugee claim and the reason why the refugee is in India. These arguments would then naturally veer towards the primary canons of justice in common law systems, such as the rules of natural justice, fair play, equity and good conscience.

3 See also *Babul Mitra vs. State of West Bengal*, 1973 (SC) AIR 197; *Muralidhar Malla vs. State of Bengal*, 1973 (SC) AIR 767; *Deonarayan Mondal vs. State of West Bengal*, 1973 (SC) AIR 1353; *Abdul Aziz vs. District Magistrate, Bardwan*, 1973 (SC) AIR 770.

It has been noticed that occasionally the courts need to be clearly presented with the various complexities and principles concerning refugee protection, such as *non-refoulement*. It would be advisable if detailed explanations of these principles are laid down in the petition, indicating the importance of protecting the refugee in India. Given the limited scope that legislation provides, this argument would give the court a chance and a reason to rule in favour of the refugee. It would also allow the court to make maximum use of the limited discretionary power of the judicial magistrate to impose a minimum fine on conviction of the refugee.

Given below are some broad outlines of the possible arguments and submissions that can be used in defence of a refugee:

- The fact that the concerned person fulfils the criteria of being classified as a refugee must be explained. A case should provide the definition of a refugee as per the 1951 Convention and explain the well-founded fear of persecution that the refugee is facing in the country of origin due to race, religion, political opinion or ethnicity. It should be clarified that the persecution has resulted or will result in grave danger to the life and liberty of the refugee. This can be demonstrated by providing personal facts of the concerned case, be it loss of property, murder of family members, harassment, torture or rape in the country of origin. Country of origin information can also establish that people in the same situation as the refugee have faced severe persecution upon return. Updated country of origin information should also be shared to emphasise the risk of *refoulement*.
- It should be stated that the refugee is unable or unwilling to seek the protection of the country of origin. This line of argument can be strengthened by pointing out that she is a person who completely lacks national protection.
- These three factors – the situation in her country, the well-founded fear of persecution, and the lack of national protection – must all be emphasised. Often, a refugee leaves members of her family, her property, important documents, a secure job and a known environment for completely new and unfamiliar surroundings. The fact that she went through all this difficulty to come to India should also be used to indicate the gravity of the situation that she left behind. Details regarding the travails of the flight, the arduous journey into India or the loss of travel documents should be provided.
- It should be made clear to the court at the outset that the concerned refugee is not a criminal, spy or infiltrator; nor is she a mere traveler or tourist. She

is rather a victim. The refugee should also not be confused with economic migrants who enter India with a view to improving their financial situation.

- Counsel must underline the fact that the refugee is attempting to reorganise her life in India and is living peacefully without threatening the peace and security of the country. Counsel should also point out that the refugee is not carrying out any extremist activity on Indian soil against her country of origin or any other country that would make her a threat to Indian interests.
- The refugee is peacefully biding time in India until the situation in her country of origin improves. She intends to return as soon as it is safe to do so. This argument of the desire to voluntarily repatriate to the country of origin once the situation there improves carries psychological weight with the host country. It reinforces the temporary nature of the refugee's presence in India.
- It is imperative to dispel the common presumption that most people from the Third World—usually the countries with conditions that give rise to refugees—want to leave their land in search of greener pastures. To counter this presumption, it can be argued that the refugee's roots are in her country of origin. She may have been well-settled, leading a comfortable life, until strife in her homeland resulted in her sudden flight to another country.
- Counsel should raise the fact that the person has been carefully screened and found to be a mandate refugee under the protection of UNHCR, indicating that the refugee has a valid concern and is in need of international protection. The refugee certificate acts as an identity document. In addition, if she has been given financial and social assistance, it would further indicate that the need to assist the refugee is essential.
- Clearly, favourable judicial precedent, coupled with developments in international law on the subject, carry weight in new refugee cases. Please see the Annexures for a few of these case which might prove helpful.
- Three specific legal submissions must be made. First, the Indian Constitution and its precedents recognise international instruments as incorporated into domestic legislation and are enforced as such. Second, the principle of *non-refoulement* and other principles of refugee protection have now become part of customary international law and are therefore enforceable even though India has not signed the 1951 Convention. Third, the principle of legitimate

expectation must be specifically pleaded. The fact that India has signed a range of international instruments and participated in various international declarations and General Assembly resolutions, in addition to the fact that she is a member of ExCom, would indicate the full range of obligations that India has expressly adhered to.

The above arguments should be supplemented by additional arguments specific to the individual case.

Some district courts may be of the opinion that deportation of the refugee is mandatory upon completion of her sentence. In such situations, the matter may be taken up with the administrative authorities. Alternatively, the order may be appealed to a higher court. The court may be requested to hand over the refugee to the care of UNHCR, and the court precedents in this regard can be referenced.

7.3 MAJOR DECISIONS OF INDIAN COURTS

7.3.1 Supreme Court Decisions

The Supreme Court of India, in *Maiwand's Trust of Afghan Human Freedom Fighters vs State of Punjab* (Criminal Writ Petition Nos. 125 and 126 of 1986) and *N. D. Pancholi vs State of Punjab and Others* (Criminal Writ Petition No. 243 of 1988), stayed the deportation of refugees. In the matter of *Dr. Malavika Karlekar vs Union of India* (Criminal Writ Petition No. 583 of 1992), the Supreme Court stayed the deportation of the Andaman Island Burmese refugees since "their claim for refugee status is pending determination and a *prima facie* case is made out for grant of refugee status and further these individuals pose no danger or threat to the security of the country."

In *Luis De Raedt vs Union of India* (1991 (3) SCC 554), three foreigners petitioned the Supreme Court under Article 32 of the Constitution challenging an order dated 8 July 1987, whereby their prayer for further extension of the period of their stay in India was rejected. Mr. De Raedt argued that since he had been living in the country since 1937, he would qualify as a citizen of India under Article 5 of the Constitution. However, the Supreme Court pointed out that Article 5 mandates that the person concerned must have her domicile in the territory of India at the time of commencement of the Constitution. Domicile, according to the Court, required an intention to permanently reside in the territory, and while the petitioners may have remained in the country for a long period, there was no indication that they intended to stay in this country on a permanent basis. Therefore, the claim of the petitioners was rejected. This case must be studied

carefully because this argument is often used by state lawyers against refugees. The distinguishing feature is that the petitioner claimed to be a citizen, while refugees do not make this claim.

The second contention of the petitioners in this case was that foreigners also have a right to reside in this country. The Court in *Luis De Raedt vs Union of India* laid down the law that even foreigners enjoy the fundamental right to life and liberty, as guaranteed by Article 21 of the Constitution of India, but the fundamental rights of foreigners in this respect are confined to this Article alone. Article 21 guarantees the protection of personal liberty to citizens and foreigners alike, and no person can be deprived of her personal liberty except according to the procedure established by law. However, the right to life and liberty does not include the right to reside and settle in this country, as mentioned under Article 19(1)(e), which is applicable only to the citizens of this country. Relying on *Hans Muller of Nuremberg vs Superintendent, Presidency Jail, Calcutta* (1955 (SC) AIR 367) the Supreme Court held that the government has an unrestricted right to expel a foreigner and that in respect of the right to be heard, there is no hard and fast rule regarding the manner in which a deportee has to be given an opportunity to place her case. The petitioners could have produced some relevant documents in support of their claim of acquisition of citizenship, but they failed to do so. Hans Muller's case must also be read very carefully since it is regularly used against refugees. The distinguishing feature is that this was an expulsion case where the issue was made out to be one of extradition. The petitioner's argument was that extradition law should be resorted to in cases where the government merely expelled the petitioner. The court's sweeping observation that the government has an unrestricted right to expel a foreigner came in the context of whether a foreigner can dictate to a government the procedures to be followed for her removal.

National Human Rights Commission vs The State of Arunachal Pradesh (1996 (SC) AIR 1234) is another case which has had far reaching consequences. The Supreme Court held previously that no one should be deprived of her life or liberty without the procedure established by law. In this case, the NHRC filed a public interest petition under Article 32 of the Constitution, seeking enforcement of Article 21 with respect to 65,000 Chakmas/Hajong tribals residing in Arunachal Pradesh. These tribes were previously residing in East Pakistan (now Bangladesh), but were then displaced by the Kaptai Hydel Power Project in 1964. They took shelter in Assam and Tripura, and many became Indian citizens in due course. Subsequently, due to the inability of the Assam government to rehabilitate them, the assistance of nearby states was sought and 4,012 Chakmas were settled in parts of Arunachal

Pradesh (then known as North-East Frontier Agency). Their population in 1996 was around 65,000. Although the Central Government sanctioned grants for their rehabilitation, its promise to grant Indian citizenship to the Chakma refugees was not fulfilled. In fact, the District Collector of Arunachal Pradesh failed to forward the citizenship applications of the refugees to the Central Government. Moreover, the local population resented these Chakmas, and wanted their removal from Arunachal Pradesh altogether. The All Arunachal Pradesh Students Union (AAPSU) issued “quit India” notices to all alleged foreigners, including the Chakmas, to leave the state by 30 September 1995.

The Supreme Court found *prima facie* evidence that a threat existed to the life and liberty of the Chakmas, guaranteed by Article 21 of the Constitution. It also acknowledged that they were entitled to apply for citizenship under Section 5 of the Citizenship Act. The court held that by refusing to forward the citizenship applications of the Chakmas to the Central Government, the Deputy Collector had failed in his duty and had also prevented the Central Government from performing its duty under the Act and its rules. It stated:

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. This State is bound to protect the life and liberty of every human being, be he a citizen or otherwise.

Accordingly, the Court directed the Arunachal Pradesh government to ensure that the life and personal liberty of the Chakmas residing within the state are protected. It also stated that the Chakmas could not be evicted from their homes nor be denied a domestic life and the comforts therein. Furthermore, it held that any Quit India notices should be dealt with by the state in accordance with the law. Finally, on the matter of citizenship, the court directed that any application for citizenship by the Chakmas under Section 5 shall be dealt with properly; and that while the application of an individual Chakma is pending consideration, she should not be evicted.

The Supreme Court distinguished the *National Human Rights Commission vs State of Arunachal Pradesh* case from that of *State of Arunachal Pradesh vs Khudiram Chakma* (1994 Supp. (1) SCC 615). It held that in the latter case, the court was required to consider the claim of citizenship based on the language of Section 6-A,

and within the narrower context of Section 6-A(2), of the Citizenship Act, 1955. In the former case, the Court stated, the Chakmas were seeking citizenship under Section 5(1)(a) of the Act, which provides for citizenship by registration, and so the considerations were entirely different. In the *Khudiram Chakma* case, the court concentrated specifically on Section 6-A (2) of the Citizenship Act, 1955, Section 3 of the Foreigners Act, 1946; the Foreigners Order, 1948; as well as Articles 19(1) (d) and (e) of the Constitution.

The Supreme Court held that two conditions needed to be satisfied under Subsection (2) of Section 6-A. First, those claiming citizenship under the section must be of Indian origin (undivided India) and must have come to Assam before 1 January 1966 from the specified territory. Second, they must have been ordinarily residing in Assam as it existed in 1985 since their date of entry. "Ordinarily resident" was held to mean "resident during the period without any serious break." The appellants contended that since the territory of Arunachal Pradesh was included in the state of Assam, they should be entitled to the benefit of Section 6-A.

However, the court pointed out that the Immigrants (Expulsion from Assam) Act, 1950, applied to the territories forming parts of Meghalaya, Nagaland and Arunachal Pradesh. Under the North-Eastern Areas (Reorganisation) Act, 1971, the territories of Arunachal Pradesh are excluded from the purview of the above-mentioned Immigrants Act. The court therefore held that the second requirement under Section 6-A (2) was not satisfied. With respect to the first condition, the court held that they could not be regarded as Indian citizens.

The appellants relied upon Section 3 of the Foreigners Act, 1946, and Clause 9 of the Foreigners Order, 1948, which restricts foreigners from acquiring land within protected areas. In 1964, some land was allotted to Chakmas under the Chakma Resettlement Scheme. Instead of residing in those allotted areas, the Chakmas inhabited land donated to them by a local raja. The administration alleged that the Chakmas were indulging in procurement of arms and other criminal activities; the state government then directed the appellants to shift to the originally allotted lands. The Supreme Court pointed out that since this was a policy matter, it would not interfere in the decision. Nevertheless, after quoting various international law authorities, the court stated that foreigners, especially refugees, cannot be discriminated against in their enjoyment of legally acquired property.

Finally, in an attempt to buttress their case, the appellants argued that they were entitled to certain fundamental rights under the Constitution, including

the right to reside and settle in India. However, the Court stated that only Article 21 was applicable to foreigners and that they could not invoke any provision under Article 19.

In *People's Union for Civil Liberties vs Union of India*, (1997 (1) SCC 301) the Supreme Court considered Articles 21, 19(1)(a) and 19(2), 14, 32, and 51 of the Constitution. It held that that it is "an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law." Citing the case of *Kesavananda Bharati vs State of Kerala*, AIR 1973 SC 1461 the Court stated, "in view of Article 51 of the directive principles, this Court must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India." Since Article 17 of the ICCPR and Article 12 of the UDHR were not contradictory to municipal law, they could be used to interpret Article 21 of the Constitution.

In *Chairman Railway Board and others vs Chandrima Das and others* (2000(2)SCC 465), the Supreme Court, after discussing various precedents and international instruments, held that 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 have a 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 lives of persons who are not citizens. The court also held that since "life" is 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 this word by the Court in its various decisions relating to Article 21 of the Constitution. 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.

While inaugurating a seminar on 'Refugees in the SAARC: Building a Legal Framework', the former Chief Justice of the Supreme Court of India, Justice J. S. Verma, acknowledged the plight of refugees in India and encouraged legislation on the subject. He stated:

Refugees being deprived of the support and protection of their home country are required to be given the needed protection by the International Community. This is a necessary commitment of civilisation. Refugees are often without means of sustenance and may not have the requisite identity papers. For this reason, provision has been made even for these basic needs.

Thus, the stand taken by the Indian judiciary has on the whole been encouraging, despite the fact that there is no existing statute relating to refugees.

7.3.2 Decisions of High Courts

The High Courts of various states in India have liberally adapted the rules of natural justice to address refugee issues. They have also recognised that UNHCR plays an important role in the protection of refugees. The Guwahati High Court has in various judgements recognised the need for refugee protection and permitted asylum-seekers to approach UNHCR for determining their refugee status. It has stayed the deportation orders issued by the district court or the administration in cases where the refugee has been arrested for violation of the Foreigners Act.

In *Ms. Zothansangpuli vs The State of Manipur*, Civil Rule No. 981 of 1989, the Guwahati High Court took a very sympathetic view of the refugee's problem. It stated:

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. It is therefore, directed that after the petitioner is released, which is stated to be the period of sentence, she may not be deported for a period of one month. During that period she may visit Delhi for making necessary arrangements (to seek political asylum in this country or a third country). 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.

The case of *Mr. Bogi vs Union of India*, (Civil Rule No.1847 of 1989) in the Guwahati High Court involved a Burmese asylum-seeker who was a prisoner undergoing trial. He claimed that if he was deported on the expiry of his detention, his life would be in danger. The court therefore ordered that the asylum-seeker be released for a period of two months, upon furnishing the appropriate security, so that he might apply for refugee status with UNHCR. If such status was granted, he was to be released without serving the remainder of his sentence. If, however, refugee status was refused by UNHCR, he would be ordered to surrender to the magistrate at Imphal.

In the matter of *Shri. Khy-Htoon and others vs State of Manipur* (Civil Rule No. 515 of 1990), the petitioners contested the refusal of the state government to comply with their request to be brought before the UNHCR office in Delhi in order for

them to seek refugee status. The petitioners also argued that they would not be able to obtain appropriate surety as foreign nationals. The Court held:

The petitioners shall be released on interim bail of three months on furnishing personal bonds of Rs. 5000 to the satisfaction of the Chief Judicial Magistrate, Imphal to enable them to go to Delhi for the aforesaid purpose. Immediately after their arrival they shall report to the Officer in charge of police station Parliament Street, New Delhi.

In *A. C. Mohammed Siddique vs Government of India and others* (Writ Petition Nos. 6708 & 7916 of 1992) the Madras High Court expressed its unwillingness to let any Sri Lankan refugees be forced to return to their country against their will.

In another far-reaching judgement in a case before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to verify the voluntariness of the refugee's decision to go back to Sri Lanka, as well as to permit those refugees who did not want to return to continue to stay in the camps in India.⁴ The court held that "since the UNHCR being a world agency was involved in ascertaining the voluntariness of the refugees return to Sri Lanka, it is not for the Court to consider whether the consent is voluntary or not." Further, the court acknowledged the competence and impartiality of the representatives of UNHCR.

The Bombay High Court, in the matter of *Mr. Syed Ata Mohammadi vs Union of India* (Criminal Writ Petition No. 7504 of 1994), held that "there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR." The court further permitted the refugee to travel to whichever country he desired. Such an order is in line with the internationally accepted principle of *non-refoulement*.

The Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi vs Union of India*, (1999 Crl. LJ 919) showed a sympathetic approach towards the petitioners. The petitioners, Iraqi refugees certified by UNHCR, were detained under the Foreigners Act by the state government and were to be deported. The petitioners stated that their lives were in danger, as they refused to join the Iraqi army due to their abhorrence of violence. The plea of the petitioners that they feared persecution in their country of origin found support in a report by UNHCR. The report pointed out that as per an order issued by the Iraqi government, the auricle of one ear of any person evading military service shall be cut off. The court held that, "[h]umanitarian jurisprudence is now an international creed in time of peace and war." The court also directed the state government to consider the case from a humanitarian point of view. The High Court held that the petitioners should not be deported from India until their

4 P. Nedumaran vs. Union of India, WMP Nos. 17372, 17424, 18085 and 18086 of 1992 in Writ Petition Nos. 12298 and 12343 of 1992.

prayer was considered in accordance with law. Even if the decision taken went against the petitioners, the court directed that they would not be deported for a further period of 15 days from the date of communication of such a decision, in order to enable the petitioners to challenge the order in court.

In *Ba Aung vs UOI and Ors* (CAN 3708 of 2006), the Kolkota High Court in an appeal granted the refugee's writ petition seeking exit permission in order for them to travel to Sweden, their resettlement country. The Court directed the prison authorities to hand over the petitioners to UNHCR. The said authorities, including the Ministry of Home Department, Govt. of West Bengal as well as to the Ministry of Home Department, Union of India, were thereafter directed to allow the petitioners to leave for Sweden.

The Madras High Court in *Raju vs State of Tamil Nadu and Ors* (W.P. 24063 of 2005) directed the respondents to consider the petitioner, a Sri Lankan refugee, for compensation for the death of his daughter, who lost her life in the tsunami.

The Bombay High Court in *Anthony Omandi Osino vs FRRO* (Cr.W.P. 2033 of 2005) stayed the deportation of the petitioner and further directed the UNHCR to hear and dispose of the appeal filed by the petitioner within a period of one month from the date of receipt of the order.

In *Akbar and Ors vs. Union of India and Ors* (CrlM(M) 2140/2000) the Delhi High Court held that a foreign national cannot automatically be deemed to be an Indian citizen without complying with the procedure established by law. It further held that the procedure for deportation must be scrupulously followed so as to minimise misery and/ or any violation of human rights.

In *Yogeswari vs. State of Tamil Nadu, Habeas Corpus Pet. No. 971 of 2001*, the Madras High Court examined the case of a Sri Lankan refugee, who after arriving with valid documentation and residing in India for several years, was taken into custody of the police. The Government claimed they had the right to detain him due to his possession of counterfeit currency, but they held him for two years with no filing of charges. The Government claimed they had the power to indefinitely detain him under the National Security Act, 1980, but the court held that they only had the right to hold foreigners under the Foreigners Act, 1950, in a residential camp with other foreign nationals – the petitioner in this case was locked up from 6am to 6pm and only given the freedom to walk around in a small enclosed area, which the court held amounted to a prison and was therefore in violation of Art. 21 of the Indian Constitution.⁵

5 For further discussion of conditions for what amounts to detention for refugees, see Premavathy Rajathi vs. State of Tamil Nadu, H.C.P. Nos. 1038, 1101, 1118, 1119, 1120, 1121, 1122, 1123, 1085, 1170 and 1226 of 2003, Madras High Court (14.11.2003).

7.4 REFUGEE ISSUE: INTERNATIONAL JUDICIAL RESPONSE

Refugee law and the entry, exit and stay of refugees are codified in the legal systems of many countries that have acceded to the 1951 Convention and have a refugee protection mechanism in place. There have also been significant developments in the practice of refugee law in these countries, including judicial precedents. Some important cases dealing with refugees are briefly enumerated below.

7.4.1 Judgements on Asylum

Granting asylum to a refugee within a territory has been the sovereign right of every state.

In *Cruz-Varas vs Sweden and Ors*, 46/1990/237/307, the European Court of Human Rights (ECtHR) examined the case of a Chilean political activist extradited from Sweden to Chile, which the applicant claimed was in violation of Article 3 of the European Convention on Human Rights (ECHR), which states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The ECtHR had previously held that, “the decision by a Contracting State to extradite a fugitive may. . . engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.” However, the ECtHR also stressed that the ill treatment must attain a minimum level of severity. In its application of Article 3, the ECtHR has consistently maintained a high standard of proof and conceded considerable substantive and procedural room to national authorities.

ECtHR indicated that in assessing the degree of risk, it will look at all the material placed before it, including any evidence obtained by its own initiative. The court stated that in judging State actions, it will look at the facts known at the time of the alleged exposure to the risk. However, it would also take into account information subsequently available to confirm or refute the foundation of an applicant’s fear.

States remain under no obligation to grant asylum, while protection within a state “implies only the normal exercise of territorial sovereignty.”⁶ Save in so far as it does not trespass upon the State’s other obligations under international law, the

6 Asylum Case (Colombia v. Peru), 1950 (Rep) ICJ R 266.

sovereign act comprising the beneficial exercise of territorial jurisdiction is entitled to respect by all the other states, including the country of origin of the refugee.

The exclusion clause of the 1951 Convention states that the Convention is not applicable to those who have acted contrary to the purpose and principles of the United Nations. Significant trafficking in a dangerous illicit drug constitutes an act that is contrary to UN purposes and principles and would thus form the basis of exclusion from the refugee category⁷ under Article 1F of the Convention. Such activity is recognised, both legally and practically, not only as a domestic criminal offence but also as one that can inflict very serious and significant harm on the international community.

7.4.2 Judgements on Fear of Persecution

One of the principal elements required to claim refugee status is that the claimant must be genuinely at risk. Various legal “tests” have been developed concerning the standard of proof that is required to satisfy what constitutes being genuinely at risk or having a genuine well-founded fear of persecution. Courts in a number of countries have articulated some of these tests.

In *INS vs Cardoza Fouseca* (1987 (46) USSC 407), the US Supreme Court held:

The moderate interpretation of the ‘well-founded fear’ standard would indicate that so 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.

The judgement of the House of Lords in *R vs Secretary of the Home Department Ex Parte Sivakumaran* (1988) (1) All E.R.193 (H.L.), suggests that the test should consider whether there is an evidence of a “real and substantial danger of persecution.” The Canadian Federal Court of Appeal considered the above and disapproved of the House of Lords formulation in *Joseph Adjei vs Ministry of Employment & Immigration* (1989) (7:2d) Imm.L.R 169). The court adopted the “reasonable chance” standard.⁸

In *D vs Board of Immigration*, the Board held that the applicant established a well-founded fear of persecution, after hearing evidence that she was gang-raped and beaten in her home by soldiers and targeted by her attackers because of her political opinion and religion.

7 Pashupanathan vs. Canada (Minister of Citizenship and Immigration) and Another, File No. 25173 of 9 Oct 1998, Immigration and Refugee Board Canada.

8 D vs. Board of Immigration, 1993 BIA Lewis 15.

These judgements demonstrate that a rather liberal approach is taken when determining whether a person has a well-founded fear of persecution. If there is objective evidence indicating a reasonable possibility or chance of persecution in the claimant's state of origin, the claim should be adjudged well-founded.

7.4.3 Judgement on Racial Persecution

The international community has expressed its abhorrence of discrimination on racial grounds, but whether such discrimination amounts to persecution by itself is less clear. In the *Patel* case, the International Court of Justice held that the discrimination likely to be faced by a Kenyan citizen of Asian origin did not amount to persecution.⁹

7.4.4 Judgements on Religious Persecution

Article 18 of the ICCPR and Article 18 of the UDHR prescribe that everyone shall have the right to freedom of thought, conscience and religion, which shall include the freedom to have or adopt a religion or belief of choice and the freedom to manifest such a religion or belief. Article 9 of ECHR also expressly recognises the freedom to change one's religion or belief. However, a distinction may be drawn between the freedom to practice a religious belief and the right to proselytise.¹⁰

7.4.5 Judgements on Nationality Persecution

Nationality in Article 1A(2) of the 1951 Convention is usually interpreted in broad terms to include the origins and membership of particular ethnic, religious, cultural and linguistic communities. In *London Borough of Ealing vs Race Relations Board* (1972 () AC 342), the court excluded nationality from the generic term "national origin."

7.4.6 Judgements on Membership of a Social Group

The social group category has given rise to several judgements, especially in Canada. In *Cheung vs Minister for Employment and Immigration* (1993(2) FC 314), the Canadian Federal Court of Appeal held that women in China who have more than one child and are faced with forced sterilisation are a social group. Particular weight was attached to a woman's reproductive liberty as a basic right fundamental to human dignity.

9 *Patel et al vs. United Kingdom*, Application No. 4403/700 of Oct 1970.

10 *Kojjinakis vs. Greece*, 3/1992/348/421, European Court of Human Rights, 25 May 1993.

Chen Shi Hai vs Minister of Immigration and Multicultural Affairs, (2000 HCA 19), involved a Chinese national born to Chinese parents whilst they were being held in Australian immigration detention facilities pending their return to China as illegal immigrants. The applicant was the youngest of the three children born in contravention of China's one child policy, who wanted a protection visa, pursuant to Section 36(2) of the Migration Act, 1958. This section provides that persons to whom Australia has an obligation under the 1951 Convention should be afforded protection. It was argued that the appellant was a member of a social group referred to as "black children" (children born of unauthorised marriages and in contravention of the one child policy) and as a consequence, he would suffer social stigma and persecution if forced to return to China. In particular, the State would deny various benefits and access to food, education and health care. After the initial refusal by the Minister of Immigration and Multicultural Affairs and the Federal Court, the appellant appealed to the Australian High Court. The findings of the latter were that children who have not violated the one child policy themselves but are born in contravention of it do constitute a social group; they are defined other than by reference to the discriminatory treatment—i.e. of their fear of persecution.¹¹ The court also held that though the alleged persecution would not result from any enmity or other adverse intention towards the appellant himself as a "black child," that did not alter the reality of the persecution that the applicant would face, and therefore allowed granted relief to the applicant.

In *Nasser Mustapha vs Alberto Gonzales*, the United States Court of Appeals for the Ninth Circuit held that the applicant had a well-founded fear of persecution if he were removed to Lebanon, in consideration the fact that the applicant was gay and suffering from HIV/AIDS.¹² Homosexuals were thus held to constitute a 'particular social group'.

7.4.7 Judgements on Political Persecution

In the 1951 Convention, the term "political opinion" should be understood in its broad sense. It incorporates, within substantive limitations, any opinion on any matter in which the machinery of the state or government policy may be engaged. This wording was adopted and endorsed by the Supreme Court of Canada in *Attorney General vs Ward* (1993(2) SCR 689).

7.4.8 Judgements on Refugee *Sur Place*

That the 1951 Convention protects refugees *sur place* on an equal footing with those who cross a border after the risk of persecution is already apparent.

11 A vs. Minister of Immigration and Ethnic Affairs [1997(4) LRC 480].

12 Nasser Mustapha vs. Alberto Gonzales, 399 F.3d 1163 (9th Cir. 2005).

Chaudhri vs Canada (Minister of Employment & Immigration) (1986 (69) N.R.114) involved a Pakistani citizen who had been an activist of the ruling Pakistan Peoples' Party prior to the military overthrow of 1979. Mr. Chaudhri had been in Canada for three years prior to the coup. In 1980, he learned that the new military government had issued a politically inspired warrant for his arrest that could lead to indefinite detention. The Federal Court of Appeal of Canada held that he was properly considered a Convention refugee *sur place* since his fear of persecution while not extant at the time of his departure from Pakistan was nonetheless well-founded in subsequent events.

7.4.9 Judgements on *non-refoulement*

In *Kirkwood vs United Kingdom* (10479/83), 37 D & R 158, the European Commission on Human Rights held:

If conditions in a country are such that the risk of serious treatment and the severity of that treatment fall within the scope of Article 3, a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility...of the contacting State which so decides.

According to the Commission, the Article 3 guarantees "are of an absolute character, permitting no exception." Thus, the European Convention on Human Rights provides wider guarantees than Articles 32 and 33 of the 1951 Convention.

In *Chahal vs The United Kingdom*, ((1997) 23 EHRR 413) the European Court of Human Rights (ECtHR) held that:

[E]xpulsion by a Contracting State may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country.

The applicant was an Indian national who faced deportation from the UK on the grounds that his activities within that country posed a threat to its national security. He opposed the deportation order on the basis that if he returned to India, he would face persecution from the national security forces because of his association with the Sikh separatist movement. Although the English Court of Appeal found that the Home Secretary was obliged to balance the interest of national security against the risk that the deportee would face in his home country when considering the deportation order, that court stopped short of quashing the order. The ECtHR however found that there was sufficient evidence to show that Mr. Chahal would face a real risk of torture on being deported to India. Accordingly,

if the UK implemented the order, it would be in breach of its obligation under Article 3.

The ECtHR went even further in its decision in the case of *Ahmed vs Austria* 71/1995/577/663. The applicant was a Somali national who had been granted asylum by the Austrian government but subsequently had his refugee status revoked because of his conviction for robbery whilst he was staying in Austria. The applicant argued that if he returned to Somalia, he would be at risk of being tortured because of his association with the United Somali Congress, one of the warring factions in the civil war. Austria argued that it was acting in accordance with Article 33(2) of the 1951 Convention, which allows a State to refuse refugee status to those who have been convicted of a serious crime in that State. The court however held that Article 3 of the ECHR provides for an absolute prohibition on torture and is wider than the protection afforded under Article 33 of the 1951 Convention. Thus, as long as there was a risk of the applicant being tortured on his return to Somalia, any attempt to deport him made by the Austrian authorities would be in breach of Austria's obligation under Article 3 of the ECHR.

It should however be noted that the United States Supreme Court in *Sale vs. Haitian Centers Council*, 509 U.S. 155 (1993), has not upheld the principle of *non-refoulement*. In this case, an executive order authorising the US Coast Guard to intercept vessels transporting Haitians to the US and to repatriate them was upheld by the Supreme Court as not running afoul of Article 33 of the 1951 Convention.¹³

While States may be bound by the principle of *non-refoulement*, they still retain discretion regarding both the grant of durable asylum and the conditions under which it may be enjoyed or terminated. However, decisions of expulsion are required to be in accordance with the due process of law, except where compelling reasons of national security require otherwise. Nevertheless, the permitted power of expulsion does not include the power to return the individual to the country in which her life or freedom may be threatened, unless the further exacting provisions, which regulate exceptions to the principle of *non-refoulement*, are also met.

In *Refugee Case* ((28) ILR 297) the Federal Administrative Court of Germany held that a refugee found to be unlawfully in the country could be expelled, provided she was not returned to the country in which her life or freedom would be

13 The Inter-American Commission subsequently held that the order violated the obligations of the United States under the American Declaration of the Rights and Duties of Man (Haitian Interdiction Case No. 10.675, 13 March 1997).

threatened. An almost identical conclusion was reached in the US in *Chim Ming vs Marks* (505 F.2d 1170 (2d Cir. 1974)).

In *Expulsion of Alien* ((28) ILR Austrian Case 310), the Austrian Supreme Court, upholding an expulsion order, observed that it merely required a person to leave the State; it did not render her liable to be returned to a specific foreign country.

7.4.10 Judgements on Detention

The Human Rights Committee in the case of *A vs Australia* (Communication No. 560 of 1993) held *inter alia* that although the fact of illegal entry of an asylum-seeker—coupled with other factors, such as the possibility that she may abscond—can justify her detention, she should not be detained for a period longer than the State can justify. Where detention was beyond a time for which the State could provide appropriate justification, it was arbitrary and thus contrary to Article 9 of the ICCPR. In this case, the Committee found that Australia had violated Article 9 since it could not provide appropriate justification for detaining the applicant for over four years.

In *Amuur vs France*, (ECtHR decision on 25-6-96), the applicants (three brothers and a sister) arrived with ten other Somali nationals at a Paris airport from Syria. They claimed to have fled Somalia because their lives were at risk following the overthrow of the president. However, the airport personnel and the border police refused to admit them into French territory as their passports were not genuine. The Somalis were taken to a hotel converted for use as a waiting area in the airport. Their request to be granted refugee status was turned down. They made an urgent application seeking to be released from their confinement at the hotel and complained to the European Commission on Human Rights about their treatment. The Commission's President indicated that it was desirable to refrain from sending them back to Somalia. The Interior Minister, however, refused the applicants, denied leave to enter and the Somali nationals were sent back to Syria.

The ECtHR ruled that the applicants' detention was not provided for in any legislation and was unlawful. It directed that they be released. In view of this ruling, Syria assured their life and liberty. The other Somali nationals were recognised as political refugees.

The ECtHR held that keeping the applicant in the international zone was equivalent in practice to a deprivation of liberty. This is an important decision. Many governments claim to hold refugees in no man's land, such as transit zones, where they claim the law does not apply, as the refugee has technically not landed in the country of refuge. The ruling also provides an expanded meaning of what is understood by deprivation of liberty and reflects a keen appreciation of the ground realities confronting many asylum-seekers, particularly when several states are anxious to stem the flow of migration.

8

LEGAL COMPLICATIONS AND POSSIBLE SOLUTIONS

In a normal case of refugee protection before a court, various legal complications invariably arise. Some typical scenarios and the possible courses of action to be taken to extricate refugees are discussed below.

8.1 DETENTION

The government has the power to detain foreigners who are illegal entrants and those who illegally remain in India, pending their deportation or a decision on their entry or continued stay. Detention can be at the port of entry or any prison or police lock-up. Two issues are involved in the detention of refugees and asylum-seekers. The first is whether the power to detain and the period of detention are limited in the case of a refugee, and the second is whether the conditions of detention are in accordance with the internationally accepted norms for the treatment of detainees.

Regarding the first issue, the 1986 UNHCR ExCom Conclusion No. 44 stated:

Detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead authorities of the State in which they intend to claim asylum; or to protect national security or public order.

In India, refugees who have attempted to defraud the authorities as well as asylum-seekers who have not been recognised as refugees can be detained. If an asylum-seeker is detained, she must be kept only until her claim is determined.

While in detention, she should be allowed to approach UNHCR for refugee status determination.

In *Dr. Malavika Karlekar vs Union of India* (Criminal Writ Petition No. 583 of 1992), the Supreme Court took a lenient view with regard to 21 Burmese nationals who were to be deported from Andaman Islands to Myanmar. The Court held that while their claim for refugee status was pending with UNHCR, they may not be deported. The Metropolitan Magistrate in Delhi passed a similar order in *State vs Mohd Ehsan* (FIR No. 435 of 1993). The deportation order was considered unnecessary as the asylum-seeker was recognised as a refugee by UNHCR. Various high courts have stayed deportation orders in cases where the claims for refugee status determination were pending with UNHCR.¹⁴ If the refugee has been detained for breaking Indian law, she has a right to due process before the law.¹⁵ She cannot be detained without a fair trial or after the sentence has been served.¹⁶

In determining the second issue, regarding the conditions of detention, it is important that the conditions are compatible with the prohibition on cruel, inhuman or degrading treatment, the pursuit of special protection accorded to the family and to children, and the general recognition given to basic procedural rights and guarantees. As far as the last right is concerned, UNHCR has often been granted access to detained refugees for determining their refugee claim. However, the detaining authorities often procrastinate in issuing a first information report (FIR), which results in delayed access to legal representation.

As the example given below shows, detention will cease when the judiciary or executive issues directives for the release of the detainee.

*The Bombay High Court ordered the release of an Iraqi refugee who had been detained at the Immigration Lounge of Sahar International Airport for over a month, pending deportation. He was released primarily because the UNHCR had granted him refugee status.*¹⁷

14 Mst. Khadija vs. Union of India, Criminal Writ Petition No. 658 of 1997, Delhi High Court; Syed Ata Mohamadi vs. Union of India, Criminal Writ Petition No. 7504 of 1994 Bombay High Court; Gurinder Singh vs. Union of India, Criminal Writ Petition No. 871 of 1994, Punjab and Haryana High Court.

15 The detention of refugees is generally covered by national law and is subject to the principles, norms and standards contained in the 1951 Convention, and the applicable human rights instruments.

16 N.D. Pancholi vs. State of Punjab, Criminal Writ Petition No. 243 of 1988, Supreme Court ("Pending notices, Iranian National mentioned in the Writ Petition shall not be deported").

17 Syed Ata Mohamadi vs. State, Criminal Writ Petition No. 7504 of 1994 Bombay High Court.

Relief from detention may be sought by way of a criminal writ petition filed in the appropriate high court under Article 226 of the Constitution of India. This was done in the case cited below:

*Two Afghan refugees were arrested while trying to exit India to Afghanistan via the Attari border at Amritsar in May 1994. They were tried and convicted for the offence and duly completed their sentences in mid-1995. However they were kept in detention at the Transit Camp of Amritsar Central Jail. Their release was sought several times by UNHCR with the Ministry of Home Affairs in New Delhi. Finally, a criminal writ petition was filed on behalf of the said refugees in the Punjab and Haryana High Court at Chandigarh. Consent for their release was granted by the Ministries but due to a lack of communication and subsequent confusion regarding the instruction from the Central Government to the Punjab State Department of Home Affairs, release of the refugees took a considerable length of time. Justice S.S. Sudhalkar of the Punjab and Haryana High Court eventually released them in March 1997 following a judgement in February 1997. By that time the refugees had been illegally detained in the Transit Camp of the jail for two years, despite the fact that orders for their release had been issued much earlier by the Central Government.*¹⁸

8.1.1 Detention of Women Refugees

The Indian judiciary is sympathetic to the cases of detained female refugees. Many courts are of the opinion that in cases where there has been no grave breach of law by the accused woman, she should be released on bail pending trial. One such case is cited below:

*An Iraqi refugee fled persecution from Iraq with her husband and children and entered India illegally. The family was arrested in New Delhi. However, she was released on bail soon afterwards. Her husband continued to be in detention until intervention by the Delhi High Court secured his release.*¹⁹

In certain cases, the woman may find herself in a worse predicament upon release. The courts might pass deportation orders that further complicate the situation. UNHCR has had limited success in resettling these refugees in a sympathetic third country. A case with a successful outcome is described below:

A Sudanese refugee fled persecution in her country of origin because of her conversion to Christianity. She failed to obtain an extension of her

18 Shah Ghazai vs. State, Criminal Writ Petition No. 499 of 96, Punjab and Haryana High Court.

19 Malika Marui Safi vs. State, Criminal Miscellaneous (Main) No. 1135 of 1997, Delhi High Court, FIR No. 44 of 1997 (filed under Sections 419, 420, 468 and 471 of the IPC).

*passport, which expired while she was in India. She was arrested and subsequently released on a personal bond. She later pleaded guilty to the offence under Section 14 of the Foreigners Act and was sentenced to 15 days imprisonment, which she had already served, and a fine of Rs 2,500. Since she had a well-founded fear of persecution and because fundamentalist Sudanese in India were harassing her, the Canadian High Commission accepted her for permanent residence in Canada under their "Women at Risk Programme."*²⁰

Advocates must specifically request that judges not order deportation, and must inform judges of the consequences of passing such an order. If a judge is determined to do so, the advocate must request a stay on the order to enable an appeal to be filed.

8.1.2 Detention of Refugee Children

Refugee children are required to be treated with care by the authorities concerned. When adults accompany them, detained mothers are provided access to their children and are allowed to tend to their needs.

There are many cases of older refugee children, between 15 to 18 years, who have been detained for non-possession of valid travel documents. Problems arise because children are not granted separate residential permits. Inclusion of their names in their parents' residential permits can create various difficulties. The case cited below describes the plight of one such refugee:

*A young Afghan refugee was barely 17 years old when arrested for non-possession of valid travel documents in New Delhi. He had a valid residential permit to stay in India, as his name was included in his father's residential permit. At the time of his arrest, he was not in possession of the residential permit. He was not given an opportunity to produce his residential permit or even contact his family. Meanwhile, the family filed a missing persons report with the local police. Later, a constable informed the parents of their son's detention in jail. The parents initiated legal proceedings to have him released. He was subsequently discharged after considerable effort.*²¹

20 State vs. Eva Masar Musa Ahmad, FIR No. 278 of 95 (filed under Section 14 of the Foreigners Act, 1946).

21 Farid Ali Mohammed Khan vs. State, FIR No. 473 of 95 (filed under Section 14 of the Foreigners Act, 1946).

In cases where refugee children are separated from their families, all possible efforts are made to reunite them. The long and arduous road to reunion of one such separated refugee is described below:

A Sri Lankan Tamil refugee was only 17 years old when he reached New Delhi from Madras after being accidentally separated from his family, who themselves had proceeded to London on an asylum claim. He was traveling to London via Moscow on false travel documents, and was deported back to New Delhi, where he was arrested upon his return. He was granted bail. In the meantime, efforts were made to reunite him with his family who had been recognised as refugees. The British Immigration and Nationality Department then granted him clearance. However, the charge sheet had not yet been filed in the court of Metropolitan Magistrate by the prosecution, thus delaying the disposal of the court case. The refugee could not be permitted to leave the country until the case was decided. Upon the intervention of the Delhi High Court, the prosecution was directed to immediately file the charge sheet and to dispose of it promptly. The prosecution obliged and the refugee pleaded guilty to the offences under sections 419 and 471 of the IPC. He was fined Rs. 10,000 and sentenced to two months imprisonment to be set off against time already served. The refugee was then provided with Red Cross documents that allowed him to travel to London.²²

8.1.3 Detention for Illegal Entry

A refugee may face detention by the border control authorities as soon as she illegally crosses into India. The refugee would have entered an unknown country after fleeing her country of origin to save her life. She may have undergone the trauma of loss of family and friends, property and roots in her homeland or en route to India. In such a situation, the refugee may be unable to explain her concerns during the initial interrogation. This could make the local authorities doubt the genuineness of her subsequent refugee claims. She may be suspected of being a spy or infiltrator in the light of inconsistent statements made by her to the authorities. This may result in further interrogation and continued detention without the registration of an FIR. Since no family member may be aware of her plight and she may not be in a position to alert a friend or a relative, the refugee may languish in jail for a long time before she is located.

²² State vs. Winston Venojan, FIR No.438 of 1993 (filed under Sections 419, 420, 468 and 471 of the IPC).

However, once the refugee is able to establish contacts with the outer world—with the assistance of jail authorities or other prisoners undergoing trial, or by other means—she can obtain a clearer picture of her legal options. She may send a letter or message to the UNHCR office in New Delhi or may contact an advocate and seek legal assistance. Below is a case of prolonged detention before the refugees' release could be secured.

An Afghan refugee was arrested while illegally crossing into India via the Indo Nepal border at District Sitamarhi in the interiors of Bihar. The refugee was detained at the border for a considerable period of time because of doubts on the part of the local administration regarding the veracity of his statements due to difficulty of language. His arrest was formally recorded only when the authorities realised that he was a genuine refugee. He was then sent to the Sitamarhi Central Jail where the Jail Superintendent informed UNHCR of the refugee's plight. Thereafter, counsel was appointed by UNHCR to secure release of the refugee. By the time of release the refugee had spent a long period in detention.²³

8.1.4 LACK OF MEDICAL AID IN DETENTION

While in detention a refugee may suffer from some physical ailment, requiring immediate medical attention. Provided that refugees have access to courts through legal representation, release from custody for medical attention can be obtained. A petition may be filed, bringing the illness of the refugee to the attention of the court. Indian courts may then order the detaining authorities to provide the requisite medical aid and secure the primary welfare of the refugee. In some cases, refugees may not be receiving adequate food whilst in detention; orders can also be secured from the court for provision of a proper diet. As the example below shows, court intervention can play a decisive role.

A Palestinian refugee was detained at the international airport in New Delhi because a deportation order was pending against him. On a writ petition filed in the Delhi High Court it was contended that the refugee was not being given proper food and medical attention. The court ordered that the refugee should be provided with at least the basic necessities of food and medical care.

23 Majid Ahmed Abdul Majid Jad Al Hak vs. Union of India & Others, Criminal Writ Petition No. 60 of 1997, Delhi High Court.

8.2 DEFENDING A CRIMINAL CHARGE

It is important for counsel to be aware of what to expect when defending a refugee on criminal charges. A brief outline of criminal law and procedure with respect to refugees is given below.

8.2.1 Bail

The IPC has classified offences into “bailable” and “non-bailable” offences. Bail is a security given in order to obtain a prisoner’s release from imprisonment, ensuring her appearance in court. Serious offences, particularly those punishable with imprisonment for three years or more, are non-bailable. Any refugee arrested by the police without any order from the magistrate and without a warrant under the circumstances mentioned in Section 41 of the Criminal Procedure Code (CrPC) has to be released on bail if the offence with which she is concerned is a bailable one. Bail is a matter of right in bailable offences under Section 436 of the CrPC. With respect to a bailable offence, there is no question of discretion in granting bail, since the section does not provide for such latitude. However, the grant of bail to a refugee accused of a non-bailable offence is at the discretion of the officer in charge of the police station or the Magistrate, under Section 437 of the IPC.

Detention Period

The Legislature contemplated that the investigation should be completed, in the first instance, within 24 hours. If this is not possible, then under Section 167 of the CrPC it should be brought to an end within 15 days from the date when the person arrested was first produced before the Magistrate. If a refugee is arrested and kept in custody by the police during investigation and it appears that the investigation cannot be completed within 24 hours, she must be brought before a judicial magistrate. The Magistrate may authorise her detention either in police custody or in judicial custody depending on whether the offence is bailable or non-bailable. Beyond the first 15 days of police custody, even a high court cannot direct further police custody under its inherent powers.²⁴ The Supreme Court also made it clear in *C.B.I., Spl. Investigation Cell, New Delhi vs Anupam J. Kulkarni* (1992 (3) SCC 141), that the remand of the accused in police custody can only be for 15 days; thereafter, further remand during the period of 90 days can only be judicial.

²⁴ State vs. K.S. Sadanandan, 1984 Cr LJ 1823.

Where the investigation cannot be completed within 15 days, the magistrate may authorise detention of the accused in custody for a total period not exceeding 90 days. Proviso (a) of Section 167(2) of the CrPC dictates that where the investigation relates to an offence punishable with death or imprisonment for at least 10 years, detention may be authorised for a period not more than 90 days; detention may be authorised for no more than 60 days where the investigation relates to any other offence. If the investigation is not completed within the aforesaid period, the accused has an indefeasible right to obtain bail because of the failure of the investigating officer to submit the charge sheet under Sections 167(1) and (2) of the CrPC. In *Matabar Parida vs State of Orissa* (1975(2) SCC 484), the Supreme Court held that if it was not possible to complete the investigation within a period of 60 days, then even in serious crimes the accused is entitled to be released on bail.

The purpose of the arrest and detention of the accused is primarily to secure her appearance during the trial and to ensure that she is available to serve her sentence if found guilty. In the case of foreigners and refugees, there is a fear that they may become untraceable because of their high mobility and lack of community ties within India.

Legal Undertaking for Court Appearance

Release on bail is important for the refugee. If bail is denied to the refugee, her prison term will add to the psychological and physical problems that she may have already suffered in her country of origin. The recent judicial trend, however, reflects greater sensitivity to the issues concerning refugees. The courts in several instances have released asylum-seekers on bail so that they can pursue their claim for refugee status determination with UNHCR in Delhi.²⁵ Frequently the prosecution has withdrawn the case once the person concerned is recognised as a refugee by UNHCR.

In order for bail to be secured, the court has to be convinced that the refugee will not abscond and will assist the authorities in the investigation of the case. In procuring the release of the refugee from legal custody, it is beneficial to state that she will appear at the designated time and place and submit herself to the jurisdiction and judgement of the court.

²⁵ State vs. K. Htoon Htoon, FIR (18(3) 89 SGTPS, CJM Churachandpur, Manipur.

Surety

A refugee residing in the area where she was arrested may in all probability be unable to find any person to stand local surety for her and guarantee her presence in court on each date of the hearing. Hence, unless the trial court permits the refugee to be her own surety, and she is able to pay the surety amount, securing the refugee's release may not be possible. The case cited below highlights these difficulties:

An Iraqi refugee had obtained orders for his release on bail by an Additional Sessions Judge, on executing a bail bond to the amount of Rs. 20,000 with one surety in the same amount. The Judge declined the prayer for deposit of the amount instead of executing the bail bond and furnishing surety. However, the High Court intervened and held that since the petitioner was a refugee and was unable to produce local surety, he should be bailed on deposit of an amount of Rs. 20,000 in Court and should also execute a personal bond for the same amount.²⁶

Executing a personal bond is the only alternative for refugees who cannot produce a local surety.²⁷ In the event that the refugee does not appear for the trial, the amount so deposited shall be forfeited. In *Moti Ram vs State of Madhya Pradesh* (1978(4) SCC 47) the Supreme Court held that it has the power to release a person on bail without surety. The court stated:

The victims, when the suretyship is insisted on or heavy sums are demanded by way of bail or local bailers alone are persona grata, may well be weaker segments of society like the proletariat, the linguistic and other minorities and distant denizens from the far corners of our country with its vast diversity. In fact the grant of bail can be stultified or made impossibly inconvenient and expensive if the Court is powerless to dispense with surety or to receive an Indian bailer across the district borders as good or the sum is so expensive that to procure a wealthy surety may be both exasperating and expensive. The problem is plainly one of human rights, especially freedom vis-a-vis the lowly.

Conditional Bail

The court may impose certain conditions on the release of a refugee, such as insisting on regular attendance at the concerned police station in order to make sure that she does not become untraceable. These conditions are binding on

26 Malika Marui Shafi vs. State, Criminal Miscellaneous Main No. 1135 of 1997, Delhi High Court.

27 Ms. Lialoma Wafa vs. Union of India, Criminal Miscellaneous Main No. 3953 of 1998 and Criminal Writ No. 312 of 1998, Delhi High Court.

the refugee. If she does not comply with them or fails to appear in court on the appointed date, bail will be withdrawn and a warrant for her arrest will be issued. An example of the conditions that can be imposed is given below:

*In the matter of a refugee a petition for release on bail was filed at the High Court of Delhi. The Judge granted bail to the refugee, on the condition that he shall not leave Delhi without permission of the court. Further, he shall report every Monday between 11 a.m. to 1 p.m. at the concerned Police station either to the Station House Officer or the Investigating Officer.*²⁸

Ensuring the Refugee is Traceable

The release of a refugee from detention is often fraught with legalities. Courts are sometimes reluctant to direct the release without securing her presence at the trial. The primary concern is that the refugee should not become untraceable. In order to prevent such an eventuality, a suggestion often made by counsel of the refugee to the court is that the refugee be handed over to UNHCR. This is possible only in cases where the refugee is registered as a mandate refugee with UNHCR and holds a refugee certificate issued by the office. If the refugee is not registered with the office, then she needs to be transferred to New Delhi. There she may seek asylum or, under special circumstances, call in the UNHCR official to determine her status while she is still in detention. The case cited below illustrates the role UNHCR can play in matters pertaining to the release of refugees.

*An Afghan refugee was detained along with his minor son while illegally crossing over the Indian border into Pakistan. The Indian government sought to deport the refugee to Afghanistan. Although the Court was concerned about releasing the refugees and having them become untraceable it stayed the deportation order when the UNHCR offered to take these refugees under its care. The court ordered the refugees to be sent to UNHCR New Delhi under police escort from Amritsar where they were in detention. The court further held that in the event of UNHCR refusing custody of the refugees, they should be taken back to the Central Jail.*²⁹

Proclaimed Offender

After being released on bail, if a refugee fails to attend court as directed and becomes untraceable, the court may issue warrants of arrest for her appearance.

28 State vs. Jameel Ahmad Hossain, Criminal Miscellaneous Main No. 1399 of 1989, Delhi High Court.

29 Shah Ghazai vs. State, Criminal Writ Petition No. 499 of 1996, Punjab and Haryana High Court.

If her presence in court is still not secured, then the court may formally declare her a “proclaimed offender” and all the concerned police stations are alerted about her disappearance. Her subsequent arrest may invite a more severe penalty.

8.2.2 Charge Sheet

A primary requirement for a fair trial in criminal cases is to give precise information to the accused as to what charges have been brought against her. This is vitally important to the accused in the preparation of her defence. Where serious offences are involved, the CrPC requires that the accusations be formulated and put in writing with great precision and clarity. This is the charge that is read and explained to the accused. The provisions relating to the framing of charges are contained in Sections 211 to 224 and 464 of the CrPC. The charge therefore serves the purpose of notifying and informing the accused in clear and unambiguous language of the precise nature of the accusation to which she will need to respond during the trial.³⁰

Timely Filing of Charge Sheet by the Prosecution

If a refugee intends to plead guilty, it is imperative that the prosecution files its charge sheet containing all the charges for prosecuting the refugee in order to ensure early disposal of her case. Only when the charge sheet is filed is it possible for the refugee to be aware of the charges against her and to enter a guilty plea. In some cases, the refugee may require early disposal of her case; hence, the prompt filing of charges is crucial. The counsel for the refugee can force prompt filing of the charges through an executive or judicial order. The difficulties that arise from such delays are highlighted by the example given below:

In the case of an Iranian refugee, who had been detained in Ajmer Central Jail, knowledge of the refugee’s detention was obtained from the local police of Ajmer, who visited the UNHCR office to investigate the case since the refugee was in possession of a refugee certificate when he was arrested. The counsel seeking release of the refugee was hampered by the fact that the prosecution had not filed the charge sheet in the court, thus delaying the matter considerably. The matter was then pursued at the administrative level to seek early filing of the charge sheet enabling the refugee to plead guilty to the offences charged.³¹

30 V.C. Shukla vs. State, through CBI, 1980 Supp. SCC 92.

31 State vs. Habib Iranpur, Criminal Case No 66 of 1996, FIR No.102 of 1996.

8.2.3 Pleading Guilty or not Guilty

The prosecution draws up the charge sheet, produces it before the court and gives a copy to the accused. The trial court then frames the charges and asks the refugee to submit a plea to each charge. If the refugee enters a plea of not guilty, she must be prepared to produce evidence in her defence on trial. Until the trial is complete, the refugee has to appear in court on each day of the court hearing unless she is granted bail. She must also abide by any conditions that the court imposes on her.

In the event that the refugee pleads guilty to the offences with which she is charged, the court must confirm the plea by determining whether the refugee understands what she is saying and is aware of the implications of her plea.³² The counsel for the refugee must then enter a plea for mitigation of the sentence.³³

In most refugee matters under the Foreigners Act, 1946, the Passports Act, 1920, and the Registration of Foreigners Act, 1939, the refugee may be advised to plead guilty if in fact she has broken the law. Her counsel can then ask for the imposition of a fine and imprisonment limited to the time already served.³⁴ A refugee may plead guilty even if bail has been sought. The courts often display a tolerant attitude, as the two cases cited below show.

*The Defendant refugee pleaded guilty. The Court of the Additional Chief Metropolitan Magistrate took a lenient view of the case because he was registered with the UNHCR. A small fine of Rs. 500/ and imprisonment limited to the time already served was imposed.*³⁵

*In the matter of a Somalian refugee, who also pleaded guilty to offences under section 14 of the Foreigners Act and Section 471 of the IPC, the court took a lenient view of her plea because she had fled her country in dire circumstances. She had to pay a fine of Rs. 200/ and the period of sentence of 5 days already served was imposed.*³⁶

32 State vs. Mohd Riza Ali, FIR No. 414 of 1993, Additional Chief Metropolitan Magistrate, New Delhi.

33 State of Maharashtra vs. Mustafe Jmam Ahmed, RCC No. 162 of 1994, JMFC Cant. Pune; State vs. Asghar Nikoorkar Rahimi, CC No.151 of 1998, District Munsif Cum Judicial Magistrate, Alandur; State vs. Montasir Gubara, CC No 427/P/1994, Additional Chief Metropolitan Magistrate, Esplande, Mumbai.

34 State vs. Mohd. Yaashin, FIR No. 289 of 1997, Metropolitan Magistrate Delhi; State vs. Teresi, Calendar Case No. 406 of 1996 CJM Kozhikode; State vs. Thang Cin Thawn, FIR No. 330 of 2001, CJM New Delhi, State vs. Gafoor Zarin, 269/P/2001, State vs. Majid Abdul Raheman Darandash, CC No. 66/P/2002 (LAC No. 207/2002), MM Girgaum Mumbai.

35 State vs. Montasir Gubara, C.C. No. 427/P/1994, Additional Chief Metropolitan Magistrate, Esplande, Mumbai.

36 State vs. Aminu Mohammed Arten, Metropolitan Magistrate Delhi, FIR No. 415 of 1992.

However, this may not always be the case. A judge may react negatively and impose the maximum sentence. Hence, grave caution must be exercised while advising the client as to her plea.

Rearrest on Release from Detention

On being released from prison after serving her sentence, a refugee may still lack valid travel documents. She may then face the risk of being arrested again while in India. The authorities are often requested to provide police escort to the refugee to enable her to safely reach the UNHCR office in New Delhi, update her refugee certificate and establish contact with the Home Ministry to secure valid stay documents in India.

In the matter of a Myanmar refugee, after the executive authorities granted the order for his release, a further order was sought and granted for him to be escorted by the police to New Delhi. In New Delhi he obtained refugee certification from the UNHCR.³⁷

Permission to Travel Abroad

A refugee may have applied abroad for higher studies and received admission to an educational course of short duration in view of her refugee status. Meanwhile, she could be facing trial in India for a refugee-related offence. In such situations, the authorities may be unwilling to discharge the case, as the example given below shows.

A Myanmar refugee had been arrested in Manipur for entering India without valid travel documents. He was later released on bail, while his trial continued. The refugee in the interim obtained admission in a Norwegian University for advanced studies and was issued travel documents and a visa by the Norwegian government. However, he had to obtain exit permission from the Indian Government, which was reluctant to grant such permission in light of the pending trial in Manipur. Only when the Delhi High Court was moved and permission was obtained for the refugee's departure to Norway could he leave the country.³⁸

Misbehaviour on the Refugee's Part

A refugee's unfortunate circumstances may sometimes lead her to treat the detaining authorities or judges with a lack of respect, resulting in the loss of their

37 State vs. Benjamin Zang Neng, GR Case No. 1253 of 1994 Additional District Magistrate, Kolkata.

38 Maung Maung Myo Nyunt vs. State, Criminal Writ Petition No. 5120 of 1994, Delhi High Court.

sympathy for her. In *State vs Hudson Vilvaraj*, (FIR No. 583 of 1997), the court of the Delhi Metropolitan Magistrate held that the person is always subject to the laws of the country that has accorded her refugee status. Any misconduct on the part of the refugee or attempts to put pressure on the authorities can alienate the judge. This is brought out by the case cited below:

An Iranian refugee was detained at Sunauli police station in District Maharajganj in Uttar Pradesh, while illegally crossing over to Nepal. The refugee was travelling with forged travel documents. He was detained in Gorakhpur Central Jail where he managed to contact his friends who sought relief for him. However, they were unsuccessful in securing his release because he had antagonised the judge by attempting to bribe the authorities. When the case was transferred to another Judge, the refugee went on a hunger strike, which further spoilt his chances of immediate release. He was eventually released after pleading guilty to the offences charged.³⁹

8.3 DEPORTATION

8.3.1 Deportation by Courts

Occasionally, courts may order the deportation of a refugee on completion of her sentence. However, the refugee may be unable to return to her country of origin because of a well-founded fear of persecution. To complicate matters further, resettlement in a third country may not be possible for a number of reasons, such as non-acceptance of the refugee by the third country. However, in certain cases UNHCR might be able to resettle such person to a third country.

An Afghan refugee was arrested for entering India without valid travel documents. He was released on bail and his trial continued for several years. He was ultimately convicted, fined and sentenced to a term of imprisonment in the amount already served. However, the Metropolitan Magistrate ordered his deportation. The High Court was moved without success but fortunately the UNHCR was able to resettle him in Canada.⁴⁰

8.3.2 Leave India Notice

A refugee may be served a Leave India Notice, directing her to leave India within a stipulated time period. The notice gives the refugee the option to leave Indian soil

³⁹ State vs. Mahmood Gajol, ST No. 6 of 1994, Sessions Judge, Maharajganj.

⁴⁰ State vs. Jamil Ahmed, Metropolitan Magistrate Delhi, FIR No. 445 of 89.

voluntarily or be forcibly deported by the government. In the case cited below, the refugee took legal recourse but was unable to get the order overturned.

A Sudanese refugee, while pursuing his studies in India, was able to obtain an extension of his residential permit without much difficulty. However, when his studies ceased, extension of his stay in India was refused by the FRRO. He was served with a Leave India Notice requiring him to leave within a few days of receipt of the notice. The refugee moved the Bombay High Court at Nagpur but the court declined to intervene and directed him to obtain his remedy from the government. The refugee then sought asylum in a third country, since forcible return to Sudan would have resulted in severe prosecution for him.⁴¹

8.3.3 International Zone Concept

It is a fundamental principle of international law that every state enjoys *prima facie* exclusive authority over its territory and persons within its territory. However, many states choose to accord lesser rights in their municipal law to those awaiting formal admission than to those who have entered. The United States is a typical example where physical presence is not necessarily synonymous with legal presence for the purpose of determining constitutional guarantees.

International zones are transit areas at airports and other points of entry into countries like India, which are earmarked as being outside Indian territory. The jurisdiction of Indian courts is a major “risk factor” for refugees in case they get caught in these areas since it reduces their access to legal remedies. This legal grey area can be used to violate the internationally acknowledged principle of *non-refoulement*. In one case, a refugee who had travelled to New Delhi from Kathmandu was detained at New Delhi International Airport without access to a lawyer on the grounds that it was an international zone. His only option of getting relief was via the administrative authorities.⁴²

8.4 NEED FOR NATIONAL LEGISLATION

The entire region of South Asia is lacking in refugee legislation. As a consequence, refugees are dealt with on a purely *ad hoc* basis. Such treatment may perhaps suffice in cases of mass influx of refugees, where governmental policy can

41 State vs. Lawrence Loro Kamilo, Criminal Writ Petition No. 189 of 96 Bombay High Court, Nagpur Bench.

42 Majid Ahmad vs. Union of India, Criminal Writ Petition No. 60 of 1997, Delhi High Court.

establish broad guidelines for administrative authorities to follow in recognising and assisting specific groups of refugees. However, since this procedure is not legally defined and is based on an *ad hoc* determination, it is not conducive to the rule of law.

Moreover, the cases of individual asylum-seekers are bereft of any legal process of identification and determination. They get lost in the maze of stringent rules and regulations aimed at foreigners in general, with no established procedure for identifying and protecting genuine refugees. In the absence of a legislative framework, vital decisions are left in the hands of sometimes ill-informed bureaucrats. Not sensitised to the humanitarian principles of refugee law, these officials are not sufficiently conscious of the responsibilities that accompany such decision-making processes.

National legislation, meaning a statute or written law enacted by a sovereign state with the purpose of directing the actions of the government, the administration and individuals of and within the state, is what India needs to enact for refugees specifically. For national law to function, it must firmly embrace universal principles and international law. The greater value of the 1951 Convention and the 1967 Protocol lies in the guidance for legislators when drafting rules for their countries, and not in the immediate applicability of these instruments. Through the medium of national legislation, the state can direct its officers and agencies and convey the rules to those who are going to administer them. Methods and procedures have to be drawn up. The transplantation of the provisions of the Convention to national law necessitates a keen understanding of the special conditions and traditions of the state concerned. This can be done perhaps more easily and systematically by national legislation than via other routes.

8.4.1 Judicious, Fair and Accountable Procedures

The Indian legal system is grounded in the Constitution of India. At its core, the Constitution upholds the dignity of the individual. Its central plank is the guarantee that the life and liberty of the individual are protected. Not merely is the life of a citizen of India guaranteed, but everyone who inhabits the terrain of this country is assured of protection of her life and liberty.

The rule of law is the cornerstone of a democratic society. There is certainly a need for greater transparency and accountability in the law relating to refugees. The discretionary use of the Foreigners Act, 1946 by all types of officials is unsatisfactory and may lead to avoidable arbitrariness and corruption. It is not fair to allow the system to adopt *ad hoc* responses depending upon who the asylum-seekers are. Not everyone who is dealt with arbitrarily can seek the protection of courts. As

such, there is a need to formalise the refugee-friendly law that India has been practising, into a statute with appropriate controls to protect state security and to prevent abuse of process. There should be a consolidation and reiteration of the existing principles of the Indian Constitution and administrative law—to provide easy access to officials who handle asylum issues and to avoid any possible misuse of power vis-a-vis refugees.

A formal framework for refugees will provide clarity and guidance on many legal and administrative issues pertaining to the recognition and protection of refugees and the provision of assistance to them. It will also establish consistency and predictability in handling asylum-seekers and refugees.

Due to the absence of legislation on refugee protection, *ad hoc* and differential measures have occasionally been applied to certain refugee groups in India—in particular, the Tibetans and the Sri Lankans. These measures vary for each refugee group with regard to their determination and treatment. Current sectarian political interests of the receiving regional state have dictated existing policies. A national legislation for refugee protection will put forth standardised and acknowledged principles for refugee determination and treatment. Under a policy regime that caters to a specific group of refugees, the powers to grant refugee status are vested in the administrators at the district and subdistrict levels. These administrators are not guided by any defined mechanisms of determination. This leads to administrative discretion and lack of consistency between determining agencies. The problem is further compounded in the case of individual asylum-seekers, since no governmental/judicial forum has been established for the specific purpose of receiving asylum claims and determination thereof.

Enactment of refugee-specific legislation will enable the creation of a framework based on agreed standards of refugee status determination, protection and treatment. The general laws relating to foreigners currently govern the entry, stay and exit of individual refugees in India. These laws are the Foreigners Act, 1946; the Registration of Foreigners Act, 1939; the Passport (Entry into India) Act, 1920; the Passport Act, 1967; and the Extradition Act, 1962. The relevant provisions should be harmonised under one legislation for refugee protection to enable meaningful implementation guided by humanitarian principles. Without a refugee-specific law, the rights available to refugees are no different from those granted to aliens in general. The laws dealing with foreigners do not take cognisance of the existential realities that confront a refugee. Often, a refugee is in the country without proper papers and therefore can be deported under the Foreigners Act. This is not only unfortunate but also in violation of the principle of *non-refoulement*.

Given the prevalence of the rule of law in the Indian legal system, and as enunciated in the Indian Constitution, it is appropriate that refugee determination and treatment be accorded the same attention that other human rights protection issues receive. This will be in keeping with India's active participation in ExCom and her leadership role in the region and among developing nations.

8.4.2 Enhanced Administrative Control by the State

Putting in place a standardised mechanism for refugee status determination and treatment will also enhance administrative control by the state, leading to huge administrative gains. Among them will be the establishment of a database providing detailed information on asylum-seekers, including their backgrounds in the country of origin and the precise reason for their departure or flight from that country. Also on record will be current information, including present whereabouts, family profile and the activities of the asylum-seekers. This will enable the government to distinguish between *bona fide* asylum-seekers and migrants, terrorists, criminal elements, etc. Asylum-seekers who may not be deemed to be deserving of refugee status may be dealt with in accordance with the immigration procedures. Those who have been granted refugee status shall be treated in accordance with the accepted standards and principles. They may be required to keep regular contact with the concerned administrative authorities for location of residence, work, movement to other parts of India and any other issue that may arise.

Thus, a national law dealing with the status of refugees will facilitate the identification of illegal migrants posing as refugees. The existence of such a law will also clarify to the border guards and others in charge of safeguarding our borders that asylum-seekers need to be treated differently from illegal migrants. Otherwise, it may mean possible *refoulement*, deportation or a long period of unavoidable detention for the asylum-seeker.

Concerted Search for Durable Solutions

In view of the dictate that a refugee is not a refugee forever, the search for durable solutions for particular groups of refugees and individual refugees shall be informed by a planned and structured approach in the presence of domestic legislation.

Coordination among Concerned Agencies

Enacting a national legislation that deals with the roles of government, the judiciary, the UN and other agencies in the determination, protection and treatment of refugees shall clarify the functions and responsibilities of the different agencies as well as provide for appropriate cooperation among them.

8.4.3 Less Friction between States

Enactment of a national legislation for refugee protection will help to avoid friction between the host country and country of origin. The act of granting asylum being governed by law rather than an *ad hoc* policy will then be understood by other States as a peaceful, humanitarian and legal act under a judicial system rather than as a hostile political gesture.

Bearing in mind that one is not always sure what is international customary law on a particular issue, and whether the national courts will be convinced of its applicability in the state concerned, it may be asserted that there is no way to effectively implement refugee conventions other than by incorporating their important provisions in a national legislation. Such an enactment will not only be in the interest of refugees but also in the interest of the country of asylum.

India can explicitly address her security concerns in the national law. Among other issues, she can identify the category of persons who cannot benefit from the law. The 1951 Convention also contains exclusion clauses. However, these provisions have been interpreted in various ways in different jurisdictions. India can examine these interpretations and choose wordings that safeguard her interests, though these should be in keeping with her obligations under international human rights law. For example, there is an apprehension that terrorists may take advantage of the law to enter the country. This scenario can be specially provided for in the law, subject to procedural safeguards.

The law can provide for the circumstances in which the refugee status is revoked. The 1951 Convention includes what are called cessation clauses, identifying the situations in which a person ceases to be a refugee. In such cases, protection can be withdrawn from the person. In the absence of a national law on the subject, there are no guidelines as to when the refugee status comes to an end. As a result, protection often continues even when it is no longer required. The national

law can also include a provision with regard to voluntary repatriation. This will facilitate the return of refugees to the country of origin.

The duties of refugees towards the host country can clearly be spelt out. Their principal duty is to respect the laws of the host country and not to use its territory to carry out any criminal or subversive activities.

The passage of a national law on refugees will show that India takes her membership of ExCom seriously. It may be noted in this respect that the northern States participate very actively in the deliberations of ExCom. They therefore expect states with leadership ambitions in international politics to do likewise.

No doubt, there are international conventions and institutions for the protection of refugees, like the 1951 Convention and UNHCR. However, ultimately the protection of refugees depends on individual sovereign States who have to translate this international law into national legislation and respect its provisions.

8.4.4 National Refugee Law: Enduring Solution or Fraught with Risks

In the end, it can be asserted that both in terms of State practice as well as the judiciary's approach, some basic principles of refugee protection are taken into account in India. However, what is lacking is a definite legal framework. Its absence hampers the applicability of other important provisions regarding the protection of refugees. The administrative and judicial authorities are greatly handicapped as a result of these gaps. As J.S. Verma, former Chief Justice of the Supreme Court of India, has argued, "while India has an excellent record in giving asylum to those who flee threats to their lives and freedom, and the Indian judiciary has mostly been helpful in safeguarding the interests of asylum-seekers, the need to establish a formal legal framework for the protection of refugees has still not been fulfilled." In his considered view, there is "the attempt to fill the void by judicial creativity." This can only be effective temporarily. Legislation alone will provide a permanent solution. In this regard, India should immediately carry out an in-depth study of the legislation in other countries in order to benefit from their experience. She should also take into account the peculiar features of the South Asian region from where most refugees originate and frame legislation that offers protection to those who direly need it, without in any way sacrificing her national interests.

However, this task is not without attendant risks. Those associated with the drafting of social legislation in India, such as the initiatives on child labour and

domestic violence, found to their dismay that though they were involved in the initial phases, the bill ultimately presented to Parliament contained clauses that undermined the entire effort. Refugee legislation in India may, given the present preoccupations, also go the same way. The State could introduce such stringent legislation that those working on refugee protection may well say that they were better off with the old arbitrary and inconsistent system. Nevertheless, the urgent need for a national legislation on the subject of refugees outweighs the potential risks, and should be pursued in the immediate future.

IV
SPECIAL GROUPS: RIGHTS OF
REFUGEE WOMEN AND
CHILDREN

9

RIGHTS OF A REFUGEE

In order to secure the legal status of a refugee in the country of asylum, the 1951 Convention contains comprehensive provisions regarding refugee rights. Except where more favorable rights are explicitly provided for in the Convention, the refugee is accorded, at the minimum, the same rights as those generally granted to aliens. Over and above this, the refugee is to be granted specific rights not normally enjoyed by ordinary aliens, owing to the fact that she lacks the protection of nationality of her State. The provisions of the Convention apply to all refugees without discrimination on the grounds of race, religion or the country of origin.

In the past, human rights issues were virtually not allowed to enter the global discourse on refugees under the erroneous assumption that as a humanitarian problem, the refugee problem is quite distinct from the human rights problem. The current trend is towards integration of human rights law, humanitarian law and refugee law. It is now increasingly recognised that such an approach is useful in reinforcing and supplementing the existing refugee law and securing compliance with its provisions through quasi-judicial human rights implementing bodies. Further, it renders refugee law more humane and effective. Against this backdrop, some basic human rights essential for the protection of refugees are discussed below.

9.1 REFUGEE RIGHTS

Right to Seek Asylum: Once a person fleeing persecution enters a State other than that of her origin or nationality, what she needs first and foremost most is asylum. “Asylum is the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.”¹

1 Institute of International Law: Resolutions Adopted at its Bath Session, September, 1950, 50 American Journal of International Law 15, 15 (1951) (Supplement: Official Documents).

The UDHR in Article 14 clearly states, “Everyone has the right to seek and enjoy in other countries asylum from persecution.”

Yet, no binding treaty or convention obliges states to grant asylum. There is a gap between an individual’s right to seek asylum and the State’s discretion whether or not to provide it. In this legal no-man’s-land, each State makes its own decisions as to whom it will admit and why.

In practice, of course, these decisions are constrained by circumstances beyond the control of the affected State. When asylum-seekers cross a border in large numbers, the State receiving them may, at least initially, have little choice other than to give them asylum. Due to legal and practical considerations, State practice in granting asylum varies widely. Violation of rights occurs in instances where people are rejected at the frontier even when they have no possibility of seeking asylum elsewhere or when they are forcibly returned to a country where they may fear persecution.

Denial of this right to seek asylum has taken a number of forms in recent years. Refugees have been prevented from crossing a frontier when they were in mortal danger from hostile forces, experiencing severe shortage of food and exposed to harsh weather conditions. Others have been forcibly returned to a country where they fear persecution.

Right to Remain: It has been long established, as affirmed by the UN Subcommission on Prevention of Discrimination and Protection of Minorities some years ago, that it is “the right of persons to remain in peace in their own homes, on their own lands and in their own countries... No person shall be compelled to leave his or her own Country.”² This right, which is also known as “the right not to be a refugee,” has provided the jurisprudential basis for the concept of “preventive protection.” This concept refers to the mitigation or amelioration of conditions that are most often the proximate causes of flight. The linkage to protection implies that whatever action is taken to deal with the underlying reasons for flight, groups and individuals should not be worse off—in the sense of remaining exposed to danger or risk to life and limb, while also losing the possibility of flight to refuge and asylum.

2 Sub Commission Res. 1994/94, UN Doc. E/KN.4/Sub.2/1994/56, at para. 1 (Oct 28, 1994). See also Sub Commission Res. 1995/13, Report of Sub Commission, 47th Sess. (July 31 – August 25, 1995).

The concept of preventive protection is postulated in recognition of the roots of the refugee problem, which can lead to a beneficial consideration of the whole range of human rights applicable to refugees. These include “collective rights” as well as those of the individual—economic, social, cultural, civil and political rights.

Right to Protection Against Refoulement: Article 33 of the 1951 Convention gives expression to the principle of non-refoulement. This principle prohibits the expulsion or forcible return of refugees, in any manner whatsoever, to a territory where her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The principle, which prohibits both rejection of a refugee at the frontier and expulsion after entry, is considered to be a crucial element of customary international law. The protection of Article 33, however, cannot be claimed by a refugee who, on reasonable grounds, is regarded as a danger to the security of the country of asylum or has been convicted of a particularly serious crime and therefore constitutes a danger to the community.

This right is further provided in Article 3 of Convention Against Torture, Article 16 of Declaration on the Protection of All Persons from Enforced Disappearance and Principle 5 of Effective Prevention and Investigation of Extra Legal Arbitrary And Summary Executions.

Right to Physical Safety: The statute of the UNHCR and the 1951 Convention refer to the protection mandate and functions of UNHCR without specifically alluding to the physical safety of refugees. Today, however, armed attacks on refugees take various forms in different parts of the world. The culprits can be countries of origin, countries of asylum or armed groups within these countries. The attacks may be indiscriminate or directed at specific refugee camps or locations. In one region, the State of asylum may separate armed refugees from non-combatant refugees; in another region, combatants and civilians may be housed side by side in the same camps. There is no single body of law that adequately deals with the problem.³ It is important to acknowledge the threat to the refugees’ physical safety, particularly the need to prohibit armed attacks on them. This should be clarified, specified and consolidated in the principles and rules of international law applicable to the entire question of refugee security.

3 Mtango, Elly-Elikunda, Military and Armed Attacks on Refugee Camps, in *Refugees and International Relations* 87-88, 102, 113-118 (Gill Loescher and Leila Monahan eds. 1989).

Right to Not Be Expelled: Pursuant to Article 32 of the 1951 Convention, contracting States shall not expel refugees who are lawfully in their territory, save on grounds of national security or public order. The article also details the procedural standards that need to be satisfied before expulsion.

Exemption from Penalties for Illegal Entry: Due to the circumstances under which the refugees may be obliged to leave their home country, it may not be possible for them to enter their potential country in a regular manner, e.g., with a valid passport and/or entry visa. Ordinarily, such illegal entry or presence is punishable with imprisonment or fine. However, the punishment should be waived in the case of refugees. Article 31 of the 1951 Convention protects refugees from penalties for unlawful entry or presence, provided they present themselves without delay to the competent authorities and show good cause for their illegal entry or presence.

Right to Challenge the Lawfulness of Detention: Detention can only be resorted to on the grounds prescribed by law—to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; or to protect national security and public order. The right to petition a court to seek release from detention (often called habeas corpus) is a fundamental right common to any legal system and is guaranteed in a number of international and regional human rights instruments. The right applies to all detained persons, including refugees and asylum-seekers. In addition to this right, which is exercised at the initiative of the detainee, the detention itself must automatically be subject to judicial control.

Right to Identity Papers and Travel Documents: As per Article 27 of the 1951 Convention, once a refugee is recognised, contracting States should issue the corresponding identity documents.

Further, Article 28 provides that contracting States shall issue travel documents to lawfully staying refugees. The issuance of a travel document does not imply the grant of nationality to a refugee. Nevertheless, such documents are of particular importance to refugees in facilitating travel to other countries—be it for the purpose of study, employment, health or resettlement.

Right to Compensation: The majority of States in Asia are neither parties to the 1951 Convention nor do they have national refugee legislation.⁴ Moreover, there is no continent-wide regional organisation in Asia in the manner of OAU or OAS. There are only a few small subregional organisations like the Arab League, the Association of South-East Asian Nations (ASEAN), and the South Asian Association for Regional Cooperation (SAARC). The most important document relating to refugees in Asia is the Principles Concerning the Treatment of Refugees. Adopted by the Asian–African Legal Consultative Committee, they are commonly referred to as the Bangkok Principles.

Besides laying down the minimum standards for the treatment of refugees, the Bangkok Principles⁵ also incorporate their right to compensation. Article V(1) states, “A refugee shall have the right to receive compensation from the State or the Country which he left or to which he was unable to return.”

The burden of millions of refugees is mostly shouldered by the country of asylum and sometimes by the country of resettlement, with the assistance of the international community. The country of origin is rarely held responsible. This imbalance has attracted the attention of the international community. State responsibility for the creation of the refugee problem includes payment of compensation—both to the refugees and the country of asylum. The right of refugees to compensation received attention during the 1980s.⁶ There is no doubt that there is a legal basis for this right. An act by a State that reduces its own citizens to refugees is ipso facto illegal. However, it appears that the international community is not prepared at this time to confer the right to compensation on refugees. Insurmountable difficulties may be encountered in securing this right.

Right to Freedom of Movement: Contracting States are required by Article 26 of the 1951 Convention to accord refugees lawfully in their territory the right to choose their place of residence and to move freely within their territory. This right is subject to any regulation generally applicable to aliens in the same circumstances.

4 J.N. Saxena, Proposal for a Refugee Legislation in India, 2 Bulletin of International Humanitarian Law and Refugee Law (1998).

5 Supra note 28.

6 Luke Lee, Right to Compensation: Refugee and Countries of Asylum, 80 American Journal of International Law, 533, 535 (1986).

Right to Freedom of Peaceful Assembly: There is no provision in the 1951 Convention regarding freedom of assembly. However, this right is protected under international and regional human rights instruments, which generally protect the right to meet and gather with others in a peaceful assembly. In *Plattform "Ärzte für das Leben" v. Austria* the European Court of Human Rights (ECtHR) found that freedom of peaceful assembly could not be reduced to a mere duty on the part of the State not to intervene.⁷ Rather, it imposes an affirmative obligation on the State to protect lawful demonstrators from those wishing to interfere with or disrupt them.

The right to peaceful assembly is closely related to the rights regarding freedom of expression and freedom of religion. The right protects only "peaceful" assembly. There is no international jurisprudence that lays down the parameters for determining what constitutes a peaceful assembly. Obviously, where the assembly is for the purpose of engaging in rioting, violence or looting, it is not protected under human rights instruments. The right to peaceful assembly may be subject to only such restrictions as are considered necessary in a democratic society. This implies that limitations may be imposed if they are in the interest of national security, public safety, public order, public health and morals, and in order to protect the rights and freedoms of others.

Right to Freedom of Opinion and Expression: There is also no provision in the 1951 Convention relating to the freedom of opinion and expression. The freedom to hold opinions without interference and the freedom to express opinions includes the freedom to seek, receive and impart information and ideas of all kinds—regardless of frontiers—orally, in writing or through any other medium. All these freedoms are protected by international and regional human rights law. The freedom to express opinions is subject to limitations, based on grounds of respect for the rights or reputation of others, national security, public order, public health and public morals. However, these limitations affect only the public freedom of expression and not the private freedom of opinion.

Right to Freedom of Religion and Free Access to Courts: These freedoms are deemed so important that the relevant provisions of the Convention, Articles 4(1) and 16(1), cannot be made the subjects of reservations on the part of contracting States. Like the principles of non-discrimination and non-refoulement,

⁷ Application No. 10126/82, 21 June 1988.

these provisions are so fundamental that if State Parties do not accept them, the Convention cannot fulfill its purpose.

Right to Fair Hearing and Procedure: All decisions must be reached in accordance with law. This means that in making a decision leading to the deportation of an asylum-seeker, a State Party must follow the substantive and procedural requirements of its national law. A person about to be deported must be allowed to submit the reasons against her expulsion. In other words, asylum-seekers are given sufficient time to prepare their explanations, which are to be presented in a hearing.

A person against whom a deportation order has been passed has the right to have her case reviewed by a competent authority. She should also be allowed to remain in the country pending such review. The person challenging the deportation order has the right to be represented for the hearing before a competent authority.

Right to Equality and Non-discrimination: Since refugees are not in their own country, and usually speak a different language and often belong to a different racial or ethnic group from the population of the host country, they are particularly vulnerable to racial or other forms of discrimination. In order to address this concern, Article 3 of the 1951 Convention provides that State Parties must ensure that the rights protected by the Convention are enjoyed by all refugees, regardless of their nationality and ethnic or racial origin. The rule of non-discrimination in refugee law provides that the rights it recognises must be respected without discrimination on the basis of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status.

Since refugees are not citizens of the host country, it is inevitable that they will not enjoy all the rights available to citizens under national laws. The 1951 Convention provides for equality in the treatment of citizens with regard to the following rights:

- Freedom of religion
- Right to intellectual property
- Right of access to courts
- Right to elementary education

- Right to public relief
- Rights associated with employment, labour legislation and social security

With regard to the rights mentioned below, the Convention only provides for equality of treatment with other non-citizens:

- Movable and immovable property rights
- Right to association
- Right to work
- Right to start a private business or practice a profession
- Right to housing
- Right to post-elementary education
- Freedom of movement

Right to Life and Personal Security: Human rights law guarantees the right to life and protection against genocide, which is a grave violation of the right to life. Arbitrary deprivation of the right to life is prohibited in all circumstances. State Parties should take measures not only to prevent and punish deprivation of life by criminal acts but also to prevent arbitrary killing by their own security forces.

Right to Family Life: The 1951 Convention, in Chapter IV Part B, makes the recommendation that the country of asylum should take necessary measures for the protection of the refugee's family. Measures are to be taken to preserve the unity of the family, particularly in cases where the head of the family or the principal applicant has fulfilled the necessary conditions for admission to a particular country. The chapter also provides guidelines for the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

In addition to the above, the 1981 UNHCR ExCom Conclusion No. 24 (XXXI) on family reunification has laid down the following principles with regard to the right to family life:

- Efforts should be made to ensure reunification of separated refugee families; to ensure that this reunification takes place with the least possible delay, it is important that there is cooperation between the country of origin, the country of asylum and UNHCR.

- The country of origin should grant exit permits to facilitate family reunification—recognising the right of everyone to leave any country including her own—and enable the refugee to join her family abroad.
- To promote a comprehensive reunification of the family, it is also important that the country of asylum applies liberal criteria in identifying those family members who can be admitted.

Right to Education: With regard to elementary education, refugees shall receive the same treatment as nationals. In respect of secondary and higher education, State Parties to the 1951 Convention shall accord refugees the same treatment as that generally given to aliens in the same circumstances.⁸

Right to Work: The right to work is one of the most fundamental economic rights. Refugees need to be in a position to support themselves and their families, especially if conditions in their home country are unlikely to change in the near future. Articles 17, 18 and 19 of the 1951 Convention provide that the refugees' right to work—whether in wage-earning employment, self-employment or a liberal profession—is limited to ensuring equality of treatment with other nationals. Therefore, restrictions on the working rights of non-nationals may also be applied to refugees. There are however two important exceptions to this provision.

The first exception, with respect to wage-earning employment, is that under Article 17 of the Convention, any restrictions placed on non-nationals shall not be imposed on refugees if they meet the following criteria:

- Completed three years' residence in the country
- Married to a national of the country
- Have children who are nationals of the country

The second exception, for those refugees who are self-employed or practice a liberal profession, is that under Articles 18 and 19 of the Convention, States undertake to accord treatment as favorable as possible. This imposes a positive obligation on the States to make every effort to lift restrictions on the right of refugees to start their own business or to practice a profession.

⁸ 1951 Convention, *supra* note 6, art. 22.

Rights of Refugee Children: The following rights are particularly important to children:

- Right to be protected from discrimination
- Right to survival and development
- Right to have her best interest taken into account in all actions that concern her
- Right to have her birth registered, along with the right to acquire a nationality
- Right of a child and her parents to leave any country and to enter their own for the purpose of family reunification
- Right to participate in judicial and administrative proceedings affecting the child
- Right to special protection and assistance for children seeking refugee status or who are considered refugees
- Right to protection and care for children who are affected by armed conflict⁹

Rights of Refugee Women: Under international law, refugee women are entitled to the same kind of protection as all other refugees. However, refugee women often face a number of disadvantages in obtaining international protection. To overcome these problems, the 1951 Convention has established certain standards for States in respect of:

- Suppression of all forms of traffic in women and their exploitation and prostitution
- Nationality
- Education
- Employment
- Health care
- Specific problems of rural women
- Equality before law
- All matters relating to family and marriage relations¹⁰

9 See Chapter 11, *infra*, for more in-depth discussion of refugee children.

10 See Chapter 10, *infra*, for more in-depth discussion of refugee women.

Right to Return: Human rights law recognises the right of an individual, who is outside her national territory, to return to her country.¹¹ The right of a refugee to return to her country of origin also stems from the rules of traditional international law, which stress the duty of the State of origin to receive back its citizens when the latter are expelled by the admitting State and to extend its diplomatic protection to them. Besides the State of origin, it also casts an obligation on the State of refuge and the international community to create conditions conducive to the voluntary and safe return of refugees to the country of origin. The refugee status is a temporary phase—its only objective is to deliver human rights protection during the period of risk. It should be withdrawn once the risk has ceased by reason of a fundamental change in circumstances.

9.2 OBLIGATIONS OF A REFUGEE

Refugees have to fulfill certain duties. Article 2 of the 1951 Convention states:

Every refugee has duties towards the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

The parameters of the duties of refugees are clear. They have a general obligation to respect the laws and regulations of the country in which they find themselves. In this regard, they are no different from the citizens of that country or other foreigners. This obligation includes a duty to refrain from engaging in subversive activities directed against their country of origin, such as armed insurrection.¹² What is less clear is how these obligations can be met without impinging on the refugees' fundamental human rights, such as the freedom of opinion and expression. Refugees are persons whose fundamental rights have been violated. They seek refuge abroad precisely in order to be able to continue to enjoy their basic human rights, including the right to freedom and expression. While refugees

11 See UDHR, *supra* note 40, art. 13(2); African (Banjul) Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, art. 12(2) (June 27, 1981) [hereinafter African Charter]; ICERD, *supra* note 40, art. 5d(ii); International Covenant on Civil and Political Rights, art. 12(4) (Dec 16, 1966) [hereinafter ICCPR]; Article 22 of the American Convention on Human Rights, art. 22 (Nov 22, 1969) [hereinafter American Convention]; Fourth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3(2) (Nov. 1, 1998) [hereinafter Fourth Protocol to the European Convention]. All prohibit deprivation of the right to enter the territory of the State of which a person is a national. The African Charter limits restrictions to those provided for by law in the interest of national security, law and order, public health or morality.

12 Anders B. Johnsson, *The Duties of Refugees*, 3 *International Journal of Refugee Law* 579 (1991).

clearly are no different from other individuals, in so far as they must respect the laws and regulations of the country in which they find themselves, this obligation must not be abused to deprive them of their fundamental human rights.

9.3 STATE OF EMERGENCY AND DEROGABLE RIGHTS

Many national constitutions allow for the suspension of constitutionally guaranteed rights and the imposition of emergency rule under certain circumstances. Article 9 of the 1951 Convention also contains provisions on the special measures to be taken with regard to refugees in times of war or other grave and exceptional situations. International human rights law allows States to derogate from their obligations when there is a state of emergency. Article 4 of the ICCPR states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

However, the State cannot under any circumstances derogate from the following basic human rights:

- Right to life
- Right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment
- Right to freedom from slavery and servitude
- Right to freedom of thought, conscience and religion

Moreover, States do not have absolute discretion to restrict the enjoyment of human rights simply by declaring a state of emergency. The decision to derogate, and the measures taken, must be in accordance with international obligations. To justify the derogation, there must be a public emergency that threatens the life of the nation. The threat must be such that the existence of the State itself (not the government currently in power) is in question. In addition, the measures taken must be officially proclaimed— that is, the legal procedures laid down in

the Constitution, or in other laws allowing for derogation, must be followed. The measures taken must not discriminate on the basis of race, religion, colour, language, sex or social origin. The derogation must be a temporary measure.

It should be considered that a person becomes a refugee because of circumstances that are beyond her control. She is left with no option but to flee from human rights violations, socio-economic and political insecurity, generalised violence, and civil war or ethnic strife—all of which give rise to a genuine fear of persecution. A proper understanding of the circumstances of specific refugee cases by the concerned law enforcement agency, or even by an individual official, can pave the way for the humane treatment of refugees—from both the humanitarian as well as the human rights angle. Further, an awareness of the rights of this special group of people on the part of those who handle refugees—whether they are part of the government machinery or outside it, including international agencies and NGOs—can considerably aid the care of refugees and avoid gross violation of human rights.

9.4 OBLIGATIONS AND RESPONSIBILITY OF THE STATE

The theory of State responsibility rests on a practical proposition. It is that every State must be held responsible for meeting its international obligations under the rules of international law, whether such rules derive from customs, treaties or other sources of international law. Failure to discharge these obligations constitutes an international wrong.

Legal developments brought about by human rights activism/movements leave no doubt that the conduct of a State with regard to the treatment of its own population is a matter of international law. A State that turns a person into a refugee commits, in the eyes of the international community, a wrongful act, which in turn creates an obligation to make right the wrong done.

It might seem to be unfair and unacceptable to place liability on a State for the outflow of refugees from its territory without having regard to the conditions that cause such an outflow. For instance, natural disasters such as heavy floods, prolonged drought, soil erosion, earthquakes and desertification can hardly be causes or factors for which a State can be held liable. But some would argue that such disasters are not entirely natural. The development models adopted by States can have serious environment consequences. Moreover, there are cases where

the relief effort on the part of the administration has been woefully inadequate or grossly mismanaged. Notwithstanding the latitude that should be given for circumstances that are beyond the control of States, the responsibility for caring for refugees ultimately rests upon the countries that directly or indirectly force their own citizens to flee abroad as refugees.

The grant of asylum may place an unduly heavy burden on certain countries. A satisfactory solution to the problem, which is recognised by the United Nation as being global in scope and nature, cannot be found without international cooperation. The principle of international solidarity and burden sharing needs to be progressively applied to facilitate the process of finding durable solutions for refugees, whether within or outside a particular region. It is important to keep in mind that in certain situations, durable solutions may be found by allowing refugees to reside in countries outside the region due to political, social and economic considerations.

Obligation of State Parties to the 1951 Convention and the 1967 Protocol: By adhering to the 1951 Convention and the 1967 Protocol, States make a commitment to each other and the international community to grant refugees in their territory the rights guaranteed by these instruments. Given below are examples of the stipulations that apply to the States' obligations under the Convention and the Protocol.

Exemption from reciprocity: If, according to a State's legislation, the grant of a right to an alien is subject to the grant of a similar treatment by the alien's country of nationality (reciprocity), this does not apply to refugees. The notion of reciprocity has no application in the cases of refugees, since they do not enjoy the protection of the state of their nationality.

Cooperation with UNHCR: Article 35 of the Convention and Article II of the Protocol require an undertaking by the contracting State to cooperate with the office of UNHCR in the exercise of its functions and, in particular, to facilitate in the discharge of its duties to supervise the implementation of the provisions of these instruments.

Information on national legislation: State Parties to the 1951 Convention undertake to communicate to the Secretary General of the United Nation the laws and regulations that they may adopt to ensure the application of the Convention.

9.5 FUTURE OF THE REFUGEE RIGHTS REGIME

The refugee rights regime is interlinked with international human rights. This raises important questions on the relationship between refugee rights and human rights, and the future role of refugee-specific legislation.

Prior to the development of international human rights law in the post-World War II period, traditional international law was exclusively a “law of nations” rather than a “law of people”.¹³ The individual was subsumed into the nation-State framework through the bond of nationality. A wrong committed by a State against an alien was interpreted as a wrong against the alien’s State of nationality. The position of refugees was thus particularly precarious. Lacking a State of nationality to champion their case, refugees were utterly without protection. Due to their inability to obtain protection from their country of origin and their consequent involuntary separation from that State, refugees were identified as individuals in need of special protection. In addressing the dilemma of refugees via the establishment of a particularised rights regime, the approach embodied in the 1951 Convention can legitimately be considered progressive in international law. It should however be remembered that at the time of its drafting, the only comprehensive standard for human rights law was the UDHR.

The development of human rights law over the past four decades has to some extent filled the vacuum of protection that necessitated the development of a refugee-specific rights regime in 1951. Human rights law has evolved beyond the norms of the refugee regime, so that refugees now derive protection for their basic human rights from both the refugee-specific 1951 Convention and from general human rights instruments. These rights regimes are interlinked; and in case of any varying standards, they have to be logically reconciled.

National rapporteurs have noted several areas of overlap between human rights law and refugee law, including the rights to employment, social assistance, education, freedom of movement, non-discrimination and freedom from expulsion. Since the rights in the 1951 Convention are often framed differently from their counterparts in conventional human rights law, it can be difficult to determine which of the standards afford a stronger basis for protection. For example, the socio-economic rights in the ICESCR appear superior to those provided for in the 1951 Convention.

13 James C. Hathaway and John A. Dent, *Refugee Rights: Report on a Comparative Survey* 43-48 (1995).

Unlike the latter's Articles 17, 18 and 19, the former is not limited to guaranteeing the same treatment as that afforded to aliens; it arguably mandates treatment akin to that granted to nationals.

While they are interlinked in several areas, the comparison of refugee law with human rights law reveals a number of rights unique to one or the other. That the protection established by the 1951 Convention extends beyond general human rights is not surprising, given the particularly vulnerable plight of refugees. Refugee-specific rights are needed to address the unique dilemmas relating to personal status, naturalisation, illegal entry, the need for travel and other identity documents, and the threats of expulsion and refoulement.

In appraising the utility of a refugee-specific rights regime in an era of highly applicable human rights, one might consider whether it meets the following three criteria:

- First, does the existence of a refugee-specific regime enhance the enforceability of generally guaranteed rights?
- Second, does the refugee rights regime break substantive new ground as compared to general human rights law, resulting in a more comprehensive enumeration of rights?
- Third, does the refugee-specific regime aid in the clarification or reinforcement of generally accepted rights, so as to more effectively complement the genuine needs of refugees?

10

RIGHTS OF A REFUGEE WOMAN

The refugee status affects men and women differently. Women are more vulnerable to intolerable violations of their rights to live with dignity and other human rights. The road to asylum at every stage, from fleeing a war zone to the arrival at a refugee camp, is paved with threats of sexual violence and exploitation. The protection of refugee women should be seen in the broader context of the protection of their human rights. As women, these refugees have special rights in specific areas which need to be respected in order to safeguard their human dignity. Those specific areas are protection, health care, employment, education and cultural adjustment, apart from the universally recognised human rights that are directly applicable to all refugees.

10.1 PROTECTION NEEDS

The experience of refugee women often varies from that of their male counterparts. They often fear persecution for different reasons and face additional problems upon becoming refugees.

Forms of harm that have found mention in asylum claims and that are unique to, or more commonly befall, women include sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence and forced abortion. The form of harm or punishment may be selected because of the gender of the victim. Persecution through sexual violence not only constitutes a gross violation of human rights; but when committed in the context of armed conflict, it is a grave breach of humanitarian law and a serious offence to human dignity. While physical safety constitutes the most important component of human security, refugee women have essential material, social and psychological needs, which must be met by empowering them and bringing a degree of dignity to their lives.

Once in exile, women and girl refugees or asylum-seekers are vulnerable to sexual violence or exploitation by camp officials or other refugees. In camps, refugee women may be forced into having sex in exchange for material assistance for themselves or their children—particularly if the distribution of basic supplies is left to all-male camp committees. Officials sometimes use rations or identification papers in order to sexually coerce women. To add to the multiple travails that refugee women face—disintegration of their families, missing or dead husbands and fathers—they are single-handedly responsible for the survival of their children at a time when they are least able to bear such a burden alone and when their own survival is at stake. Even in the protection of a refugee camp, where there should be no immediate fear of death or persecution, there is extreme hardship and every day is a challenge. The circumstances confronting refugee women are often fraught with many risks. They find it much more difficult than men to adapt to deep social divisions and chronic political instabilities, thus experiencing considerable psychological trauma.

Gender-based violence is a form of discrimination that seriously inhibits the ability of women to enjoy rights and freedoms on an equal basis with men. CEDAW is breached when women are subjected to such treatment. Further, the 1993 Declaration on the Elimination of Violence against Women (DEVAW) affirms that such violence constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of these rights and freedoms.

10.1.1 UNHCR Conclusions, Resolutions and Guidelines

The conclusions adopted by ExCom each year are not binding on State Parties. Though they are recommendatory in nature, they often have great value in practice. ExCom Conclusion No. 39, adopted in 1985, noted that refugee women and girls constituted the majority of the world's refugee population and that many of them were exposed to special problems. The conclusion also recognised that States are free to adopt the interpretation that women asylum-seekers faced with harsh or inhuman treatment for having transgressed the social mores of the society in which they live can be considered to be a "particular social group" within the 1951 Convention definition. In 1991, UNHCR issued its Guidelines on the Protection of Refugee Women, which essentially addressed issues relating to women in refugee camps. The guidelines also dealt with gender-related persecution and recommended procedures to make the refugee adjudication

process more accessible to women. In October 1993, ExCom adopted Conclusion No. 73 on Refugee Protection and Sexual Violence, which recognised that asylum-seekers who have suffered sexual violence should be treated with particular sensitivity. It recommended the development of training programmes designed to ensure that those involved in the determination of refugee status are adequately sensitive to issues of gender and culture.

In 1993, the UN General Assembly adopted DEVAW, recognising violence against women as an issue of international concern and that all States have an obligation to work towards its eradication. The Declaration, in Article 1, widely interprets such violence as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.” Moreover, such violence is seen less in terms of individual behaviour and to a greater degree as a “manifestation of historically unequal power relationships between men and women”, which may occur in the family or the general community, and be perpetrated or condoned by the State. DEVAW recognises that some groups—such as refugee women, women belonging to minority groups, indigenous women, and women in situations of armed conflict—are especially vulnerable.

The UNCHR has also passed some resolutions with respect to the rights of women. Its Resolution 2002/49 reaffirms women’s right to property and housing. This resolution calls on UN agencies, specifically UNHCR, to address in their activities discrimination against women with respect to land, property and adequate housing. UNCHR Resolution 2002/52 condemns violence against women in all its forms, including inter alia physical, sexual or psychological harm or suffering to women, domestic violence, crimes committed in the name of honour, crimes committed in the name of passion, trafficking in women and girls, female genital mutilation and other harmful traditional practices, dowry-related violence, and violence related to commercial sexual and economic exploitation. UNCHR Resolution 2002/51 refers to the myriad issues of trafficking in women and girls.

In an environment where implementation depends so substantially on traditional power structures, including male and societal attitudes, it remains to be seen how effectively DEVAW and the UNHCR guidelines contribute to the prevention or mitigation of sexual violence and the promotion of equity among refugees.

10.1.2 International Judgements

In March 1993, Canada became the first country to establish formal procedures for the adjudication of refugee claims made by women. The government issued the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution. These guidelines formally recognise that women fleeing persecution because of their gender can be treated as refugees.

The decision given in *Zekiye Incirciyan* is an instance of the Canadian law following the international lead.¹⁴ This case involved a Turkish widow who had no close family in that country. She was harassed on a daily basis by young men, was sexually assaulted and was the subject of an abduction attempt. The Immigration Appeal Board found that the government was unwilling to protect the claimant because in the authorities' view, it was inappropriate for her to be living without the protection of a male relative. Accordingly, the board found Mrs. Incirciyan to be a refugee by reason of her membership of a particular social group composed of "single women living in a Moslem country without the protection of a male relative." This category meets the test for a particular social group, since gender and the absence of male relatives are not within the control of group members and choice of marital status is a freedom guaranteed under the core norms of international human rights law.¹⁵

Serious physical harm has consistently been held to constitute persecution. Rape and other forms of severe sexual violence fall within this definition. In *Lazo-Majano vs INS*, a Salvadoran woman was held to have been "persecuted" after she was denounced as subversive and subsequently raped and brutalised by the army sergeant who denounced her.¹⁶ In *Matter of (—) Krome* (BIA, 25 May 1993), the U.S. Board of Immigration Appeals held that the gang rape and beating of a Haitian woman in retaliation for her political activities was "grievous harm" amounting to persecution. In *Minister for Immigration and Multicultural Affairs vs Khawar* ((2002) 3 CHRLD 346), the issue before the Australian High Court was whether "persecution" can result from failure to provide protection against domestic violence. The court held that the State's failure to protect a person against ill-treatment or violence that she suffers at the hands of non-State agents implies persecution. Indeed, such failure is an essential element and provides the bridge

14 Immigration Appeal Board Decision M87-1541X (August 10, 1987).

15 UDHR, *supra* note 114, art. 16 n. 71; ICCPR, *supra* note 114, art. 23 n. 71.

16 813 F.2d 1432, 1434 (9th Cir. 1987).

between persecution by the State and by non-State actors, which is necessary to ensure consistency in the application of the refugee protection scheme. The court further held that women in Pakistan could constitute a particular social group. Women in any society are a distinct and recognisable group. Their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments, including being subjected to domestic violence.

In May 1995, the United States became the second country in the world to adopt formal guidelines recognising that women may experience discrimination unique to their gender; and that in some cases, such discrimination can meet the standards for refugee status. While the formulation of these guidelines represents substantial progress, it is important that these be translated into justice on the ground.

The solution to the problem of inadequate protection for refugee women lies not merely in creating a separate “female paradigm” for gender-based claims to persecution. A human rights-based approach to defining persecution, the recognition of women as a particular social group, the documentation of discriminatory and repressive measures aimed at or particularly affecting women, access to full and fair determination procedures, and a liberal reading of the 1951 Convention definition—together these can all provide the basis for the development of a profile of gender-based refugee claims and for acknowledging the difference that gender makes.

10.1.3 Impact of Migration

Women’s traditional roles, responsibilities and supportive networks become dramatically altered by involuntary migration, especially when it entails separation from husbands and kin. Extended family networks from which women normally draw much of the strength and support for their onerous roles in traditional society may be completely lost. Instead, women become isolated, dependent upon themselves and solely responsible for their children in the absence of their husbands; these women are subject to exploitation and, in many cases, to emotional and physical/sexual abuse. For many women, becoming a refugee sets in motion an almost continuous process of balancing traditional values with a new “sense of self” imposed by the refugee experience.

The most significant impact on refugee women, especially those who become “heads of households”, is the change in family values, expectations and responsibilities. They are forced into a completely new set of decision making roles and acquire new powers for determining the allocation of resources. These women’s traditional roles as mothers are transformed by the need to survive; they are forced to become the sole providers of material and emotional stability for their children. The need to strive for economic self-sufficiency outside a traditional system becomes a crucial element of their new sense of self. The opportunities available to refugee women for self-support are usually very limited. At times, out of sheer desperation and a total lack of other viable options, some refugee women may be forced to resort to prostitution. Loneliness and a feeling of abandonment are common. As a result of these huge changes, they experience considerable emotional and psychological upheaval.

Women have special needs in the area of health care. The 1994 Cairo International Conference on Population and Development recognised “reproductive health care and family planning as vital human rights.” These rights are still absent in many refugee camps. Women are malnourished and suffer from nutritional deficiencies. They have special dietary requirements, on account of child bearing and nursing, which are not adequately met in refugee camps. The food in the camps when distributed under male heads does not reach the needy and often finds its way to the black market.

Such severe disruption of the lives of refugee women clearly has serious implications when repatriation occurs. Alienation from the traditional system often reaches irreversible levels. This is especially true of younger, single women. Unlike their male counterparts, few women are likely to have learned readily applicable skills while in exile. Many would not even have had an opportunity for education. Finding lost kin and being accepted by them—given the non-traditional attitudes, values and even the manner of dress acquired while in exile—may also pose a problem. Consequently, many women may well drift into the anonymity of urban areas on return, where they are compelled to take up marginalised activities.

10.2 DURABLE SOLUTIONS

The question of how to facilitate the reintegration of refugee women must be accorded a much higher priority in any repatriation plan than what it is currently

given. Attention must be paid as to how female refugees can be better prepared for repatriation via participation in special skills-upgrading programmes before departure. Community and social support programmes must also be developed to assist women prior to departure as well as after reaching their destinations.

UNHCR, contracting States and ExCom have also recognised that the special protection needs of refugee women may call for resettlement opportunities. Besides addressing security concerns, resettlement can also contribute to “humanitarian protection” for women at risk, torture victims, the physically or mentally handicapped, and certain medical and family reunion cases.¹⁷

10.2.1 Legal Framework for Protection

UNHCR’s Guidelines outlines the international legal framework for the protection of refugee women and the measures required at the level of assistance and protection—in particular, the need for refugees to be involved in the planning and delivery of assistance activities.

Ensuring the protection of refugee women requires adherence not only to the 1951 Convention and its 1967 Protocol but also to other relevant international instruments. These include the UDHR, the Geneva Conventions and the two Additional Protocols of 1977; the 1966 Human Rights Covenants; CEDAW; the 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict; the 1964 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages; the 1958 Convention on the Nationality of Married Women; and the CRC. While individual States may not be signatories to all these instruments, they do provide a framework of international human rights standards for implementing protection and assistance measures related to refugee women.

From these various international instruments can be drawn the principles of equity that should underlie all policies and programmes formulated for refugees. According to Article 1 of CEDAW, to which over 185 States are parties, no distinction, exclusion or restriction is to be made on the basis of sex that has the

17 See 1988 ExCom Conclusion on Refugee Women, 39th Sess., UN Doc. A/AC.96/721, “Recognising That Refugee Women Face Particular Hazards, Especially Threats to Physical Safety and Sexual Exploitation, and Calling for Support for Special Resettlement Programmes,” para. 26. See also 1989 ExCom Conclusion on Refugee Women, 40th Sess., UN Doc. A/ AC.96/737, para. 26(c); 1990 ExCom Conclusion No. 64, 41st Sess., “Refugee Women and International Protection,” para (a)(xi).

effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women—irrespective of their marital status—of human rights and fundamental freedoms in the political, social, cultural, civil or other fields. This Convention establishes standards for States in a number of areas that are important to refugee women. These include suppression of all forms of trafficking in women and preventing women from being forced into prostitution; nationality, education, employment and health; specific problems of rural women; equality before law; and all matters relating to marriage and family relations. Of particular importance is the recognition that the goal of equality in opportunity and treatment may require positive measures in favour of women.

International protection goes beyond adherence to legal principles. The protection of refugee women requires planning and a great deal of common sense in establishing programmes and enforcing priorities that support their safety and well-being. Thus, international protection of refugee women must be understood in its widest sense. Those who are unable to feed, clothe and shelter themselves and their children are more vulnerable to manipulation and to physical and sexual abuse in their efforts to secure such necessities. Refugee women who are detained among strangers, and/or where traditional social protection systems no longer exist, face greater dangers than those living among family and friends. Those who must bribe guards to obtain firewood, water or other essential goods are more susceptible to sexual harassment. Moreover, refugee women who formerly had a means of expressing their views in the community may find themselves unable to do so in the camp management committees established by assistance organisations.

In addition to international law, the national law of the country of asylum governs the protection of refugee women. Signatories to the 1951 Convention and the 1967 Protocol agree to cooperate with UNHCR in the exercise of its functions and, in particular, its duty of supervising the application of the provisions of the Convention and the Protocol.¹⁸ Further, national laws and policies determine the legal status granted to an individual, where she will live and what assistance will be provided. Moreover, many offences against women, such as rape and physical attack, are punishable by national law. An additional legal framework, within the national framework, is provided by the legal codes and processes adopted

18 1951 Convention, *supra* note 6, art. 35.

for international use in refugee camps. It is particularly important that these instruments of self-governance are provided for the protection of refugee women.

10.2.2 Participation of Refugee Women

As these examples indicate, the inherent link between protection and assistance is particularly evident in relation to refugee women, female adolescents and children. Protection concerns can often be best addressed through assistance-related measures. Conversely, the planning and implementation of assistance programmes can have direct, and sometimes adverse, consequences for the protection of refugee women if the programmes ignore their special needs.

To fully understand and address the protection concerns of refugee women, they must be encouraged to participate in the process of planning for protection and assistance activities. Programmes that are not planned in consultation with the beneficiaries, nor implemented with their participation, cannot be effective. Since a large proportion of refugees are women, many solely responsible for their dependent children, it is essential that they be involved in the planning and delivery of assistance activities if the activities are to be properly focused on their needs.

Participation itself promotes protection. Internal protection problems often arise because of people's feelings of isolation, frustration, lack of belonging to a structured society and lack of control over their own future. This may be particularly evident in overcrowded camp conditions. Refugee participation helps build the values and sense of community that contribute to reducing protection-related problems.

Relief officials often point to the cultural constraints involved in bringing women into the decision-making process, particularly where women have had a limited role in the country of origin. Treating women as decision-makers under these circumstances, they argue, amounts to tampering with the culture of the group.

However, these relief officials may have only a superficial understanding of the socio-cultural roles of women. Their concerns may reflect their own cultural biases and/or an inadequate understanding of both traditional cultures and the new circumstances in which refugee women find themselves. Prior to flight, women might have opportunities to express their concerns and needs—through their husbands or via traditional support networks. In refugee camps, however,

many women are unable to participate as these traditional mechanisms have broken down. Alternative arrangements must be made to ensure that their voices are heard and their perspectives inform the decision-making process. It is essential, therefore, that organisations working with refugees recognise that special initiatives may be needed so that refugee women have the opportunity to contribute to the protection-and assistance-related activities being planned for them.

10.2.3 Conclusion

The rights of refugee women are human rights, which are universal, interdependent, interrelated and indivisible. The international protection regime is based on human rights that come into play during different phases of asylum-seeking—flight, admission, treatment and finding solutions to the refugee problem. These include the rights of refugee women who face systematic human rights violence alongside generalised violence and persecution. With mounting unemployment and growing socio-economic problems in most countries, refugees are hardly received with open arms. At best, they are tolerated as a further burden on the asylum country's dwindling resources; often, they are met with open hostility and closed borders. This pushes women further into hardships, violating their basic human rights. The core of protection for these refugee women, and refugees in general, lies in the grant of asylum. This is the cornerstone of international protection of refugees, derived directly from the right to seek and enjoy asylum set out in Article 14 of the UDHR.

11

RIGHTS OF REFUGEE CHILDREN

11.1 INTRODUCTION

One of the most vulnerable populations among refugees are children. It has been documented that about half of the world's refugees are children. Unfortunately, most of the children who become refugees do not have any particular political orientation; nor do they directly opt for a path of confrontation with which an adult may be involved. In almost all cases, they are victims of circumstances. Amongst them, orphans form the most vulnerable group. Thus, it is essential that special attention be paid to the care and protection of child refugees.

Armed conflict and employment of child soldiers is perhaps the primary reason for the increase in the number of children as refugees. Often, children are sent away by their parents in the hope of avoiding conscription and finding safe asylum and education. This may lead to a greater risk of assault and exploitation.

Children, particularly in their early years, are dependent upon their parents or other adults for the nutritional and emotional nourishment necessary for their survival and growth into healthy adults. Owing to their extremely vulnerable condition and acute dependence, refugee children need special care and attention. As a group, they face a high risk of suffering from psychological problems following the turmoil and trauma they undergo at the time of flight. Younger children are physically less able to survive illness, malnutrition or deprivation of basic necessities than adults and adolescents. When resources are scarce, they are the first to die.

There is widespread sexual exploitation of refugee children. Refugee girls are far more vulnerable both socially and physically. The incidence of abuse is higher amongst girls. Education is rarely available and when provided, it is discontinued at an early stage. There is also a great fear of trafficking among refugee girls.

Vulnerable in normal circumstances, as refugees, children's lives, health and safety are at extreme risk. Living conditions, particularly in an emergency context, are often precarious. In some cases, the survival of children must be assured in

the midst of armed conflict. Not only are children frequently the unintended casualties of war, they are sometimes a direct target. In many conflict situations, military and armed groups recruit children. Their protection calls for extraordinary efforts.

Another highly vulnerable section among refugee children are those who are unaccompanied. In the absence of special efforts to monitor and protect their well-being, the basic needs of unaccompanied refugee children often go unmet and their rights are frequently violated. Indeed, the presence of unaccompanied children and the need to take special measures on their behalf must be anticipated in every refugee situation.

Addressing refugee children's developmental needs is a fundamental reality that is often not considered in relief efforts. In order to grow and develop normally, a child has certain age-specific requirements that must be satisfied. Basic health care, nutrition and education are generally recognised as necessary for the physical and intellectual development of children. Beyond these, however, healthy psycho-social development depends on the nurturing and stimulation that children receive as they grow and the opportunities they are given to learn and master new skills. For refugee children, healthy psycho-social development also requires coping effectively with the multiple traumas of loss, uprooting and often more damaging experiences. Tragic long-term consequences may result when children's developmental needs are not adequately fulfilled.

Another reason why children form the most vulnerable section among the refugees is their lack of awareness of, and inability to access, systems of international protection that are available to them. For example, unaccompanied children may not register themselves.

11.2 INTERNATIONAL CONVENTIONS AND REFUGEE CHILDREN

Children as a distinct group have not been directly addressed in the 1951 Convention on the Status of Refugees. In fact, the first direct address to children was made in the 1924 League of Nations Declaration on the Rights of the Child. In 1989, the Convention on the Rights of the Child (CRC) was passed. Over the years a large number of countries have ratified it.¹⁹

Article 22 of the Convention deals with refugee children and reads as follows:

1. State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with

¹⁹ India signed the Convention on Rights of a Child on 11th Dec 1992.

applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, State Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organisations or non governmental organisations cooperating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

In 1989, while deciding on the implementation of the Convention and the Protocol, ExCom dealt with the issue of refugee children. It decided to promote the best possible legal protection of unaccompanied minors, particularly with regard to forced recruitment to armed forces and the risks associated with irregular adoption. The High Commissioner was requested to ensure that the needs of the refugee children are given particular attention via regular assessments of the resources and requirements of each refugee situation. This would entail collecting and using in programme planning relevant demographic, socio-economic and cultural information and monitoring and evaluating the impact of the programs on refugee children. ExCom also noted with serious concern the health problems of children caused by serious malnutrition. It recommended that steps be taken to strengthen its efforts in assisting host countries to allow access to education.

However, these international guidelines are not fully adequate to protect and ensure the safety of refugee children. An important aspect missing from these Conventions is the support system that a State ought to provide in emergencies. Nor are these Conventions clear as to the steps that need to be taken for children who are outside their country, who are in conflict with the law of a foreign country, and who require access to institutions and other care facilities that would have been available in their home country.

The CRC consistently aims to reintegrate the refugee child into her family. The UNHCR has separate guidelines for children as a group and those who are unaccompanied.

The grounds for special action on behalf of refugee children are well established in both national and international law. Refugee children share certain universal rights with all other people, have additional rights as children and particular rights as refugees. On account of their dependence, vulnerability and developmental needs, these children are accorded specific civil, economic, social and cultural rights in national and international law. Refugee children are also entitled to the international protection and assistance of UNHCR.

The CRC provides a comprehensive framework for the responsibilities of its States parties to all children within their borders, including those who are of concern to UNHCR. Moreover, as a UN Convention, it constitutes a normative frame of reference for action on the part of UNHCR. The policy that results is therefore consistent with the CRC. This Convention also provides parameters for action that supplement those contained in the 1951 Convention and which aim to ensure appropriate protection of and assistance to children of concern to the High Commissioner.

A principle of international law is the primary responsibility of parents or legal guardians to care for children. Moreover, States are responsible for protecting the human rights of all persons within their territory, including refugee children, and for providing the adults accountable for these children with the support necessary to fulfill their own responsibilities. In fact, constant efforts are also made to ensure that unaccompanied children's parents are traced and the family reunited.

11.3 UNHCR AND REFUGEE CHILDREN

The UNHCR is committed to protecting and providing adequately for the needs of all children within its competence. Expanding on the measures taken by the office and outlined in the background information provided above, ExCom has adopted two conclusions specifically on refugee children.

In its Conclusion No. 59 (XL) 4, adopted in 1989, ExCom reaffirmed²⁰ and expanded upon the importance of paying particular attention to refugee children, giving examples of how their needs can be assessed, monitored and met. It drew special

20 In 1987, ExCom adopted Conclusion No. 47 (XXXVIII) which urged action in addressing the human rights and needs of children who are refugee, highlighting the particularly vulnerability of unaccompanied and disable refugee children and the need for action by UNHCR to protect and assist them.

attention to UNHCR's particular endeavor to ensure the right of refugee children to education, as well as their protection from military recruitment and irregular adoption. The conclusion urged UNHCR to intensify its efforts in the area of public awareness of these issues— in particular the effects of persecution and armed conflict on refugee children —as well as in the development of training materials to improve the capacity of field staff to identify and address refugee children's protection and assistance needs. Finally, it reiterated its request that the High Commissioner report regularly to ExCom on the needs of refugee children and on the existing and proposed programmes for their benefit.

More recently, ExCom adopted Conclusion No. 107 (LVIII) in 2007.

Children share with adult refugees the need for protection and assistance. However, they have needs and rights over and above those of adults. Care must be taken to ensure that these special needs and rights are perceived, understood and attended to by those who generally seek to protect and assist refugees. Until this becomes a matter of course for all actors working with refugees, specific directives regarding refugee children are required. UNHCR's primary goals in this regard are as follows:

- To ensure the protection and healthy development of refugee children
- To achieve durable solutions that are appropriate to the immediate and long-term developmental needs of refugee children

As in all aspects concerning children, their best interests are to be given primary consideration. Preserving and restoring family unity are of fundamental concern. Actions to benefit refugee children should be primarily directed at enabling their primary caregivers to fulfill their principal responsibility to meet their children's needs. A child's welfare is closely linked to the health and security of the primary caregiver, who is usually the mother. Consequently, it is important to strengthen the capacities of refugee families to meet their own needs and to improve the participation and situation of refugee women, thereby contributing significantly to the welfare of their children. Effective implementation of the High Commissioner's Policy on Refugee Women and UNHCR's Guidelines on the Protection of Refugee Women can ameliorate the plight of refugee children. Since the High Commissioner's policies on children and women are complementary, their implementation needs to be coordinated. Moreover, the components of the policy on refugee children must be integrated within an overall programme of general protection and assistance for refugees.

There should be equality in the treatment of refugee boys and girls. Unaccompanied refugee children must be the particular focus of protection and care. There is also

a tremendous need to protect refugee children at risk from detention, armed conflict, military recruitment, sexual assault or abuse, prostitution, torture, hazardous working conditions, or any other form of violence, abuse or neglect.

11.4 REFUGEE CHILDREN AND NATIONAL LAWS

Although there is no national law that deals with refugee children, India's status as a signatory to the CRC creates an obligation for the Indian State to provide special care to refugee children so that they are protected from all forms of abuse and violence. There is an additional obligation on the part of the State to provide these children with access to education, hospitals and other public utility services. However, refugee children are often unable to access these facilities.

The refugee children may have come into conflict with the law owing to their refugee status and may also have come in conflict with certain national law. As refugee law practitioners, it is important to bear in mind the following aspects while dealing with refugee children.

- Diligent enforcement of national laws regarding all forms of violence and abuse against refugee children, in accordance with the relevant international legal obligations
- Protection and assistance criteria for assessing, monitoring and addressing the needs and vulnerabilities of refugee children
- Identification of and provision for the special protection and care of unaccompanied children in every refugee situation, as well as their reunification with their families
- Training of police and military forces, other government employees involved with refugee protection and assistance, and adults and leaders regarding the human rights most relevant to the well-being of refugee children
- Sensitisation of refugee children themselves to their specific rights
- Promoting awareness of, and responsiveness to, the particular needs of refugee children through information strategies directed at the governments of both the countries of asylum and the countries of origin, donors, NGOs, other UN bodies and the public at large.

V

**REFUGEE CONCERNS:
ROLE OF UNHCR IN
FINDING SOLUTIONS**

12

ROLE OF UNHCR AND NGOS

12.1 ASSISTANCE PROVIDED BY UNHCR

The office of the UNHCR in India has no formal accreditation and operates under the umbrella of the United Nations Development Programme (UNDP). UNHCR has established the Office of the Chief of Mission in New Delhi. In carrying out its mandate of protection, this office interviews individual asylum-seekers for refugee status and promotes durable solutions. UNHCR also has a sub-office in Chennai, to verify the voluntary nature of the repatriation of Sri Lankan Tamil refugees.

12.1.1 Approaching UNHCR, India

Once a refugee claimant enters India, she may approach the local UNHCR office at New Delhi for registration and determination of her claim for refugee status. In cases where the claimant may be in detention, or where the claimant may be located in a remote area with no possibility of personally visiting the office, she or an acquaintance may contact UNHCR with information about the circumstances of her flight and her place of confinement or lodging. In such cases, UNHCR protection staff members are deputed to visit the claimant and verify the claim for refugee status.

In the example given below, their efforts had a positive outcome.

An Afghan refugee had been detained at the Sitamarhi Central Jail in Bihar. He had been arrested while illegally crossing over the Indo-Nepal border into India. He requested the Superintendent of the Jail to inform UNHCR in New Delhi about his plight. The Superintendent contacted UNHCR with the information. On receipt of the news, and being satisfied of the genuineness of his claim to refugee status, a team of UNHCR officials visited Sitamarhi to conduct a refugee interview. He was subsequently

granted refugee status and legal action was initiated which secured his release from detention.¹

In cases where the applicant is found to be eligible for the grant of refugee status, she is assisted by UNHCR to find a solution. If however the facts run counter to the claim, as in the example given below, UNHCR is not mandated to take up the person's case.

UNHCR received an application for refugee status from an inmate of the Tihar Jail, Delhi. The applicant was an Afghan claiming that he had obtained refugee status from UNHCR in Pakistan. Upon investigation of the claim, UNHCR found that the applicant was a criminal involved in smuggling arms across the Indo-Pakistan border and was undergoing trial in a designated Delhi court. He did not have a claim for refugee status and UNHCR did not intervene in the matter.²

12.1.2 Application Procedure for Refugee Status

When a claimant for refugee status contacts UNHCR, she is assisted in filling out an Application for Mandate Refugee Status (AMRS). This is a registration form used to record general details about the applicant, such as family background, education, work experience and travel particulars. On the basis of this form, she is interviewed by a legal officer of UNHCR. Wherever possible, the applicant should substantiate her claim by providing relevant documentation. The information recorded in the AMRS and gleaned from the interview, coupled with independent country of origin information forms, form the basis of the applicant's claim. If the applicant is rejected in the first instance, she is entitled to an appeal with UNHCR. Another legal officer conducts an appeal review, which may be a file review; if needed, UNHCR may invite the applicant for another interview. A second reopening is normally not entertained. If the applicant submits substantial reasons, together with new and material facts on the changed circumstances, a reopening of the case may be considered. If refugee status is granted, the claimant is provided with a refugee certificate. This document must be renewed periodically. As of now the validity of the certificate is for 18 months.

12.1.3 Verification of Refugee Status Claim

Neither the criminal standard of beyond a reasonable doubt nor the civil standard of a balance of probabilities is valid for refugee status applications. Rather, a

1 As per UNHCR records.

2 As per UNHCR records.

standard akin to the “reasonable possibility” of persecution formulation of the United States Supreme Court, in *INS vs Cardoza Fonseca* is used.³ Where the applicant has made a genuine effort to substantiate her story but is unable to prove every part of her case, she must be given the benefit of the doubt.⁴

Whether the standard of proof is met or not is assessed by first ascertaining the credibility of the applicant herself. Substantial contradictions in her story in the course of the interviews may put her claim to refugee status in doubt. However, such inconsistencies must be examined with great care. A person who has just fled from persecution by the establishment in her own country may be sceptical of communicating with authorities of any kind and thus may be unable to speak freely and accurately. Applicants are therefore encouraged to honestly present all the relevant facts to their claims. Statements made by the claimant are checked against the available country of origin information. UNHCR receives updated information from a wide range of governmental and independent sources in order to assist the officers engaged in assessing a case. Thus, the evidence that persons similarly situated to the applicant who are also at risk in the country of origin is taken into account while determining the applicant’s claim.

The applicant should submit any documentation in her possession that supports her claim. This may include documents substantiating her personal details, such as identification papers, proofs of previous employment, medical records and educational certificates. The applicant should further provide any documents she may have that substantiate her allegation of persecution, such as the names of the agents or leaders involved in the persecution. In most cases, however, it is not possible for the asylum-seeker to provide documentary or other proof of her claim, given the circumstances of her departure and the nature of the claims made. This will not disqualify her from being recognised as a refugee as long as the claim is based on a well-founded fear of persecution on any of the grounds mentioned in the 1951 Convention or Protocol. Thus the claim to refugee status is verified by considering a range of subjective data and objective information.

12.1.4 Assistance Provided Via UNHCR’s Implementing Partners

Once a refugee has been recognised by UNHCR, her legal and financial concerns can be addressed to some extent. UNHCR runs various assistance programmes via its implementing partners for the benefit of refugees.

3 480 U.S. 421 (1987).

4 1951 Convention Handbook, *supra* note 5, at para. 48.

Medical Assistance Programme

In the region of Delhi the medical assistance programme for refugees is run by UNHCR in association with the Young Men's Christian Association (YMCA). YMCA is a Christian voluntary movement for women and men, with special emphasis on the genuine involvement of young people reaching towards building a human community of justice with love, peace, and reconciliation for the fullness of life for all.

Economically needy refugees availing themselves of medical treatment in the State under the supervision of doctors in Government-run institutions or any other UNHCR-recognised charitable institutes are provided with medical assistance by YMCA. Persons approved for medical assistance can be categorised into the following four groups.

Chronic medical ailment

Serious long-term ailments such as epilepsy, psychiatric illness, asthma, TB, hyper/hypo tension, cardiac problems, diabetes, liver cirrhosis, cancer, arthritis, AIDS, etc., are among the chronic diseases that fall in this group. Medical assistance in this category is only provided with medical prescriptions. Refugees undergoing examination for these ailments are assisted until the diagnosis is complete. Subsequent assistance is provided only if the diagnosis is in the affirmative.

Medically vulnerable individuals

A refugee is said to be medically vulnerable if she needs special medical care on a continued basis, and is unable to carry out activities of daily life without external support.

Disabled Group

This category includes all the physically and mentally disabled persons. However mental illness or psychiatric cases already covered by the previous two categories are not included.

Others

Reproductive health care and dental care are some of the medical benefits provided in this category. Wheelchairs are also made available to needy refugees on request and if prescribed by a government hospital. Hearing aids are provided to young children if required. This programme does not cover minor short-term

ailments such as common cold, cosmetic problems and infertility treatment. The refugees are also reimbursed for expenses incurred on medicines, prosthetics, laboratory investigations and hospitalisation in government hospitals.

Along with providing primary health care and health education, YMCA aims to assist the chronically ill and the handicapped through close monitoring and follow-up assistance. Its goal is to provide training to those who are sensitive to the physical and mental needs of the refugee population. Health education classes and group counselling sessions are an integral part of YMCA's health care programme.

Educational Assistance Programme

UNHCR works closely with its implementing partners to provide refugees with access to academic resources. It runs the educational assistance programme, also in association with the YMCA, Delhi.

Educational assistance is provided to all refugee children who are pursuing primary and lower secondary education, that is until class 10. Further educational assistance is provided on the basis of merit. An applicant for such assistance is required to fill out an application form, and attach photocopies of the refugee certificate and a bona fide student certificate, and provide two passport-size photographs. The grant may not cover all the expenses related to the child's education. Nevertheless, it is designed to help offset educational expenses. YMCA also helps refugees in getting admissions to schools.

Subsistence Allowance

YMCA is responsible for resource assessment and social assistance. A subsistence allowance is usually provided to vulnerable refugees with no other means of support. It is intended to cover basic expenses on items such as food, shelter and transportation. The subsistence allowance is provided for a limited period of time.

UNHCR-YMCA social counsellors discuss the alternatives, if any, before they together decide whether the refugee actually requires a subsistence allowance. A home visit is conducted by the YMCA to assess the refugee's degree of need and the extent of her resources, including personal skills. If the refugee is eligible to receive subsistence allowance, the amount will depend on how large her family is. The refugee collects the allowance on presentation of the refugee certificate on the scheduled date announced by the YMCA centre.

Self-Reliance Programme

UNHCR, along with Don Bosco Ashalayam, has started vocational courses as well as community development projects to ensure the refugee's long-term self-sufficiency and skill building. Don Bosco Ashalayam works with children and young at risk. They strive to empower them with high quality vocational and life skills enabling them to excel in their lives and careers. Don Bosco Ashalayam is a part of the Don Bosco Network which is spread over more than 135 countries providing various services to young people around the globe. The UNHCR Bosco Self-reliance programme is aimed at making refugees self-reliant by encouraging them to take up vocational training and life skills. The first phase of the programme focuses on imparting basic skills in Information Technology (IT), English language and life skills. After successful completion of the training programme, the refugees are also provided assistance for the next stage, i.e. job placement.

Rehabilitation Support

There are a number of refugees with symptoms of extreme distress and aggression. Don Bosco tries to identify new emerging cases as well as known cases and provides support for community re-integration and rehabilitation. This involves a package of inputs: psycho-social support, skill upgradation, and job placement. They work in synchronicity with UNHCR's established programmes on Self-Reliance, Education/Social Welfare and Health.

Socio-Legal Assistance

UNHCR provides socio-legal assistance to refugees through its implementing partner, the Socio Legal Information Centre. SLIC is a registered public trust committed to providing assistance in the form of socio-legal aid to the marginalised and vulnerable sections of the society. It is dedicated to the use of the legal system, to advance human rights and access to justice for all. It also seeks to strengthen human rights mechanisms through trainings, investigations and campaigns. SLIC works with women, prisoners, refugees, Dalits, workers, children, farmers, the disabled, religious and sexual minorities amongst others.

Refugees have to approach SLIC for the periodic renewal of the refugee certificate or for the file renewal interview. The entire family has to be present for the file renewal interview, and all the adult members have to personally collect their

valid certificates. The refugees have to get their interviews scheduled in advance to avoid any confusion. While conducting the file renewal interviews, the social workers update the available data and make their own assessments in the case. If necessary, referrals are sent to other implementing partners or to UNHCR for further action. All file renewals are forwarded to UNHCR for approval and printing of the certificates.

SLIC also provides legal support to refugees who have problems with the local communities or with the local authorities and the police. The organisation handles the litigation for refugees by providing legal support to the refugees and taking any ancillary action required. SLIC through its network of lawyers all over the country also ensures that no refugee is unrepresented in a court of law and that every refugee has access to legal aid. SLIC also organises training programmes for legal practitioners all over the country to build and consolidate a network of lawyers across the country interested in taking up refugee matters. The organisation conducts sensitisation programmes for the police on refugee issues.

SLIC also helps interested and eligible refugees to apply for the durable solution of naturalisation. The objective is that eligible refugees should become naturalised citizens and thus end their status as a refugee. SLIC tries to facilitate this process by providing them with the necessary guidance at each step. It identifies eligible refugees and submits their citizenship forms to the appropriate authorities and follows up their cases at various levels.

Most of the work of UNHCR is centered on finding durable solutions for refugees under its protection. These solutions are voluntary repatriation, local integration and resettlement, and discussed in detail in Chapter 13. Each solution has its limits. Voluntary repatriation is not promoted when the situation in the country of origin is very grim. Local integration is limited by the fact that India has not ratified the 1951 Convention and the stay of refugees largely depends on State policy. Resettlement has to be supported by a third country and is not always possible.

UNHCR has a limited mandate and cannot operate without the cooperation of States. While India has neither signed the 1951 Convention nor enacted national legislation concerning refugees, it has allowed UNHCR to operate in its territory and has been a strong advocate of the protection of refugees.

12.2 UNHCR'S WORLDWIDE COLLABORATION WITH NGOS

From its inception in 1951, UNHCR has maintained, as an integral part of its activities, collaboration with NGOs. Its humanitarian character and its non-operational role in the initial phase meant that NGOs became important actors in the implementation of assistance projects for refugees. UNHCR was involved in the planning and coordination of these projects while the implementation of these programmes was largely the responsibility of NGOs. As UNHCR became involved in regions outside Europe, it also developed relations with the nascent NGO movements in these regions, particularly in Latin America and Africa. Many NGOs were already engaged in small, localised efforts to address displacement problems. The large-scale refugee influxes in Africa marked a new chapter in the association between NGOs and UNHCR and strengthened the joint efforts to address the problems of refugees. In Asia, UNHCR has sought material assistance to respond to unprecedented refugee needs. Today, more than 1,000 NGOs worldwide are working directly or indirectly with refugees. UNHCR has formal agreements with more than 250 NGOs and a quarter of its annual global budget of USD 300 million is channelled directly or indirectly through them.

In the very first stages of a refugee emergency, UNHCR depends on NGOs already well established on the ground to provide invaluable information about the unfolding crises. Further, NGOs are the main partners in the delivery of humanitarian relief and in the implementation of assistance programs. They play a crucial role in consolidating solutions. Their community-based approach is an asset in bridging the gap between relief and development, helping refugee populations to integrate. In recognition of the decisive role played by NGOs in almost every aspect of refugee assistance, UNHCR and its NGO partners embarked on a process, known as Partnership in Action (PARinAC), which culminated in a global conference in June 1994, in Oslo. The plan of action adopted by the conference constitutes the blueprint for NGO-UNHCR cooperation in the areas of protection, emergency preparedness and response, internally displaced persons, solutions and the continuum from relief to development.

India has a strong NGO movement, especially in the field of refugee protection and human rights. The NGOs work with refugees and simultaneously liaison with the government authorities and UNHCR. It is this link that has to be built and strengthened for effective working on the refugee issues.

13

PROMOTING DURABLE SOLUTIONS

International protection provided to refugees is normally not given for an unlimited period. It ceases with the restoration of national protection, either in the country of origin or through integration, or with resettlement elsewhere.

As noted in earlier chapters, traditionally, three major durable solutions have been pursued: voluntary repatriation, local settlement and third country resettlement. In recent years, the international community has placed an emphasis on voluntary repatriation as the strongly preferred solution. A corollary of this emphasis on repatriation has been the increased importance attached to the prevention of conditions in the countries of origin leading to displacement.

13.1 VOLUNTARY REPATRIATION TO COUNTRY OF ORIGIN

Voluntary repatriation is usually viewed as the most desirable long-term solution, both by the refugees themselves as well as the international community. The standard criteria for return are “safety and dignity.” This enables refugees to resume their lives in a familiar setting under the protection and care of their home country, preferably in an organised fashion and with the cooperation of the governments of both the host country and the country of origin.

Article 13(2) of the UDHR provides that “everyone has a right to leave any country, including his own and to return to his country.” The Article applies to every individual, including refugees. In normal circumstances it means that an individual can leave or return to her country without any hindrance by the State. However, in a situation of return of refugees, the State may be called upon to play an active part in promoting the former. Neither the 1951 Convention nor the Protocol make any mention of the solution of voluntary repatriation. However Clause 8(c) of the UNHCR statute States that the High Commissioner shall “provide

for the protection of refugees by assisting governmental and private efforts to promote voluntary repatriation or assimilation within new communities.” The OAU Convention is unique not only for adopting a broad-based definition of the term “refugee”, but also for clearly laying down the guidelines for voluntary repatriation in Article V. Since the OAU Convention had taken into account the ground realities in Africa, these guidelines remain relevant even today. UNHCR’s mandate for refugee repatriation has been extended over the years through General Assembly resolutions, and ExCom conclusions and practices. Initially, the role of UNHCR was considered to be over once the refugees crossed the border and returned to the country of origin. However, in its extended role, UNHCR is supposed to monitor the safety and security of returned refugees and also provide them with reintegration assistance. ExCom first examined the issue of voluntary repatriation in 1980 and recognised, in its Conclusion No. 18 (XXXI), the desirability of the involvement of UNHCR in voluntary repatriation. In 1985, ExCom adopted Conclusion No. 40 (XXXVI) on the same subject and significantly developed the doctrine with regard to voluntary repatriation.

Repatriation can broadly be of two types:

- **Organised repatriation:** When refugees return home under the terms of a plan that is worked out well in advance and has the support of both the home and asylum governments, as well as of UNHCR and the refugees themselves, some problems of protection and assistance can be avoided. Such plans commonly include amnesties for political offences, assurances of safe passage for returning refugees, material assistance to help them re-establish themselves and provisions for an international presence of some kind to monitor their safety. Such advance and systematic planning is also likely to be backed by a larger quantum of resources, though rarely at the level desired.
- **Spontaneous repatriation:** The great majority of refugees who return to their home countries do so on their own initiative. That is, the route usually opted for is not one of agreeing to join a formal repatriation plan devised under international auspices after a “fundamental change of circumstances” has made possible a return “in safety and dignity.” Spontaneous repatriation poses a dilemma for the entities involved in protecting refugees — namely, governments, NGOs and UNHCR. Their duty to protect does not allow them to encourage repatriation into situations they consider to be unsafe. However,

they also have a responsibility to assist refugees who decide to exercise their right to return to their own country. If UNHCR believes that repatriation is premature, it usually attempts to tread the fine line between facilitating return and actively encouraging or promoting it. While UNHCR will not advise people to go back, and it may advise them not to, it will still give repatriation assistance to those who decide to do so. It will also continue its attempts to promote the conditions for a safe return and to negotiate guarantees for the protection of returnees, including access for international monitors.

The ideal environment for the return of refugees is one in which the causes of flight have been definitively and permanently removed, e.g. the end of a civil war or a change of government, which brings an end to violence or persecution. This ideal is rarely achieved. Instead, refugees return to places where political disputes still simmer and occasionally boil over; where fragile ceasefires collapse, are revived, only to unravel once again; where agreements are breached and trust is minimal. UNHCR's approach to voluntary repatriation depends on a number of factors—most importantly, conditions in the country of origin. Unless UNHCR is convinced that refugees can return in reasonable safety, the organisation does not actively promote return. It may, however, facilitate existing spontaneous movements. In some cases, where conditions in the country of origin permit, UNHCR may actively promote and organise the return of refugees.⁵

Voluntary repatriation is one of the mandated functions of UNHCR. The General Assembly Resolution 428 (V) of 14 December 1950, adopting the UNHCR statute, calls upon governments to cooperate with the High Commissioner in the performance of her functions inter alia by “assisting the High Commissioner in (her) efforts to promote the voluntary repatriation of refugees.” Later conclusions

5 For discussion relating to the protection aspect of voluntary repatriation, see, e.g., “Conclusion on the Return of Persons Not in Need of International Protection”, A/AC.96/987 (10 Oct 2003); “Composite Flows and the Relationship to Refugee Outflows, including Return of Persons not in Need of International Protection, as well as Facilitation of Return in its Global Dimension” EC/48/SC/CRP.29 (25 May 1998); “Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It”, EC/47/SC/CRP.27 (30 May 1997); “Annual Theme: The Pursuit and Implementation of Durable Solutions”, A/AC.96/872 (30 August 1996); “UNHCR’s Protection Role in Countries of Origin”, EC/46/SC/CRP.17 (18 March 1996); “Information Note on the Development of UNHCR’s Guidelines on the Protection Aspects of Voluntary Repatriation”, EC/SCP/80 (3 August 1993); Kathleen Newland et al., *The State of The World’s Refugees 1993: The Challenge of Protection*, Chapter 6: Voluntary Repatriation (1993), available at <http://www.unhcr.org/3eeedf3d5.html>; ExCom Conclusion No. 40, “Voluntary Repatriation”, EC/SCP/41 (1 August 1985).

and recommendations on the subject have elaborated in detail the following:

- Repatriation must be voluntary.
- UNHCR, governments and (NGOs) have a joint role to play in voluntary repatriations.
- Voluntary repatriation should be both facilitated and promoted.

In light of various developments, the current UNHCR mandate for voluntary repatriation may be summarised as follows:⁶

- Ensure the voluntary character of refugee repatriation.
- Promote the creation of conditions that are conducive to voluntary return in safety and with dignity.
- Promote the voluntary repatriation of refugees once conditions are conducive to return.
- Facilitate the return of refugees who have made an informed and voluntary decision to repatriate even if the conditions are not fully conducive.
- Organise, in cooperation with NGOs and other agencies, the transportation and reception of returnees, provided that such arrangements are necessary to protect their interests and well-being.
- Monitor the status of returnees in their country of origin and intervene on their behalf if necessary.
- Undertake activities in support of national legal and judicial capacity building, to help States address the causes of refugee movements.
- Raise funds from the donor community in order to assist governments and provide active support to repatriation and reintegration programmes.

6 For discussion of voluntary repatriation, reconstruction and reintegration, see "Oversight Issues: Reintegration", EC/48/SC/CRP.15 (2 April 1998); "Synopsis Report on the Review of UNHCR's Phase-out Strategies: Case Studies in Selected Countries of Origin", EC/48/SC/CRP.16 (28 March 1998); "Annual Theme: Repatriation Challenges", A/AC.96/887 (9 September 1997); "Social and economic impact of large refugee populations on host developing countries", EC/47/SC/CRP.7 (6 January 1997); "Lessons learnt from the Burundi and Rwanda emergencies: Conclusions of an internal review process", EC/47/SC/CRP.11 (2 January 1997); "UNHCR's Role in National Legal and Judicial Capacity-Building", EC/46/SC/CRP.31 (28 May 1996); "Follow-Up to ECOSOC Resolution 1995/56: UNHCR Assistance Activities in Countries of Origin", EC/46/SC/CRP.16 (18 March 1996); "Assistance Policies and Strategies for Durable Solutions: Achieving Sustainable Reintegration", EC/1995/SC.2/CRP.4 (2 January 1995).

- Act as a catalyst for medium and long-term rehabilitation assistance provided by NGOs, specialised development agencies and bilateral donors.

A refugee's right to return is recognised in international law. Related to this right are the rights to a nationality and fundamental rights— such as the right to life, liberty and security of a person, the right not to be subjected to arbitrary arrest or detention or exile, and the right to freedom of movement. Returnees are furthermore entitled to basic rights, including the rights to work, education, health care, social security and other social benefits.⁷

There are various obligations on the host State and the receiving State as well. The following is a summary of the responsibilities of the country of asylum:

- The country of asylum is bound by the fundamental principle of non-refoulement not to return refugees in any manner whatsoever to territories, or to the frontiers of territories, where their life or freedom would be threatened.
- The country of asylum is obliged to continue to treat refugees according to internationally accepted standards as long as they are in its territory.
- The country of asylum should allow UNHCR, in the exercise of its international protection functions, to supervise the well-being of asylum-seekers and refugees.
- The country of asylum should respect the leading role of UNHCR in promoting, facilitating and coordinating voluntary repatriation.
- The country of asylum should contribute to the promotion of voluntary repatriation as a durable solution.
- The country of asylum should allow UNHCR to ascertain the voluntary character of the repatriation, with regard to individual refugees and large-scale movements.

⁷ For international instruments that address voluntary repatriation and/or the right to return, see Declaration on the Protection of Refugees and Displaced Persons in the Arab World, art. 1 (Nov 19, 1992); Cartagena Declaration on Refugees, Conclusion No. 12 (Nov 22, 1984); African Charter, *supra* note 114, art. 12(2); Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 5 (Sept. 10, 1969); American Convention, *supra* note 114, art. 22(5); ICCPR, *supra* note 114, art. 12(4); CERD, *supra* note 114, art. 5(d)(ii); UDHR, *supra* note 114, art. 13(2).

- The country of asylum should facilitate UNHCR's involvement and ensure that accurate and objective information on conditions in the country of origin is communicated to refugees.
- In the event of refugees wishing to visit their country of origin, to assess the conditions there in the context of possible repatriation, UNHCR and the countries of origin and asylum should seek to facilitate such visits. Under such circumstances, automatic application of the cessation clauses of the 1951 Convention is not appropriate.

In the Indian context, East Pakistan refugees as well as a large number of Chakma refugees have been repatriated to Bangladesh. Sri Lankan Tamil refugees are being voluntarily repatriated back to Sri Lanka by the two concerned governments with the assistance of UNHCR. In fact, Indian courts have supported the concept of voluntary repatriation by appointing UNHCR as an independent third party to ascertain the voluntariness of the refugee's return to Sri Lanka.⁸

Various groups of mandate refugees are also being repatriated with the assistance of UNHCR when the country of origin is safe for their return, the voluntariness of the repatriation has been established and when support in the returning country is available.⁹ Unfortunately, 2009 was the worst year for voluntary repatriation in two decades, since 1990.¹⁰

Table 13.1: Major Voluntary Repatriation Movements in 2009¹¹

(Country/Territory of Origin)	Total
Afghanistan	57,582
Democratic Republic of Congo	44,300

8 M. Gurunathan, P. Nedumaran, Dr. S. Ramadoss vs. Union of India, Civil Writ No. 12343 of 1992, Madras High Court.

9 For information on individual movements, see "Update on Regional Developments in Central, East and West Africa", EC/48/SC/CRP.24 (25 May 1998); "Update on Developments in the Southern African Region", EC/48/SC/CRP.23 (25 May 1998); "Update on Regional Developments in the Former Yugoslavia", EC/48/SC/CRP.10 (2 April 1998); "Update on Regional Developments in Europe", EC/48/SC/CRP.9 (2 April 1998); "Update on Regional Developments in Central Asia, South West Asia, North Africa and the Middle East", EC/48/SC/CRP.3 (7 January 1998); "Update on Regional Developments in Asia and the Pacific", EC/47/SC/CRP.44 (15 August 1997); "Update on Regional Developments in the Americas and the Caribbean", EC/46/SC/CRP.43, (15 August 1997).

10 2009 Global Trends Report, supra note 29.

11 Id.

(Country/Territory of Origin)	Total
Iraq	38,000
Sudan	33,100
Burundi	32,400
Rwanda	20,600

The principle of voluntariness is the cornerstone of international protection with respect to the wishes of refugees. It is understood that voluntary return is more likely to be lasting and sustainable. The requirement of voluntariness constitutes a pragmatic and sensible approach towards finding a truly durable solution.

Refugee repatriation as a concept and process has evolved over the years and helped in finding durable solutions for millions of refugees. With repatriation and the cessation of her refugee status a refugee is able to avail herself of the national protection of her country of origin. This solution needs to be vigorously pursued with the cooperation of all concerned. It requires intense involvement and commitment on the part of the countries of origin and asylum and the international community. The latter must address the causes of refugee inflows and take proactive role to bring about peace and reconciliation. Adequate and timely reintegration assistance plays a very important role in successful repatriation and therefore should get the due attention of the international community.

13.2 LOCAL INTEGRATION

Local integration, an important durable solution for refugees, has three inter-related dimensions. First, refugees are granted an increasingly wider range of rights and entitlements by the host country that are broadly comparable to those enjoyed by its citizens. Over time this process leads to permanent residence rights and eventually to the acquisition of citizenship in the country of asylum. Second, refugees become progressively less reliant on State aid or humanitarian assistance, attaining self-reliance and a sustainable livelihood, thus contributing to the economic life of the host country. Third, local integration entails accommodation by the local communities, enabling refugees to live amongst or alongside the host population, without discrimination or exploitation and to contribute actively to the social life of their country of asylum.

While voluntary repatriation is the strongly preferred durable solution to contemporary problems of forced displacement, it is not always feasible or desirable. Certain contexts that give rise to refugees may be of a long-term nature, requiring other solutions, at least for some of those involved. Moreover, the security of individuals, indeed of societies and regions, may, occasionally, be better served by other solutions.

In cases where voluntary repatriation is unlikely to take place in the foreseeable future, the best solution is often to settle refugees in their host country. However, this can only be done with the agreement of the government of the asylum country concerned. With the escalation in refugee numbers, local settlement opportunities have tended to become increasingly restricted in many parts of the world.

In industrialised countries, government welfare systems and NGOs provide the bulk of the resources necessary to integrate refugees. Elsewhere, UNHCR furnishes varying degrees of support for local settlement projects in both rural and urban settings. Traditionally, local integration projects in rural areas have taken the form of settlements. In urban or semi-urban areas, assistance is given to individual refugees to help them integrate. Wherever possible, UNHCR provides education, vocational training and counseling to help refugees gain access to employment and the means to become independent.

The Indian government, for various reasons and with the exception of Tibetan refugees, has not accepted local integration as a feasible solution for refugees in its territory. It is only able to offer temporary protection to these refugees until a more durable solution (i.e., repatriation or resettlement) is found for them. Nevertheless, a small number of refugees have stayed in this country for periods long enough to integrate into the Indian society.

13.2.1 Obtaining Citizenship

The provisions for acquiring citizenship are governed by the Indian Citizenship Act, 1955. Citizenship by registration and naturalisation are the methods of obtaining citizenship by refugees in India. Section 5 provides for registration as a citizen of India for any person who falls within the following five categories. Subject to the conditions and restrictions imposed by the administrative authority, they include:

- persons of Indian origin who are ordinarily resident in India and have been resident for seven years immediately before making an application for registration;
- persons of Indian origin who are ordinarily resident in any country or place outside undivided India
- persons who are, or have been, married to citizens of India and are ordinarily resident in India and have been so resident for seven years immediately before making an application for registration;
- minor children of persons who are citizens of India; and
- any adult whose parents are registered as citizens of India under section 5(a) or naturalised citizens.

A person who is not a citizen by virtue of the Constitution or by the other provisions of this Act and who belongs to any of the five categories listed above can apply for citizenship by registration. A person is deemed to be of Indian origin for this subsection if either of his parents was born in undivided India. This provision may apply to some Afghan refugees who are of Hindu or Sikh origin. These applicants have to provide proof of their “Indian origin”. In respect of refugees married to Indian nationals, the above provisions apply only if the refugee has been legally living in India continuously for seven years preceding the application for citizenship.

Section 6 of the Citizenship Act, 1955, deals with citizenship by naturalisation. Under this section any person of full age and capacity can apply for grant of a certificate of naturalisation provided she is not an illegal migrant. A certificate of naturalisation can be granted by the government provided the applicant has qualified for naturalisation under the provisions of the Third Schedule.

The main conditions as set out in the Third Schedule are as follows:

- The applicant should not be a subject or citizen of any country where citizens of India are prevented by law or practice of that country from becoming subjects or citizens of that country by naturalisation.
- The applicant, in case she is a citizen of any country, must renounce citizenship of that country in accordance with the law therein in force and should notify such renunciation to the Central Government.

- The applicant must have resided in India or worked for the Indian government, for at least 12 months, or partially fulfilled both these conditions prior to the date of application.
- The applicant during the 14 years immediately preceding the said period of 12 months should have either resided in India or been in the service of Government of India, or partially fulfilled both these conditions, for periods amounting in the aggregate to not less than 11 years.
- The applicant must be of a good character.
- The applicant must have adequate knowledge of at least one language specified in the Eighth Schedule of the Constitution.

The Central Government has the discretion to waive all or any of the conditions in the Third Schedule, if it is satisfied that the person has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress in general. Thus, this form of acquiring citizenship requires executive consent.

Section 6A of the Citizenship Act, 1955 was inserted in 1985 and deals with various consequences of the Assam Accord of 15 August 1985. The Accord distinguishes between foreigners arriving in Assam prior to 1 January 1966 (who can regularise their stay in Assam); persons arriving in Assam from 1 January 1966 to 24 March 1971, who are dealt with under the provisions of the Foreigners Act, 1946, and the Foreigners Tribunal Order, of 1964; and those arriving in Assam after 25 March 1971, who will be expelled from the territory.

In *Khudiram Chakma vs State of Arunachal Pradesh* the Supreme Court stated that it is clear from the language of subsection (2) that any person who has come before 1 January 1966 must ordinarily be a resident in Assam from the date of entry till the incorporation of Section 6A (i.e., 7 December 1985).¹² It also clarified that the word "Assam" is defined in Section 6A(a) and that it refers to territories in the state of Assam immediately before the commencement of the Citizenship (Amendment) Act, 1985. The court further held that the petitioner and the other Chakma people who had been residing in Miao subdivision of Tirap district, Arunachal Pradesh, prior to 1985 could not be regarded as citizens of India.

12 1993 (Supp) 1 SC 615.

13.2.2 Amendments to the Citizenship Act

The Citizenship Act was amended in 2003. The amendment makes grant of citizenship more difficult in the context of the refugee situation.

In Section 5 “five years” has been replaced by “seven years” thus increasing the period of stay by two years for being eligible to apply for registration. Section 6 has also been amended to exclude illegal migrants from being eligible to apply for naturalisation. The period of residence in India has been increased from 10 years to 12 years to be eligible for applying for naturalisation.

Section 2(1)(b) has been introduced to define an “illegal migrant” as 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.

The exclusion of illegal migrants as being eligible from applying for naturalisation can be used against refugees who are interested in applying for naturalisation or registration. Most of the refugees will fall under this definition as they have either entered illegally or have continued to stay even after the expiry of the validity of their documents.

13.2.3 Naturalisation Procedure

On completion of the stipulated period of stay in India, the refugee may apply in the prescribed format to the district collector/sub-divisional magistrate’s (SDM) office for grant of naturalisation. The applicant has to be an adult to be eligible to apply for naturalisation.

The application for a certificate of naturalisation shall be made in Form XII to the district collector/SDM, within whose jurisdiction the applicant is ordinarily resident.

For completion of an application form the following documents are required:

- Three duty-stamped affidavits along with the form. The affidavit includes affidavit of the applicant and affidavits of two Indians by births known to the applicant.

- A certificate to the effect that the applicant has adequate knowledge of one of the languages specified in the Eighth Schedule to the Constitution e.g. Hindi or Punjabi. An applicant shall be considered to have adequate knowledge of the concerned language if he can speak or understand or read or write that language. This certificate can either be from a recognised education or social institute or another public organisation of repute. If this is not possible the applicant can substitute at least two respectful persons of the applicant's locality or district who are citizens of India and hold respectful positions either in Government or Municipal services, public life etc.

The applicant is thereafter required to publish an advertisement in the prescribed format in newspaper expressing his/her intention to obtain Indian citizenship. Two advertisements have to be published for each applicant and it is imperative for each applicant to buy 10 copies of the newspaper. The applicant also has to pay the processing fees and submit the receipt along with the form. Five sets of the application form have to be submitted to the SDM. Each set should have the original photographs as well as the newspaper copy.

The SDM does a preliminary scrutiny and then forwards the file to the Foreigners Regional Registration Office (FRRO). FRRO orders various enquiries to verify the character and antecedents of the applicant. These enquiries are from the police, immigration department and the intelligence. After receiving all the reports the FRRO consolidates them in its own report and sends the file back to the SDM office along with all the reports for forwarding to the state government. The SDM forwards the file to the state administration. The concerned department again scrutinises the file to ensure everything is in order. If so, it forwards the same to the Ministry of Home Affairs (MHA) for a final decision. If not, it writes to the applicant to make good the deficiencies. Once the deficiencies are rectified the file is forwarded to the MHA for their consideration.

The Home Ministry further scrutinises the attached documents and the report of the district collector/SDM to satisfy itself. Discretion for approving or rejecting the application is vested in the Joint Secretary of the Ministry. In case approval is granted, the Joint Secretary conveys a letter of acceptance to the concerned applicant with a precondition to renounce the existing nationality of the applicant and also to pay the requisite fees for grant of naturalisation.

If the refugee has difficulty obtaining this certificate, she may seek to have the rule waived. It may be sufficient for the applicant to swear an affidavit before a first class magistrate in India for renunciation of her previous nationality. The applicant must also obtain attested photographs to be attached with the certificate of nationality granted by the Home Ministry. Finally, an oath of allegiance is taken and signed by the applicant, and she is then deemed to be an Indian citizen.

If the application for citizenship is rejected, the aggrieved applicant may file a review application before an authority superior to the one that rejected her application. In case the superior authority also rejects her application, the only recourse left can be to challenge the order by filling a writ petition.

Once the parents get naturalised, children both minor as well as adults can get themselves registered as Indian Citizens through registration, which is simpler and less expensive.

13.3 RESETTLEMENT TO A THIRD COUNTRY

For refugees who can neither return to their country of origin nor remain safely in their country of refuge, the only durable solution is to resettle in a third country. Resettlement is about refugees moving from a transit country or country of first asylum to another, or third State. It is a vital instrument of protection and among the recommended durable solutions. It is geared primarily to the special needs of an individual whose life, liberty, safety, health or fundamental human rights are in jeopardy in the country where she first sought asylum. Resettlement is a process that involves identifying those in urgent need and finding a suitable country prepared to accept them. In certain circumstances it is also viewed as a durable solution, for refugees who do not have immediate protection concerns.

The decision to resettle a refugee is usually taken, on a priority basis, when there is no other alternative to guarantee the legal or physical security of the person concerned. In light of this, the common description of resettlement as a last resort should not be interpreted to mean that there is a hierarchy of solutions and that resettlement is the least valuable among them. For many refugees, resettlement is in fact the best, or perhaps the only alternative. Resettlement also provides significant potential for the development of a resource base for the return of professional and skilled personnel at some time in the future when repatriation becomes viable.

A number of countries offer asylum to refugees on a temporary basis only on the condition that they subsequently find protection in another country, either by repatriation or resettlement. Even in countries that do not impose this condition, the local economic, political or security factors may sometimes make it necessary to move the refugee elsewhere. Resettlement can also relieve the physical strain on receiving countries. In other instances, it eases the political pressure the countries are under from the countries of origin. Thus, resettlement contributes to international solidarity via burden sharing and maintaining the fundamental principles of protection.

People eligible for resettlement include those who are essentially protection cases—refugees threatened with refoulement to their country of origin and those in physical danger in their first country of asylum. Resettlement is also the option for “vulnerable groups”, such as torture and rape victims, the disabled and injured; severely traumatised people in need of specialised treatment unavailable in their first country of asylum, and for “long-stayers” for whom no other solution is available. It is often the only way to reunite refugee families who, through no fault of their own, find themselves divided by borders or sometimes by entire continents.

At the individual level, resettlement can mean the difference between life and death. Refugees may be denied basic human rights in the country of first refuge; their lives and freedom may be threatened by local elements motivated by racial, religious or political reasons, or by attacks and assassinations directed from outside. The authorities, in turn, may be unable or unwilling to offer effective protection. In such circumstances, resettlement is not the solution of last resort, but the principal objective. Similar considerations apply to other categories such as children, the disabled, and rescued-at-sea cases, for whom the exercise of protection without the prospect of finding solutions is otherwise quite meaningless. UNHCR, States and the ExCom have also recognised that the special protection needs of women refugees may call for resettlement opportunities.

A few countries accept applications for resettlement directly from refugees. These countries apply their own criteria for deciding whether or not to accept applicants, and UNHCR does not play an active role in facilitating their resettlement. Alternatively, some refugees may get private sponsorship from their relatives in third countries. More often than not, UNHCR plays a very active role in the

submission of refugee cases for resettlement based on its own criteria and those of the resettlement countries. A large number of refugees have been resettled by these two methods.

Where refugees face the risk of forcible deportation due to court orders, or where a Leave India Notice has been issued by the authorities, UNHCR makes all possible attempts to rehabilitate the concerned refugee in a third country. This is a difficult task since it involves getting the consent of the third country. Further, since refugees often do not have valid travel documents, they may be unable to travel to the country of asylum. In such cases, UNHCR may again step in to request the Indian government to issue temporary travel documents to the refugee, valid only for exiting India. Alternatively, the Red Cross may be requested to issue a special international travel permit for the refugee to legally reach the country of resettlement. Besides addressing security concerns, resettlement could also contribute to the “humanitarian protection” of women at risk, torture victims, the physically or mentally challenged, and certain medical and family reunion cases.

However, it must be noted that resettlement is extremely difficult and not possible in most cases. Many countries no longer recognise resettlement as a durable solution. Third country resettlement has come to mean resettlement only in developed countries. The criteria adopted for resettlement varies from country to country. Basically, the individual must meet the 1951 Convention definition of a refugee and the case should reflect the special humanitarian concerns of the resettlement country. Since the number of people who are resettled is insignificant, there is a need to increase the resettlement opportunities. Resettlement has played an important role in the past. It must continue to do so but on an expanded scale, so that this particular solution is made available to a large number of deserving cases, where other options are not feasible.

In 2009, approximately 112,400 refugees were resettled with UNHCR assistance.¹³ In contrast to the number of refugees voluntarily repatriated, this number was the highest it has been since 1995. Resettled refugees normally have access to long-term residence status, a range of social, economic and legal rights and eventually to naturalisation. Resettled refugees thus require little, if any international protection. Once they obtain the citizenship of the host country, they are no longer refugees and thus find durable resolution.

13 Id.

ANNEXURES

I
FOREIGN AND INTERNATIONAL
JUDGEMENTS

Elgafaji Vs. Staatssecretaris van Justitie

Country: European Union

Judicial Body: European Court of Justice

Decision Date: 17 February 2009

Judgement OF THE COURT (Grand Chamber)

In Case C-465/07,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Raad van State (Netherlands), made by decision of 12 October 2007, received at the Court on 17 October 2007, in the proceedings

Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie,

Judgement

- 0 This reference for a preliminary ruling concerns the interpretation of Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; ‘the Directive’), in conjunction with Article 2(e) of that directive.
1. The reference was made in the course of proceedings between Mr and Mrs Elgafaji, both Iraqi nationals, and the Staatssecretaris van Justitie (State Secretary for Justice) relating to his refusal of their applications for temporary residence permits in the Netherlands.

Legal context

The European Convention for the Protection of Human Rights and Fundamental Freedoms

2. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (‘the ECHR’), is entitled ‘Prohibition of torture’, and provides:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

Community legislation

3. Recital 1 in the preamble to the Directive states:

'A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.'

4. Recital 6 in the preamble to the Directive states:

'The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.'

5. Recital 10 in the preamble to the Directive states:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1)]. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

6. Recitals 24 to 26 in the preamble to the Directive state:

'(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the [Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951].

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.'

7. Article 1 of the Directive provides:

'The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.'

Under Article 2(c), (e) and (g) of the Directive:

- (c) *“refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...*
- (e) *“person eligible for subsidiary protection” means a third country national or a Stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a Stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 ... and [who] is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;*
- (g) *“application for international protection” means a request made by a third country national or a Stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status ...’*

8. Under Article 4(1), (3) and (4) in Chapter II of the Directive, entitled ‘Assessment of applications for international protection’:

- Member States may consider it the duty of the applicant to submit all elements needed to substantiate the application for international protection;
- the assessment of an application for international protection is to be carried out on an individual basis taking into account a number of factors as they relate to the country of origin at the time of taking a decision on the application and the personal circumstances of the applicant;
- the fact that an applicant has already been subject to serious harm or to direct threats of such harm, is a serious indication of a real risk of suffering serious harm, unless there are good reasons to consider that such serious harm will not be repeated.

9. Article 8(1) in Chapter II, provides:

‘As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.’

10. Under the heading ‘Serious harm’, Article 15 in Chapter V of the Directive, entitled ‘Qualification for subsidiary protection’, provides:

‘Serious harm consists of:

- (a) death penalty or execution; or*
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or*
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’*

11. Article 18 of the Directive provides that Member States are to grant subsidiary protection status to a third country national eligible for subsidiary protection in accordance with Chapters II and V of that directive.

National legislation

12. Article 29(1)(b) and (d) of the Law on Aliens 2000 (Vreemdelingenwet 2000, ‘the Vw 2000’) provides:

‘A temporary residence permit, as referred to in Article 28, may be issued to an alien:

- (b) who has proved that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment;*
- (d) for whom return to his country of origin would, in the opinion of the Minister, constitute an exceptional hardship in the context of the overall situation there.’*

13. The Circular on Aliens of 2000 (Vreemdelingencirculaire 2000), in the version in force on 20 December 2006, states in paragraph C 1/4.3.1:

‘Article 29(1)(b) of the [Vw 2000] allows the grant of a residence permit where the alien has proved satisfactorily that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

That provision is derived from Article 3 of [the ECHR]. The removal of a person to a country in which he runs a real risk of being subjected to such treatment constitutes an infringement of that article. If that real risk has been or is established, a temporary (asylum) residence permit is in principle issued.

14. A new Article 3.105(d) was inserted into the Decree on Aliens of 2000 (Vreemdelingenbesluit 2000) in order expressly to transpose, with effect from 25 April 2008, Article 15(c) of the Directive.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15. On 13 December 2006 Mr and Mrs Elgafaji submitted applications for temporary residence permits in the Netherlands, together with evidence seeking to prove the real risk to which they would be exposed if they were expelled to their country of origin, in this case, Iraq. In support of their arguments, they relied, in particular, on facts relating to their personal circumstances.
16. They pointed out, inter alia, that Mr Elgafaji, who is a Shiite Muslim, had worked from August 2004 until September 2006 for a British firm providing security for personnel transport between the airport and the 'green' zone. They stated that Mr Elgafaji's uncle, employed by the same firm, had been killed by militia, his death certificate stating that his death followed a terrorist act. A short time later, a letter threatening 'death to collaborators' was fixed to the door of the residence which Mr Elgafaji shared with his wife, a Sunni Muslim.
17. By orders of 20 December 2006, the Minister voor Vreemdelingenzaken en Integratie (Minister for Immigration and Integration; 'the Minister') -- the competent authority until 22 February 2007, the date on which the Staatssecretaris van Justitie became responsible for immigration matters -- refused to grant temporary residence permits to Mr and Mrs Elgafaji. He found, inter alia, that they had not proved satisfactorily the circumstances on which they were relying and, therefore, had not established the real risk of serious and individual threat to which they claimed to be exposed in their country of origin. He thus concluded that their situation did not come within the scope of Article 29(1)(b) of the Vw 2000.
18. According to the Minister, the standard of proof required for the protection granted under Article 15(b) of the Directive is identical to that required for the protection granted under Article 15(c). Those two provisions, like Article 29(1)(b) of the Vw 2000, require applicants to show satisfactorily, in their individual circumstances, the risk of serious and individual threat to which they would be exposed were they to be returned to their country of origin. As Mr and Mrs Elgafaji failed to produce such evidence under Article 29(1)(b) of the Vw 2000, they could not effectively rely on Article 15(c) of the Directive.
19. Following the refusal of their applications for temporary residence permits, Mr and Mrs Elgafaji brought actions before the Rechtbank te 's-Gravenhage (District Court, The Hague). Their actions before that court were successful.

20. That court held, *inter alia*, that Article 15(c) of the Directive, which takes account of the existence of armed conflict in the country of origin of the applicant seeking protection, does not require the high degree of individualisation of the threat, required by Article 15(b) of the Directive and by Article 29(1)(b) of the Vw 2000. Thus, the existence of a serious and individual threat to the persons seeking protection can be proved more easily under Article 15(c) of the Directive than under Article 15(b).
21. Consequently, the *Rechtbank te 's-Gravenhage* annulled the orders of 20 December 2006 refusing to grant temporary residence permits to Mr and Mrs Elgafaji, since the proof required under Article 15(c) of the Directive had been aligned with that required in the application of Article 15(b) of the Directive, as reproduced in Article 29(1)(b) of the Vw 2000.
22. According to that court, the Minister ought to have examined whether there were grounds for issuing temporary residence permits to Mr and Mrs Elgafaji under Article 29(1)(d) of the Vw 2000 on account of the existence of serious harm within the meaning of Article 15(c) of the Directive.
23. Seised on appeal, the Raad van State (Council of State) held that there were difficulties in interpreting the relevant provisions of the Directive. It held, furthermore, that Article 15(c) of the Directive had not been transposed into Netherlands law by 20 December 2006, the date on which the Minister's contested orders were made.
24. In those circumstances, the Raad van State decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
 1. Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?
 2. If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?

The questions referred for a preliminary ruling

25. At the outset, it should be noted that the referring court seeks guidance on the protection guaranteed under Article 15(c) of the Directive, in comparison with that under Article 3 of the ECHR as interpreted in the case-law of the European Court of Human Rights (see, inter alia, Eur. Court H.R. NA. v. The United Kingdom, judgement of 17 July 2008, not yet published in the Reports of Judgements and Decisions, § 115 to 117, and the case-law cited).
26. In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.
27. The questions referred, which it is appropriate to examine together, thus concern the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof.
28. Having regard to those preliminary observations, and in the light of the circumstances of the case in the main proceedings, the referring court asks, in essence, whether Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances. If not, the referring court wishes to know the criterion on the basis of which the existence of such a threat can be considered to be established.
29. In order to reply to those questions, it is appropriate to compare the three types of 'serious harm' defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2(e) of the Directive, substantial grounds have been shown for believing that the applicant faces 'a real risk of [such] harm' if returned to the relevant country.

30. In that regard, it must be noted that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.
31. By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.
32. Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.
33. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place -- assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred -- reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.
34. That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.
35. While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows -- by the use of the word 'normally' -- for the possibility of an exceptional situation which would be characterised by

such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.

36. The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.
37. In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.
38. Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:
 - the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and
 - the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.
39. Lastly, in the case in the main proceedings, it should be borne in mind that, although Article 15(c) of the Directive was expressly transposed into the Netherlands law only after the facts giving rise to the dispute before the referring court, it is for that court to seek to carry out an interpretation of national law, in particular of Article 29(1)(b) and (d) of the Vw 2000, which is consistent with the Directive.
40. According to settled case-law, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the

wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see, inter alia, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-188/07 *Commune de Mesquer* [2008] ECR I-0000, paragraph 84).

41. Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) of the Directive, must be interpreted as meaning that:
- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
 - the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place -- assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred -- reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.
42. It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, *NA. v. The United Kingdom*, § 115 to 117 and the case-law cited).

Costs

43. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless

persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place -- assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred -- reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

[Signatures]

Said Shamilovich Kadzoev Vs. Direktsia 'Migratsia' pri Ministerstvo na vatrešnite raboti

Country: European Union

Judicial Body: European Court of Justice

Decision Date: 30 November 2009

THE COURT (Grand Chamber) gives the following

Judgement

1. This reference for a preliminary ruling concerns the interpretation of Article 15(4) to (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).
2. The reference was made in the course of administrative proceedings brought on the initiative of the director of the Direktsia 'Migratsia' pri Ministerstvo na vatrešnite raboti (Directorate for Migration at the Ministry of the Interior) requesting the Administrativen sad Sofia-grad (Sofia City Administrative Court) to rule of its own motion on the continued detention of Mr Kadzoev (Huchbarov) at that directorate's special detention facility for foreign nationals ('the detention centre') in Busmantsi in the district of Sofia.

Legal context

Community legislation

3. Directive 2008/115 was adopted on the basis in particular of Article 63(3)(b) EC. According to recital 9 in the preamble to the directive:

'In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [OJ 2005 L 326, p. 13], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.'

4. Article 15 of Directive 2008/115, which forms part of the chapter on detention for the purpose of removal, reads as follows:

'1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention

a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

- (a) there is a risk of absconding or*
- (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.*

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. *Detention shall be ordered by administrative or judicial authorities.*

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

- (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;*
- (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.*

The third-country national concerned shall be released immediately if the detention is not lawful.

3. *In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.*
4. *When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.*
5. *Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.*
6. *Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their*

reasonable efforts the removal operation is likely to last longer owing to:
 (a) *a lack of cooperation by the third-country national concerned, or*
 (b) *delays in obtaining the necessary documentation from third countries.'*

5. Under Article 20 of Directive 2008/115, Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive, with the exception of Article 13(4), by 24 December 2010.
6. In accordance with Article 22 of the directive, it entered into force on 13 January 2009.

National legislation

7. Directive 2008/115 was transposed into Bulgarian law by the Law on foreign nationals in the Republic of Bulgaria (DV No 153 of 1998), as amended on 15 May 2009 (DV No 36 of 2009) ('the Law on foreign nationals').
8. According to the referring court, Article 15(4) of the directive has, however, not yet been transposed into Bulgarian law.
9. Under Article 44(6) of the Law on foreign nationals, where a coercive administrative measure cannot be applied to a foreign national because his identity has not been established or because he is likely to go into hiding, the body which adopted the measure may order the foreign national to be placed in a detention centre for foreign nationals in order to enable his deportation or expulsion to be arranged.
10. Before the transposition of Directive 2008/115, detention in such a centre was not subject to any time-limit.
11. Now, under Article 44(8) of the Law on foreign nationals, '[t]he detention shall last as long as the circumstances set out in paragraph 6 above pertain but may not exceed six months. Exceptionally, where the person refuses to cooperate with the competent authorities, where there is a delay in obtaining the documents essential for deportation or expulsion, or where the person constitutes a threat to national security or public order, the period of detention may be extended to 12 months.'
12. Article 46a(3) to (5) of the Law on foreign nationals provides:

'(3) Every six months the head of the detention centre for foreign nationals shall present a list of the foreign nationals who have been detained for more than six months owing to impediments to their removal from

Bulgarian territory. The list is to be sent to the administrative court of the place where the detention centre is situated.

- (4) At the end of each period of six months' detention in a detention centre, the court deliberating in private shall of its own motion determine whether the period of detention is to be extended, replaced, or terminated. No appeal shall lie against the court's decision.*
- (5) Where the court annuls the contested detention order or orders the foreign national to be released, the latter shall be immediately released from the detention centre.'*

The main proceedings and the reference for a preliminary ruling

13. On 21 October 2006 a person was arrested by Bulgarian law enforcement officials near the frontier with Turkey. He had no identity documents and said that his name was Said Shamilovich Huchbarov, born on 11 February 1979 in Grozny (Chechnya). He stated that he did not wish the Russian consulate to be informed of his arrest.
14. By decree of 22 October 2006 of the competent police department, a coercive administrative measure of deportation was imposed on him.
15. He was placed in the detention centre on 3 November 2006, to be detained until it was possible to execute the decree, that is, until documents were obtained enabling him to travel abroad and sufficient funds guaranteed to purchase a ticket to Chechnya. The decree became enforceable on 17 April 2008, following judicial review proceedings.
16. On 14 December 2006 he declared to the authorities of the detention centre that his real name was not Huchbarov but Kadzoev.
17. In the course of two administrative proceedings before the Administrativen sad Sofia-grad a birth certificate was produced showing that Mr Kadzoev was born on 11 February 1979 in Moscow (former Soviet Union) of a Chechen father, Shamil Kadzoev, and a Georgian mother, Loli Elihvari. However, a temporary identity card for a national of the Chechen Republic of Ichkeria, valid until 11 February 2001, issued in the name of Said Shamilovich Kadzoev, born on 11 February 1979 in Grozny, was also produced. The person concerned nevertheless continued to present himself to the authorities under the names of either Kadzoev or Huchbarov.
18. In the period from January 2007 to April 2008, there was an exchange of correspondence between the Bulgarian and Russian authorities. Contrary to

the view of the Bulgarian authorities, the Russian authorities claimed that the temporary identity card in the name of Said Shamilovich Kadzoev came from persons and an authority unknown to the Russian Federation, and could not therefore be regarded as a document proving the person's Russian nationality.

19. On 31 May 2007, while he was detained in the detention centre, Mr Kadzoev applied for refugee status. The action he brought against the refusal of the Bulgarian administrative authorities to grant that application was dismissed by judgement of the Administrativen sad Sofia-grad of 9 October 2007. On 21 March 2008 he made a second application for asylum, but withdrew it on 2 April 2008. On 24 March 2009 he made a third application for asylum. By decision of 10 July 2009, the Administrativen sad Sofia-grad dismissed his action and refused him asylum. No appeal lies against that decision.
20. On 20 June 2008 Mr Kadzoev's lawyer applied for the detention to be replaced by a less severe measure, namely the obligation for Mr Kadzoev to sign periodically a register kept by the police authorities at his place of residence. As the competent authorities considered that he had no actual address in Bulgaria, they rejected the application on the ground that the necessary conditions were not satisfied.
21. On 22 October 2008 a similar application was made, which was likewise rejected.
22. Following an administrative procedure brought at the request of Mr Kadzoev before the Commission for Protection against Discrimination, which gave rise to proceedings in the Varhoven administrativen sad (Supreme Administrative Court), that court, in agreement with the commission, accepted in its judgement of 12 March 2009 that it was not possible to establish with certainty the identity and nationality of Mr Kadzoev, so that it considered him to be a Stateless person.
23. According to the order for reference, the help centre for survivors of torture, the United Nations High Commission for Refugees and Amnesty International find it credible that Mr Kadzoev was the victim of torture and inhuman and degrading treatment in his country of origin.
24. Despite the efforts of the Bulgarian authorities, several non-governmental organisations and Mr Kadzoev himself to find a safe third country which could receive him, no agreement was reached, and he has not as yet obtained any travel documents. Thus the Republic of Austria and Georgia, to which the Bulgarian authorities applied, refused to accept Mr Kadzoev. The Republic of Turkey, to which the Bulgarian authorities also applied, did not reply.

25. The Administrativen sad Sofia-grad states that Mr Kadzoev is still detained in the detention centre.
26. The main proceedings were commenced by an administrative document filed by the director of the Directorate for Migration at the Ministry of the Interior, asking that court to rule of its own motion, pursuant to Article 46a(3) of the Law on foreign nationals, on the continued detention of Mr Kadzoev.
27. That court states that, before the Law on foreign nationals in the Republic of Bulgaria was amended for the purpose of transposing Directive 2008/115, the duration of detention in the detention centre was not limited to any period. It points out that there are no transitional provisions governing situations in which decisions were taken before that amendment. The applicability of the new rules deriving from the directive to periods and the grounds for extending them is therefore a matter on which interpretation should be sought, especially as, in the case at issue in the main proceedings, the maximum duration of detention laid down by the directive had already been exceeded before the directive was adopted.
28. Moreover, there is no express provision stating whether in a case such as the present one the periods referred to in Article 15(5) and (6) of Directive 2008/115 are to be understood as including the period during which the foreign national was detained when there was a legal prohibition on executing an administrative measure of 'deportation' on the ground that a procedure for recognition of humanitarian and refugee status had been initiated by Mr Kadzoev.
29. Finally, the referring court indicates that, if there is no 'reasonable prospect of removal' within the meaning of Article 15(4) of Directive 2008/115, the question arises whether the immediate release of Mr Kadzoev should be ordered in accordance with that provision.
30. In those circumstances, the Administrativen sad Sofia-grad decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
 - '1. *Must Article 15(5) and (6) of Directive 2008/115 ... be interpreted as meaning that*
 - (a) *where the national law of the Member State did not provide for a maximum period of detention or grounds for extending such detention before the transposition of the requirements of that directive and, on transposition of the directive, no provision was made for conferring*

retroactive effect on the new provisions, the requirements of the directive only apply and cause the period to start to run from their transposition into the national law of the Member State?

- (b) within the periods laid down for detention in a specialised facility with a view to removal within the meaning of the directive, no account is to be taken of the period during which the execution of a decision of removal from the Member State under an express provision was suspended owing to a pending request for asylum by a third-country national, where during that procedure he continued to remain in that specialised detention facility, if the national law of the Member State so permits?*
- 2. Must Article 15(5) and (6) of Directive 2008/115 ... be interpreted as meaning that within the periods laid down for detention in a specialised facility with a view to removal within the meaning of that directive no account is to be taken of the period during which execution of a decision of removal from the Member State was suspended under an express provision on the ground that an appeal against that decision is pending, even though during the period of that procedure the third-country national has continued to stay in that specialised detention facility, where he did not have valid identity documents and there is therefore some doubt as to his identity or where he does not have any means of supporting himself or where he has demonstrated aggressive conduct?*
- 3. Must Article 15(4) of Directive 2008/115 ... be interpreted as meaning that removal is not reasonably possible where:*

 - (a) at the time when a judicial review of the detention is conducted, the State of which the person is a national has refused to issue him with a travel document for his return and until then there was no agreement with a third country in order to secure the person's entry there even though the administrative bodies of the Member State are continuing to make endeavours to that end?*
 - (b) at the time when a judicial review of the detention is conducted there was an agreement for readmission between the European Union and the State of which the person is a national, but, owing to the existence of new evidence, namely the person's birth certificate, the Member State did not refer to the provisions of that agreement, if the person concerned does not wish to return?*
 - (c) the possibilities of extending the detention periods provided for in Article 15(6) of the directive have been exhausted in the situation where no agreement for readmission has been reached with the third country at the time when a judicial review of his detention is conducted, regard being had to Article 15(6)(b) of the directive?*

4. *Must Article 15(4) and (6) of Directive 2008/115 ... be interpreted as meaning that if at the time when the detention with a view to removal of the third-country national is reviewed there is found to be no reasonable ground for removing him and the grounds for extending his detention have been exhausted, in such a case:*
- (a) *it is none the less not appropriate to order his immediate release if the following conditions are all met: the person concerned does not have valid identity documents, whatever the duration of their validity, with the result that there is a doubt as to his identity, he is aggressive in his conduct, he has no means of supporting himself and there is no third person who has undertaken to provide for his subsistence?*
- (b) *with a view to the decision on release it must be assessed whether, under the provisions of the national law of the Member State, the third-country national has the resources necessary to stay in the Member State as well as an address at which he may reside?'*

The urgent procedure

31. The Administrativen sad Sofia-grad asked for the reference for a preliminary ruling to be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure.
32. The referring court justified its request by stating that the case raises the question whether Mr Kadzoev should be kept in detention in the detention centre or released. In view of his situation, the court stated that the proceedings should not be suspended for a prolonged period.
33. The Second Chamber of the Court, after hearing the Advocate General, decided to grant the referring court's request for the reference for a preliminary ruling to be dealt with under an urgent procedure, and to remit the case to the Court for it to be assigned to the Grand Chamber.

The questions referred for a preliminary ruling

Question 1(a)

34. By Question 1(a) the referring court essentially asks whether Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include also the period of detention completed before the rules in the directive become applicable.

35. It must be observed that Article 15(5) and (6) of Directive 2008/115 fixes the maximum period of detention for the purpose of removal.
36. If the period of detention for the purpose of removal completed before the rules in Directive 2008/115 become applicable were not taken into account for calculating the maximum period of detention, persons in a situation such as that of Mr Kadzoev could be detained for longer than the maximum periods mentioned in Article 15(5) and (6) of that directive.
37. Such a situation would not be consistent with the objective of those provisions of Directive 2008/115, namely to guarantee in any event that detention for the purpose of removal does not exceed 18 months.
38. Moreover, Article 15(5) and (6) of Directive 2008/115 applies immediately to the future consequences of a situation that arose when the previous rules were in force.
39. The answer to Question 1(a) is therefore that Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.

Question 1(b)

40. By Question 1(b) the referring court seeks to know whether, when calculating the period of detention for the purpose of removal under Article 15(5) and (6) of Directive 2008/115, the period must be included during which the execution of the removal decision was suspended because of the examination of an application for asylum by a third-country national, where, during the procedure relating to that application, he has remained in the detention centre.
41. It should be recalled that recital 9 in the preamble to Directive 2008/115 states that '[i]n accordance with ... Directive 2005/85 ... a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force'.
42. In accordance with Article 7(1) and (3) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18), asylum seekers may move freely within the territory of the

host Member State or within an area assigned to them by that Member State, but when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

43. Article 21 of Directive 2003/9 provides that Member States are to ensure that negative decisions relating to the granting of benefits under that directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or a review before a judicial body must be granted.
44. Under Article 18(1) of Directive 2005/85, Member States must not hold a person in detention for the sole reason that he or she is an applicant for asylum and, under Article 18(2), where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.
45. Detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker in particular under Directives 2003/9 and 2005/85 and the applicable national provisions thus fall under different legal rules.
46. It is for the national court to determine whether Mr Kadzoev's stay in the detention centre during the period in which he was an asylum seeker complied with the conditions laid down by the provisions of Community and national law concerning asylum seekers.
47. Should it prove to be the case that no decision was taken on Mr Kadzoev's placement in the detention centre in the context of the procedures opened following his applications for asylum, referred to in paragraph 19 above, so that his detention remained based on the previous national rules on detention for the purpose of removal or on the provisions of Directive 2008/115, Mr Kadzoev's period of detention corresponding to the period during which those asylum procedures were under way would have to be taken into account in calculating the period of detention for the purpose of removal mentioned in Article 15(5) and (6) of Directive 2008/115.
48. Consequently, the answer to Question 1(b) is that a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Decision 2008/115.

Question 2

49. By this question the referring court asks essentially whether Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.
50. It must be observed that Article 13(1) and (2) of Directive 2008/115 provides in particular that the third-country national concerned is to be afforded an effective remedy to appeal against or seek review of decisions related to return before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence. That authority or body must have the power to review decisions related to return, including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.
51. Neither Article 15(5) and (6) of Directive 2008/115 nor any other provision of that directive permits the view that periods of detention for the purpose of removal should not be included in the maximum duration of detention defined in Article 15(5) and (6) because of the suspension of execution of the removal decision.
52. In particular, the suspension of execution of the removal decision because of a procedure for judicial review of that decision is not one of the grounds for extending the period of detention laid down in Article 15(6) of Directive 2008/115.
53. The period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must therefore be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of Directive 2008/115.
54. If it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of Directive 2008/115, namely to ensure a maximum duration of detention common to the Member States.
55. This conclusion is not called into question by the judgement in Case C-19/08 Petrosian [2009] ECR I-0000 relied on by the Bulgarian Government. In that case,

which concerned the interpretation of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1), the Court held that where, in the context of the procedure for transfer of an asylum seeker, the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer laid down in Article 20(1)(d) of that regulation begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

56. That interpretation of Article 20(1)(d) of Regulation No 343/2003 cannot be transposed to the context of the interpretation of Article 15(5) and (6) of Directive 2008/115. While the period at issue in the Petrosian case determines the time available to the requesting Member State for implementing the transfer of an asylum seeker to the Member State which is obliged to re-admit him, the maximum periods laid down in Article 15(5) and (6) of Directive 2008/115 serve the purpose of limiting the deprivation of a person's liberty. Moreover, the latter periods set a limit to the duration of detention for the purpose of removal, not to the implementation of the removal procedure as such.
57. Consequently, the answer to Question 2 is that Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.

Question 3

58. By this question the referring court seeks clarification, in the light of the facts of the case in the main proceedings, the meaning of Article 15(4) of Directive 2008/115, in particular the concept of a 'reasonable prospect of removal'.

Question 3(c)

59. By Question 3(c) the referring court asks whether Article 15(4) of Directive 2008/115 is to be interpreted as meaning that there is no reasonable prospect of removal where the possibilities of extending the periods of detention provided

for in Article 15(6) have been exhausted, in the situation where no agreement for readmission has been reached with the third country at the time when a judicial review of the detention of the person concerned is conducted.

60. It is clear that, where the maximum duration of detention provided for in Article 15(6) of Directive 2008/115 has been reached, the question whether there is no longer a 'reasonable prospect of removal' within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately.
61. Article 15(4) of Directive 2008/115 can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired.
62. Consequently, the answer to Question 3(c) is that Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.

Question 3(a) and (b)

63. As regards Question 3(a) and (b), it should be pointed out that, under Article 15(4) of Directive 2008/115, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.
64. As is apparent from Article 15(1) and (5) of Directive 2008/115, the detention of a person for the purpose of removal may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal.
65. It must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive.
66. Thus a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.
67. Consequently, the answer to Question 3(a) and (b) is that Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal

can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

Question 4

68. By this question the referring court asks essentially whether Article 15(4) and (6) of Directive 2008/115 allows the person concerned not to be released immediately, even though the maximum period of detention provided for by that directive has expired, on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.
69. It must be pointed out that, as is apparent in particular from paragraphs 37, 54 and 61 above, Article 15(6) of Directive 2008/115 in no case authorises the maximum period defined in that provision to be exceeded.
70. The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court can therefore constitute in itself a ground for detention under the provisions of that directive.
71. Consequently, the answer to Question 4 is that Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

Costs

72. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 15(5) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be

interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.

2. A period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Decision 2008/115.
3. Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.
4. Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.
5. Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.
6. Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

[Signatures]

Negusie Vs. Holder, Attorney General

Country: United States of America

Judicial Body: Supreme Court of the United States

Decision Date: 3 March 2009

The Immigration and Nationality Act (INA) bars an alien from obtaining refugee status in this country if he “assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U. S. C. §1101(a)(42). This so-called “persecutor bar” applies to those seeking asylum or withholding of removal, but does not disqualify an alien from receiving a temporary deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). During the time petitioner, an Eritrean national, was forced to work as a prison guard in that country, the prisoners he guarded were persecuted on grounds protected under §1101(a)(42). After escaping to the United States, petitioner applied for asylum and withholding of removal. Concluding that he assisted in the persecution of prisoners by working as an armed guard, the Immigration Judge denied relief on the basis of the persecutor bar, but granted deferral of removal under CAT because petitioner was likely to be tortured if returned to Eritrea. The Board of Immigration Appeals (BIA) affirmed in all respects, holding, inter alia, that the persecutor bar applies even if the alien’s assistance in persecution was coerced or otherwise the product of duress. The BIA followed its earlier decisions finding *Fedorenko v. United States*, 449 U. S. 490, controlling. The Fifth Circuit affirmed, relying on its precedent following the same reasoning.

Held: The BIA and Fifth Circuit misapplied *Fedorenko* as mandating that whether an alien is compelled to assist in persecution is immaterial for prosecutor-bar purposes. The BIA must interpret the statute, free from this mistaken legal premise, in the first instance. Pp. 4–12.

- (a) Under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, the BIA is entitled to deference in interpreting ambiguous INA provisions, see, e.g., *INS v. Aguirre-Aguirre*, 526 U. S. 415. When the BIA has not spoken on “a matter that statutes place primarily in agency hands,” this Court’s ordinary rule is to remand to allow “the BIA ... to address the matter in the first instance in light of its own experience.” *INS v. Orlando Ventura*, 537 U. S. 12. Pp. 4–5.
- (b) As there is substance both to petitioner’s contention that involuntary acts cannot implicate the persecutor bar because “persecution” presumes moral

blameworthiness, and to the Government's argument that the question at issue is answered by the statute's failure to provide an exception for coerced conduct, it must be concluded that the INA has an ambiguity that the BIA should address in the first instance. Fedorenko, which addressed a different statute enacted for a different purpose, does not control the BIA's interpretation of this persecutor bar. In holding that voluntariness was not required with respect to such a bar in the Displaced Persons Act of 1948 (DPA), Fedorenko contrasted the omission there of the word "voluntary" with the word's inclusion in a related statutory subsection. 449 U. S., at 512. Because Congress did not use the word "voluntary" anywhere in the persecutor bar at issue here, its omission cannot carry the same significance as it did in Fedorenko. Moreover, the DPA's exclusion of even those involved in nonculpable, involuntary assistance in persecution was enacted in part to address the Holocaust and its horror, see *id.*, at 511, n. 32, whereas the persecutor bar in this case was enacted as part of the Refugee Act of 1980, which was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons, see, e.g., Aguirre-Aguirre, *supra*, at 427. Pp. 5–8.

- (c) Whether a BIA determination that the persecution bar contains no exception for coerced conduct would be reasonable, and thus owed Chevron deference, is a legitimate question; but it is not presented here. In denying petitioner relief, the BIA recited a rule it has developed in its cases: An alien's motivation and intent are irrelevant to the issue whether he "assisted" in persecution; rather, his actions' objective effect controls. A reading of those decisions confirms that the BIA has not exercised its interpretive authority but, instead, has deemed its interpretation to be mandated by Fedorenko. This error prevented the BIA from fully considering the statutory question presented. Its mistaken assumption stems from a failure to recognize the inapplicability of the statutory construction principle invoked in Fedorenko, as well as a failure to appreciate the differences in statutory purpose. The BIA is not bound to apply the Fedorenko rule to the persecutor bar here at issue. Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency. Pp. 8–10.
- (d) Because the BIA has not yet exercised its Chevron discretion to interpret the statute, the proper course is to remand to it for additional investigation or explanation, e.g., *Gonzales v. Thomas*, 547 U. S. 183, allowing it to bring its expertise to bear on the matter, evaluate the evidence, make an initial determination, and thereby help a court later determine whether its decision exceeds the leeway that the law provides, e.g., *id.*, at 186–187. Pp. 10–12.

231 Fed. Appx. 325, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Souter, Ginsburg, and Alito, JJ., joined. Scalia, J., filed a concurring opinion, in which Alito, J., joined. Stevens, J., filed an opinion concurring in part and dissenting in part, in which Breyer, J., joined. Thomas, J., filed a dissenting opinion.

Salahadin Abdulla and Others Vs. Bundesrepublik Deutschland

Country: European Union

Judicial Body: European Court of Justice

Decision Date: 2 March 2010

Judgement OF THE COURT (Grand Chamber)

Judgement

1. These references for a preliminary ruling concern the interpretation of Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12) ('the Directive'), read in conjunction with Article 2(c) of that directive.
2. The references have been made in the course of proceedings between the Iraqi nationals Mr Salahadin Abdulla, Mr Hasan, Mr Adem and his wife, Ms Mosa Rashi, and Mr Jamal (collectively, 'the appellants in the main proceedings') and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesministerium des Innern (Federal Ministry of the Interior), itself represented by the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) ('the Bundesamt'), regarding the latter's revocation of their refugee status.

Legal context

The Convention relating to the Status of Refugees

3. The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol relating to the Status of Refugees of 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').
4. The first subparagraph of Article 1(A)(2) of the Geneva Convention provides that the term 'refugee' is to apply to any 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, 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.’

5. Article 1(C)(5) of the Geneva Convention provides that:

‘This Convention shall cease to apply to any person falling under the terms of section A if:

...

5. *He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;*

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality’.

European Union legislation

6. The first subparagraph of Article 6(1) TEU provides:

‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.’

7. Article 18 of the Charter of Fundamental Rights of the European Union (‘the Charter’) states:

‘The right to asylum shall be guaranteed with due respect for the rules of the [Geneva Convention] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union’.

8. Recitals 2 and 3 of the preamble to the Directive state:

‘(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention ..., thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention ... [provides] the cornerstone of the international legal regime for the protection of refugees.’

9. Recital 10 of the preamble to the Directive states:

'This Directive respects the fundamental rights and observes the principles recognised in particular by the [Charter]. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.'

10. Recitals 16 and 17 of the preamble to the Directive are worded as follows:

'(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.'

11. Article 1 of the Directive provides:

'The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.'

12. Under Article 2(a), (c) to (e) and (g) of the Directive:

'(a) 'international protection' means the refugee and subsidiary protection status as defined in (d) and (f);

...

(c) 'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a Stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) 'refugee status' means the recognition by a Member State of a third country national or a Stateless person as a refugee;

(e) 'person eligible for subsidiary protection' means a third country national ... who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ..., would face a real risk of suffering serious harm as defined in Article 15 ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

...

(g) *'application for international protection' means a request made by a third country national ... for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status...'*

13. Articles 13 and 18 of the Directive state that Member States are to grant refugee status or subsidiary protection status to third country nationals who satisfy the conditions laid down respectively in Chapters II and III or II and V of that directive.
14. Article 4 of the Directive, which is contained in Chapter II thereof ('Assessment of applications for international protection'), sets out the conditions governing the assessment of facts and circumstances. Article 4(1) provides:

'Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.'
15. Article 4(3) of the Directive specifies the matters to be taken into account for the purpose of assessing an application for international protection on an individual basis.
16. Under Article 4(4) of the Directive, '[t]he fact that an applicant has already been subject to persecution ... or to direct threats of such persecution ... is a serious indication of the applicant's well-founded fear of persecution ..., unless there are good reasons to consider that such persecution ... will not be repeated.'
17. Article 5(1) of the Directive, which also features in Chapter II thereof, adds that a well-founded fear of being persecuted may be based on events which have taken place since the applicant left the country of origin.
18. Article 6 of the Directive, which is contained in Chapter II and is entitled 'Actors of persecution or serious harm', States:

'Actors of persecution or serious harm include:

 - (a) *the State;*
 - (b) *parties or organisations controlling the State or a substantial part of the territory of the State;*
 - (c) *non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.'*

19. Article 7(1) and (2), which is contained in Chapter II and is entitled 'Actors of protection', provides:
- '1. Protection can be provided by:
 - (a) the State; or
 - (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.
 2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.'
20. Article 9(1) and (2) of the Directive, which is contained in Chapter III ('Qualification for being a refugee'), defines acts of persecution. Article 9(3) requires that there be a connection between the reasons for persecution mentioned in Article 10 of the Directive and those acts of persecution.
21. Article 10(1) of the Directive, which is also contained in Chapter III and is entitled 'Reasons for persecution', determines the elements which must be taken into account in the assessment of each of the five reasons for persecution.
22. Article 11 of the Directive, which also features in Chapter III and is entitled 'Cessation', provides:
- '1. A third country national ... shall cease to be a refugee if he or she:
 - ...
 - (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;
 - ...
 2. In considering [point] (e) ... of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well founded.'
23. Article 14 of the Directive, which is entitled 'Revocation of, ending of or refusal to renew refugee status' and features in Chapter IV ('Refugee status'), provides as follows:
- '1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse

to renew the refugee status of a third country national ... granted by a [competent] body, if he or she has ceased to be a refugee in accordance with Article 11.

2. *Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State which has granted refugee status shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.*

...'

24. Article 15 of the Directive, which is entitled 'Serious harm' and features in Chapter V ('Qualification for subsidiary protection'), states:

'Serious harm consists of:

- (a) death penalty or execution; or*
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or*
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'*

25. In accordance with its Articles 38 and 39, the Directive entered into force on 20 October 2004 and had to be transposed by 10 October 2006 at the latest.

National legislation

26. Paragraph 3(1) of the Law on asylum procedure (Asylverfahrensgesetz) ('the AsylVfG') provides that:

'A foreign national is a refugee within the meaning of the [Geneva Convention] when he is exposed to the threats referred to in Paragraph 60(1) of the Law on the residence of foreign nationals [Aufenthaltsgesetz] in his State of nationality ...'

27. Paragraph 60 of the Law on the residence of foreign nationals, which is contained in the chapter dealing with cessation of residence and entitled 'Prohibition of deportation', provides in subparagraph (1):

'Under the [Geneva] Convention, a foreign national cannot be deported to a State in which his life or freedom are threatened for reasons of his race, religion, nationality, membership of a particular social group or political opinion ...'

28. The first and second sentences of Paragraph 73(1) of the AsylVfG, as amended by the Law implementing the directives of the European Union on rights of residence

and asylum (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union) of 19 August 2007 (BGBl. 2007 I, p. 1970), state:

'The grant of the right to asylum and of refugee status shall be revoked without delay when the conditions on which they were based have ceased to exist. This is particularly the case when, the circumstances which led to that right to asylum or refugee status being granted to him having ceased to exist, the foreign national can no longer continue to refuse to avail himself of the protection of his country of nationality ...'

29. Pursuant to the third sentence of Paragraph 73(1) of the AsylVfG, the grant of the right to asylum and of refugee status may not be revoked 'when the foreign national is able to invoke compelling reasons, arising out of persecution to which he has been subject in the past, for refusing to avail himself of the protection of his country of nationality...'

The disputes in the main proceedings and the questions referred for a preliminary ruling

30. The appellants in the main proceedings travelled to Germany between 1999 and 2002 and there applied for asylum.
31. In support of their respective applications, they submitted a variety of reasons which made them fear being persecuted in Iraq by the regime of Saddam Hussein's Baath Party.
32. The Bundesamt granted them refugee status in 2001 and 2002.
33. In 2004 and 2005 the Bundesamt, as a result of the changed circumstances in Iraq, initiated procedures to revoke the recognition as refugees which had been granted to the appellants.
34. As a result of those procedures, the Bundesamt revoked that recognition by decisions adopted between January and August 2005.
35. By decisions delivered between July and October 2005, the competent administrative courts set aside the revocation decisions. They held, in essence, that, given the extremely unstable situation in Iraq, it could not be concluded that there had been a durable and lasting change in the situation such as to justify revocation of the recognition as refugees which had been granted.
36. Following appeals lodged by the Federal Republic of Germany, the higher administrative courts having jurisdiction in the matter, by rulings delivered in March and August 2006, overturned the first-instance decisions and dismissed the

actions for annulment which had been brought against the revocation decisions. Referring to the fundamental change in the situation in Iraq, those courts held that the appellants in the main proceedings were now safe from the persecution suffered under the previous regime and that they were not under any significantly likely threat of further persecution on any other grounds.

37. The appellants in the main proceedings lodged appeals on a point of law ('Revision') against the appellate rulings before the Bundesverwaltungsgericht (Federal Administrative Court), seeking confirmation of the decisions delivered at first instance.
38. The referring court takes the view that there is a cessation of refugee status when, first, the situation in a refugee's country of origin has changed in a significant and non-temporary manner and the circumstances justifying his fear of persecution, on the basis of which he was recognised as a refugee, have ceased to exist and when, secondly, he has no other reason to fear being 'persecuted' within the meaning of the Directive.
39. According to the referring court, the expression 'protection of the country' referred to in Article 11(1)(e) of the Directive has the same meaning as the expression 'protection of that country' used in Article 2(c) of the Directive and refers solely to protection against persecution.
40. General dangers do not, in the view of the referring court, come within the scope of the protection of that directive or of the Geneva Convention. The question whether a refugee may be forced to return to his country of origin even though dangers of a general nature exist there cannot be examined in the context of the revocation of refugee status pursuant to Paragraph 73(1) of the AsylVfG. That question may be examined only subsequently, when a decision has to be taken on whether the person concerned must be returned to his country of origin.
41. The referring court maintains that, according to the findings made at the stage of the appeal proceedings by which it is bound, the appellants in the main proceedings cannot rely upon the effects of previous acts of persecution for the purpose of refusing to return to Iraq. It deduces from this that the 'compelling reasons' arising out of previous persecution referred to in the third sentence of Paragraph 73(1) of the AsylVfG and in the second clause of Article 1(C)(5) of the Geneva Convention cannot be relied upon before it.
42. It notes, however, that the revocation of refugee status does not necessarily lead to the loss of a person's right to reside in Germany.

43. In those circumstances, the Bundesverwaltungsgericht decided to stay the proceedings and to refer, in each of the cases in the main proceedings, the following questions to the Court of Justice for a preliminary ruling:

- ‘1. *Is Article 11(1)(e) of [the] Directive ... to be interpreted as meaning that apart from the second clause of Article 1(C)(5) of the [Geneva] Convention refugee status ceases to exist if the refugee’s well-founded fear of persecution within the terms of Article 2(c) of that directive, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2(c) of [that directive]?*
2. *If Question 1 is to be answered in the negative: does the cessation of refugee status under Article 11(1)(e) of [the] Directive also require that, in the country of the refugee’s nationality,*
 - (a) an actor of protection within the meaning of Article 7(1) of [the Directive] be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops,*
 - (b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of [the Directive], which leads to the granting of subsidiary protection under Article 18 of that directive, and/or*
 - (c) the security situation be stable and the general living conditions ensure a minimum standard of living?*
3. *In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, are new, different circumstances founding persecution to be:*
 - (a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or*
 - (b) assessed having regard to the relaxation of the burden of proof under Article 4(4) of [the] Directive ...?’*

44. By order of the President of the Court of 25 June 2008, Cases C-175/08 to C-179/08 were joined for the purposes of the written and oral procedure and of the judgement. By order of the President of the Court of 4 August 2008, Case C-177/08 was subsequently disjoined from those cases and removed from the register of the Court.

Jurisdiction of the Court

45. In the cases in the main proceedings, the appellants filed their applications for international protection before the Directive entered into force, that is to say, before 20 October 2004.

46. In the case where a person has ceased to hold refugee status under Article 11 of the Directive, Article 14(1) thereof provides for revocation of that status only if the application for international protection was filed after that directive had entered into force.
47. The applications for international protection which have given rise to the questions referred by the Bundesverwaltungsgericht are not therefore covered *ratione temporis* by the Directive.
48. However, it must be borne in mind that where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling. Neither the wording of Articles 68 EC and 234 EC nor the aim of the procedure established by Article 234 EC indicates that the framers of the EC Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a directive where the domestic law of a Member State refers to the provisions of that directive in order to determine the rules applicable to a situation which is purely internal to that State. In such a case it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (see Case C-3/04 *Poseidon Chartering* [2006] ECR I-2505, paragraphs 15 and 16 and the case-law cited).
49. In the present cases, the referring court maintains that the Law transposing the directives on rights of residence and asylum, which entered into force on 28 August 2007 and from which the new wording of Paragraph 73(1) of the AsylVfG stems, transposed Articles 11 and 14 of the Directive without imposing temporal limits on the applicability of its provisions, with the result that those national provisions are applicable to applications for international protection which were filed before the Directive entered into force.
50. In those circumstances, the questions referred for a preliminary ruling should be answered.

The questions referred

Preliminary observations

51. The Directive was adopted on the basis of, *inter alia*, point (1)(c) of the first subparagraph of Article 63 EC, which required the Council of the European Union to adopt measures on asylum, in accordance with the Geneva Convention and

other relevant treaties, within the area of minimum standards with respect to the qualifications of nationals of third countries as refugees.

52. It is apparent from recitals 13, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.
53. The provisions of the Directive must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC.
54. Those provisions must also, as is apparent from recital 10 in the preamble to the Directive, be interpreted in a manner which respects the fundamental rights and the principles recognised in particular by the Charter.

The first question

55. By its first question, the referring court asks, in essence, whether Article 11(1) (e) of the Directive is to be interpreted as meaning that refugee status ceases to exist if the circumstances which justified the refugee's fear of persecution for one of the reasons referred to in Article 2(c) of the Directive, on the basis of which refugee status was granted, no longer exist and the refugee has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of the Directive.
56. In that regard, it must be borne in mind that, under Article 2(c) of the Directive, the term 'refugee' refers, in particular, to a third country national who is outside the country of his nationality 'owing to a well-founded fear of being persecuted' for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, 'owing to such fear', unwilling to avail himself of the 'protection' of that country.
57. The national concerned must therefore, on account of circumstances existing in his country of origin, have a well-founded fear of being personally the subject of persecution for at least one of the five reasons listed in the Directive and the Geneva Convention.
58. Those circumstances will indicate that the third country does not protect its national against acts of persecution.

59. Those circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the 'protection' of his country of origin within the meaning of Article 2(c) of the Directive, that is to say, in terms of that country's ability to prevent or punish acts of persecution.
60. They are therefore determinant factors in respect of the granting of refugee status.
61. Under Article 4(1) of the Directive, the facts and circumstances are to be assessed, for the purposes of the granting of refugee status, in cooperation with the applicant.
62. Under Article 13 of the Directive, the Member State is required to grant refugee status to the applicant if he qualifies under, inter alia, Articles 9 and 10 thereof.
63. Article 9 of the Directive defines the elements which make it possible to regard acts as constituting persecution. In that regard, Article 9(1) states that the relevant facts must be 'sufficiently serious' by their nature or repetition as to constitute a 'severe violation of basic human rights' or be an accumulation of various measures which is 'sufficiently severe' as to affect an individual in a manner similar to a 'severe violation of basic human rights'.
64. Article 9(3) of the Directive adds that there must be a connection between the reasons for persecution mentioned in Article 10 of the Directive and the acts of persecution.
65. Article 11(1)(e) of the Directive, in the same way as Article 1(C)(5) of the Geneva Convention, provides that a person ceases to be classified as a refugee when the circumstances as a result of which he was recognised as such have ceased to exist, that is to say, in other words, when he no longer qualifies for refugee status.
66. By stating that, because those circumstances 'have ceased to exist', the national 'can no longer ... continue to refuse to avail himself or herself of the protection of the country of nationality', that article establishes, by its very wording, a causal connection between the change in circumstances and the impossibility for the person concerned to continue to refuse and thus to retain his refugee status, in that his original fear of persecution no longer appears to be well founded.
67. In so far as it provides that the national 'can no longer ... continue to refuse' to avail himself of the protection of his country of origin, Article 11(1)(e) of the Directive implies that the 'protection' in question is the same as that which has

up to that point been lacking, namely protection against the acts of persecution envisaged by the Directive.

68. In that way, the circumstances which demonstrate the country of origin's inability or, conversely, its ability to ensure protection against acts of persecution constitute a crucial element in the assessment which leads to the granting of, or, as the case may be, by means of the opposite conclusion, to the cessation of refugee status.
69. Consequently, refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the five reasons listed in Article 2(c) of the Directive. Such a cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.
70. In order to arrive at the conclusion that the refugee's fear of being persecuted is no longer well founded, the competent authorities, by reference to Article 7(2) of the Directive, must verify, having regard to the refugee's individual situation, that the actor or actors of protection of the third country in question have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status.
71. That verification means that the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country. In accordance with Article 4(3) of the Directive, relating to the assessment of facts and circumstances, those authorities may take into account, *inter alia*, the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country.
72. Furthermore, Article 11(2) of the Directive provides that the change of circumstances recorded by the competent authorities must be 'of such a significant and non-temporary nature' that the refugee's fear of persecution can no longer be regarded as well founded.
73. The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) of the Directive, when the factors which formed

the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive.

74. It must be pointed out that the actor or actors of protection with respect to which the reality of a change of circumstances in the country of origin is to be assessed are, under Article 7(1) of the Directive, either the State itself or the parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.
75. As regards the latter point, it must be acknowledged that Article 7(1) of the Directive does not preclude the protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in the territory of the third country.
76. In view of all the foregoing considerations, the answer to the first question is that Article 11(1)(e) of the Directive is to be interpreted as meaning that:
 - refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) of the Directive, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of the Directive;
 - for the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of the Directive have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status;
 - the actors of protection referred to in Article 7(1)(b) of the Directive may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory.

The second question

77. Having regard to the answer given to the first question and the information provided in paragraphs 74 and 75 of this judgement, there is no need to answer the second question.
78. Nevertheless, as regards Question 2(b), it is important to point out, in any event, that, in connection with the concept of 'international protection', the Directive governs two distinct systems of protection, that is to say, firstly, refugee status and, secondly, subsidiary protection status, in view of the fact that Article 2(e) of the Directive states that a person eligible for subsidiary protection is one 'who does not qualify as a refugee'.
79. Therefore, as there would otherwise be a failure to have regard for the respective domains of the two systems of protection, the cessation of refugee status cannot be made conditional on a finding that a person does not qualify for subsidiary protection status.
80. Within the system of the Directive, the possible cessation of refugee status occurs without prejudice to the right of the person concerned to request the granting of subsidiary protection status in the case where all the factors, referred to in Article 4 of the Directive, which are necessary to establish that he qualifies for such protection under Article 15 of the Directive are present.

The third question

Preliminary observations

81. The third question relates to the situation in which it is assumed that a finding has already been made that the circumstances on the basis of which refugee status was granted have ceased to exist.
82. It concerns the conditions under which the competent authorities then verify, if necessary, before finding that that status has ceased to exist, whether there are other circumstances which may give rise to a well-founded fear of persecution on the part of the person concerned.
83. That verification therefore implies an assessment analogous to that carried out during the examination of an initial application for the granting of refugee status.

Question 3(a)

84. By Question 3(a) the referring court asks, in essence, whether, when the circumstances which resulted in the granting of refugee status have ceased to

exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of the Directive, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.

85. In that regard it must be borne in mind that:

- that standard of probability applies to the assessment of the extent of the risk of actually suffering acts of persecution in a particular situation, as established in the context of the cooperation between the Member State and the person concerned, to which Articles 4(1) and 14(2) of the Directive refer;
- under Article 9(1) of the Directive, the relevant facts examined must be sufficiently serious.

86. It must be acknowledged that the level of difficulty encountered, first, in gathering the relevant elements for the purposes of the assessment of the circumstances may, solely from the perspective of the relevance of the facts, prove to be higher or lower from one case to another.

87. In that regard, a person who, after having resided for a number of years as a refugee outside of his country of origin, relies on other circumstances to found a fear of persecution does not normally have the same opportunities to assess the risk to which he would be exposed in his country of origin as does an applicant who has recently left his country of origin.

88. By contrast, the standard which must then guide the assessment of the elements present does not vary, either at the stage of the examination of an application for refugee status or at the stage of the examination of the question of whether that status should be maintained, when, after the circumstances which led to the granting of that status have ceased to exist, other circumstances which may have given rise to a well-founded fear of acts of persecution are assessed.

89. At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution.

90. That assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the

person and to individual liberties, issues which relate to the fundamental values of the Union.

91. The answer to Question 3(a) is therefore that, when the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of the Directive, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.

Question 3(b)

92. By Question 3(b) the referring court asks, in essence, whether, in so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of the Directive applies when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of the Directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee.
93. In that regard, it must be stated that Article 4(4) of the Directive applies when the competent authorities have to assess whether the circumstances which they are examining justify a well-founded fear of persecution on the part of the applicant.
94. That is the situation, first and foremost, at the stage of the examination of an initial application for the granting of refugee status, when the applicant relies on earlier acts or threats of persecution as indications of the validity of his fear that the persecution in question will recur if he returns to his country of origin. The evidential value attached by Article 4(4) of the Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are connected with the reason for persecution relied on by the person applying for protection.
95. In the situation envisaged by the question referred, the assessment to be carried out by the competent authorities as to the existence of circumstances other than those on the basis of which refugee status was granted is, as has been pointed out in paragraph 83 of the present judgement, analogous to that carried out during the examination of an initial application.

96. Consequently, in that situation, Article 4(4) of the Directive may be applicable where there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.
97. That may be the case, in particular, where the refugee relies on a reason for persecution other than that accepted at the time when refugee status was granted and:
- prior to his initial application for international protection, he suffered acts or threats of persecution on account of that other reason, but did not then rely on them;
 - he suffered acts or threats of persecution for that reason after he left his country of origin and those acts or threats originate in that country.
98. By contrast, where the refugee, relying on the same reason for persecution as that accepted at the time when refugee status was granted, submits to the competent authorities that the cessation of the facts which gave rise to the granting of that status was followed by the occurrence of other facts which gave rise to a fear of persecution for that same reason, the assessment to be carried out will normally be covered, not by Article 4(4) of the Directive, but by Article 11(2) thereof.
99. It is under Article 11(2) of the Directive that the competent authorities must assess whether the alleged change of circumstances for example, the disappearance of one actor of persecution followed by the appearance of another actor of persecution is of such a significant nature that the refugee's fear of persecution can no longer be regarded as well founded.
100. The answer to Question 3(b) is therefore that:
- in so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of the Directive may apply when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of the Directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee;
 - however, that may normally be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.

Costs

101. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 11(1)(e) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that:
 - ◆ refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) of Directive 2004/83, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of Directive 2004/83;
 - ◆ for the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status;
 - ◆ the actors of protection referred to in Article 7(1)(b) of Directive 2004/83 may comprise international organisations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multinational force in that territory.
2. When the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially

at issue or for one of the other reasons set out in Article 2(c) of Directive 2004/83, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.

3. In so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of Directive 2004/83 may apply when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of that directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee. However, that may normally be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.

Ladha Vs. Immigration and Naturalisation Service

Country: United States of American

Judicial Body: United States Court of Appeals for the Ninth Circuit

Decision Date: 1 June 2000

WARDLAW, Circuit Judge:

Shabanali Ladha (“Mr. Ladha”) and Khatoon Ladha (“Mrs. Ladha”), husband and wife, and Farzana Ladha (“Farzana”), their daughter, are Pakistani nationals and citizens. They petition for review of the decision of the Board of Immigration Appeals (“BIA”) denying their claims to asylum and withholding of deportation. The BIA held that, even assuming that the Ladhas’ testimony was credible, they had not met their burden of proof because they failed to provide corroborative evidence of their testimony. The Ladhas also challenge a decision of the Immigration Judge (“IJ”) to exclude certain evidence from the immigration hearing. We have jurisdiction,[1] and we hold that the BIA erred as a matter of law in requiring corroborative evidence to support the Ladhas’ credible testimony and that the IJ erred as a matter of law in failing to make a record of the evidence. We grant the petition for review, reverse in part, vacate in part, and remand in part.

- I. The background evidence in the record, set forth in a State Department report and in Mr. Ladha’s testimony, sets the stage well for the Ladhas’ claims. Mr. and Mrs. Ladha were born in Bombay, India, and moved to Karachi, Pakistan, when British India was partitioned. The Ladhas thus belong to the Khoja, or Mohajir,[2] community in Pakistan, which comprises “Pakistanis who emigrated from India at the time of the partition of the subcontinent in 1947, or their direct descendants.”

Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, Pakistan -- Profile of Asylum Claims and Country Conditions 10 (1996) (“Profile”). Although Muslim, the Khojas are a small religious minority within Pakistan’s Muslim population. “In a population of nearly 132 million people, 77 percent are Sunni Muslims [and] 20 percent Shia Muslims.” *Id.* at 7. The Khojas are within the minority Shia branch, and, according to Mr. Ladha, the Khoja sect constitutes only about “two to five percent” of the Shia population.

Relations between the Shia and the Sunni are unstable.

“While the Shia are well integrated into Pakistani society and occupy responsible positions in society, there have been outbreaks of Sunni-Shia violence from time to time” *Id.*

“Both Sunnis and Shiites have their own social, political and cultural organisations; some of these have been involved in attacks on individuals of the other religious persuasion”*Id.*

Although the government generally responds quickly to such violence, according to the Profile, “in Karachi over the last few years . . . a serious law and order problem, in part but not exclusively arising from sectarian violence, has developed.” *Id.* (noting that “for the first half of 1996, however, Karachi has been relatively quiet.”).

Another rift in Pakistani society is between competing violent political organisations. The Mohajir Quami Movement (“MQM”) is “a political organisation representing the interests of mohajirs.” *Id.* at 10. The MQM is split into two wings, which have “tense” relations with one another. *Id.* at 11. “Virtually all Pakistani political parties have armed militants and the MQM is no exception. It should be said also, however, that MQM members have sometimes been the victims of human rights abuses, including the killing of MQM workers, committed by other political party militants.” *Id.* at 11.

- II. In the fall of 1995, the Immigration and Naturalisation Service (“INS”) charged the Ladhas with being deportable for staying in the United States after their authorisation had expired. All three conceded deportability, but sought asylum, withholding of deportation, and in the alternative, voluntary departure. Although their original application cited other bases for relief under the Immigration and Nationality Act (“INA”), the Ladhas now rely on allegations of political, religious and social-group persecution. See 8 U.S.C. S 1101(a) (42)(A) (1994) (listing the bases for refugee status).

At the hearing before the IJ, most of the testimony was from Mr. Ladha, who testified in Urdu. Mr. Ladha testified that he was the chief priest^[3] over six Khoja churches in the Karachi area and that his church had 2500-3000 members. He described his duties at the church, testifying that he had been a priest from 1984 to 1990. Mr. Ladha also testified that he supported the MQM. He provided “[m]onitoring or if they needed any help, material-wise,” i.e., “[i]f they needed some table, the chair, they wanted to make some arrangements for them for the meetings, I would help them.”

As Mr. Ladha relates it, the majority Sunni Muslims “believe that we are not Muslims” and “warn that we should not believe in our practices, our religion.” Mr. Ladha describes a pattern of abuse of his church members at the hands of people

that he identified as “Suni [sic] fundamentalists and from Jamatay Islam”:[4] “when our ladies go to the church to pray and to meditate,” these people would “bother the ladies. They abuse them and they do that all the time.” When asked for specifics, he stated “When we go to our church in the evening for prayers, it is the time to pray, they come and interfere.

They come in like in our way. They touch the ladies. They snatch their purses. They come and block their ways with two escortsers.”

In July 1988, Mr. Ladha encountered violence at the church. “Some people came to our church and just tried -- like they broke the doors, windows, and just tried everything, and we had some speed breakers there to reduce speed and they broke that.” Mr. Ladha added that these attackers were the “people from Jamatay Islam and Sunis [sic].” He testified that he came upon the church in the midst of this attack and “[w]hen I tried to talk with them, they slapped me.”[5] Mr. Ladha further testified that “[w]e filed a report against those people who broke all of the things against them in the police station right away. Because police was under their influence they did not take any step.”

Violence struck another time that year. “[T]he fundamentalists, Suni [sic] Muslims,” Mr. Ladha relates, “came to our shops and they beat us up there and we had -- and they closed our shutters down and they threatened us, and they said that we should not support the Mohajer Khomy [sic] movement.” The group addressed Mr. Ladha “[b]ecause they knew that I was the leader of the church and they knew that if I don’t support them that sect or that church will not support these people.” “They said that if I stopped the support it would be better for me. Otherwise, they said that we can harm your family.”

Mr. Ladha testified that he did not cease his support for MQM, and that in 1990, when Mr. Ladha was not at home, the fundamentalists came to his house and “abused our ladies,” including pushing his pregnant daughter-in-law and hitting her “with a rifle butt on her face and there are still marks of that . . .” Mrs. Ladha was also pushed, and Farzana was present. After this incident, the Ladhas left for the United States because they believed their “lives were in danger.”

More abstractly, he explained that “[t]he reason . . . we left Pakistan is because our -- in Pakistan our religion is considered a minorities among minorities.” The Ladhas intended to return to Pakistan “if the conditions got better;” however, Mr. Ladha’s brothers have informed him that it is still not safe to return and, except for a brief visit by Mr. Ladha to sell some property, they have not returned. Mr.

Ladha testified that his congregation still exists and still is being bothered, and that the person who is the church's priest keeps changing, because the priest is "the target" of the Sunni fundamentalists.

Mrs. Ladha and Farzana testified more briefly and confirmed the main details of Mr. Ladha's account. Farzana indicated that at the attack at their house she was "touched in the wrong places, it was not right" and that the attackers were Sunni Muslims from the Pakistan Peoples Party. She also gave details about her own work as a teacher and aide to her father at the church. She testified that if she returned to Pakistan some people would recognise her as the priest's daughter and that even if not recognised as such, her distinctive dress would identify her as Khoja and cause her to be "considered as a foreigner." Mrs. Ladha likewise confirmed the occurrence of the violence in her home, and described the duties she had at the church.

The IJ rejected the Ladhas' asylum and withholding of deportation claims, granting them voluntary departure.^[6] The IJ's decision contains a hodgepodge of rationales, some of which, at least, strike us as incorrect. Because the BIA provided de novo review of the record, however, we do not review the decision of the IJ but instead that of the BIA. See *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993) (noting that "any errors made by the IJ will be rendered harmless" by the BIA's de novo review).

Explicitly reserving the question of the Ladhas' credibility, the BIA dismissed their appeal, citing its decisions in *Matter of M-D-*, Interim Decision 3339 (BIA 1998) (en banc), *Matter of S-M-J-*, Interim Decision 3303 (BIA 1997) (en banc), and *Matter of Dass*, 20 I. & N. Dec. 120 (BIA 1989). It concluded that the Ladhas failed to meet their "affirmative duty to corroborate, to the degree they can, both their personal circumstances and the general country conditions that frame their asylum claim." The BIA wrote that "[t]he record contains no corroboration of the specific events they describe, nor does it contain evidence that Khojas generally or Khoja clergy specifically are being targeted for harm." Further, "[g]iven the lead respondent's alleged prominence, the particularity of their claim, the broad environment of sectarian violence and abuse they describe, and the time available in which to obtain supporting documentation, it is not unreasonable to expect the respondents to provide more meaningful corroboration or explain their failure to do so," especially "when the record indicates that Khojas continue to practice their faith in Pakistan today, even in the respondents' own mosque."

The Ladhas timely petitioned for review.

III. A. “We review de novo purely legal questions regarding the requirements of the Immigration and Nationality Act . . .,” *Hartooni v. INS*, 21 F.3d 336, 340 (9th Cir. 1994), although the BIA’s interpretation of the meaning of the statute is entitled to the deference according to the rules of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439, 1445-46 (1999); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 (1987); see also *Jenkins v. INS*, 108 F.3d 195, 201 (9th Cir. 1997) (The court “must give substantial deference to an agency’s interpretation of its own regulations.” (internal quotation marks omitted)). We do not, however, explicitly apply the principles of deference to questions already controlled by circuit precedent, because a panel may not reconsider the correctness of an earlier panel’s decisions, see *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993), “unless an en banc decision, Supreme Court decision, or subsequent legislation undermines [that] decision[],” *Visness v. Contra Costa County (In re Visness)*, 57 F.3d 775, 778 (9th Cir. 1995) (quoting *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989)) (internal quotations omitted).

Not only must a panel of this court follow the decisions of previous panels, but also the BIA must follow the decisions of our court. See *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (The BIA “is also bound by our prior decisions interpreting the Act.”); *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (same); *Singh*, 63 F.3d at 1508 (“A federal agency is obligated to follow circuit precedent in cases originating within that circuit.”).

“[F]actual findings by the Board regarding asylum or withholding of deportation claims are ‘conclusive’ if ‘supported by reasonable, substantial, and probative evidence on the record considered as a whole.’” *Hartooni*, 21 F.3d at 340 (quoting 8 U.S.C. S 1105a(a)(4)). “We reverse such findings only where the evidence presented by the applicant would compel any reasonable factfinder to reach a contrary result.” *Id.* (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)).

- B. [1] A “refugee” under section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. S 1101(a)(42)(A) (1994), is generally eligible for asylum in the United States.

See 8 U.S.C. S 1158(a) (1994). A refugee is an alien who is unwilling to return to his or her country of origin “because of persecution or a well-

founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. S 1101(a)(42)(A) (1994). “ ‘Persecution’ means ‘the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.’ ” *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997) (quoting *Sagermark v. INS*, 767 F.2d 645, 649 (9th Cir. 1985)). “[P]ersecution cognisable under the Act can emanate from sections of the population that do not accept the laws of the country at issue, sections that the government of that country is either unable or unwilling to control.” *Borja v. INS*, 175 F.3d 732, 736 n.1 (9th Cir. 1999) (en banc).

- [2] “To establish a well-founded fear of persecution, petitioners must show their fear to be both objectively reasonable and subjectively genuine.” *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1244 (9th Cir. 1999). “An alien satisfies the subjective component by credibly testifying that he genuinely fears persecution.” *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999). “The objective component can be established in two different ways.” *Id.* One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable “presumption that a well-founded fear of future persecution exists.” *Id.*; see 8 C.F.R. S 208.13(b)(1)(i) (1999).

The second way is to “show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.” *Duarte de Guinac*, 179 F.3d at 1159; see *Reyes-Guerrero*, 192 F.3d at 1244 (stating that the evidence must show “that persecution is a reasonable possibility.”). The objective requirement can be met by “either through the production of specific documentary evidence or by credible and persuasive testimony.” *Duarte de Guinac*, 179 F.3d at 1159.

Even after an alien proves himself or herself to be a refugee eligible for asylum, the decision to grant asylum is left to the discretion of the Attorney General. See *id.*

- [3] An alien is entitled to withholding of deportation “if the evidence demonstrates a clear probability that the applicant would be persecuted were he to be deported to his home country.” *Id.* He or she must show “more likely than not that he [or she] will be persecuted on account

of one of the five enumerated factors were he to return.” *Id.* (internal quotation marks omitted). A rebuttable presumption of entitlement to withholding of deportation arises when an applicant shows that he or she “has suffered past persecution such that his life or freedom was threatened in his home country on account of a protected ground.” *Id.* at 1164; see *id.* at 1159. The Attorney General has no discretion to deny withholding of deportation to eligible aliens. See *id.* at 1159.

IV. The BIA expressly declined to determine whether the Ladhas’ testimony was credible. Instead, assuming credibility, the BIA held that the Ladhas’ claims failed because they did not provide (or justify the absence of) independent corroboration of facts that the BIA deemed readily susceptible to corroboration. The BIA classifies the Ladhas’ supposed failing as not having met their burden of proof. This analysis is legal error.

A. [4] The Immigration and Nationality Act (“INA”) itself does not detail matters of proof on the question of asylum, but the Attorney General has the implicit power to do so, because she is charged with the enforcement of the Act. See *Chevron, U.S.A., Inc.*, 467 U.S. at 843; 8 U.S.C. S 1103(a) (Supp. II 1996).[7] The governing INS regulation in effect at the time of the Ladhas’ hearing provided that “[t]he testimony of the applicant, if credible in light of general conditions in the applicant’s country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration.” 8 C.F.R. S 208.13(a) (1996). [8] The Attorney General has delegated her authority to the BIA to resolve asylum and withholding cases. See 8 C.F.R. 3.1(d)(1) (1999) (“Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case.”). In practice, this means the BIA must interpret the law that it is applying to the facts of a case. The BIA has interpreted the law to require, under some circumstances, the corroboration of credible evidence.

In *Matter of S-M-J-*, Interim Decision 3303 (BIA 1997) (en banc), one of the cases relied upon by the BIA in rejecting the Ladhas’ claim, the BIA discussed its view of the role of corroborative evidence in assessing applicants’ claims. As the BIA sees it, corroborative evidence affects the analysis of both (1) whether testimony is credible and (2) whether credible testimony meets the burden of proof. The BIA wrote:

Where the record contains general country condition information, and an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the asylum applicant's particular experience is not required. Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor). However, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided.

Matter of S-M-J-, Interim Decision 3303, at 5-6 (emphasis added); see id. at 6 ("[A]n asylum applicant should provide documentary support for material facts which are central to his or her claim and easily subject to verification, such as evidence of his or her place of birth, media accounts of large demonstrations, evidence of a publicly held office, or documentation of medical treatment.").^[9]

Matter of S-M-J- focused on corroboration through the presentation of general background evidence, which it deemed lacking in S-M-J-'s case. In Matter of M-D-, Interim Decision 3339 (BIA 1998) (en banc), however, the BIA made clear that S-M-J-'s rule of corroboration applies to specific allegations as well as general context. See Matter of M-D-, Interim Decision 3339, at 4. The BIA concluded that "where an alien's testimony is the only evidence available, it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the alien's alleged fear," but that "the introduction of such evidence is not 'purely an option' with the asylum applicant; rather, corroborating evidence should be presented where available." Matter of M-D-, Interim Decision 3339, at 3-4 (citations omitted). The BIA wrote that "we find it reasonable in this case to expect basic documentation of nationality and identity, as well as confirmation of his or his family's presence at [a] refugee camp," and listed a variety of forms of corroboration that it would expect reasonably could be provided.^[10] Matter of M-D-, Interim Decision #3339, at 6. Noting the lack of corroboration (or explanation for its absence), the BIA dismissed M-D-'s appeal. See id.

- B.** [5] We are not free to consider as an open question whether the BIA has hit upon a permissible interpretation of the INA, for the law we must follow

is already set out for us: “this court does not require corroborative evidence,” *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000), from applicants for asylum and withholding of deportation who have testified credibly. “This court recognises the serious difficulty with which asylum applicants are faced in their attempts to prove persecution, and has adjusted the evidentiary requirements accordingly.” *Id.* at 992-93 (citation omitted). Moreover, as we have noted, “[t]hat . . . objective facts are established through credible and persuasive testimony of the applicant does not make those fears less objective.” *Aguilera-Cota v. INS*, 914 F.2d 1375, 1378 (9th Cir. 1990) (quoting *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985) (internal quotation marks omitted)). The rule established in the BIA’s cases, and applied to the *Ladhas*, is unequivocally contrary to the rule in this circuit. See *Singh*, 63 F.3d at 1508 (“A federal agency is obligated to follow circuit precedent in cases originating within that circuit.”).

- [6] That the law in this circuit is clear is demonstrated by three lines of cases, each with a different focus, but each reaching the same conclusion. The first line emphasises the difficulty of proving specific threats by persecutors, and emphasises that credible testimony as to a threat is sufficient to prove that the threat was made (though further proof that the threat is “serious” may be required before relief is granted). See, e.g., *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) (“[T]he applicant’s testimony, if unrefuted and credible, is sufficient to establish the fact that a threat was made.”); *Artiga Turcios v. INS*, 829 F.2d 720, 723 (9th Cir. 1987) (“The alien is not, however, required to provide independent corroborative evidence of the threats of persecution.

An alien’s own testimony regarding specific threats can establish a clear probability of persecution, if credible and supported by general documentary evidence that the threats should be considered serious.” (citation omitted)); *Bolanos-Hernandez*, 767 F.2d at 1285, 1288 (noting that corroboration is not necessary for an alien’s “unrefuted and credible” testimony about the fact of a threat and that “general corroborative evidence, such as documentary evidence, may be most useful” to show that the maker of the threat had “the will or the ability to carry it out” (internal quotation marks omitted) (second alteration in original)). The rationale in these cases for deeming corroboration to be unnecessary

for credible testimony of a specific threat is that “[a]uthentic refugees rarely are able to offer direct corroboration of specific threats” and that “[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.” *Bolanos-Hernandez*, 767 F.2d at 1285.

- [7] A second line of cases emphasises that not only specific threats but also other facts that serve as the basis for an asylum or withholding claim can be shown by credible testimony alone if corroborative evidence is “unavailable.” See *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991) (“The objective standard may be satisfied with the applicant’s testimony alone if documentary evidence is unavailable.”); *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (“Where corroborating documentary evidence is unavailable, an alien’s testimony alone will suffice to prove a well-founded fear, but only if it is credible, persuasive, and specific.” (internal quotation marks omitted)); *Estrada-Posadas v. INS*, 924 F.2d 916, 918-19 (9th Cir. 1991) (same); *Aguilera-Cota*, 914 F.2d at 1378 (“Where the evidence is not available, the applicant’s testimony will suffice if it is credible, persuasive, and specific.”); *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042-43 (9th Cir. 1987) (“[I]f documentary evidence is not available, the applicant’s testimony will suffice if it is credible, persuasive, and refers to specific facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds listed in section 208(a).” (internal quotation marks omitted) (alteration in the original)); *Del Valle v. INS*, 776 F.2d 1407, 1411 (9th Cir. 1985) (same); *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985) (same), *aff’d*, 480 U.S. 1421 (1987). These cases seem to assume that evidence supporting the claim, if not presented, is unavailable in the relevant sense. As the court in *Aguilera-Cota* stated:

We have previously tried to make it clear that asylum applicants are not required to produce documentary evidence of events such as those involved here [the receipt of a threatening note and the appearance of an inquisitive stranger at *Aguilera-Cota*’s home].

As we have previously stated, “Persecutors are not likely to provide their victims with affidavits attesting to their acts of persecution.”

Aguilera-Cota, 914 F.2d at 1380; see also *id.* at 1378 (“Documentary evidence establishing past persecution or threat of future persecution is usually sufficient to satisfy the objective component of the well-founded fear standard. But we have also recognised that refugees frequently do not possess documentary evidence regarding such events.” (emphasis added)).

- [8] The breadth of the circuit’s rule that corroboration of credible testimony is not necessary can be seen in the third line of cases. These cases make clear that when an alien credibly testifies to certain facts, those facts are deemed true, and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief. No further corroboration is required. See *Khourassany v. INS*, _____ F.3d _____, 2000 WL 347167, at *3 (9th Cir. Apr. 5, 2000) (“Because the BIA left the IJ’s positive credibility determination undisturbed, we accept *Khourassany*’s testimony as true.”); *Yazitchian v. INS*, _____ F.3d _____, 2000 WL 339764, at *2 (9th Cir. Apr. 3, 2000) (“Because the immigration judge found the *Yazitchians*’ testimony credible, and the BIA did not make a contrary finding, we must accept as undisputed the facts as petitioners testified to them.”); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1159 (9th Cir. 1999) (“The applicant may make this showing [of an objective well-founded fear of persecution] either through the production of specific documentary evidence or by credible and persuasive testimony.”); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 & n.2 (9th Cir. 1999) (Because of “the IJ’s finding that [petitioner’s] testimony was credible, this uncontradicted testimony must be taken as true” and petitioner’s “actual, uncontradicted and credible testimony did evidence past persecution.”); *Campos-Sanchez v. INS*, 164 F.3d 448, 451 n.1 (9th Cir. 1999) (“[I]f the BIA finds the petitioner credible on remand, it should not require corroborating documents in order to establish his claim of a well-founded fear of persecution. Our cases are clear that such corroboration is encouraged but not required.”); *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998) (“Although *Garrovillas* provided documentary evidence of his past persecution and his political activities, corroborative evidence is not necessary for a petitioner to establish past persecution.”); *Velarde v. INS*, 140 F.3d 1305, 1312 (9th Cir. 1998) (“The IJ explicitly found *Velarde* to be credible and the government failed to produce any evidence

against her. As a result, all facts testified to by Velarde must be taken as true.”); Hartooni, 21 F.3d at 342 (9th Cir. 1994) (“Absent an explicit finding that a specific statement by the petitioner is not credible we are required to accept her testimony as true.”); Beltran-Zavala v. INS, 912 F.2d 1027, 1030 (9th Cir. 1990) (“Once credibility has been accorded to Beltran’s testimony, corroborative evidence is not required.”).[11] [9] We have taken this opportunity to review the extensive and consistent rule on corroboration of our circuit because of the BIA’s apparent adherence to an incompatible rule. We reaffirm that an alien’s testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified without the need for any corroboration. To the extent that decisions such as Matter of S-M-J- and Matter of M-D- establish a corroboration requirement for credible testimony, they are disapproved.

- C. [10] Assuming the Ladhas to be credible, as we must in the absence of an explicit finding by the BIA to the contrary, see Hartooni, 21 F.3d at 342 (9th Cir. 1994), and applying the governing law of our circuit, we hold that the evidence compels the conclusion that the Ladhas are eligible for asylum on account of religious and political persecution. [12] [11] Assuming the Ladhas’ credibility, they have satisfied the subjective component of the test for asylum eligibility. See Duarte de Guinac, 179 F.3d at 1159 (“An alien satisfies the subjective component by credibly testifying that he genuinely fears persecution.”). On the objective side of the analysis, the record shows the Ladhas to have presented compelling proof of past persecution. See *id.* As noted above, the record contains background evidence of religious and political violence, and reveals that, at least in Karachi in what seems to be the relevant period, the government was not able to control the violence. They further testified to a general harassment of the members of their church. Having provided that background context, the Ladhas testified to three incidents of physical violence and threats against them, at the hands of Sunni fundamentalists, on account of the Ladhas’ related religious and political beliefs: (i) in their church, which was attacked and in which Mr. Ladha was slapped; (ii) at the “shops” where, as Mr. Ladha testified, “they beat us up threatened us, and they said that we should not support the Mohajer Khomy[sic] movement”; and (iii) in their home, where invaders assaulted Mr. Ladhas’ family. Mr. Ladha testified to his support for the MQM party. He made clear that, at least during the attack at the shops, the reason he was specifically targeted

was his position as a church leader: the attackers spoke to him “[b]ecause they knew that I was the leader of the church and they knew that if I don’t support them that sect or that church will not support these people,” and “[t]hey said that if I stopped the support it would be better for me. Otherwise, they said that we can harm your family.” These facts compel a finding of past persecution on account of political and religious opinion. Therefore, a rebuttable presumption arises of a well-founded fear of future persecution. This presumption was not rebutted by evidence in the record; indeed, the State Department Profile provides country conditions information supporting the claims of the Ladhas. In addition, Farzana specifically testified that despite a recent change in political power, part of the hostile Sunni party was still in power. We conclude that the record compels the conclusion that the INS has not rebutted the presumption by a preponderance of the evidence, see *Duarte de Guinac*, 179 F.3d at 1159, through “individualised analysis of how changed conditions will affect the specific petitioner’s situation,” *Borja*, 175 F.3d at 738 (quoting *Garrovillas*, 156 F.3d at 1017 (internal quotation marks omitted)).

[12] With regard to withholding of deportation, we conclude that the evidence may not compel, but certainly does not prohibit, a finding that the Ladhas have met their burden of proof. Although, as noted above, the record compels a conclusion of past persecution, a reasonable factfinder might not be compelled to find that the past persecution carried the threat of death or imprisonment. See *Duarte de Guinac*, 179 F.3d at 1164 (noting that a presumption of entitlement to withholding of deportation arises if the applicant has shown past persecution “such that his life or freedom was threatened in his home country on account of a protected ground.”). Moreover, the evidence in the record focusing on the future likelihood of persecution may also not compel the conclusion that “more likely than not” the future persecution would occur. On the other hand, “[a] key factor in finding evidence sufficient for withholding of deportation is whether the harm or threats of harm were aimed against the petitioner specifically.” *Chanchavac v. INS*, _____ F.3d _____, 2000 WL 306356

(9th Cir. Mar. 27, 2000) (finding that Chanchavac was entitled to withholding of deportation because “[t]he military targeted Chanchavac specifically when it broke into his home, beat and interrogated him,

and copied down his name”) (quoting *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1141 (9th Cir. 1988) (emphasis added)) (internal quotation marks omitted). Because the “compelling” nature of this evidence is a close call, and because the BIA applied the wrong legal standard to the evidence on its first assessment, we remand for the BIA to reassess the withholding of deportation claim under proper standard.

D. [13] Because we reverse the BIA’s conclusion as to the objective component of the asylum decision, and because the BIA “expressly declined to rule on the issue” of credibility, we remand the case for findings as to credibility. *Briones v. INS*, 175 F.3d 727, 730 (9th Cir. 1999) (en banc). If the BIA determines that the Ladhas testified credibly under Ninth Circuit law, then the Attorney General shall exercise her discretion and determine whether to grant asylum. We also remand for the BIA to determine whether the Ladhas have shown an entitlement to withholding of deportation.

V. Because we are remanding for factual determinations, we must address the Ladhas’s challenge to the IJ’s evidentiary exclusion of two proffered documents.

A. [14] A preliminary question is whether the Ladhas exhausted administrative remedies on this issue. See 8 U.S.C.S 1105a(c) (1994) (“An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations . . .”).

Although they urged the admissibility of the evidence at the deportation hearing and raised the issue in their notices of appeal to the BIA, the Ladhas did not discuss it in their briefs before the BIA. Nonetheless, our opinion in *Vargas v. INS*, 831 F.2d 906 (9th Cir. 1987), suggests that they have satisfied the exhaustion requirement. In *Vargas*, we found that the petitioner had failed to exhaust his administrative remedies on the claim that a record of conviction, introduced at the deportation hearing, was inaccurate. We observed that:

At the deportation hearing Vargas objected to the complaint portion of the record on hearsay grounds and specifically stated that he had “no problem with the conviction record itself.” Moreover, Vargas failed to file a brief with the BIA and his notice of appeal to the BIA only challenged the IJ’s discretionary decision to deny him a waiver of deportation.

Vargas, 831 F.2d at 908 (footnote omitted) (“Had Vargas brought his due process claim before the IJ or BIA, the descriptive error in the conviction record could have been corrected. However, because Vargas failed to do this, he did not exhaust his administrative remedies.”). Unlike Vargas, the Ladhas both raised the issue of the admissibility of this evidence on the record before the IJ and further raised the issue in their notice of appeal to the BIA. Notices of appeal are filed directly with the BIA, see 8 C.F.R.S 3.3(a) (1999), and the regulations specifically contemplate that supporting briefs are not required to be filed by a party, see 8 C.F.R.S 3.38(f) (1999) (“Briefs may be filed by both parties” (emphasis added)); therefore, the notice of appeal is of great importance in raising claims before the BIA. Because the BIA conducted a *de novo* review of the record in this case, we conclude that it had “a full opportunity to resolve [the] controversy or correct its own errors before judicial intervention, “ *Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1984), and that therefore the claim was exhausted.

- B. [15] Under the Fifth Amendment’s Due Process Clause, “an alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf.” *Colmenar v. INS*, _____ F.3d _____, 2000 WL 376671, at *4 (9th Cir. Apr. 14, 2000). “[I]f the proceeding was ‘so fundamentally unfair that the alien was prevented from reasonably presenting his case,’ “ and if the alien shows prejudice from this unfairness, we will reverse the BIA’s decision. See *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (“To prevail on a due process challenge to deportation proceedings, Lata must show error and substantial prejudice”); see also *Espinoza v. INS*, 45 F.3d 308, 310, 311 (9th Cir. 1995) (noting that “[t]he sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair” and holding that the refusal to allow cross-examination of the preparer of an INS form did not justify relief where it would not have affected the outcome); cf. *Trias Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975) (probative documentary evidence, admitted without the presence of the author at trial, was not “so fundamentally unfair so as to violate due process”). In addition to the Due Process Clause, statutes and regulations grant the alien a right to present evidence. See, e.g., 8 U.S.C. S 1252(b)(3) (1994) (pre-IIRIRA provision of the INA stating that in a deportation hearing “the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence on his own

behalf, and to cross-examine witnesses presented by the Government”).

[13] “When these protections are denied, and such denial results in prejudice, the constitutional guarantee of due process has been denied.” *Jacinto v. INS*, _____ F.3d _____, 2000 WL 271896, at *2 (9th Cir. Mar. 4, 2000).

Before we are able to determine whether the exclusion of proffered evidence has rendered an immigration hearing fundamentally unfair or violated the statute or regulations with resultant prejudice, we must have before us a sufficient description of the excluded evidence. If an IJ excludes a document without either entering the document into the record for the purposes of identification or describing the document’s content orally and on the record, we have no adequate way of reviewing the IJ’s decision.[14] In other related contexts, we have made clear that the BIA must provide reasons for its actions sufficient to allow for judicial review. See *Stoyanov v. INS*, 172 F.3d 731, 735 (9th Cir. 1999) (“In order for this court to conduct a proper substantial evidence review of the BIA’s decision, the Board’s opinion must state with sufficient particularity and clarity the reasons for denial of asylum.” (internal quotation marks omitted)); *Velarde*, 140 F.3d at 1310 (9th Cir. 1998) (“Failure by the BIA `to support its conclusions [denying relief] with a reasoned explanation based on legitimate concerns’ . . . constitutes an abuse of discretion.”) (quoting *Vargas*, 831 F.2d at 908) (bracketed alteration in original)); *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995) (requiring that “the Board provide a comprehensible reason for its decision sufficient for us to conduct our review and to be assured the petitioner’s case received individualised attention”); *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991) (“Boilerplate opinions, which set out general legal standards yet are devoid of statements that evidence an individualised review of the petitioner’s contentions and circumstances, neither afford the petitioner the BIA review to which he or she is entitled, nor do they provide an adequate basis for this court to conduct its review.”).

[16] We therefore hold that a decision of the BIA or IJ under review in this court must contain a sufficient indication of the content of excluded evidence to allow us to review the exclusion for fundamental fairness. Any other conclusion would be nonsensical in the face of the constitutional, statutory, and regulatory regime allowing for an asylum applicant to offer

evidence and the right of judicial review of final orders of deportation. See *Chevron U.S.A. Inc.*, 467 U.S. at 842-43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). [15]

[17] The IJ’s decision in this case failed to meet this standard. The IJ excluded a letter from Mr. Ladha’s brother and a document from Mr. Ladha’s church. The letter from the brother was apparently written in 1996. The IJ rejected the letter as “totally self-serving and not admissible and not worthy of any evidence or value, whatsoever,” at least in part because it was not written contemporaneously with the events it described. The second document, described in the transcript as a notarised copy of a church document written in 1984, was also rejected, apparently because the IJ did not have confidence in the notarisation and also felt the documents were “self-serving,” although the IJ’s explanation is particularly unclear on the precise ground for finding this document inadmissible.[16] Aside from these facts, the IJ revealed nothing of substance about the documents. The IJ did not identify their content during his colloquy with counsel nor in his oral decision to exclude the documents. Moreover, the IJ did not enter the documents into the record for the purposes of identification.[17]

We are thus left, on this record, with no means of reviewing the IJ’s decision to exclude evidence. [18] Therefore, on remand we instruct the BIA to clarify the record with regard to the excluded evidence or to remand to the IJ for such clarification. See *Castillo*, 951 F.2d at 1121 (“Those Board opinions that lack an adequate statement of the BIA’s reasons for denying the petitioner relief must be remanded to the Board for clarification of the bases for its opinion.”).

VI. For the foregoing reasons, we GRANT the petition for review, REVERSE the BIA’s determination as to the objective component of asylum eligibility, VACATE the BIA’s determination as to withholding of deportation, and REMAND the case for further proceedings.

[1] Our jurisdiction is under former Immigration and Nationality Act S 106(a), 8 U.S.C. S 1105a(a) (1994), as modified by the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),

Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996).

- [2] The record suggests that the terms are interchangeable, and the applicants seem to favor the word “Khoja.”
- [3] The words “priest” and “church” were used by Mr. Ladha to describe his religious position and congregation, and so we follow his usage.
- [4] The meaning of the phrase “Jamatay Islam” is not explained in the record.
- [5] Mr. Ladha was forced to overcome the inappropriately hostile questioning of the IJ to provide this information.
- [6] He also refused to admit two documents, offered by the Ladhas, into evidence. See *supra* Part IV.
- [7] Arguably, she also has the explicit authority to do so because she is empowered (and required) to establish a procedure for making asylum determinations. See 8 U.S.C. S 1158(d)(1) (Supp. II 1996). But cf. *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959) (for Erie purposes, burden of proof is not procedural but substantive).
- [8] In the same vein, the current provision states: “The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof [for asylum eligibility] without corroboration.” 8 C.F.R. S 208.13(a).
- [9] The BIA apparently intended *Matter of S-M-J-* to clarify its previous holding in *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987) (en banc), in which it wrote:

Although every effort should be made to obtain [“documentary or other corroborative”] evidence, the lack of such evidence will not necessarily be fatal to the application. The alien’s own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear. *Id.* at 445-46.

- [10] Identified as lacking were (1) documents showing national identity; (2) a corroborative “letter or affidavit” from the alien’s sister with whom he is in contact, (3) “any other correspondence or affidavits substantiating the respondent’s testimony,” (4) “supporting evidence from his family, despite the fact that his sister maintains regular contact with them in the refugee

camp”; (5) “evidence of his former presence at the refugee camp in Senegal, where he claims to have lived for 11 months”; and (6) “evidence confirming his family’s presence in the camp, despite the fact that his family has been living there for the past 7 years and continues to reside in the camp.” Matter of M-D-, Interim Decision 3339, at 4-6.

[11] Some cases use the ambiguous word “may,” as in, “his own testimony, if credible, may establish a clear probability of persecution,” *Blanco-Lopez v. INS*, 858 F.2d 531, 532 (9th Cir. 1988), as does the governing regulation, 8 C.F.R. S 208.13(a) (1999) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”) In context, we do not understand this usage to mean that sometimes corroboration of credible testimony is necessary to support the facts testified to. Instead, we consider it to indicate that sometimes the facts, credibly testified to and taken therefore to be true, will not cover all elements of the asylum or withholding claim needed to justify relief. See, e.g. *Blanco-Lopez*, 858 F.2d at 532 (“Petitioner is not required to provided independent corroborative evidence of persecution. Rather, his own testimony, if credible, may establish a clear probability of persecution.” (emphasis added)); *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987) (“[A]n alien’s unrefuted and credible testimony may be sufficient” to show a clear probability of persecution.).

[12] There is no dispute that the Ladhas have exhausted their religious persecution claim. Although the INS argues that the Ladhas’ political persecution claim was not exhausted, because the BIA held it to have been waived by not being raised on appeal, we disagree. Although before the BIA the parties do not specifically use the phrase “persecution on account of political opinion,” the IJ had specifically considered and rejected the political asylum claim, in part apparently because he found not credible what he described as Mr. Ladha’s claim of torture based on his membership in the MQM, and the Ladhas’ brief before the BIA challenges this very aspect of the IJ’s opinion. The BIA thus had sufficient reason to be aware of, and opportunity to review, this claim, cf. *Sagermark*, 767 F.2d at 648 (9th Cir. 1984), and we find that the Ladhas have administratively exhausted it. In contrast, the Ladhas have failed to exhaust their claim to persecution on account of social group, by failing to make reference to the relevant claim before the BIA, leaving us without jurisdiction to consider the claim on judicial review. See *Vargas*, 831 F.2d at 908.

- [13] The current, post-IIRIRA, provisions are similar. See, e.g., 8 U.S.C. S 1229a(b) (4)(B) (Supp. II 1996) (“[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government . . .”).
- [14] Even if the parties could supplement the record on the petition for review, compare *Fisher*, 79 F.3d at 963 (concluding that the court is not permitted to take judicial notice of materials not in the administrative record), with *Colmenar*, _____ F.3d at _____, 2000 WL 376671, at *5 n.5 (9th Cir. Apr. 14, 2000) (“Although we believe that a petitioner is entitled to present evidence outside the record in order to show that he was prejudiced by the lack of a full and fair hearing, we can find no cases in which we have stated this proposition explicitly. Therefore, we are especially reluctant to penalise *Colmenar* for failing to explain exactly what evidence he would have presented below if given the change.”), this method would have a number of severe disadvantages, including depriving us of a meaningful review by the BIA of the IJ’s decision.
- [15] Moreover, this conclusion is consistent with the statute providing that “a complete record shall be kept of all testimony and evidence produced at the proceeding.” 8 C.F.R. S 1229a(b)(4)(C) (Supp. II 1996).
- [16] Although on this inadequate record we cannot assess the propriety of the IJ’s decision, we note that excluding documents for being “self-serving” is not a sound practice. Cf. *Murphy v. INS*, 54 F.3d 605, 612 (9th Cir. 1995) (“Testimony should not be disregarded merely because it is uncorroborated and in the individual’s own interest.”).
- [17] Our review shows nothing in the record that appears to correspond to the excluded letter; although a document in the record may be the excluded church document, we cannot be certain.

Norbert Okoli and The Minister of Citizenship and Immigration

Country: Canada

Judicial Body: Federal Court of Canada

Decision Date: 31 March 2009

The Honourable Mr. Justice Mandamin

Reasons for Judgement and Judgement

- [1] Protection Division denying his claim for Convention Refugee Status under sections 96 and 97(1) of the *Immigration and Refugee Protection Act (IRPA)* on the basis of being persecuted as a homosexual person in Nigeria.
- [2] The Applicant is a citizen of Nigeria from Enugu. He says he is homosexual and fears persecution from members of the Ogbete Traders Association and from the general public in Nigeria. Mr. Okoli applied for judicial review of the June 2, 2008 decision of the Refugee Nigeria. Mr. Okoli had worked in a market in Nigeria as a member of the Ogbete Traders Association. He first became involved in a homosexual relationship with a trader in 1997. In 1998, he met Emeka and the two began a homosexual relationship in 1999 that continued until 2005.
- [3] Mr. Okoli says that because of his homosexual relationship he was persecuted by members of the Ogbete Traders Association including two severe beatings, ongoing harassment, forced intercourse with a prostitute, death threats and expulsion from the Ogbete Traders Association. Around April 2005 his lover, Emeka, approached a priest to ask if the two could be married. The proposed marriage was disclosed to the local media and members of the Ogbete Traders Association came searching for him and Emeka. The two went into hiding and fled from Nigeria separately. Mr. Okoli made his way to Canada travelling on a false French passport. He filed a claim for refugee status on June 18, 2005.
- [4] The Refugee Protection Division board member denied his refugee claim on the basis that the Applicant was not credible. The member concluded that Mr. Okoli does not have a well- founded fear of persecution in Nigeria nor would he be subject to personalised risk upon return. The member also found that an internal flight alternative was available within Nigeria in Lagos City if the Applicant kept his sexual orientation discreet.

- [5] In the application for judicial review, the Applicant poses a question for certification as follows:

Background

“Is there a requirement under the 1951 convention Related to the Status of Refugees or under s. 97 of the Immigration and Refugee Protection Act that an individual hide his/her sexual orientation to avoid persecution?”

- [6] The Applicant says that an agent helped the Applicant to get to Canada and recommended that he apply once inside the country rather than at the airport. He was also advised that if there were any problems entering the country he should say that he had made a refugee claim in the Netherlands so he would be returned there rather than Nigeria. When the Applicant claimed refugee status on arrival he told officials that he had made a claim in the Netherlands. He was kept in detention until November 2, 2005 for reasons of identity.
- [7] While in detention, the Applicant was provided with the name of a lawyer who met with him only briefly a couple of times. The Applicant alleges that this lawyer told him that his story was “too sweet”, meaning that it would not be believed. The Applicant says that he relied on the lawyer’s advice since he was in detention. From July to September, the Applicant says that the lawyer did very little on his case or in attempting to have him released. In September, he requested a different lawyer.
- [8] After release, with the assistance of his new lawyer, the Applicant submitted a revised PIF which he states by affidavit is the true narrative. The Applicant states that people in his community of Enugu, including the Ogbete Traders Association, first found out about his sexual orientation in 1999 and that since then he has experienced serious beatings and threats, was forced out of his home and was arrested by the police.
- [9] The Applicant alleges that he became afraid that he would be killed in April 2005 after people found out that his partner, Emeka, had asked a local priest about the two getting married. Emeka apparently provided the priest with a photo of the couple and a letter. The media were informed and a gang from the Ogbete Traders Association went hunting for both of them. They fled and went into in hiding in a village before leaving the country separately. The Applicant does not know Emeka’s whereabouts.
- [10] The Applicant submitted a doctor’s medical report about numerous scars on his body and a physiological report about the effects of the treatment he received.

The Decision Under Review

- [11] The board member found that the Applicant was a trader in Enugu and that he was homosexual. The board member did not dispute the findings of Dr. Ng with respect to the Applicant's numerous scars but concluded that there was insufficient evidence that they were due to a beating because of his homosexuality. He found that the Applicant was not credible due to inconsistencies and contradictions between his testimony, the two versions of his PIF, his Port of Entry (POE) Declaration and associated notes despite his explanations about fear upon arrival, incompetent counsel and memory problems for the inconsistencies.
- [12] The board member rejected the Applicant's explanation that he was stressed and fearful at the Port of Entry. Instead, the member found that the Applicant came to Canada with the intent to mislead Canadian officials because he came as a visitor and only applied for refugee status after his false French passport was challenged. As such, the board member found any inconsistencies in the POE documents were caused by his deception and getting caught, not stress or fear.
- [13] The board member concluded that the Applicant did not provide credible or trustworthy evidence to support his allegations about his first lawyer since he did not make any complaint to the Law Society of Upper Canada or inform the lawyer of the allegations to provide him with the opportunity to defend himself.
- [14] The board member found the Applicant's explanation of memory problems to be unreasonable because although the Applicant was able to provide details about his treatment at the psychological evaluation, at the doctor's office, and when asked by his counsel at the hearing, he claimed memory problems when asked to clarify inconsistencies by the board member.
- [15] The board member found inconsistencies in the POE documentation and the two PIFs as to the frequency and details of beatings. The board member also found that the Applicant's story about fleeing with his boyfriend varied in the different accounts. The Applicant's explanations were rejected. The board member found it to be implausible, in the homophobic context of Nigeria, that Emeka would ask a priest to marry them and also provide a photograph and letter which could be used as evidence against them. No evidence of the alleged media reports was provided. The board member concluded on a balance of probabilities that the Applicant was not abused by the Ogbete Traders Association and did not have his life threatened because of the plans to marry his homosexual partner.

- [16] The board member questioned whether the Applicant was even in Nigeria after April/May 2004, as he had no documents proving he was there. This was found to be critical as the final events were after that period and there was some concern that the Applicant might have been in the Netherlands at that time. The documentation and explanations of the Applicant were rejected as unreasonable.
- [17] The board member gave little weight to the psychological report because the Applicant's story was found not to be credible.
- [18] Finally, after considering the documentary evidence and explaining why he gave the weight he did to the various documents, the board member concluded that the Applicant had a reasonable IFA in Lagos, "if he were discreet about his sexuality".

The Standard of Review

- [19] The decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, has established that there are now only two standards of review: correctness and reasonableness, at para. 34. Where questions of fact and credibility are reviewed, the standard of review is reasonableness (*Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at para. 15).
- [20] A claimant's testimony is presumed to be true (*Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para. 6). The presumption may be refuted by the presence of inconsistencies and contradictions in testimony, implausibility and where facts as presented are not what could reasonably be expected (*Jiang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 775 at para. 15). Lastly, the Board is entitled to deference in regard to its credibility determinations (*R.K.L. v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para. 8).
- [21] The parties agree that the reasonableness standard applies to all of the questions. I agree that credibility findings are to be assessed on the reasonableness standard (*Aguirre v. Canada (M.C.I.)*, 2008 FC 571, at para. 14). The same is true for IFA findings (*Khokhar v. Canada (M.C.I.)*, 2008 FC 449, at paras. 21-22).

Issues

[22] The issues in this proceeding are:

1. *Did the Board member ignore or misapprehend the evidence such that the credibility findings were unreasonable?*
2. *Was the Board member's IFA finding reasonable?*

Analysis

Did the board member ignore or misapprehend the evidence such that the credibility findings were unreasonable?

- [23] The Respondent submits that the board member is entitled to consider discrepancies between the POE and the PIF and draw negative inferences from the omission of significant events in the PIF (*Oyebade v. Canada (M.C.I.)*, 2001 FCT 773).
- [24] The details of the beatings, frequency and dates were not consistent in the various sources. The Respondent submits that the board member did consider the explanations for the inconsistencies, that is: the Applicant's fear at the POE, the incompetence and misrepresentation by former counsel, and the Applicant's memory problems. The Respondent submits that the board member gave cogent reasons for his credibility findings.
- [25] The Respondent submits that, given the generalised discrimination faced by homosexuals in the country and the previous treatment received by the Applicant and Emeka, it was reasonable for the board member to conclude that Emeka approaching a priest to ask him about marriage was implausible.
- [26] The Respondent submits that both the medical and psychological reports were considered but properly given little weight because the Applicant's allegations were not found to be credible. In result the Respondent submits the Applicant has not demonstrated that any error was made by the board member.
- [27] I find the board member accepted several crucial elements of the Applicant's story: his sexual orientation, his scars, mistreatment of homosexuals in Nigeria and lack of police protection for homosexuals. The board member's overall credibility findings about the Applicant are based almost entirely on inconsistencies between the port of entry notes and the two versions of the PIF. The Applicant was detained and asked for the details of his claim at the Port of Entry. There were discrepancies over several interviews but the core of the Applicant's claim remained the same. The Applicant provided a PIF while in detention and an amended PIF after release from detention.
- [28] The Applicant provided an explanation for the amended PIF. The amendment was made almost immediately after the Applicant found a new lawyer and was released from detention (*Giminez v. Canada (M.C.I.)*, 2005 FC 1114). The board member may not draw negative inferences from the fact of an amendment which was done in a timely manner well before the hearing (*Ameir v. Canada*

(*M.C.I.*), 2005 FC 876). The amended PIF merely expands on the original, rather than contradicting it. In similar cases, this Court has concluded that such a change provides no reason to question the credibility of the claimant (*Puentes v. Canada (M.C.I.)*, 2007 FC 1335, para. 17-19). The amended PIF addresses the omissions directly, explaining why they occurred. The board member's role was to assess these explanations, rather than point out the inconsistencies (*Osman v. Canada (M.C.I.)*, [1993] F.C.J. No 1414, para. 12-13). The board member failed to assess the Applicant's explanation.

[29] The board member disregarded the Applicant's explanation about the change from the initial PIF to the amended PIF because the Applicant had not made a complaint to the Law Society or notified the previous counsel. However, at the hearing the board member, after adjourning to consult legal counsel, indicated that he would not be applying the policy requiring a complaint and notice. Nevertheless he applied the policy in his decision.

[30] As an example of microscopic examination, the board member notes that the Applicant did not mention that he had been tied to a pole when being beaten with canes and electrical wires, as he did mention this to his doctor. The Applicant was consistent in saying that he'd been attacked throughout the proceedings and to conclude that the attacks did not happen because he did not mention being tied to a pole is unreasonable. Where the evidence supports the plausibility of the story, namely the medical report of numerous scars and the reliable documentary evidence of homophobic attitudes in Nigeria, relatively minor inconsistencies should not lead to a negative credibility finding (*Mohacsi v. Canada (M.C.I.)*, 2003 FCT 429, para. 20).

[31] The board member's finding of implausibility with respect to Emeka's approaching the priest ignored the explanation provided. The Applicant's companion did not approach just any priest but rather a priest he thought was gay and would be receptive to the idea. This may have been naïve, but is an explanation that negates an implausibility conclusion.

[32] The board member did not dispute the medical report which confirmed numerous scars on the Applicant's body on the shoulder, biceps, abdomen, thigh and back. The board member decided since the Applicant's claim of beatings because of his homosexual relationship was not credible, little weight should be assigned to the medical report. The board member treated the psychological findings in support of the Applicant's claim in a similar fashion. In effect, the board member discounted the medical and physiological reports submitted in support of the

Applicant's credibility about the beatings as of little weight because the member already decided the Applicant was not credible.

[33] I find the board member's assessment of the Applicant's credibility to be unreasonable.

Did the board member err in finding an internal flight arrangement in Lagos City?

[34] The Respondent submits that the onus is on the Applicant to demonstrate that he does not have an IFA in Lagos City. The board member did not say that the Applicant would have to give up his homosexual identity or lifestyle, just that he would need to be discreet. According to the Respondent, an IFA is only unreasonable when there is evidence that the life or safety of the Applicant would be jeopardised (*Ranganathan v. Canada (M.C.I.)*, [2000] F.C.J. 2118 (FCA)).

[35] As I have found the board member's assessment of credibility to be flawed, it follows that the assessment of an IFA on faulty fact finding is itself flawed.

[36] The board member found that the Applicant did not present sufficient credible evidence that he would be personally targeted by the police or the public in Nigeria based on his sexuality.

Although he noted that the British-Danish Fact Finding Mission Report stated that homosexuals in large cities in Nigeria have a well-founded fear from the person's local community and society at large, he preferred the statement in the Report that homosexuals in larger cities may not have reason to fear persecution as long as they do not present themselves as homosexuals in public. The board member stated: "There was no evidence to suggest that he [the Applicant] would have to remain in hiding, should he live there, although, as with respect to certain elements of his life in Canada, he would possibly have to practice discretion with respect to his sexual orientation in Nigeria." The Federal Court has repeatedly found such findings perverse as they require an individual to repress an immutable characteristic (*Sadeghi-Pari v. Canada (M.C.I.)*, 2004 FC 282, para. 29).

[37] I find the board member's conclusion that a viable IFA exists in Lagos City to be unreasonable given the flawed credibility finding of facts and requirement that the Applicant repress an immutable characteristic to live there.

Question for Certification

[38] The Applicant proposes a question for certification as a serious question of general importance under s. 74(d) of *IRPA*. Since I have found the board member erred on

assessment of credibility, the facts of this application have to be re-determined before any question could be considered for certification.

Conclusion

[39] I have found the board member erred in the assessment of the Applicant's credibility because he failed to consider the Applicant's explanation for the amended PIF; he acted contrary to his statement that he would not apply policy on non-reporting the first lawyer's misconduct; he failed to consider medical and psychological evidence; and he conducted an overly microscopic examination of the Applicant's claim. Further, the board member erred in assessing an IFA based on a faulty assessment of credibility and on an impermissible requirement for concealment of a personal characteristic, the Applicant's homosexuality. Accordingly, the decision is unreasonable. The application for judicial review is granted.

[40] Given my conclusion on the credibility findings in this matter, I do not consider it appropriate to propose a question for certification.

The application for judicial review is granted. The matter is remitted back for re-determination by a differently constituted board.

QD (Iraq) & AH (Iraq) Vs. Secretary of State for the Home Department

Country: United Kingdom

Judicial Body: Supreme Court of Judicature, Court of Appeal (Civil Division)

Date of Decision: 24 June 2009

Lord Justice Sedley:

This is the judgement of the court.

1. The outcome of both of these appeals depends, at least in the first instance, on whether the approach of the Asylum and Immigration Tribunal to the meaning and effect of article 15 of the Qualification Directive is legally flawed. In the second instance it depends on whether, even if the AIT's understanding of the law was incorrect, a correct reading and application of the law could make any difference to the outcome of either case, which was adverse to both appellants.
2. For reasons which will become apparent when we deal with the law, we consider it impossible to predict with certainty what would be the outcome on the facts already found. These are, in outline, as follows.
3. QD comes from Samarra in the Salah Al-Din governorate of Iraq. Under the Saddam regime he was a Ba'ath Party member, and his expressed fear is of reprisals. On arrival here in August 2004 he therefore claimed asylum. This was refused, with the result that he faces return unless return is prevented by article 15(c). The immigration judge, applying the law set out in *KH (Iraq)*, to which we will come, concluded that the level of violence in QD's home area did not pose a sufficiently immediate threat to his safety to attract the protection of article 15(c) and so dismissed his appeal. On reconsideration, no material error of law was found. It is against this finding that QD now appeals.
4. AH, who has just turned 18, comes from Baquba in Iraq. The AIT on a second-stage reconsideration found that, to escape serious local violence, he had moved with his family to Kifri in the Diyala governorate. The tribunal, likewise applying *KH*, were not satisfied that the level of violence prevalent in Kifri would place AH at sufficient individual risk if (subject to Home Office policy on unaccompanied minors) he were to be returned.
5. Both cases therefore hinge on the true meaning and effect of article 15 of the Qualification Directive. In addressing this we have had assistance of high calibre

submissions, for which we record our gratitude, both from counsel representing the parties and by way of intervention from the Office of the United Nations High Commissioner for Refugees, represented pro bono by the counsel and solicitors named at the head of this judgement. Because UNHCR's written submission contains much valuable background information which it will not be necessary for us to reproduce for the purposes of our decision, we propose, with the authors' permission, to annexe it to this judgement.

6. While in the nature of things the AIT has been under scrutiny without being separately represented, the determination with which we have been principally concerned – *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKAIT 00023 – is a lucid and scholarly judgement capable of holding its own under what has been a concerted attack by the parties and the intervener.

The 2004 Qualification Directive

7. In the half-century and more that has passed since the 1951 Geneva Convention created the modern concept of the refugee, new tranches of need for protection and new international obligations to provide protection have developed. By the turn of the century it had become apparent that for a variety of reasons it was necessary that the member States of the European Union should give effect to their shared obligations in a way which distributed the burdens equally according to common standards.
8. The Qualification Directive (Council Directive 2004/83/EC) thus forms part of the Common European Asylum System. It sets, according to its headnote and (with one immaterial variation) its first article,
“minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.”
9. As this suggests, the Directive brings together classical Geneva refugee status with what it calls subsidiary protection status. The latter status has broadly two sources. One is the obligation assumed by all EU member States as part of the Council of Europe to give effect to the rights contained in the European Convention on Human Rights and Fundamental Freedoms – essentially rights of non-refoulement for individuals who cannot establish an affirmative right to asylum. The other is the humanitarian practices adopted by many EU States, the UK included, towards individuals who manifestly need protection but who do not necessarily qualify under either convention. Among these are people whose lives or safety, if returned to their home area, would be imperilled by endemic violence.

10. Article 2 (in its material parts and with emphasis added) provides: For the purposes of this Directive:

.....

- (e) ‘person eligible for subsidiary protection’ means a third country national who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, ... would face **a real risk of suffering serious harm as defined in article 15**, ... and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country.”

11. Article 15 provides:

Serious harm

Serious harm consists of (a) death penalty or execution; or

- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

12. Such persons are required to be granted subsidiary protection status (article 18) unless an internal relocation alternative is open to them (article 8) or until the risk in the country of origin ceases (article 16).

13. It is also left open to member States, by article 3, to adopt more favourable standards of protection. This the UK has already done by paragraph 339C of the Immigration Rules, which repairs the surprising omission of article 15 to provide for protection from a real risk of targeted deprivation of life in breach of ECHR article 2. Rule 339C accordingly adds unlawful killing to the tabulation of forms of serious harm which, for the rest, it takes directly from article 15.

14. Among the 40 paragraphs of the preamble to the Directive, at least three have a bearing on the meaning of these provisions:

(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary

protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

International humanitarian law

15. It is appropriate to begin by considering the approach to these provisions taken by the AIT in *KH (Iraq)*. Their analysis was, in summary, that because the vocabulary of article 15 was clearly drawn from international humanitarian law, that was the context within which and the end to which the article should be interpreted and applied. The determination explains carefully why the AIT arrived at their premise; and if we took the same view of the premise, we would have much sympathy with their conclusions. But, in agreement with all three counsel, we respectfully consider the premise to be incorrect and the conclusions to fall with it. Since both tribunals from which the present appeals come took their law, as they were required to do, from *KH*, their decisions too cannot stand.
16. International humanitarian law (IHL) is the name given to the body of law which seeks to protect both combatants and non-combatants from collateral harm in the course of armed conflicts. It thus has a specific area of operation. It also, however, has defined and limited purposes which do not include the grant of refuge to people who flee armed conflict. This should, we respectfully think, have sounded a warning bell to the tribunal which decided *KH*. But the Home Secretary had accepted that Iraq was currently in a state of internal armed conflict within the meaning given to the phrase by IHL and the tribunal went on (§33-39) to reason out why, despite indicators to the contrary in its drafting history, article 15(c) sought to give effect to IHL. The result, they concluded (§51), was that its purpose was to give refuge from “international crimes caused by a serious threat of indiscriminate violence”; in other words “a realistic threat of being victims of war crimes or other serious breaches of IHL”. If this were right, every article 15(c) claim would prompt an inquiry of which the Directive gives no hint and which would depend on an extraneous body of law.
17. We recognise that the drafting history is complex and in places ambiguous in the ways noted by the AIT, not least in the removal of an early reference to Geneva Convention IV without an abandonment of its vocabulary. As they put it:

“several of the terms used in article 15(c) are terms of art within international humanitarian (and international criminal) law: e.g. ‘civilian’, ‘life and [or] person’, ‘indiscriminate’ and, of course, ‘international or non-international

[internal] armed conflict'. The only body of law in which all of these terms feature is IHL (together with international criminal law)."

18. None of this, however, is in our view sufficient to introduce an unarticulated gloss of a fundamental kind into a Directive which goes far wider in its purposes than states of armed conflict. We consider that the Directive has to stand on its own legs and to be treated, so far as it does not expressly or manifestly adopt extraneous sources of law, as autonomous. It is not necessary, this being so, to track in *KH* the effects of the AIT's erroneous premise, but we accept broadly Mr Husain's submission that it led them to construe "indiscriminate violence" and "life or person" too narrowly, to construe "individual" too broadly, and to set the threshold of risk too high.

Articles 2(e) and 15(c)

19. This, however, is a long way from the end of the road. Article 15(c), both on its own and even more so when married with article 2(e), is highly problematical - in large part, we are bound to say, because of poor drafting. Three particular sticking points are readily perceptible:

- (1) the ostensibly cumulative but logically intractable test of "a real risk" of a "threat";
- (2) the contradictory postulation of an "individual threat" to life or safety from "indiscriminate violence";
- (3) the requirement of "armed conflict" when there may well be only one source of indiscriminate violence.

The first of these has to be coped with pragmatically. The second has now been resolved in principle by the European Court of Justice. The third, albeit troubling, is the subject of agreement before us.

20. The shape of article 15 follows the guidelines contained in the preamble. Paragraph (a) reflects the prohibition on the use or execution of the death penalty contained in the Sixth and Thirteenth Protocols to the ECHR. Paragraph (b) reflects article 3. ECHR. In *NA v United Kingdom* (25904/07; 17 July 2008) the European Court of Human Rights made it clear (§114-7) that the risk of ill-treatment contrary to this article could arise from general as well as from particular circumstances. It said:

115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail

that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

21. Paragraph (c) draws not on prescribed standards, except insofar as it has regard to the right to life enshrined in ECHR article 2, but on State practice, a source explicitly contemplated in paragraph 25 of the preamble. For reasons of common humanity most EU States, the United Kingdom among them, had by 2004 made it a practice not to return unsuccessful asylum-seekers to war zones or situations of armed anarchy. Article 15(c) elevated this practice to a minimum standard. The problems arise from the wording by which it has been done.

Elgafaji v Staatssecretaris van Justitie

22. Since these appeals were decided by the AIT, the Grand Chamber of the European Court of Justice has given its ruling in the *Elgafaji* case (C-465/07; 17 February 2009). The two questions referred to it by the Dutch Raad van State (council of State) were these:

1. Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?
2. If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?

23. The Court held, unsurprisingly, that “it is article 15(b) of the Directive which corresponds, in essence, to article 3 of the ECHR”. It continued (§28):

“By contrast, article 15(c) of the Directive is a provision, the content of which is different from that of article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.”

24. Having thus answered the first referred question, the Court went on to address the question whether article 15(c) required proof of a threat directed at the individual applicant, and, if not, what was the correct test. It said:

- 31 *In order to reply to those questions, it is appropriate to compare the three types of 'serious harm' defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2(e) of the Directive, substantial grounds have been shown for believing that the applicant faces 'a real risk of [such] harm' if returned to the relevant country.*
- 32 *In that regard, it must be noted that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15(a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.*
- 33 *By contrast, the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.*
- 34 *Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.*
- 35 *In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place - assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred - reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.*
- 36 *That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.*
- 37 *While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows - by the use of the word 'normally' - for the possibility of an exceptional*

situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.

- 38 *The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.*
- 39 *In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.*
- 40 *Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:*
- *the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and*
 - *the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.*
-
- 43 *Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) of the Directive, must be interpreted as meaning that:*
- *the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;*
 - *the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place -- assessed by the competent national authorities before which an application for*

subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred -- reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

- 44 *It should also, lastly, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, NA. v. The United Kingdom, § 115 to 117 and the case-law cited).*

“individual threat” and “indiscriminate violence”

25. In this way the ECJ has sought to reconcile two things which Advocate-General Maduro in his Opinion (§31) had described as seeming “prima facie irreconcilable” – an individual threat arising from indiscriminate violence. The Court did not, as it might have done, decide that “individual” was there simply to exclude persons who enjoyed some form of protection from the violence faced by the population generally. Nor, however, has the judgement introduced an additional test of exceptionality. By using the words “exceptional” and “exceptionally” it is simply stressing that it is not every armed conflict or violent situation which will attract the protection of article 15(c), but only one where the level of violence is such that, without anything to render them a particular target, civilians face real risks to their life or personal safety.
26. While this formulation leaves open a very large area of factual judgement, it answers, so far as can be done, the second difficulty mentioned above.

“a risk” of “a ... threat”

27. The ECJ’s judgement, however, does not resolve the multiplication of contingencies by articles 2(e) and 15(c). In fact the final words of its answer to the second question appear to adopt it: “a real risk of being subject to that threat”. It is possible to devise a theoretical situation in which people can be said to face a risk of a threat (the possibility that a quiescent militia will re-emerge; a rumour that the local wells have been poisoned) but it is not thinkable that the Directive seeks to cover such remote and not truly dangerous situations rather than the real risks and real threats presented by the kinds of endemic act of indiscriminate violence

– the placing of car bombs in market places; snipers firing methodically at people in the streets – which have come to disfigure the modern world.

28. In this regard it is possible that the Directive is less strong than IHL, which – as the AIT point out in §126 of *KH* – prohibits “threats of violence the primary purpose of which is to spread terror among the civilian population”. It seems to us clear, nevertheless, that when article 15(c) speaks of a threat to a civilian’s life or person it is concerned not with fear alone but with a possibility that may become a reality.
29. In our judgement “risk” in article 2(e) overlaps with “threat” in article 15(c), so that the latter reiterates but does not qualify or dilute the former. As a matter of syntax this no doubt has its problems, but as a matter of law and common sense it does not. Tribunals will of course need to address them in the light of the ECJ’s ruling, but as a single, not a cumulative, contingency.
30. Beyond what was decided in *Elgafaji*, however, lie at least two further questions that arose in *KH* and have been debated again before us.
31. One is whether the word “serious” qualifies “threat”, as grammatically it would appear to do, or “harm”, as the appellants contend it substantively does. In our judgement it would be an unjustified departure from the wording of the paragraph to tinker with its grammatical meaning. Not every threat is real and not every real threat is serious. Article 15(c) is intelligibly concerned with serious threats of real harm.
32. The second is what kind or degree of risk to individuals is required to bring a situation of armed conflict within the purview of article 15(c). The AIT in *KH* (§135) adopted the test, approved by this court in *AA (Zimbabwe)*[2007] EWCA Civ 149, of a “consistent pattern” of mistreatment of returning asylum-seekers by state authorities at the airport. Mr Saini, for the Home Secretary, supports this much of the decision. For our part we would not endorse the simple reading across of a porous concept like risk or threat from one context to another. What in one situation requires consistency of practice if a risk to an individual is to be established may simply not be relevant in another. The contrast between the methodical victimisation of those suspected of disloyalty and the occurrence of indiscriminate violence is a good example. The risk of random injury or death which indiscriminate violence carries is the converse of consistency.
33. In fact the AIT in *KH*, at §136, go a long way towards recognising this. An applicant would have to show, they say, that incidents of indiscriminate violence

“were happening on a wide scale and in such a way as to be of sufficient severity to pose a real risk of serious harm ... to civilians generally.”

“armed conflict”

34. One of the reasons for doubting the use of IHL as an aid to the construction of article 15 is the difference between the need for the purposes of the law of war to define international and internal armed conflict and the quite different objects of article 15. As Mr Fordham points out, the Directive in article 17(1)(a) is specific in invoking the treaty definitions of crimes against peace, war crimes and crimes against humanity, so that its corresponding silence in article 15(c) is eloquent. This, however, makes the adoption of the phrase “armed conflict” no less problematical. If the overriding purpose of article 15(c) is to give temporary refuge to people whose safety is placed in serious jeopardy by indiscriminate violence, it cannot matter whether the source of the violence is two or more warring factions (which is what “conflict” would ordinarily suggest) or a single entity or faction.
35. We therefore accept the proposition, on which the parties before us and the intervener agree, that the phrase “situations of international or internal armed conflict” in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*. The Home Secretary in *KH* accepted that there was currently an armed conflict in Iraq, and the AIT proceeded on that acceptance.
36. We would accept UNHCR’s submission that, for the purposes of article 15(c), there is no requirement that the armed conflict itself must be exceptional. What is, however, required is an intensity of indiscriminate violence – which will self-evidently not characterise every such situation – great enough to meet the test spelt out by the ECJ.
37. It must follow, as again all counsel agree, that “civilian” in article 15(c) means not simply someone not in uniform – which by itself might include a good many terrorists – but only genuine non-combatants (though UNHCR submitted that former “combatants” should not be excluded).

Disposal

38. Both these appeals therefore succeed in principle, requiring on the face of it remission for redetermination on the facts in accordance with the law as we have held it to be. But Mr Saini has endeavoured to persuade us that they should

nevertheless not be allowed because it is a foregone conclusion that, if remitted, they will fail again.

39. It is sufficient to say that it became quickly apparent that the submission could succeed only if this court were to turn itself into a primary fact-finding body. The evidence we have been shown certainly does not affirmatively demonstrate an absence of individual risk from indiscriminate violence in either appellant's home governorate. Once it is established that the edifice of law which both tribunals took from *KH* is defective, there is in our judgement no option but to locate the evidence within a different legal paradigm and reach a fact-sensitive fresh conclusion. That is what the AIT is for.

40. We would put the critical question, in the light of the Directive, of the ECJ's recent jurisprudence and of our own reasoning, in this way:

Is there in Iraq or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant such as QD or AH would, solely by being present there, face a real risk which threatens his life or person?

By "material part" we mean the applicant's home area or, if otherwise appropriate, any potential place of internal relocation.

41. Each appeal will therefore be allowed to the extent of being remitted to a differently constituted tribunal. It will be for the acting president of the AIT to decide whether they should be heard separately or together.

K v Secretary of State for the Home Department Fornah v Secretary of State for the Home Department

House of Lords

[2006] UKHL 46, [2007] 1 AC 412

Country: United Kingdom

Judicial Body: House of Lords

Date of Decision: 18 October 2006

Judgement-1:

Lord Bingham of Cornhill:

- 1 My Lords, the question in each of these appeals, arising on very different facts, is whether the appellant falls within the familiar definition of “refugee” in article 1A(2) of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. It is common ground in each case that the appellant has a well-founded fear of being persecuted if she were to be returned to her home country, Iran (in the first case) and Sierra Leone (in the second). In each case the appellant is outside the country of her nationality and is unable or, owing to her fear of persecution unwilling, to avail herself of the protection of that country. The only issue in each case is whether the appellant’s well-founded fear is of being persecuted “for reasons of ... membership of a particular social group”. The practical importance of this issue to the appellants is somewhat mitigated by the Secretary of State’s acceptance that article 3 of the European Convention on Human Rights precludes the return of the appellants to their home countries, because of the treatment they would be liable to suffer if returned. But the Secretary of State contends, and the Court of Appeal has in each case held, that such treatment, although persecutory, would not be “for reasons of ... membership of a particular social group” and therefore the appellants fall outside the definition of refugee. The correct understanding of this expression is a question of theoretical but also practical importance since the appellants enjoy stronger protection if recognised as refugees.

The first appeal: the facts

- 2 The first appellant is an Iranian citizen. She is married to B with whom, and their child, she lived in Iran. In about April 2001 B disappeared. It appears he was

arrested, and he has since been held in prison without, so far as the first appellant is aware, charge or trial. On her one visit to him in prison he appeared to her to show signs of ill-treatment. The grounds for his detention are not known. About two or three weeks after B's disappearance Revolutionary Guards, agents of the Islamic Iranian State, searched the first appellant's house and took away books and papers. About a week later the Revolutionary Guards again visited the first appellant's house: they searched the house further, and insulted and raped her. Following this incident the first appellant made herself scarce. She was not again approached by Revolutionary Guards and nor were members of her family. But the school year began on 23 September 2001 and on the following day the headmaster of the school attended by her son, then aged 7, told her that the Revolutionary Guards had been to the school to make inquiries about the boy. The adjudicator found that the Revolutionary Guards had approached the school in an open manner knowing that this would come to the attention of the first appellant and that it would cause her great fear. She was indeed very frightened, and fled from Iran with her son. The adjudicator accepted that in the then current situation in Iran the families of those of adverse interest to the authorities could well be targeted. The first appellant travelled via Turkey to the United Kingdom where, on 5 October 2001, the day after her arrival, she claimed asylum.

- 3 The first appellant's asylum claim was refused by the Secretary of State on 30 November 2001. She appealed to an adjudicator (Mr D J B Trotter) who upheld her claim, holding that she had a well-founded fear of persecution for reasons of her membership of a particular social group, namely her husband's family. He also upheld her human rights claim under article 3, a decision which the Secretary of State has not challenged. But he appealed successfully against the asylum decision to the Immigration Appeal Tribunal which held, in a determination dated 29 September 2003, that "the family is the quintessential social group" but that the Court of Appeal decision in *Quijano v Secretary of State for the Home Department* [1997] Imm AR 227, showed, at para 12 of the determination, that: "where the primary member of a family is not persecuted for a Convention reason, then the secondary members cannot be said to be persecuted for being members of the primary person's family." Here, B was not shown to be detained for a Convention reason, and so the first appellant could not succeed. In a judgement considered in more detail below, the Court of Appeal (Tuckey, Clarke and Laws LJ) [2004] EWCA Civ 986 upheld this conclusion, which the first appellant challenges and the Secretary of State supports.

The second appeal: the facts

- 4 The second appellant was born in Sierra Leone on 23 May 1987. She arrived in the United Kingdom on 15 March 2003, aged 15, and claimed asylum. The basis of her claim was that, if returned to Sierra Leone, she would be at risk of subjection to female genital mutilation (“FGM”).
- 5 In 1998 the second appellant and her mother were living in her father’s family village to escape the civil war, and she overheard discussions of her undergoing FGM as part of her initiation into womanhood. In order to avoid this she ran away, but she was captured by rebels and repeatedly raped by a rebel leader, by whom she became pregnant. An uncle had arranged her departure from Sierra Leone to the United Kingdom. She resisted return on the ground that, if returned, she would have nowhere to live but her father’s village, where she feared she would be subjected to FGM.
- 6 FGM is performed on the overwhelming majority of girls in Sierra Leone apart from Krios, a small minority of the population. The operation, often very crudely performed, causes excruciating pain. It can give rise to serious long-term ill-effects, physical and mental, and it is sometimes fatal. The operation is performed by older women, members of secret societies, and is a rite of passage from childhood to full womanhood, symbolised by admission of the initiate to these secret societies. Even the lower classes of Sierra Leonean society regard uninitiated indigenous women as an abomination fit only for the worst sort of sexual exploitation. Because of its totemic significance the practice is welcomed by some women and accepted by almost all. In society as a whole the practice is generally accepted where it is not approved, and the authorities do little to curb or eliminate it.
- 7 The practice of FGM powerfully reinforces and expresses the inferior status of women as compared with men in Sierra Leonean society. The evidence is that despite constitutional guarantees against discrimination, the rights of married women, particularly those married under customary and Islamic laws, are limited. Their position is comparable with that of a minor. Under customary law, a wife is obliged always to obey her husband, with whom she can refuse sexual intercourse only in limited circumstances. She is subject to chastisement at his hands.
- 8 FGM has been condemned as cruel, discriminatory and degrading by a long series of international instruments, declarations, resolutions, pronouncements and recommendations. Nothing turns on the detail of these. Their tenor may

be illustrated by a recent Report of the United Nations Special Rapporteur on violence against women, E/CN.4/2002/83, 31 January 2002, Introduction, para 6:

“Nevertheless, many of the practices enumerated in the next section are unconscionable and challenge the very concept of universal human rights. Many of them involve ‘severe pain and suffering’ and may be considered ‘torture like’ in their manifestation. Others such as property and marital rights are inherently unequal and blatantly challenge the international imperatives towards equality. The right to be free from torture is considered by many scholars to be jus cogens, a norm of international law that cannot be derogated from by nation States. So fundamental is the right to be free from torture that, along with the right to be free from genocide, it is seen as a norm that binds all nation States, whether or not they have signed any international convention or document. Therefore those cultural practices that involve ‘severe pain and suffering’ for the woman or the girl child, those that do not respect the physical integrity of the female body, must receive maximum international scrutiny and agitation. It is imperative that practices such as female genital mutilation, honour killings, Sati or any other form of cultural practice that brutalises the female body receive international attention, and international leverage should be used to ensure that these practices are curtailed and eliminated as quickly as possible.”

In some countries, including the United Kingdom, effect is given to this international consensus by the prohibition of FGM on pain of severe criminal sanctions.

- 9 By letter dated 24 April 2003 the Secretary of State granted the second appellant limited leave to enter but rejected her claim to asylum because (so far as now relevant) he did not consider that girls who were at risk of being subjected to FGM formed a social group within the terms of the Refugee Convention. The second appellant appealed to an adjudicator (Mr M R Oliver). At the hearing before him her credibility was not challenged and all issues were resolved in her favour in his determination promulgated on 6 October 2003. The adjudicator found that her fear was for a Convention reason, “i e because of her membership of a particular social group, that of young, single Sierra Leonean women, who are clearly at considerable risk of enforced FGM”. On the Secretary of State’s appeal to the Immigration Appeal Tribunal this decision was reversed. In its determination notified on 5 August 2004, the tribunal was not satisfied that the social group identified by the adjudicator, “that of young, single Sierra Leonean women”, or that identified by counsel, “young Sierra Leonean women”, could properly be regarded as a particular social group within the meaning of the Refugee Convention. In judgements considered in more detail below the Court of Appeal (Auld and Chadwick LJ, Arden LJ dissenting) [2005] 1 WLR 3773 upheld this decision. The second appellant challenges this decision which the Secretary of State, while in

no way condoning or justifying the practice of FGM, supports. Leave to intervene in the House was granted to the United Nations High Commissioner for Refugees, and the House derived great help from the submissions of counsel on his behalf which, although properly directed to principle, were strongly supportive of the second appellant's appeal.

Article 1A(2) of the Refugee Convention

10 Article 1A(2) of the Refugee Convention as amended defines a "refugee" for purposes of the Convention as any 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, is unwilling to avail himself of the protection of that country ..."

It is well established that the Convention must be interpreted in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms. Since the Convention is an international instrument which no supra-national court has the ultimate authority to interpret, the construction put upon it by other States, while not determinative (*R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 508-509, 515-518, 524-527, 528-531), is of importance, and in case of doubt articles 31-33 of the Vienna Convention on the Law of Treaties (1980) (Cmdn 7964) may be invoked to aid the process of interpretation. But the starting point of the construction exercise must be the text of the Refugee Convention itself, because it expresses what the parties to it have agreed: see *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 4, and the cases there cited. Central to the definition of refugee are the five specified grounds, the Convention reasons as they are often called, on which alone a claim to recognition as a refugee may be founded under the Convention. Treatment, however persecutory or abhorrent, will not found such a claim unless inflicted (or to be inflicted) for one or other of these five Convention grounds. Thus the question at the heart of each of these appeals is whether the persecution feared by each appellant will be for reasons of her membership of a particular social group.

The meaning of "a particular social group"

11 The four Convention grounds most commonly relied on (race, religion, nationality and political opinion), whatever the difficulty of applying them in a given case,

leave little room for doubt about their meaning. By contrast, the meaning of “a particular social group”, for all the apparent simplicity and intelligibility of that expression, has been the subject of much consideration and analysis.

- 12 The leading domestic authority is the decision of the House in *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629. The appellants were married Pakistani women who had been forced to leave their homes and feared that, if they were returned to Pakistan, they would be at risk of being falsely accused of adultery, which could lead to extreme social and penal consequences against which the State would offer no effective protection. Their claim for asylum was based on the “membership of a particular social group” ground, but different definitions were advanced at different stages of the social group in question: pp 632, 644, 649-650. By differing majorities the House accepted, on the evidence adduced in the case, that the appellants’ claim should succeed, either on the basis of their membership of a wider social group, that of women in Pakistan (pp 645, 652, 655, 658), or of a narrower social group, that of women who had offended against social mores or against whom there were imputations of sexual misconduct: pp 645, 655, 658-659. Lord Millett dissented, not as I understand because he did not consider the appellants to be members of a particular social group, but because he did not consider that the feared persecution would be for reasons of such membership: pp 664-665.
- 13 Certain important points of principle relevant to these appeals are to be derived from the opinions of the House. First, the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being: pp 651, 656. Secondly, to identify a social group one must first identify the society of which it forms part; a particular social group may be recognisable as such in one country but not in another: pp 652, 657. Thirdly, a social group need not be cohesive to be recognised as such: pp 643, 651, 657. Fourthly, applying *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 263, there can only be a particular social group if it exists independently of the persecution to which it is subject: pp 639-640, 656-657, 658.
- 14 In *Shah*, the House cited and relied strongly on *In re Acosta* (1985) 19 I & N 211, a relatively early American decision given by the Board of Immigration Appeals. Construing “membership of a particular social group” *eiusdem generis* with the other grounds of persecution recognised by the Convention, the board

held the expression to refer to a group of persons all of whom share a common characteristic, which may be one the members cannot change or may be one that they should not be required to change because it is fundamental to their individual identities or consciences. The Supreme Court of Canada relied on and elaborated this approach in *Canada (Attorney General) v Ward* [1993] 2 SCR 689, 738-739, and *La Forest J* reverted to it in his dissent in *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, 642-644. The trend of authority in New Zealand has been generally in accord with *Acosta and Ward*: T A Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group' " UNHCR's Global Consultations on International Protection, ed Feller, T rk and Nicholson, (2003), pp 263, 280. The leading Canadian authorities were considered by the High Court of Australia in *Applicant A* 190 CLR 225, where the court was divided as to the outcome but the judgements yield valuable insights. Brennan CJ observed, at p 234:

"By the ordinary meaning of the words used, a 'particular group' is a group identifiable by any characteristic common to the members of the group and a 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the member of the group from society at large. The persons possessing any such characteristic form a particular social group."

Dawson J, at p 241, saw no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions might each be a particular social group. Gummow J, at p 285, did not regard numerous individuals with similar characteristics or aspirations as comprising a particular social group of which they were members: there must be a common unifying element binding the members together before there would be a social group of this kind.

- 15 Increased reliance on membership of a particular social group as a ground for claiming asylum prompted the UNHCR to convene an expert meeting at San Remo in September 2001, which was followed on 7 May 2002 by the issue of Guidelines on International Protection: "Membership of a particular social group" directed to clarifying this ground of claim. Having identified what it called the "protected characteristics" or "immutability" and "social perception" approaches, which it suggested would usually, but not always, converge, the UNHCR proposed:

"B. UNHCR's Definition

"10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled."

“11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches: a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

“12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.

“13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognisable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might none the less constitute a particular social group if in the society they are recognised as a group which sets them apart.”

The UNHCR accepted that a particular social group could not be defined exclusively by the persecution members suffer or fear, but also accepted the view advanced in Applicant A and accepted by some members of the House in Shah that persecutory action towards a group may be a relevant factor in determining the visibility of a group in a particular society. It appears to me that the UNHCR Guidelines, clearly based on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect.

- 16 European Union Council Directive 2004/83/EC of 29 April 2004, (OJ 2004 L304, p 12), effective as of 10 October 2006, is directed to the setting of minimum standards among member States for the qualification and status of third country nationals or Stateless persons as refugees, or as persons who otherwise need international protection, and setting minimum standards for the content of the protection granted. The recitals recognise the need for minimum standards and common criteria in the recognition of refugees, and for a common concept of

“membership of a particular social group as a persecution ground”. The Directive expressly permits member States to apply standards more favourable to the applicant than the minimum laid down. Article 10 provides (with Roman numerals added to the text):

“Reasons for persecution “ I Member States shall take the following elements into account when assessing the reasons for persecution ... “(d) a group shall be considered to form a particular social group where in particular:

“[(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

“[(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

“[(iii)] depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this article ...”

Read literally, this provision is in no way inconsistent with the trend of international authority. When assessing a claim based on membership of a particular social group national authorities should certainly take the matters listed into account. I do not doubt that a group should be considered to form a particular social group where, in particular, the criteria in sub-paragraphs (i) and (ii) are both satisfied. Sub-paragraph (iii) is not wholly clear to me, but appears in part to address a different aspect. If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published Comments on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met. With regard to (iii), the UNHCR comments:

“With respect to the provision that ‘[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of the article,’ UNHCR notes that courts and administrative bodies in a number of jurisdictions have found that women, for example,

can constitute a particular social group within the meaning of article 1A(2). Gender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. This does not mean that all women in the society qualify for refugee status. A claimant must demonstrate a well-founded fear of being persecuted based on her membership in the particular social group. Even though less has been said in relation to the age dimension in the interpretation and application of international refugee law, the range of potential claims where age is a relevant factor is broad, including forcible or under-age recruitment into military service, (forced) child marriage, female genital mutilation, child trafficking, or child pornography or abuse. Some claims that are age-related may also include a gender element and compound the vulnerability of the claimant.”

The meaning of “for reasons of”

- 17 The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple “but for” test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case.
- 18 I do not understand these propositions to be contentious. They are in my opinion well attested by authorities such as *Shah* [1999] 2 AC 629, 653-655; *R (Sivakumar) v Secretary of State for the Home Department* [2003] 1 WLR 840, paras 41-42; *Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856, paras 21-23; *Suarez v Secretary of State for the Home Department* [2002] 1 WLR 2663, para 29; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, paras 32-33, 67-71; *Minister for Immigration and Multicultural Affairs v Sarrazola (No 4)* [2001] FCA 263, para 52; and *Thomas v Gonzales* (2005) 409 F 3d 1177. They are also reflected in the Michigan Guidelines on Nexus to a Convention Ground, published following a colloquium in March 2001. Whatever the difficulty of applying it in a particular case, I do not think that the test of causation is problematical in principle.

The claim of the first appellant

19 The persecution feared by the first appellant was said to be for reasons of her membership of a particular social group, namely her husband's family. In resisting her claim the Secretary of State did not seek to contend that a family cannot be a particular social group for purposes of the Convention. He accepted that it could, consistently with the submission of counsel on his behalf in *Skenderaj v Secretary of State for the Home Department* [2002] 4 All ER 555, para 21, that:

"a family group could be a particular social group, since society recognises the family bond as distinct and attaches importance to it, but only if society also sets it apart in such a way as to stigmatise or discriminate against it for that reason."

The Secretary of State's acceptance reflects a consensus very clearly established by earlier domestic authority such as *Secretary of State for the Home Department v Savchenkov* [1996] Imm AR 28, and also by international authority. In *Minister for Immigration and Multicultural Affairs v Sarrazola* (No 4)[2001] FCA 263, paras 28-34, there was held to be little doubt that persecution by reason of being a member of a particular family could constitute persecution for reasons of membership of a particular social group. In *Thomas v Gonzales* 409 F 3d 1177, 1188 the conclusion was reached:

"that the harm suffered by the Thomases was not the result of random crime, but was perpetrated on account of their family membership, specifically on account of the family relationship with Boss Ronnie."

The consensus is clearly reflected in the academic literature: J Hathaway, *The Law of Refugee Status* (1991), pp 164-166; G S Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996), p 361.

20 A special problem has been thought to arise where a family member attracts the adverse attention of the authorities, whether for non-Convention reasons or reasons unknown, and persecutory treatment is then directed to other family members. Laws J, sitting at first instance, addressed this problem in obiter observations in *R v Immigration Appeal Tribunal, Ex p De Melo* [1997] Imm AR 43, 49-50, when he said:

"It is necessary next to examine the second question: is the alleged or actual persecution 'for the reasons of ... membership of a particular social group'? Mr Kovats [for the Secretary of State] submits as follows. Where an individual is persecuted for a non-Convention reason, concurrent or subsequent threats (or, presumably, acts) against his family likewise cannot be regarded as

persecution for a Convention reason. If it were otherwise, the person initially ill treated-here, the father-would have no claim to asylum under the 1951 Convention, and so it would be anomalous were the members of his family, persecuted or ill-treated simply because of their association with him, to be accorded Convention rights. I do not consider that this argument is correct. Let it be assumed that an individual has been ill-treated or terrorised for a reason having nothing to do with the Convention. He has no Convention rights. But, on the view I have taken, his family may form a particular social group within the meaning of the Convention. If then they are persecuted because of their connection with him, it is as a matter of ordinary language and logic, for reasons of their membership of a family- the group-that they are persecuted. I see nothing anomalous in this. The original evil which gives rise to persecution against an individual is one thing; if it is then transferred so that a family is persecuted, on the face of it that will come within the Convention. The definition of 'refugee' in article 1 of the Convention treats membership of a particular social group as being in pari materia with the other 'Convention reasons' for persecution: race, religion and so forth. Mr Kovats' argument implies, however, that membership of a particular social group is (at least on some sets of facts) to be regarded as merely adjectival to or parasitic upon the other reasons. With deference to him, that in my judgement amounts to a misconstruction of article 1 with the consequence that his submission proceeds on a false premise. Moreover I incline to think that the argument accords to the persecutor's motive a status not warranted by the Convention's words. The motive may be to terrorise the person against whom the persecutor entertains ill will (for a 'non-Convention' reason) by getting at his family; but when it comes to the question whether the family are persecuted by reason of their membership of a particular social group-the family-I do not see that the persecutor's motive has any relevance."

These observations of Laws J were relied on by the appellant in Quijano v Secretary of State for the Home Department [1997] Imm AR 227, where the appellant's claim related to persecutory treatment directed to him because of his relationship with his stepfather who had crossed a Columbian drug baron. His appeal to the Court of Appeal against an adverse decision given before De Melo was unsuccessful. The reason given by Thorpe LJ, at p 232, was this:

"Second I conclude that the persecution arises not because the appellant is a member of the Martinez [Quijano] family but because of his stepfather's no doubt laudable refusal to do business with the cartel. The persecution has that plain origin and the cartel's subsequent decision to take punitive action against an individual related by marriage is fortuitous and incidental as would have been a decision to take punitive action against the stepfather's partners and their employees had the business been of that dimension."

Morritt LJ, at p 233, put it a little differently:

“But the fear of each member of the group is not derived from or a consequence of their relationship with each other or their membership of the group but because of their relationship, actual or as perceived by the drugs cartel, with the stepfather of the appellant. The stepfather was not persecuted for any Convention reason so that their individual relationship with him cannot cause a fear of [for] a Convention reason either. In short the assumed fear of the appellant is not caused by his membership of a particular social group.”

Roch LJ, at p 234, also put the point differently:

“The anomaly that would arise in the present case, were the arguments of the appellant’s counsel to be correct, that the appellant’s stepfather would not be entitled to claim political asylum under the Convention, whereas all other members of the family would be entitled to political asylum, is merely an indicator that this family is not ‘a social group’ liable to persecution because it is ‘a particular social group’. The other members of the family are being persecuted because they are related to the stepfather who has offended the drug cartel, who have decided to retaliate against the stepfather by persecuting him and members of his family. Who will constitute part of the family or social group is entirely the decision of the drug cartel. It may include those living in the stepfather’s house who are not related to him by blood or marriage. These considerations underline, in my opinion, the fact that in the circumstances of this case the Martinez [Quijano] family is not ‘a particular social group.’”

- 21 The reasoning of Laws J in De Melo was in my respectful opinion correct, and the Court of Appeal were wrong to reject it in Quijano. The drug baron’s persecution of the stepfather was plainly not for a Convention reason, and he could not have claimed recognition as a refugee. But there was nothing in the facts as briefly reported to suggest that the real reason for the persecutory treatment of the appellant was anything other than his family relationship with his stepfather. That relationship may in one sense have been fortuitous and incidental, as Thorpe LJ described it, but if it was the reason for the persecution he feared it was, in principle, enough. Morritt LJ, as I read him, asked himself what was the cause of the appellant’s fear and not, as he should, what was the cause of the apprehended persecution. Roch LJ accepted the argument which Laws J rejected, in my view rightly, in De Melo.
- 22 In the present case the Immigration Appeal Tribunal followed Quijano (see para 3), as it was bound to do. The Court of Appeal was also bound by the court’s earlier decision which, as accepted by Laws LJ in his leading judgement, para 11, had overruled his judgement in De Melo. The short answer to the appeal, he

held, at para 20, was the answer given in Quijano. Clarke LJ had obvious difficulty accepting the ratio of Quijano, but did so for reasons which he expressed in this way, at para 27:

“The reference to ‘for reasons of membership’ of such a group, say a family, suggests that the focus should be on the persecutor’s purpose (my emphasis). As Laws LJ put it, the feared persecution must be the persecutor’s end and not a means to another end. That is essentially what was decided in Quijano. It is not therefore sufficient to ask simply why B was being persecuted. The answer to that question could be that it was for two reasons, namely the persecutor’s wish to persecute A and the family relationship between B and A. If, as Quijano shows, the purpose or end of the persecutor is the key factor in the context of the Convention, the answer becomes clear. It is that B does not have a well founded fear of persecution for reasons of membership of his or her family because the persecution feared is not for those reasons but for whatever reasons prompted the authorities to persecute A.”

Tuckey LJ agreed with both judgements. The binding authority of Quijano presented the court with an insoluble problem, by distracting attention from the crucial question: what will be the real reason for the persecution of the claimant of which the claimant has a well-founded fear?

- 23 I am satisfied that the Immigration Appeal Tribunal and the Court of Appeal, through no fault of their own, reversed the adjudicator’s decision on a false basis. But it does not follow that the first appellant’s claim should have succeeded. The Secretary of State points out that when the first appellant made herself scarce after the two visits to her house by Revolutionary Guards, there was no further approach to her, even when she visited her husband in prison, and there was no evidence of pressure on any other family member. These are fair points, and the adjudicator might have accepted them and rejected the first appellant’s claim. But having heard the evidence he did not, and made a clear finding that the persecution she feared would be of her as a member of her husband’s family. It is not indeed easy to see any basis other than their relationship with her husband for the authorities’ severe ill-treatment of the first appellant and their deliberately menacing conduct towards her young son. The Secretary of State suggests that the real reason for the persecution feared was not her membership of her husband’s family but her bilateral marriage relationship with her husband, but this does not account for the implied threat to the child.
- 24 Since it is common ground that a family may be a particular social group for purposes of article 1A(2), the questions here are whether the adjudicator was entitled to conclude that on the facts the family of the first appellant’s husband

was such a group and, if so, whether the real reason for the persecution which she feared was her membership of that group. Whether applying the UNHCR definition (para 15 above) or article 10(d)(i) and (ii), jointly or alternatively, of the European Union Directive (para 16 above), I am of opinion that he was clearly so entitled. Subject to a correct self-direction of law, the second question is one of fact: the adjudicator did not misdirect himself and reached a tenable conclusion. For these reasons, and those given by my noble and learned friend, Lord Rodger of Earlsferry, I would accordingly allow the first appellant's appeal, set aside the orders of the Immigration Appeal Tribunal and the Court of Appeal and restore the order of the adjudicator.

The second appellant's claim

- 25 It is common ground in this appeal that FGM constitutes treatment which would amount to persecution within the meaning of the Convention and that if the second appellant were, as she contends, a member of a particular social group the persecution of her would be for reasons of her membership of that group. Thus the very limited issue between the parties is whether the second appellant was a member of a particular social group, however defined. The parties' agreement that fear of FGM may found a successful claim to recognition as a refugee (if for reasons of membership of a particular social group) obviates the need to analyse a mass of material which would otherwise be relevant. But in truth the parties' agreement on this point is all but inevitable, for a number of reasons.
- 26 First, claims based on fear of FGM have been recognised or upheld in courts all round the world. Such decisions have been made in England and Wales (*Yake v Secretary of State for the Home Department*, (unreported) 19 January 2000; *P and M v Secretary of State for the Home Department* [2005] Imm AR 84), the United States (*In re Kas- inga* (1996) 21 I & N Dec 357, *Abankwah v Immigration and Naturalisation Service* (1999) 185 F 3d 18; *Mohammed v Gonzales* (2005) 400 F 3d 785), Australia (RRT N97/19046 (unreported) 16 October 1997), Austria (GZ 220.268/0-XI/33/00 (unreported) 21 March 2002), and Canada: *In re B(PV)* [1994] CRDD No 12, 10 May 1994; and *Compendium of Decisions, Immigration and Refugee Board*, February 2003, pp 31-35. Secondly, such agreement is consistent with clearly expressed opinions of the UNHCR. Representative of its consistent view is a memorandum of 10 May 1994 on Female Genital Mutilation, which in para 7 says:

"On this basis, we must conclude that FGM, which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including

the rights of the child, and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence. Therefore, a woman can be considered as a refugee if she or her daughters/dependents fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or to allow her daughters to undergo the practice.”

Thirdly, this agreement is consistent with the view taken by the European Parliament, which on 20 September 2001 adopted a resolution (A5-0285/2001) expressing the hope that the European institutions and member States should recognise the right to asylum of women and girls at risk of being subjected to FGM and calling for the United Nations General Assembly to give priority to the topic “access to asylum procedures for women at risk of female genital mutilation”. Fourthly, the agreement is consistent with guidelines issued by national authorities, including those of Canada (“Women Refugee Claimants Fearing Gender-Related Persecution”, 13 November 1996), Australia (“Gender-Related Persecution (Article 1A(2)): An Australian Perspective”, Department of Immigration and Multicultural and Indigenous Affairs, 2001). A similar approach has been officially taken in this country. In guidance entitled “Gender issues in the asylum claim” the Home Office states, in para 7(iv):

“Women who may be subject to FGM have been found by the courts in some circumstances to constitute a particular social group for the purposes of the 1951 Convention. Whether a PSG exists will depend on the conditions in the ‘society’ from which the claimant comes. If there is a well-founded fear, which includes evidence that FGM is knowingly tolerated by the authorities or they are unable to offer effective protection, and there is no possibility of an internal flight option, a claimant who claims that she would on return to her home country suffer FGM may qualify for refugee status.”

This reflects a statement made by Miss Ann Widdecombe MP in the House of Commons on 15 July 1996 (Hansard (HC Debates), col 818):

“... I stress that both personally and as a minister I utterly accept that forcible abortion, sterilisation, genital mutilation and allied practices would almost always constitute torture. In fact, they would probably always constitute torture. There is no doubt in my mind that anyone making a case to us on those grounds would have an extremely good case for asylum.”

Fifthly and more generally, the parties’ agreement is wholly consistent with the humanitarian objectives of the Convention and reflects the international abhorrence of FGM expressed in the instruments compendiously referred to in para 8 above.

- 27 Asylum claims founded on gender-based discrimination have sometimes succeeded on the ground of membership of a particular social group widely defined. Shah[1999] 2 AC 629 and *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (in each case “women in Pakistan”) are examples, and, with reference to FGM, *P and M v Secretary of State for the Home Department* [2005] Imm AR 84, paras 41, 49 (“women in Kenya”, although this was qualified by “particularly Kikuyu women under the age of 65”) and *In re B (PV)* 10 May 1994 (“women and minors”). In other FGM cases the particular social group has been more narrowly defined: “young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had FGM, as practiced [sic] by that tribe, and who oppose the practice” (*In re Kasinga*, 21 I & N Dec 357); “Cameroonian women subject to mutilation” (GZ, 21 March 2002); “Yoruba women in Nigeria” (RRT N97/19046, 16 October 1997) and “a Yopougon woman [of the Ivory Coast] who may be subject to FGM”: Yake. On occasion, as in Shah, alternative definitions of the particular social group have been found acceptable, as in *Mohammed v Gonzales* 400 F 3d 785 where “young girls in the Benadiri clan” and “Somalian females” were both held to be particular social groups.
- 28 When the second appellant’s case was presented in the Court of Appeal, her counsel submitted that the relevant particular social group was “young single women in Sierra Leone who are at risk of circumcision”, which was between 80% and 90% of them [2005] 1 WLR 3773, para 21 but Auld LJ considered, at para 30, the nearest candidate for such grouping to be “young single women who have not been circumcised and who are, therefore, at risk of circumcision”.

Having reviewed the evidence and the authorities in some considerable detail, he expressed his conclusion in para 44 of his judgement:

*“Applying those considerations to the facts of this case, I have reached the view that the pointers are away from, rather than towards, female genital mutilation of young, single and uncircumcised Sierra Leonean women constituting persecution ‘for reasons of’ their membership of a ‘particular social group’. They are as follows. (1) The practice, however repulsive to most societies outside Sierra Leone, is, on the objective evidence before the adjudicator and the tribunal, clearly accepted and/or regarded by the majority of the population of that country, both women and men, as traditional and part of the cultural life of its society as a whole. (2) Far from the persecution that the Pakistan women feared in *R v Immigration Appeal Tribunal, Ex p Shah*[1999] 2 AC 629 by reason of their circumstances, namely ostracism by society and discrimination by the State in its failure to protect their fundamental human rights, the persecution here would result in a full*

acceptance by Sierra Leonean society of those young women who undergo the practice into adulthood, fit for marriage and to take a full part as women in the life of their communities. (3) It follows that, however harshly we may stigmatise the practice as persecution for the purpose of article 3, it is not, in the circumstances in which it is practised in Sierra Leone, discriminatory in such a way as to set those who undergo it apart from society. It is, as McHugh J observed in the Applicant A v Minister of Immigration and Ethnic Affairs 71 ALJR 381, 397 (see para 29 above), important to keep in mind the composite nature of the asylum test, and, as Lord Hope emphasised in Ex p Shah, at p 656 (see para 31 above), the distinction between persecution and discriminatory conduct giving rise to it. (4) Considered on its own, a critical common characteristic of the claimed 'particular social group' is that its members have not been circumcised. But, as soon as they have undergone the practice, they cease to be members of the group. To confine the grouping to young, single girls who, for the time being, have not been circumcised, though logical, would be contrary to the general rule that it is impermissible to define the group solely by reference to the threat of the persecution. (5) As to the possible qualification of the general rule by reference to insufficiency of State protection, this case, as I have said, is readily distinguishable from Ex p Shah. As Lord Steyn, put it in that case, at p 644, when identifying the rationale for the formula 'for reasons of ... membership of a particular social group': 'This reasoning covers Pakistani women because they are discriminated against and as a group they are unprotected by the State. Indeed the State tolerates and sanctions the discrimination.' See also, per Lord Hope, at p 658: 'The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women.' However, as I have said, although female circumcision in Sierra Leone may be condemned as a violation of article 3 and to constitute persecution of young uncircumcised girls on that account, its practice in that country's society is not discriminatory or one that results from society having set them apart, other than by the persecution itself. There is, therefore, no factual basis upon which the court could have resort to insufficiency of State protection against discriminatory conduct to qualify the general rule that, for the purpose of the Refugee Convention, a 'particular social group' cannot be defined solely by reference to the persecution."

- 29 In a reasoned judgement of his own, Chadwick LJ concluded, at para 52, that the particular social group could not be defined as "all women in Sierra Leone", or "all young, single Sierra Leonean women". Were young Sierra Leonean women a particular social group? He concluded not, because (para 56) the defining

characteristic of the group was inseparable from the persecution which the second appellant feared.

- 30 Arden LJ thought it clear, at para 61, that Sierra Leonean women in general could not be a particular social group since the group so defined would include women who no longer feared FGM because they had undergone it and might practise it on others. But she concluded, at paras 61 and 66, that the persecutory treatment feared by the second appellant would be by reason of her membership of a particular social group, namely those prospectively adult women in Sierra Leone who had not yet undergone FGM and so remained intact. She would accordingly have allowed the appeal.
- 31 Departing from the submission made below, but with the support of the UNHCR, Miss Webber for the second appellant submitted that “women in Sierra Leone” was the particular social group of which the second appellant was a member. This is a submission to be appraised in the context of Sierra Leonean society as revealed by the undisputed evidence, and without resort to extraneous generalisation. On that evidence, I think it clear that women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men. They are perceived by society as inferior. That is true of all women, those who accept or willingly embrace their inferior position and those who do not. To define the group in this way is not to define it by reference to the persecution complained of: it is a characteristic which would exist even if FGM were not practised, although FGM is an extreme and very cruel expression of male dominance. It is nothing to the point that FGM in Sierra Leone is carried out by women: such was usually the case in Cameroon (GZ) and sometimes in Nigeria (RRT N97/19046), but this did not defeat the applicant’s asylum claim. Most vicious initiatory rituals are in fact perpetuated by those who were themselves subject to the ritual as initiates and see no reason why others should not share their experience. Nor is it pertinent that a practice is widely practised and accepted, a contention considered and rejected in *Mohammed v Gonzales*. The contrast with male circumcision is obvious: where performed for ritualistic rather than health reasons, male circumcision may be seen as symbolising the dominance of the male. FGM may ensure a young woman’s acceptance in Sierra Leonean society, but she is accepted on the basis of institutionalised inferiority. I cannot, with respect, agree with Auld LJ that FGM “is not, in the circumstances in which it is practised in Sierra Leone, discriminatory in such a way as to set those who undergo it apart from society”. As I have said, FGM is an extreme expression

of the discrimination to which all women in Sierra Leone are subject, as much those who have already undergone the process as those who have not. I find no difficulty in recognising women in Sierra Leone as a particular social group for purposes of article 1A(2). Had this submission been at the forefront of the second appellant's case in the Court of Appeal, and had that court had the benefit of the UNHCR's very articulate argument, it might, I think, have reached the same conclusion. If, however, that wider social group were thought to fall outside the established jurisprudence, a view I do not share, I would accept the alternative and less favoured definition advanced by the second appellant and the UNHCR of the particular social group to which the second appellant belonged: intact women in Sierra Leone. This was the solution favoured by Arden LJ, and in my opinion it meets the Convention tests. There is a common characteristic of intactness. There is a perception of these women by society as a distinct group. And it is not a group defined by persecution: it would be a recognisable group even if FGM were entirely voluntary, not performed by force or as a result of social pressure.

- 32 Since, in this case, there is no issue on causation, I would (in full agreement with my noble and learned friend Baroness Hale of Richmond) allow the second appellant's appeal on her preferred basis, set aside the orders of the Court of Appeal and the Immigration Appeal Tribunal and restore the order of the adjudicator.
- 33 I would invite the parties to both appeals (other than the intervener) to make written submissions on costs within 14 days.

[The concurring judgements of Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Brown of Eaton-Under-Heywood are not included here, but can be accessed at <http://www.unhcr.org/refworld/docid/4550a9502.html>.]

Beoku-Betts (FC) (Appellant) Vs. Secretary of State for the Home Department

[2008] UKHL 39 on appeal from: [2005] EWCA Civ 828

Country: United Kingdom

Judicial Body: House of Lords

Date of Decision: 25 June 2008

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

The issue

5. In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the appellant would interfere disproportionately with his article 8 right to respect for his family life, should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly ie. only insofar as this would in turn have an effect upon him)?
6. That is the central question for your Lordships' determination on this appeal.

The background

7. The appellant is a citizen of Sierra Leone, now aged 29, who on 9 November 1997, just short of his 19th birthday, arrived in the United Kingdom from Senegal following a military coup in Sierra Leone. Initially he was granted 12 months' leave to enter as a student. Having completed his A-levels he began to study law at university, obtaining the necessary extensions of leave until 31 December 2000 when his final leave expired; he had mistakenly thought it continued until the end of his course.
8. The appellant is a member of a prominent and comparatively wealthy Creole family from Freetown which for generations had been involved in political life in Sierra Leone. His father was a friend of President Kabbah whose government was overthrown by the coup and, although in the coup no member of the family

suffered physical harm, he and his elder brother Seth were subject to a terrifying mock execution and understandably the family sought refuge.

9. The appellant's elder sister, Josepha, is a British citizen (born here in 1973) and has lived here continuously since 1993. The rest of the family left Sierra Leone in stages, Seth going to the USA and the appellant being followed to the UK by his mother, father and a younger sister, Candace. His father registered as a British citizen in May 1998 (having originally applied as long ago as 1972) but died of cancer in December that year. Under the immigration policy then in force, the appellant's mother and Candace, as dependants, were both granted indefinite leave to remain in October 1998; the appellant was unable to benefit from the policy.
10. On 1 June 2001 (shortly after discovering that his leave had expired) the appellant claimed asylum and also the right to remain under articles 3 and 8 of ECHR. On 27 February 2002 the Secretary of State refused both claims. The appellant appealed.

The three successive appeal hearings below

11. On 30 January 2003 the adjudicator dismissed the appellant's asylum appeal but allowed his human rights appeal on the article 8 ground. As for the asylum appeal he accepted that "the appellant's situation in Sierra Leone at the time of his departure was life-threatening due to his family's political connections" but found that the situation in Sierra Leone had improved significantly not least because of President Kabbah's return to power, although conditions there remained "comparatively harsh".
12. On the article 8 appeal the evidence included a number of statements from members of the appellant's family. The adjudicator expressed himself satisfied that "the appellant's family is close-knit and interacts on a very regular basis", that "the appellant has a strong relationship with his sisters" and "currently resides with his mother and younger sister", travelling home most weekends during university term time. The appellant also has "a range of cousins and uncles in the United Kingdom". As for the suggestion that the "appellant's mother relied upon him for emotional support", this he found "entirely natural in the circumstances of the family's departure from Sierra Leone and the death of [her husband] in 1998". He noted that Josepha was employed in a local law firm, that Candace (then 13) was clearly doing very well at school, and that her mother worked full-time as a study supervisor at that school. He expressed himself satisfied that the family "would not return to Sierra Leone even if the appellant was returned. Consequently, if

the appellant's article 8 claim were to fail, . . . he would be separated from his family". Having directed himself to "consider whether the interference with the appellant's family rights, which would obviously interfere with the family as a whole, is justified in the interest of controlling immigration", he concluded that the appellant's return to Sierra Leone would indeed be disproportionate so as to breach article 8.

13. On 5 September 2003 the Immigration Appeal Tribunal allowed the Secretary of State's appeal. For present purposes the critical paragraph in the Tribunal's determination is this:

"14. So far as the article 8 claim is concerned, we take the view that the adjudicator has placed too much emphasis on the position of the respondent's mother and siblings. It is not disputed that this is a close family with a not inconsiderable amount of inter-dependence, but it has to be borne in mind that it is the position of the respondent with regard to article 8 that is being considered and not that of his mother and siblings. In our view, the approach of the adjudicator . . . is flawed to the extent that it places considerable importance on the position of other members of the respondent's family."

14. On 4 November 2003 the Immigration Appeal Tribunal gave leave to appeal to the Court of Appeal on one ground only, namely "as to the extent to which the position of the claimant's family members was to be taken into account. There are apparently conflicting decisions by the tribunal in *Kehinde*... and at first instance on judicial review by Jack J in AC [2003] EWHC 389 (Admin) which it is desirable the Court of Appeal should resolve".

15. On 6 June 2005 the Court of Appeal (Brooke, Latham and Lloyd LJ) dismissed the appellant's appeal. Latham LJ gave the single reasoned judgement. Para 12 is central:

"Under section 65 of [the 1999 Act], the right of appeal on human rights grounds requires consideration of the alleged breach of the appellant's human rights. In the present case this required the adjudicator to concentrate on the effects of removal on the appellant. True it is, as Jack J said in R (AC) v Immigration Appeal Tribunal [2003] EWHC 389 (Admin) [2003] INLR 507, the effect on others might have an effect on an appellant, nonetheless it is the consequence to the appellant which is the relevant consequence. In the context of a merits appeal, which this was, the tribunal was entitled to conclude that the adjudicator had allowed his judgement to be affected unduly by the effect of removal on the remainder of the family in particular his mother. Further, the adjudicator does not suggest that the effect on the family, let alone the appellant, amounted to an exceptional circumstance."

16. Although by no means central to this appeal I should at this point briefly note two matters. First, that both the adjudicator and the IAT had directed themselves in accordance with *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 to ask whether the Secretary of State as the decision-maker could reasonably have concluded that the interference with the appellant's article 8 rights were proportionate in the interests of immigration control—an approach subsequently corrected by the Court of Appeal's later decision in *Huang v Secretary of State for the Home Department* [2006] QB 1, holding that the question is one for the appellate authority itself rather than by way of review of the Secretary of State's decision. Secondly, that the Court of Appeal below directed itself in accordance with *Huang* (decided just four months previously) that only in a "truly exceptional case" could the Secretary of State's decision be interfered with on appeal (a direction reflected in the final sentence of the passage cited above from Latham LJ's judgement)—itself held to be erroneous by this House on the appeal in *Huang* ([2007] 2 AC 167) which decided that no additional test of exceptionality has to be met.
17. Whether these errors (each in turn obviously unhelpful to the appellant) may have affected the outcome of these appeals I for my part think it unnecessary to explore. I have already indicated the single issue of law raised for your Lordships' determination and it seems to me that if this is resolved in the appellant's favour then the adjudicator's determination ought simply to be reinstated.

The legislation

18. The 1999 Act

"65(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision . . .

(2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.

(3) Subsections (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts relating to the appellant's entitlement to enter or remain in the United Kingdom, acted in breach of the appellant's human rights.

- (4) *The adjudicator, or the Tribunal, has jurisdiction to consider the question.*
- (5) *If the adjudicator, or the Tribunal, decides that the authority concerned acted in breach of the appellant's human rights, the appeal may be allowed on that ground."*

19. The 2002 Act (which superseded the 1999 Act)

"82(1) Where an immigration decision is made in respect of a person he may appeal to an adjudicator."

"84(1) An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds . . . (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 . . . as being incompatible with the appellant's Convention rights; . . . (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision . . . would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

The rival arguments

20. (a) The appellant's case

The appellant submits that the legislation allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.

21. In making her initial decision on removal the Secretary of State must necessarily have regard to the article 8 rights of each and all of the family members. So too the European Court of Human Rights on a complaint by the family of an article 8 violation by the United Kingdom's removal of a family member would look at the overall impact on family life. So too, therefore, should the immigration appeal authorities consider the matter on appeal. Otherwise, other family members would have no alternative but to bring separate proceedings under section 7 of the Human Rights Act 1998, parallel or sequential to the section 65 appeal.

22. (b) The Secretary of State's case The Secretary of State submits that the wording of the legislation is clear and restrictive. Both section 65 of the 1999 Act and section 84 of the 2002 Act refer repeatedly to *the appellant's* human rights and to no one else's. The appellate authorities must decide whether *his* human rights

would be breached, whether removal would be compatible with *his* Convention rights. (It is not contended that there is any material difference between the two Acts.)

23. Ms Carss-Frisk QC acknowledges that, on this approach, the appellate authorities are indeed required to answer a different and narrower question than that initially to be decided by the Secretary of State (from which the section 65 appeal lies) and that which would be addressed by Strasbourg on any subsequent complaint by the family under the Convention. She accepts, therefore, that on occasion, if the section 65 appeal fails, other family members (whether or not in combination with the unsuccessful section 65 appellant) will have to bring proceedings under the 1998 Act so that effect can be given to the rights of the family as a whole. She submits, however, that Parliament has left no alternative and suggests that in practice, in the great majority of cases, the difference between the two approaches will be unlikely to produce any different result.

The domestic case law

24. The issue before the House was first addressed in the Immigration Appeal Tribunal's starred decision in *Kehinde v Secretary of State for the Home Department* [2001] UKIAT 00010 which laid stress on the narrow wording of section 65 and continued:

"In an appeal under section 65, therefore, there is no obligation to take into account claims made about the human rights of individuals other than the appellant or individuals who have not themselves been the subject of a decision which is under appeal. Such matters (save in so far as they relate to the human rights of the appellant himself) are irrelevant to the matter under consideration.

... [A]nybody else who claims that, in making or proposing to carry out the decision a public authority will breach his or her human rights, may bring proceedings under section 7(1)(a) of the 1998 Act."

25. As noted in para 14 above it was the apparent difference between that approach and Jack J's approach in *R (AC) v Immigration Appeal Tribunal* [2003] EWHC 389 (Admin) (hereinafter "AC") which prompted the Immigration Appeal Tribunal to grant leave to appeal to the Court of Appeal in the present case.
26. AC both on its facts and by reference to the course of proceedings there seems to me a most instructive case. AC was a Turkish woman who came here clandestinely in 1995 and claimed asylum. The next month she married her Turkish fiancée and the following year had a daughter, S. The marriage broke down and two years later AC committed a violent assault for which she was sentenced to ten years imprisonment (reduced on appeal to eight) and recommended for deportation.

If deported it was recognised that direct face to face contact between AC and S (then aged about seven) would in all likelihood be lost for some ten years.

27. The adjudicator allowed AC's appeal against the Secretary of State's deportation order. In 2002 the Immigration Appeal Tribunal on the Secretary of State's appeal gave a preliminary ruling that the section 65 appeal "was to be determined by looking at the rights of AC to her family life under article 8 and not by looking at S's human right to a family life. S's human rights did not require to be taken into account. This did not exclude evidence as to the mother/daughter relationship but that evidence would be examined in the light of AC's rights."
28. That ruling was the subject of a judicial review challenge before Jack J who gave judgement in March 2003. Regrettably his decision was not altogether clear: in parts it appeared to support the narrower approach, in parts the wider approach. (The Immigration Appeal Tribunal in the present case plainly thought it in conflict with *Kehinde* whereas the Court of Appeal appears to have regarded it as supporting the narrower approach—and never even mentioned *Kehinde*).
29. In June 2004, following Jack J's judgement, AC's case returned to the Immigration Appeal Tribunal (before Ouseley J as President and two Vice-Presidents) who allowed the Secretary of State's appeal: [2004] Imm AR 573. The judgement includes the following passages:

"There was some debate before us as to what [Jack J's] judgement decided and, in any event, as to what the true position in law is" (para 16).

"We regard it as clear that the effect of section 65 is to require the adjudicator and tribunal to decide whether or not the decision breaches the appellant's human rights and not whether it breaches the rights of others who are not appellants. . . . that other person has the ability, if a victim, to bring proceedings in the Administrative Court under section 7 of the 1988 Act. It may be cumbersome, but it avoids an appellant making claims relating to someone else who may be unaware of what is being said, or who may disagree with it. A child of divorced or separated parents may be in a particularly difficult position in this regard" (para 17).

"We also accept . . . that although the right to family life and the effective interference [in] it is examined, under section 65, from the viewpoint of the appellant, the impact of separation on another may cause distress or anxiety to the appellant and that indirect impact on the appellant should be taken into account. It is right to recognise that although some family relationships may involve complete reciprocity, others, and parent-child relationships are the obvious example, may be very different depending upon the person from whose viewpoint the matter is examined" (para 18).

“We make it clear that we have not considered the position from the viewpoint of S. We recognise that the decision in this case affects her rights and interests, but for the reasons which we have given we do not bring those into the balance in this decision” (para 76).

That judgement had in fact been foreshadowed just two months previously by the Immigration Appeal Tribunal’s decision (again presided over by Ouseley J) in *SS (ECO - article 8) Malaysia v Secretary of State for the Home Department* [2004] Imm AR 1-153. In that case too, having expressed doubts as to the effect of Jack J’s judgement in *AC* and said that the tribunal was bound by the starred decision in *Kehinde*, Ouseley J said that section 65 required the narrow approach to be adopted even though that might result in other family members having to challenge removal decisions under section 7 of the 1998 Act.

30. The next decision was that of the Court of Appeal in the present case. As has been seen, only Jack J’s judgement in *AC* was referred to and that as if it constrained the narrower approach.
31. It is perhaps worth noting that in September 2005 (after the Court of Appeal’s decision in the present case) a consent order was made in the Court of Appeal in *AC*’s case allowing her further appeal and recording:

“The parties are in agreement that the appellant’s article 8 appeal requires re-examination by a freshly constituted tribunal. There was only one appellant before the IAT and there is only one family life. A proper assessment of the proportionality of the interference with the family life requires an assessment of the impact on the child of loss of contact with her parent. Although a ‘third party’, the child’s right to respect for family life is thereby a relevant factor in the assessment of proportionality.”

Your Lordships were not told the final outcome of *AC*’s case.

32. The present issue has arisen in the Court of Appeal in a number of cases since the decision in the present case. *R (Ahmadi) v Secretary of State for the Home Department* [2005] EWCA Civ 1721 concerned two brothers, one seeking to remain here to protect the other (a refugee settled here) from the consequences of his florid schizophrenia. The appeal succeeded without the court finding it necessary to resolve the issue. It was noted that the brother settled here had brought contingent separate proceedings in case they proved necessary. (The only other instances drawn to our attention of separate proceedings being brought by other family members were two Scottish cases involving petitions by other family members for judicial review following the failure of appeals against deportation orders.)

33. *Miao v Secretary of State for the Home Department* [2006] INLR 473 concerned a husband and wife seeking to remain here to care for the husband's father (settled as a refugee) who suffered chronic depression and presented a high suicide risk. The appeal succeeded. Although in argument the Crown relied on the Court of Appeal's decision in the present case, the issue was not mentioned in the judgement.
34. *NG (Pakistan) v Secretary of State for the Home Department* [2007] EWCA Civ 1543 concerned a Pakistani mother, with two young children, who was to be deported after separating from her husband, a British citizen of Pakistani origin. Contact between father and children would thereby be broken. Although it may well not have been decisive the Court of Appeal stated at para 9:

"There was no prospect of the father actually caring for the children. The children would travel with their mother if she were removed. It was the mother's article 8 rights that were under scrutiny, not the father's or even the children's (see the decision of the IAT in Kehinde)."

35. *AB (Jamaica) v Secretary of State for the Home Department* [2007] EWCA Civ 1302 concerned a Jamaican woman who overstayed here, was thereafter joined by her two daughters, then met and married a British citizen who had lived here all his life. Allowing the appeal against mother's deportation the Court of Appeal said at para 20:

"In substance, albeit not in form, [the husband] was a party to the proceedings. It was as much his marriage as the appellant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical. From Strasbourg's point of view, his Convention rights were as fully engaged as hers. He was entitled to something better than the cavalier treatment he received . . . It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact." (Sedley LJ)

Again no mention was made of the present issue.

36. Most recently the issue was raised in *VN (Uganda) v Entry Clearance Officer* [2008] EWCA Civ 232 when again it was found unnecessary to resolve it. The Court of Appeal dismissed the appeal on the basis that even if the immigration judge had taken full account of the appellant's brother's separate article 8 rights it could not have affected the outcome.

The Strasbourg case law

37. Plainly the present issue could not arise on a Strasbourg application: as Sedley LJ pointed out in *AB (Jamaica)*, from Strasbourg's point of view the husband's Convention rights were as fully engaged as the wife's. Time and again the Strasbourg case law emphasises the crucial importance of family life.

38. *Sezen v Netherlands* (2006) 43 EHRR 621 is a case in point. Noting that the case concerned "a functioning family unit where the parents and children are living together", para 49 of the judgement continued:

"The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by article 8 of the Convention and that to split up a family is an interference of a very serious order. Having regard to its finding . . . that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same [as when a 10 year exclusion order remained in force] as long as the first applicant continues to be denied the right to reside in the Netherlands."

39. True, unlike *Sezen*, the present case is not concerned with young children. But the dependency between the appellant and his mother here clearly engages article 8. As the Court stated in *Mokrani v France* (2003) 40 EHRR 123, para 33:

"[R]elationships between adults do not necessarily benefit from protection under article 8 of the Convention unless the existence of additional elements of dependence, other than normal emotional ties, can be proven."

On the adjudicator's findings of fact, such additional elements of dependence can properly be said to exist in the present case.

40. All of this, moreover, is entirely consistent with the approach taken by the House in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 186:

"[T]he main importance of the [Strasbourg] case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

Conclusions

41. Whilst it is no doubt true that only infrequently will the present issue affect the outcome of an appeal, clearly on occasion it will and in any event that could provide no reason for maintaining the present narrow approach if it is wrong—indeed, quite the contrary.
42. Ouseley J in *AC's case* (para 29 above) envisaged as a disadvantage of the wider construction that the appellant might make claims relating to other family members which they might not agree with. To my mind the risk of this is small: generally the appellant would be advised to adduce signed statements from other affected family members if not indeed to call them. The greater risk surely arises upon the narrower construction: if the impact of removal on other family members is relevant only in so far as it causes the appellant distress and anxiety, that puts a premium on the appellant exaggerating his feelings.
43. The disadvantages of the narrow approach are manifest. What could be less convenient than to have the appellant's article 8 rights taken into account in one proceeding (the section 65 appeal), other family members' rights in another (a separate claim under section 7 of the Human Rights Act)? Is it not somewhat unlikely that the very legislation which introduced "One-stop" appeals—the shoulder note to section 77 of the 1999 Act—should have intended the narrow approach to section 65? Surely Parliament was attempting to streamline and simplify proceedings. And would it not be strange too that the Secretary of State (and the Strasbourg Court) should have to approach the appellant's article 8 claim to remain on one basis, the appellate authorities on another? Unless driven by the clearest statutory language to that conclusion, I would not adopt it. And here the language seems to be far from decisive. Once it is recognised that, as recorded in the eventual consent order in *AC's case* (para 31 above), "there is only one family life", and that, assuming the appellant's proposed removal would be disproportionate looking at the family unit as a whole, then each affected family member is to be regarded as a victim, section 65 seems comfortably to accommodate the wider construction.
44. I would accordingly adopt the wider construction to section 65 contended for by the appellant, and, in the result allow the appeal, set aside the decisions of the Court of Appeal and the Immigration Appeal Tribunal, and reinstate the adjudicator's determination in the appellant's favour. Written submissions on costs are invited within 14 days.

Armenuhi Hayrapetyan Vs. Michael B. Mukasey

534 F.3d 1330 (2008)

Country: United States of America

Judicial Body: United States Court of Appeals for the Tenth Circuit

Date of Decision: 28 July 2008

Opinion by: Seymour

Armenuhi Hayrapetyan petitions for review of a Board of Immigration Appeals (BIA) decision denying her application for asylum and restriction on removal under the Immigration and Nationality Act (INA) and the United Nations Convention Against Torture (CAT). A native and citizen of Armenia, Ms. Hayrapetyan entered the United States illegally in September 2003. In February 2004, she filed her application for asylum and restriction on removal, claiming she would be persecuted if forced to return to Armenia because of her past efforts as a television reporter to expose corruption in the ruling regime of President Robert Kocharian. The immigration judge (IJ) denied the application, concluding the mistreatment she suffered did not rise to the level of political persecution. The BIA summarily affirmed the IJ's decision. We reverse and remand.

[*1333]

I. Ms. Hayrapetyan began working as a reporter for a private television station in Hrazdan, Armenia in 1999. She initially worked on a children's program, but later moved to reporting on political issues. At a hearing before the IJ, Ms. Hayrapetyan testified that because her political reports threatened to expose government corruption and the oppression of the Armenian people, the television station where she worked was warned not to air her reports, and she and her husband were repeatedly harassed, threatened, detained, and abused by the police and other government officials acting on behalf of the regime of President Kocharian.

The first such incident occurred in November 2001, when she was assigned to interview newly-inducted soldiers at the army base in Armavir, Armenia. She interviewed the soldiers in private, and they told her about torture and other mistreatment they were suffering as new recruits. She had permission from the military to conduct the interviews, which her crew filmed, but when she returned to work she was told the Ministry of Defense had called the director of the television station and told him not to air the interviews. Her boss told her that if he aired the program he would lose his license and she would lose her job.

The next incident occurred on October 25, 2002, as Ms. Hayrapetyan and her film crew were leaving a demonstration organized in remembrance of eight parliament members who were gunned down in 1999. Ms. Hayrapetyan testified that she and her crew were stopped by the police after she finished filming the demonstration. When she showed her identification, the police became very angry, slapped her, and confiscated her documents and camera equipment. She claims the police told her, “[y]ou prepared this material to bring us to justice.” Admin R. at 107. It is unclear what happened after this run-in with the police, but as far as we can tell from Ms. Hayrapetyan’s testimony, she went to the police station on November 4, 2002, to retrieve her confiscated documents. While there, Arum Manukyan, whom Ms. Hayrapetyan described as “the national defense department’s lead interrogator,” *id.*, tried to force her to sign a statement saying that she had accepted a bribe from opposition leaders. When she refused to sign, she was jailed for two days. When her husband tried to visit her, he was beaten by the police and refused visitation. When she was released, the police warned her to think carefully about her family before preparing any more reports. She took the threats seriously because other outspoken journalists in Armenia at the time were being attacked and murdered. *Id.* at 110. ** Ms. Hayrapetyan testified that she filed a complaint about this incident with the prosecutor’s office, but that nothing came of it.

The next incident occurred on March 5, 2003, the day of Armenia’s widely-criticized presidential run-off election. *** Ms. Hayrapetyan testified that as she was preparing a report on ballot-box stuffing, the Yerkrpahs (Kocharian loyalists who were allegedly doing the stuffing) approached her assistants and told them to stop filming. When she tried to intervene, she was [*1334] knocked to the ground and kicked by the Yerkrpahs. She sought the protection of the police, but they arrested her and took her to the police station. There, the chief of police told her “you already know who Kocharian is, we are not asking for your justice. He is the president.” *Id.* at 113. He confiscated her tape, and slapped her. When she told him she would complain to international observers, he held her in a cell until the next morning. When she returned home, she learned that her husband, who had also been observing the election, had been hospitalised after being beaten by the Yerkrpahs in retaliation for his wife’s “long tongue.” *Id.* He was hospitalised for fifteen days.

On March 27, however, Ms. Hayrapetyan was walking home when a car drove into her on the sidewalk, seemingly on purpose. She was injured as she attempted to move out of the way, hospitalised, and released the next morning. When

she returned home, she discovered that someone had apparently attempted to kidnap her daughter from kindergarten. Individuals had approached her daughter and called out to her, but she was able to get away. Because Ms. Hayrapetyan had received telephone threats against her family prior to the kidnapping attempt, the incident distressed her and she did not allow her daughter to return to school. She also cancelled her planned meeting with human rights officials.

On April 30, 2003, Ms. Hayrapetyan was fired from her job at the television station. She was told by the director of the station that he was firing her because the Ministry of Defense threatened to revoke the station's license due to the nature of her reporting. Shortly thereafter, she and her family left Hrazdan and moved to another city in Armenia to stay with her husband's family. Even there, however, she continued to receive telephone threats. After a short while, she decided it was not safe to stay in Armenia. Thus, in May 2003, she and her family went to Russia. While there, Ms. Hayrapetyan testified, they suffered harsh discrimination on account of being Armenian. On September 2, 2003, Ms. Hayrapetyan traveled to Mexico on a tourist visa, and from there she surreptitiously crossed the border into the United States. Her husband and daughter remained in Russia.

- II. The IJ generally found Ms. Hayrapetyan to be a credible witness. He nevertheless concluded that she failed to establish she was a refugee within the meaning of the INA. He dismissed her claims of past persecution and characterised what happened to her as mistreatment by disgruntled individuals rather than retaliatory acts of the Kocharian regime:

The respondent described the incidents which occurred . . . in the past. She was accosted on two occasions while doing her journalistic work. She was detained for what the Court believes are brief periods of time by the authorities. She was slapped. She had a nose bleed at one time. *However, I don't find that these incidents are serious enough to rise to the level of persecution. They seem to be hostile actions by people feeling they are being adversely affected by the news media.* I don't believe they rise to the level of persecution and I don't think that the respondent has shown that she suffered persecution in the past.

Id. at 81 (emphasis added). The IJ also determined that Ms. Hayrapetyan failed to show a well-founded fear of future persecution, [*1335] reasoning that it was unlikely she would continue her career in journalism and that there was no evidence of a pattern or practice of persecution against ex-journalists in Armenia. Finally, he denied her requests for restriction on removal under the INA and CAT, concluding that she failed to show it was more likely than not that she would be persecuted or tortured upon her return to Armenia.

Because the BIA summarily affirmed the IJ's decision, we treat that decision as if it were the BIA's. *Tsevegmid v. Ashcroft*, 336 F.3d 1231, 1235 (10th Cir. 2003), *superceded on other ground by statute*, 8 U.S.C. § 1252(a)(2)(D). We review the BIA's findings of fact under the substantial evidence standard, and its legal determinations *de novo*. *Niang v. Gonzales*, 422 F.3d 1187, 1196 (10th Cir. 2005). "In this circuit, the ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." *Vicente-Elias v. Mukasey*, Case Nos. 07-9542, 07-9545, 532 F.3d 1086, 2008 U.S. App. LEXIS 14798, 2008 WL 2699399, at *4 (10th Cir. July 11, 2008), *citing Nazaraghaie v. INS*, 102 F.3d 460, 463 n.2 (10th Cir. 1996). The BIA's determination must be upheld if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992) (quoting 8 U.S.C. § 1105a(a)(4)). Thus, we may reverse the BIA's decision "only if the evidence presented by [the alien] was such that a reasonable fact-finder would have to conclude that the requisite fear of persecution existed." *Id.* We are also "cautious not to assume the role of the BIA," which is charged with making decisions on asylum applications in the first instance. *Niang*, 422 F.3d at 1197. Consequently, when the BIA fails to address an argument raised by an applicant, the proper course is to "remand if the ground appears to have any substance." *Id.*

- III. Illegal aliens seeking to avoid deportation out of fear of persecution in their homeland have three avenues of recourse: (1) seeking asylum, (2) applying for restriction on removal under the INA, and/or (3) applying for restriction on removal under the CAT. Each of the three avenues has its own standards that must be met before a court can grant such relief.

First, in order to be eligible for asylum, an alien must demonstrate by a preponderance of the evidence that she is a refugee, meaning that she is outside the country of her nationality and "is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A); *see also Elzour v. Ashcroft*, 378 F.3d 1143, 1148-49 (10th Cir. 2004). She can establish refugee status in three ways: (1) by showing a well-founded fear of future persecution; (2) by showing past persecution sufficient to give rise to a presumption that she has a well-founded fear of future persecution; or (3) by showing past persecution so severe that it supports an unwillingness to return to the country where the persecution occurred. *Chaib v. Ashcroft*, 397

F.3d 1273, 1277 (10th Cir. 2005). To prove a well-founded fear of persecution, “it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (quotation marks and citation omitted). “In cases in which an applicant has demonstrated past persecution,” 8 C.F.R. § 1208.13(b)(1)(ii), [*1336] she “shall also be presumed to have a well-founded fear of persecution on the basis of the original claim,” §1208.13(b)(1), unless the government can prove by a preponderance of the evidence, § 1208.13(b)(1)(ii), that either “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant’s country of nationality,” § 1208.13(b)(1)(i)(A), or that “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality,” § 1208.13(b)(1)(i)(B).

Second, an alien may apply for restriction on removal in order to avoid being returned to the country of persecution. Restriction on removal under the INA prohibits the removal of an alien to a country “if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A). Under the statute, the alien must establish “a clear probability of persecution,” *Elzour*, 378 F.3d at 1149. Like an asylum claim, once an alien has shown past persecution, there is a “presumptive entitlement to restriction on removal on the same basis.” *Niang*, 422 F.3d at 1195.

Third, restriction on removal is also available under the CAT if the alien can prove “it is more likely than not that he or she would be tortured” if removed to a particular country. *Id.* at 1196 (quotation and citation omitted). An alien petitioning under the CAT need not show that the torture would be on account of a statutorily protected ground, only that “the persecution would be so severe that it would rise to the level of torture.” *Id.*

Ms. Hayrapetyan’s asylum application was based on past persecution and a well-founded fear of future persecution. She claimed she was persecuted by the police and other Kocharian henchmen on account of her political reporting. Additionally, she testified that she does not believe she would be safe anywhere in Armenia if she is forced to return.

The IJ rejected Ms. Hayrapetyan’s claim of past persecution because he found that the mistreatment she suffered amounted to no more than “hostile actions by people . . . adversely affected by the news media,” Admin. R. at 81, apparently

concluding that this conduct did not amount to persecution on account of political opinion. But this analysis ignores the fact that it was the Armenian government, or groups within its control, that engaged in the hostile actions. It also fails to recognise that those actions were taken in retaliation for Ms. Hayrapetyan's threatened exposure of government corruption. This alone can support a claim of political persecution. See *Zhang v. Gonzales*, 426 F.3d 540, 542 (2d Cir. 2005) ("retaliation for opposition to government corruption may . . . constitute persecution on account of political opinion."); *Hasan v. Ashcroft*, 380 F.3d 1114, 1120- 21 (9th Cir. 2004) (exposure of political leader's corruption is "inherently political"); *Grava v. INS*, 205 F.3d 1177, 1181 (9th Cir. 2000) (whistleblowing against abuse of public trust is necessarily political, even where whistleblower does not espouse political theory).

The Ninth Circuit's discussion in *Hasan* is particularly instructive. The petitioner there, a Bangladeshi journalist, claimed she was retaliated against for writing an article criticising an important government leader. The article accused the leader of, among other things, "terrorism, repression, and extortion, of misappropriation of public money . . . and of making his political office an office of corruption." *Hasan*, 380 F.3d at 1120 (quotations omitted). Overruling the BIA, the Ninth Circuit held [*1337] that the article's content was "indisputably political" in nature, *id.*, and that the retaliation against its author was necessarily because of her political opinion. *Id.* at 1121.

When the alleged corruption is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political . . .

"[T]he salient question" in determining whether an act of whistleblowing is political is whether it was "directed toward a governing institution, or only against individuals whose corruption was aberrational."

Id. at 1120 (quoting *Grava*, 205 F.3d at 1181).

"[R]etaliation completely untethered to a governmental system does not afford a basis for asylum." *Grava*, 205 F.3d at 1181, n.3. We agree with our sister circuits, however, that official retaliation against one who threatens to expose governmental corruption may, in certain circumstances, amount to political persecution. Thus, if the retaliation against Ms. Hayrapetyan was carried out by mere civilians motivated by personal vengeance, there would be no basis for asylum. That was not the case here. Ms. Hayrapetyan described retaliation by

the police for her attempts to document institutionised government corruption, particularly the rampant ballot-box stuffing that occurred during Armenia's 2003 presidential election. Moreover, it is clear that Ms. Hayrapetyan's reporting focused not on "individuals whose corruption was aberrational," *Hasan*, 380 F.3d at 1120 (quotation omitted), but on what she has described as a "criminal government" run by "corrupted authorities." Admin. R. at 381. Based on the record before us, we conclude that the IJ applied the wrong legal standard in assessing whether Ms. Hayrapetyan was politically persecuted.

The IJ also found that the incidents raised by Ms. Hayrapetyan were not "serious enough to rise to the level of persecution." Admin. R. at 81. Upon reviewing the record, however, we conclude that the IJ understated what occurred to Ms. Hayrapetyan and to her family in Armenia.

In *Wiransane v. Ashcroft*, 366 F.3d 889, 893 (10th Cir. 2004), we attempted to clarify the meaning of persecution:

Although persecution is not defined in the INA, we have held that a finding of persecution requires the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive and must entail more than just restrictions or threats to life and liberty. Such persecution may be inflicted by the government itself, or by a non-governmental group that the government is unwilling or unable to control.

Id. (internal quotations and citations omitted). Here, there is evidence that Ms. Hayrapetyan and her family suffered from such persecution. Ms. Hayrapetyan was not briefly detained, as described by the IJ. *Id.* She was jailed for two days in November 2002 and imprisoned overnight in March 2003. Moreover, contrary to the statement of the IJ, Ms. Hayrapetyan was not merely slapped, she was knocked to the ground and kicked by the Yerkrpahs on one occasion, and nearly run over by a vehicle on another. Likewise, her husband was beaten in November 2002 when he tried to visit her in jail, and again in March 2003, when he was beaten so severely that he had to be hospitalised for fifteen days. Around the same time, Ms. Hayrapetyan's daughter was almost abducted. Ms. Hayrapetyan also received telephone threats at home throughout this time period, as well [*1338] as after she relocated. Finally, she was fired from her job after the Minister of Defense threatened the station manager. Viewing all of the incidents in sum, we are persuaded there was sufficient evidence from which a reasonable factfinder could conclude that the Armenian government's treatment of Ms. Hayrapetyan amounted to "more than just restrictions or threats to life and liberty" and thus constituted political persecution. *Id.*

These incidents distinguish the facts of this case from those in *Kapcia v. INS*, 944 F.2d 702 (10th Cir. 1991), where this court upheld a determination that the petitioner did not establish he had suffered from past persecution. In *Kapcia*, unlike here, the petitioner did not receive any threats at home (although his home was searched), nor were any of his family members beaten or almost abducted. *Id.* at 704-05. More importantly, the petitioner was persecuted for being a member of the Polish Solidarity movement, a group that had become part of the coalition government by the time of the asylum hearing. *Id.* at 704, 707. Unlike the drastic changes in Poland's political climate, there is no evidence of political change in Armenia. Thus, we conclude *Kapcia* is sufficiently distinguishable from this case and does not preclude our conclusion that there is sufficient evidence here to find that Ms. Hayrapetyan was indeed persecuted in Armenia.

Because the IJ applied the wrong legal standard in determining Ms. Hayrapetyan failed to prove past political persecution, and because this record would support a determination to the contrary under the correct standard, we reverse the IJ's determination and remand for the IJ to reconsider, in light of this opinion, whether Ms. Hayrapetyan suffered from past political persecution. We also remand on Ms. Hayrapetyan's claim for restriction on removal. We are not convinced, however, that Ms. Hayrapetyan has provided sufficient evidence from which a factfinder could conclude it is more likely than not that she would be tortured if she returned to Armenia. Accordingly, we affirm the IJ's denial of her claim under the Convention Against Torture. ****

**** If the IJ should find under the appropriate standard that Ms. Hayrapetyan has established past political persecution, she would be entitled to a rebuttable presumption under both the INA and the statute governing the restriction on removal that she has a well-founded fear of future persecution. 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b)(1).

We AFFIRM the denial of Ms. Hayrapetyan's CAT claim, but we REVERSE her claims for asylum and restriction on removal and REMAND for reconsideration consistent with this opinion.

Shayan Baram SAADI against the United Kingdom

Country: United Kingdom

Judicial Body: European Court of Human Rights

Date of Decision: 29 January 2008

The Facts

The applicant, Shayan Baram Saadi, is an Iraqi national of Kurdish ethnic background, who was born in 1976 and lives in London. He is represented before the Court by Messrs Wilson & Co., solicitors practising in London. The respondent Government are represented by their agent, Mr J. Grainger, of the Foreign and Commonwealth Office, London.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant fled Iraq and arrived at London Heathrow Airport on 30 December 2000. On arrival at the immigration desk he spoke to an immigration officer and claimed asylum. He was granted “temporary admission” by the immigration officer and was asked to return to the airport at 8.00 am the following morning. Overnight the applicant was permitted to stay at a hotel of his choice. On the morning of 31 December 2000 he reported as required and was again granted temporary admission until the following day, 1 January 2001 at 10.00am. When the applicant again reported as required he was (for the third time) granted temporary admission until the following day, 2 January 2001 at 10.00am. Again the applicant reported as required. On this occasion the applicant was detained and transferred to Oakington Reception Centre (“Oakington”).

On 4 January 2001 the applicant was given the opportunity to consult with legal representatives. The representative telephoned the Chief Immigration Officer on 5 January, and was told that the reason for the detention was that the applicant was an Iraqi who met the criteria to be detained at Oakington. On the same day, the applicant was interviewed by an official of the Secretary of State for the Home Department [“SSHD”] in relation to his claim. When his asylum claim was refused on 8 January 2001 he was formally refused leave to enter the UK. The applicant submitted a notice of appeal against the asylum refusal and was released on 9 January.

In the subsequent asylum proceedings, the applicant’s appeal was allowed by an adjudicator on 9 July 2001 on the ground that the Home Office had failed to specify how the applicant could be returned to the autonomous region of Iraq. The SSHD’s

appeal to the Immigration Appeal Tribunal was allowed on 22 October 2001, and the case was remitted to an adjudicator. On 14 January 2003 the adjudicator found that the applicant was a refugee within the meaning of the 1951 Refugee Convention, and also that there was a real risk that his return to Iraq would expose him to treatment contrary to Articles 3 and 8 of the Convention. The applicant was subsequently granted asylum.

The applicant, together with three other Kurdish Iraqi detainees who had been held at Oakington, applied for permission for judicial review of their detention, claiming that it was unlawful under domestic law and under Article 5 of the Convention.

At first instance, Collins J. did not consider the detention to be unlawful under domestic law, essentially because he was not prepared to imply into the legislative provisions a requirement that the exercise of the power to detain had to be “necessary” for the purpose of carrying out an examination of an asylum claim. He did, however, find that the detention was not compatible with Article 5 § 1(f) of the Convention on the basis that once an applicant had made a proper application for asylum and there was no risk that he would abscond or otherwise misbehave, it could not be said that he needed to be detained “to prevent his effecting an unauthorised entry”. He also considered detention disproportionate because it could not be shown that it was reasonably necessary to the stated purpose for the detention which was the speedy examination of the asylum claim.

In connection with the reasons given for the detention, Collins J. noted that it apparently took the Home Office three months to realise that the wording of the form handed to detainees was not appropriate, and on 7 June 2000 and again on 21 December 2000 the form was under revision. As from 12 April 2001 (2 February 2001, according to the Government), a form of words was available which stated

“Reason for Detention

I have decided that you should be detained because I am satisfied that your application may be decided quickly using the fast track procedures established at Oakington Reception Centre. In reaching this decision I have taken into account that, on initial consideration, it appears that your application may be one which can be decided quickly”.

That form of words was not available at the time the applicant was detained, and Collins J. regarded it as a “disgrace” that the form lagged behind the policy. He continued:

“The form [in use at the time] clearly indicated that detention was only used where there was no reasonable alternative. All the reasons and factors reflect some possible misconduct by the detainee or the need for him to be cared for

by detention ...it was wholly inappropriate for Oakington detention and it is, for example, difficult to follow what reason could conceivably have been close to fitting [the applicant's] case. Unfortunately, the copy of the [form] which should have been retained on the file has disappeared and so I do not know, nor does [the applicant] why it was said that he should be detained."

The shortcomings as to the reasons for detention did not affect the lawfulness of the detention.

The Court of Appeal upheld the SSHD's appeal on 19 October 2001, and the House of Lords dismissed the applicant's appeal on 31 October 2002. Both the Court of Appeal and the House of Lords held that the detention was lawful under domestic law. In connection with Article 5 § 1(f), and by reference to the case of *Chahal (Chahal v. the United Kingdom)*, judgement of 15 November 1996, *Reports of Judgements and Decisions* 1996-V), they each held that the detention was for the purpose of deciding whether to authorise entry and that the detention did not have to be "necessary" to be compatible with the provision. The detention was therefore "to prevent ... unauthorised entry," and in addition was not disproportionate, Lord Slynn holding:

"The need for highly structured and tightly managed arrangements, which would be disrupted by late or non-attendance of the applicant for interview, is apparent. On the other side applicants not living at Oakington, but living where they chose, would inevitably suffer considerable inconvenience if they had to be available at short notice and continuously in order to answer questions.... Getting a speedy decision is in the interest not only of the applicants but of those increasingly in the queue."

B. Relevant domestic law and practice

The Immigration Act 1971 provides for the administrative detention of those subject to immigration control "pending examination and pending a decision whether to give or refuse ... leave to enter" (Schedule 2, paragraph 16). Temporary admission is used as an alternative to detention. It is a form of licensed consent to enter the United Kingdom which may be subjected to conditions, including reporting requirements and restrictions on the person's residence, employment or occupation (Schedule 2, paragraph 21).

In general (that is, in cases other than those involving Oakington), the SSHD's guidance requires an individual assessment of the need to detain to prevent absconding.

On 16th March 2000 Barbara Roche MP, Minister of State at the Home Office, announced a change in detention policy specifically and exclusively related to the new Oakington Reception Centre. Oakington asylum applicants could be detained where it appeared that their application was capable of being decided 'quickly', including those

which may be certified as being 'manifestly unfounded'. To assist immigration officers, lists of nationalities – and categories within nationalities - were drawn up in respect of which consideration at Oakington could be justified because they were expected to be simple to deal with. It was said that Oakington would strengthen the ability of the Home Office to deal quickly with asylum applications.

Further guidance was issued in the Operational Enforcement Manual in respect of individuals who were said to be *unsuitable* for Oakington detention. Cases in which detention at Oakington would not be suitable included the following:

- any case which did not appear to be one in which a quick decision could be reached or in which there are complicating factors;
- unaccompanied minor asylum seekers;
- cases in which there was a dispute as to age;
- disabled applicants;
- persons with special medical needs;
- cases involving disputes as to nationality; and cases where the asylum seeker is violent or uncooperative.

In addition, all persons believed to be at risk of absconding (from Oakington), were *not* deemed suitable for detention at Oakington.

The Oakington Reception Centre has high perimeter fences, locked gates and twenty-four hour security guards. The site is large, with space for outdoor recreation and general association and on-site legal advice is available. There is a canteen, a library, a medical centre, social visits room and a religious observance room. The following description was used in the present case:

“All of the normal facilities provided within an immigration detention centre are available – restaurant, medical centre, social visits room, religious observance and recreation. The practical operation and facilities at Oakington are, however, very different from other detention centres. In particular, there is a relaxed regime with minimal physical security, reflecting the fact that the purpose is to consider and decide applications. The site itself is very open with a large area for outdoor recreation and general association or personal space. Applicants and their dependents are free to move about the site although, in the interests of privacy and safety, there are two areas where only females and families may go.”

The 'House Rules' for Oakington require, *inter alia*, that detainees must vacate or return to their room when required; that mail may be required to be opened in front

of officers; that detainees must eat at set times and that visits can only be received at particular times. Further, detainees must carry identification at all times (to be shown to officers on request); must obey all staff and attend roll-calls. Male detainees are accommodated separately from their spouses and children and cannot stay with them overnight.

Complaints

The applicant alleges violations of Articles 5 and 14 of the Convention. He contends that his detention was not covered by Article 5 because it was disproportionate and arbitrary, and because he was not given reasons for his detention. Further, he contends that, because his detention at Oakington was only possible because Kurds from Iraq were on the list of nationalities that could be considered for Oakington, he was also a victim of a violation of Article 14 of the Convention.

The Law

The applicant alleges violations of Articles 5 §§ 1(f) and 2 and Article 14 of the Convention. Article 5 of the Convention provides, so far as relevant, as follows:

- “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
... (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
- 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”*

The Government accept that the applicant’s stay at Oakington constituted a “deprivation of liberty” for the purposes of Article 5. They consider, however, that the wording of the first limb of Article 5 § 1(f) – detention “to prevent his effecting an unauthorised entry” – describes the factual state of affairs where a person is seeking to effect an entry but has no authorisation, that being a matter under consideration by the State of entry, and that it does not require the additional feature of an attempted evasion of immigration control. If it were otherwise – that is, if a person who applied for asylum could not be detained under Article 5 § 1(f) because he was seeking to effect an authorised, rather than an unauthorised entry – States would be required to authorise entry to all who seek it. It would not even be possible to detain for short periods to make arrangements and verify identity.

The Government also contest the applicant's thesis that asylum seekers may only be detained where detention is "necessary" in order to prevent the person absconding or otherwise misbehaving. They note that Article 5 § 1(c) contains such a provision, but Article 5 § 1(f) does not, and underline that in the context of detention with a view to deportation, the Court confirmed such an interpretation in *Chahal (Chahal v. the United Kingdom)*, judgement of 15 November 1996, *Reports of Judgements and Decisions* 1996-V, § 112). The Government consider that the conclusion in *Chahal*, which was confirmed in *Čonka (Čonka v. Belgium)*, no. 51564/99, § 38, ECHR 2002-I), applies equally to detention with a view to preventing unauthorised detention.

Finally, the Government contend that in any event, the applicant's detention was not disproportionate in the circumstances: it was only possible to interview large numbers of applicants in a short time-frame if the applicants were available at short or no notice; the use of nationality as a criterion for choosing candidates for Oakington was only one of a number of criteria and was perfectly proper and justified, and the applicant's contention that the use of detention was influenced by the reaction of local residents and planning committees was not made out, as the domestic courts which considered the point had also found.

As to the reasons given for the applicant's detention, the Government point to the general statements of intent as to Oakington. They accept that the forms in use at the time of the applicant's detention were deficient, but contend that the reasons given orally to the applicant's on-site representative (who knew the general reasons) on 5 January 2001 were sufficient to enable the applicant to challenge the lawfulness of his detention under Article 5 § 4 if he wished.

The applicant maintains his claim that to detain a person who presents no threat to immigration control simply in order to accelerate a decision concerning their entry does not "prevent" unauthorised entry, and is not compatible with Article 5 § 1(f): there was no risk of the applicant absconding, and indeed Oakington is only used to detain those who are not at risk of absconding. Article 5 § 1(f) does not, however, prevent detention, for example, whilst an assessment is being made of whether an individual presents an unacceptable risk of absconding and thereby effective an unauthorised entry.

The applicant underlines that the detention in his case was wholly unrelated to whether he was granted entry: he was granted temporary admission both before and after the period of detention in questions, and entry at those times was not "unauthorised". After a person has been assessed not to present an absconding risk, examination of his claim and immigration control can be carried out without detention.

Detention is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient. The applicant cites with approval the first instance judge who said “Surely measures short of detention should be tried first and detention should be regarded as the last resort”.

As to the reasons for the applicant’s detention, the applicant underlines that unsolicited reasons were not given at any stage, and that solicited reasons were given orally on the afternoon of 5 January 2001, some 76 hours after the arrest and detention. Reference to policy announcements cannot displace the requirement to provide sufficiently prompt, adequate reasons to the applicant in relation to his detention.

The Court considers, in the light of the parties’ submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application. Consequently, the Court concludes that the application cannot be declared manifestly ill-founded within the meaning of Article 35§3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously *Declares* the application admissible, without prejudging the merits.

II

DOMESTIC JUDGEMENTS – REPORTED

Yogeswari Vs. The State of Tamil Nadu

High Court of Madras

Habeas Corpus Petition No. 971 of 2001

Decided on: 10.04.2003

Hon'ble Judges: P. Shanmugam and S.K. Krishnan, JJ.

ORDER

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. 2954 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 489D 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 in spite of the bail order granted by the criminal court in CrI.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 in spite 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 judgement of a Division Bench of this court in *KALAVATHY VS. STATE OF TAMIL NADU* 1995 (2) LW 690 and contended that the points raised by the petitioner in this case are squarely answered in the said judgement. 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 judgement of the Supreme Court in *UNION OF INDIA VS. VENKATESHAN* 2002 (3) ST 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 pre-Constitutional 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 Sub-section (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 Sub-section 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 CrI.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 unauthorisedly and as refugees.

- iv) Insofar as the detenu in this case is concerned, he has entered into India along with the petitioner herein authorisedly, 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 judgement 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 unauthorisedly, 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 judgement. 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 MANU/SC/0074/1955 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 22 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

MANU/SC/0685/2002 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.

Gyan Chand and Ors. Vs. State of Uttar Pradesh

High Court of Uttaranchal

Writ Petn. No. 1809 of 2001 (M/B)

Decided On: 26.07.2004

Hon'ble Judges: V.S. Sirpurkar, C.J. and P.C. Verma, J.

V.S. Sirpurkar, C.J.

1. As many as 118 writ petitioners have filed this writ petition for a very peculiar relief. In their prayer clause, they seek quashing of the order dated 4-9-1996 and Notification dated 13-8-1966 and 30-8-1966. They also seek a direction for complying the Government order dated 5-2-1988.
2. All the writ petitioners claimed to be refugees from West Pakistan and further claimed that they belong in all to 135 families. Out of them, the petitioners belonged to 79 families, whereas the remaining persons belonged to other 56 families. The writ petition is filed on behalf of 79 families, who, according to the petition, have remained high and dry without any semblance of rights on the land, which continues to be in their possession and is being cultivated by them. It is the case of the petitioners that under the rehabilitation policy of the Government of India, namely, Displaced Persons (Compensation and Rehabilitation) Act, 1954, one Triveni Das and Group' applied for Award of compensation in lieu of the agricultural land left by them in Pakistan and also claimed rehabilitation. They further claimed that by order dated 14-11-1953, the Commissioner, Relief and Rehabilitation, U.P. located 135 families known as Triveni Das and Group' and decided that each family should be allotted 10 acres of land in Jogipura Block in Tarai Bhabhar Govt. Estate in Nainital (presently in District Udham Singh Nagar). It is also claimed that all the families, known as Triveni Das and Group were directed to fill up appropriate forms, which was done by 135 families. It is then claimed that 10 acres of land in Jogipura Block, was allotted to each of the family by the Commissioner, Relief and Rehabilitation U.P. and letter to that effect was sent to the representative of the allottees for information to contact the Superintendent T and B and also Peshkar Bajpur for compliance. The petitioners heavily rely on this letter. A detailed survey plan was enclosed by the Superintendent, T and B Government Estate, vide order dated 22-1-1954 and letters to that effect were sent to the District Magistrate, Nainital in his capacity as District Relief and Rehabilitation Officer. The petitioners also relied on letters dated 22-1-1954 and 22-2-1954. The petitioners have then given broad history. However, we need not go into the that history because the only grievance of the petitioners was that

the land given only to 56 families out of the original group led by Triveni Das, and remaining 79 families remained without being granted Pattas. According to the petitioners, the land which was to be given to them has already been demarcated along with approach roads etc. and possession was given to all 135 families including the present 79 families, who are in possession of the land. Now the petitioners want to be known as 'Gyan Chand and party'. They seem to be a fall out group of original Triveni Das and party'.

3. There was a writ petition filed earlier that being Writ Petition No. 18408 of 1989 in Allahabad High Court. That writ petition was disposed of with the direction that the respondents (Government) shall decide the claim of the petitioners for the settlement of the land by speaking order within a period of three months. Now this petition was filed by about 79 families, giving their family members names therein because in some cases the person, who headed those families, died.
4. It is on the basis of this, a further inquiry came to be made by the Government and after considering the matter afresh, an order dated 4-9-1996 came to be passed by the Additional District Collector. The Additional District Collector had passed this order after considering the claims of the petitioners as also the Government. He held that 56 families of Triveni Das Group were rehabilitated by giving 10 acres of land to each families. However, the remaining families could not be granted the land and hence encroached upon some lands which belonged to the forest department because of the notification dated 25-6-1966 declaring the same to be a forest. He further clearly expressed that firstly the concerned land was a forest land and as such would not be given to the petitioners for the non-forest user. Secondly, unless the land was declared and made over to the revenue department it could not be granted to Gyan Chand and party. He also noted that Gyan Chand was none other but the son of Triveni Das, who had formed the original group. Now the petitioners are before us and claim that they are in possession and though it is in their continuous lawful possession ever since then till date, yet Pattas are not being given to them. Now, 118 persons have filed this petition claiming to be the same persons and belonging to the same 79 families which were parties to the earlier writ petition. They point out further that due to non-availability of the land, the 79 families remained without lands when in fact the Government had earlier agreed to grant land to them and had put them in possession.
5. Learned standing counsel for the Government, however, opposes the writ petition and specifically raises objection firstly that this land cannot now be given to the

petitioners because it has become the forest land. His second contention is that it is not clear as to whether the petitioners are members of the same 79 families, which have filed the earlier writ petition. Learned standing counsel goes on to say that out of the 135 families, which were found to be entitled to the land, the land has been given to the 110 families leaving only 25 families. Lastly learned standing counsel relies on the counter and says that there is nothing to suggest that all the petitioners, who claim to be the members of 79 families, have to do anything with the 25 remaining families which are left out. Thus, there is a basic difficulty and it is to be seen whether the petitioners have any right because of their belonging to original 79 families or as the case may be left out 25 families. It is then pointed out in the counter affidavit that the concerned land in this petition, is the land of reserved forest block of Jogipura and Guljarpur. It is on this basis that the Government opposes the writ petition. One plea raised in the counter is that one Triveni Das, who headed original party has given a statement on 1-7-1955 that 110 families have received the land from Jogipura block, Dhimari block and Dalpura block, while the remaining 25 families should be allotted the land from Maholi forest block and such forest land should be allotted to them after deforestation. In their counter affidavit, the Government says that out of the original 135 families, 110 have already been given possession and remaining 25 families could not be allotted land because it was a forest land.

6. When we specifically confronted the learned counsel for the petitioners as to whether the present petitioners were part and parcel of the original 79 families, the learned counsel asserts that they are the original families, whereas the Government very seriously disputes this proposition and learned standing counsel says that some other persons have sneaked into 79 families. Learned counsel for the petitioners also pointed out that all the petitioners are in possession of same land continuously and cultivating those lands. The learned counsel says that steady and lengthy possession on the part of the petitioner should have been taken into consideration before passing the order and rejecting the claims on the specific plea that the land is a forest land. Learned Government counsel however suggests that writ petition was filed before 8 years and Government is not in a position to accept the lengthy possession of the petitioners.
7. Under these considerations that there are number of questions of facts which are to be decided and which cannot be decided under Article 226 of the Constitution of India, the learned counsel for the petitioners very fairly accepted the suggestion that it is appropriate for the Government to undertake an inquiry on the subject by some responsible officer and find out firstly as to whether the land which is

claimed in the possession of the petitioners is in reality in their possession or not. Secondly it will be found out whether this land is a forest land or revenue land. Thirdly, it would have to be found out whether these petitioners are part of 135 families, out of which 110 families have been allotted the land and only 25 families have been left out. A complete exercise will be gone into to decide as to whether these petitioners are part of those 25 families or not. It is on this basis that the matter can be settled. This matter is pending for the last 10 years. It is proper that this exercise be done in six months from the date the order reaches the Government. In that, if it is found that the land is forest land, the Government shall take immediate steps to oust the encroachers. The learned counsel for the petitioners has no objection to it. However, if it is found that the land is the revenue land, then the Pattas will be given within one month of inquiry, only if the petitioners are found to be part of 135 families, who have not been so far allotted the land. All the interested parties would be given opportunity to take part in the enquiry.

8. The petition is disposed of accordingly.

No order as to costs.

Zalmay Vs. Union of India and Ors.

High Court of Delhi

Criminal Writ Petition No. 654 of 1989

Decided On: 15.02.1990

Hon'ble Judges: P.K. Balm, J.

JUDGEMENT

P.K. Bahri, J.

- (1) This petition has been brought under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, seeking quashing of the detention order dated August 1, 1989, passed by respondent No. 2 under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short 'Cofeposa Act') with a view to preventing the petitioner from acting in any manner prejudicial to the augmentation of foreign exchange.
- (2) Before I deal with the various contentions raised by the learned counsel for the petitioner, it is necessary to refer to the facts of the case as re-evident from the grounds of detention served on the petitioner.
- (3) A secret information being received that the detenu who usually sits Room No. 15 of Dil Aram Guest House, Ballimaran, Delhi, has been indulging in unauthorised sale and purchase of foreign exchange and gold on large-scale, on July 18, 1989, the petitioner was apprehended on the Main Road in front of Police Booth, Opposite Nai Sarak near Town Hall Building, Chandni Chowk, His personal search led to the recovery of 22,550 US dollars concealed in his right leg beneath the knee cap along with Rs. 780.00 in Indian currency and one loose sheet from the front pocket of the petitioner's kurta. His statement under Section 40 of the Foreign Exchange Regulation Act, 1973, was recorded wherein he stated that he was an Afghan national and had come to India about ten months back on a refugee status and that he had destroyed his passport and was not in a position to produce his refugee card and had no means of earning his livelihood and thus, he started encashing articles like camera, clothes, shoes etc. from the persons coming to India from abroad and selling the same on profits to other persons at the aforesaid room in Dil Aram Guest House and that other Afghan nationals were also indulging in same type of business in other rooms of the said Guest House and the petitioner came to know about purchase and sale of foreign currency, i.e. dollars, pounds etc., and had seen other Afghan nationals making profits by dealing in

purchase and sale of foreign currency and the petitioner also started purchasing foreign currencies and selling the same to some person in Jama Masjid and he indulged in this purchase and sale of foreign currencies on a large-scale and after huge foreign currencies used to accumulate with him purchased from various persons coming from Jaipur and Agra, the petitioner used to sell the same to same persons residing at Lajpat Nagar he and admitted the said recovery effected from him and stated that he was purchased the said dollars @ Rs. 19.95 per dollar from persons who had come from Jaipur and that he was keeping the account of the said transaction in the said loose sheet recovered from his kurta's pocket and the petitioner also admitted that in this way, he had earlier indulged in illegal purchase and sale of foreign currency to the tune of about Rs. 30,00,000.00 (thirty lakhs) and he had no license or permission from the Reserve Bank of India for dealing in foreign exchange, it is also mentioned that the statement was recorded by Shri S.A.Ali, Chief Enforcement Officer and he had read over the statement to the petitioner who admitted the same as correct. It was also recorded in the grounds of detention that the petitioner was remanded to judicial custody and the petitioner had moved an application for being released on bail in the court on July 19, 1989 Then the contents of the bail application save been reproduced showing the version of the petitioner as to how he had come into possession of the said dollars innocently. The detaining authority after keeping in view the said retraction of the petitioner and the other facts reached the subjective satisfaction that the petitioner has been indulging in unauthorised purchase and sale of foreign exchange and the same had affected the foreign exchange resources of the country adversely and although the petitioner was in judicial custody yet there was every possibility of his being released on bail as his application was fixed for arguments on August 2, 1989 and if the petitioner was to be released on bail, the petitioner again would indulge in such prejudicial activity affecting the foreign exchange resources of the country adversely and thus, the detention order was passed.

- (4) The learned counsel for the petitioner at first vehemently argued that the order of detention dated August 1, 1989 was not actually served on the detenu at any time and thus, the detention of the petitioner is vitiated. Shri Mahendra Prasad, Joint Secretary to the Government of India, has filed the counter-affidavit in opposition to this writ petition. At page 12 while replying to ground (1), it has been averred that the order of detention Along with its translation was sought to be served on the detenu in Tihar Jail on August 2, 1989, but the petitioner refused to receive the same and a Panchnama in that respect was drawn and later on the grounds of detention and the documents and their translations in Dari language were served

on the petitioner in Tihar Jail on August 4, 1989. In para 3 of the counter affidavit there was some confusion about these averments but that confusion stands cleared by these clear averments made in reply to ground No. (1). No affidavit in rebuttal has been filed by the petitioner although the counter affidavit was filed in court on February 7, 1990, but I had given an option to Mr. Sunil Mehta, counsel for the petitioner, that if necessary the case can be adjourned to enable the petitioner to file a rejoinder and Mr. Sunil Mehta stated that there is no need to file any rejoinder.

- (5) The learned counsel for the respondents shown me the original Panchnama which was prepared when the detenu had refused to accept the order of detention on August 2, 1989, in Tihar Jail. The Panchnama is attested by officials of the Jail. Even register of the Jail was brought during the course of the arguments and it was shown that there exist an entry in the register dated August 2, 1989, showing that the Enforcement Officer had visited the Jail on that day.
- (6) The learned counsel for the petitioner has argued that the said entry in the jail record does not indicate that any person knowing Dari language had accompanied the Enforcement Officer to explain the contents of the detention order to the detenu. The case of the detenu is that he was never offered service of order of detention and he never refused to accept the service. I have no hesitation in repelling the contention of the petitioner that he had not refused to accept the order of detention which was sought to be served on him in Jail on August 2, 1989,. After all there could be no earthly reason for the Enforcement Officer to have visited the Jail on August 2, 1989, if the order of detention was not to be served on the petitioner on that day.
- (7) Counsel for the respondents has, on the other hand, pointed out that the order of detention was got translated in Dari language from a person knowing that language and it was transcribed in Hindi script and was read over to the detenu but the detenu refused to accept the order of detention. It is also mentioned in the affidavit of Shri Mahendra Prasad that the Enforcement Officer at the time had apprehended the petitioner, had conversed with him in Hindustani and the learned counsel for the respondents has urged that the petitioner has taken up now false pleas that he was illiterate and did not know any other language except Pushto when as a matter of fact the slip of paper containing calculations in Dari language regarding his foreign exchange dealings was recovered from the person of the petitioner himself. Hence, I hold that the petitioner is not right when he asserts that he had not refused to accept the

service of the order of detention which was explained to him before it was sought to be served on him by the officials of the respondent.

- (8) The next contention raised on behalf of the petitioner by the learned counsel for the petitioner is that the grounds of detention and the documents have not been served on the petitioner in the language known to the petitioner. It is pleaded by the petitioner that he did not know any other language including Dari language except he could converse in Pushto language. In the counter-affidavit it has been mentioned that the petitioner comes from a place where Dari language is spoken by the locals and that Shri Mohd Arif Jah while explaining the grounds of detention and the documents of which translations were given in Dari language had conversed with the detenu in Dari language. No affidavit in rebuttal has been filed by the petitioner to controvert this fact. Mere fact that the petitioner had later on in his first representation taken up the plea that he did not know Dari language in my opinion, is of no consequence in face of the facts coming out on the record showing that the petitioner had a document with him on his person when he was apprehended, containing calculations in Dari language and Mohd Arif Jah had conversed with him in Dari language. Thus, the service of the documents on the petitioner in Dari language, in my opinion, meets with the requirement of law.
- (9) The learned counsel for the petitioner has made reference to certain judgements which lay down the law that the grounds of detention have to be served in the language known to the detenu. There is no dispute about this proposition of law. But in the present case, in my opinion, the facts do show that the petitioner knew Dari language besides Hindustani and documents and the grounds of detention have been rightly served on him translated in Dari language which were read over to him by Mohd. Arif Jah with whom he had conversed in Dari language. I, hence, find no merit in this contention also.
- (10) Counsel for the petitioner has then urged that the petitioner had sent a representation dated August 26, 1989, through his Advocate seeking revocation of the detention order besides supply of documents and information mentioned at page 7 of the representation but the information sought at Serial (v) was not conveyed. The petitioner has sought information with regard to the contents of the information and specific information received by the Delhi Zonal Office of the Enforcement Directorate. While rejecting this representation vide memo dated September 15, 1989, the details have been given as to what documents have been supplied to him and what documents he is to be supplied with on his request. Counsel for the respondents has argued that the information sought at

Seriall No, (v) was not all relevant as to such information had been communicated in the grounds of detention. It is not shown by the petitioner how the said information sought at Seriall No. (v) could have enabled him to make any effective representation against the order of detention.

- (11) Then, it has been urged that the petitioner had made representation dated September 20. 1989, in which he asked for documents and information pertaining to the visits of the Enforcement Officer and other persons to Tihar Jail on August 2, 1989. Copies of the said documents were admittedly not supplied. He has argued that if such information had been given the detenu could have made a representation to show to the Advisory Board that in fact, the order of detention was not sought to be served on him in Tihar Jail. Nothing turns on this representation of the petitioner because I have already give a finding on merits that the petitioner was sought to be served with the order of detention in Tihar Jail and he had refused to accept the same. After all the grounds of detention were admittedly served on the petitioner on August 4. 1989 which also clearly indicated that the order of detention has been passed against him. Nothing more was required to be delivered to the petitioner which could have enabled him to make any effective representation to the Advisory Board. So, I do not find any merit in this contention as well.
- (12) Counsel for the petitioner has made reference to Criminal Writ Petition No. 324/86, MM. Yusuf v. Union of India, decided by a Division Bench of this Court on March 17, 1987 and some other judgements in Siipport of his contention that if a request is made by the detenu for supply of some documents which could enable him to make an effective and purposeful representation and those documents are not supplied, the detention of the detenu would stand vitiated. It is true that in case there has been made some reference even casually in the grounds of detention with regard to certain documents which although are not being relied upon by the detaining authority for passing the detention order but if the detenu makes a request for supply of copies of such documents, then the detaining authority ought to supply copies of such documents to enable the detenu to make an effective and purposeful representation. The law has been now clarified by the Supreme Court in Abdul Sattar Abdul Kadar Shaikh v. Union of India & Others, MANU/SC/0425/1990 : (1990)1SCC480 , where it has been held that it is the duty of the court to see whether the detenu is in any way handicapped in making effective representation if copies of such documents are not supplied to the detenu on his request being made. In the said case, a request had been made for supply of copies of FIRs, bail application, and bail which was declined. The

Court held that the detenu knew about the contents of such documents and thus, non-supply of copies of such documents does not prejudicially affect the right of a detenu to make any effective representation.

- (13) For parity of reasons when as a question of fact it has been found by me that detenu had refused to accept the order of detention when it was sought to be served on him, it is evident that non-supply of copies of documents and information requested by him in the representation had not in any manner prejudicially affected the right of the detenu to make an effective representation.
- (14) Lastly, it has been contended that as the detenu was already in Jail in judicial custody there was no compelling necessity for the detaining authority to have passed the detention order and reliance is placed by the learned counsel for the petitioner in this respect on *Shashi Aggurwal v. State of U.P.*, MANU/SC/0457/1988 : 1988CriLJ839 . On facts in that case it was found that the prejudicial activities which were the basis for passing the order of detention, were not the actual cause of the communal riots which had taken place in Meerut on April 14, 1987 and during the intervening night of May 18 & 19, 1987. So, it was held that the subjective satisfaction recorded in the grounds of detention that the communal riots had broken out due to the prejudicial activities of the detenu was wrong on material mentioned in the grounds of detention itself. So, the Supreme Court giving this particular finding on merits examined the question whether the detaining authority could have also gone into the point whether the petitioner was likely to be released on bail and in that context the Supreme Court observed that the detail cannot be interdicted from moving the court for bail by clamping an order of detention and mere a bald statement in the grounds of detention that the person would repeat his criminal activities would not be enough, it was held that there must be credible information or cogent reason apparent on the record that the detenu if enlarged on bail would act prejudicially to the interests of public order. On facts this particular judgement of the Supreme Court is distinguishable. The facts of the present case, as enumerated above, clearly indicate the continuous prejudicial activity of the present detenu dealing in foreign exchange illegally even earlier, to the time when he was actually apprehended. So, the past prejudicial activity of the petitioner in dealing illegally with the foreign exchange on a very high scale was itself a sufficient material to enable the detaining authority to formulate the subjective satisfaction that if petitioner is released on bail he is likely to indulge in same very prejudicial activity again in future. As held in *Vijay Kumar v. UOI.* 34 MANU/SC/0568/1988 : 1988CriLJ951 , the detaining authority has to only keep in view the fact that the detenu is already in detention and has

to apply its mind to the material in order to determine whether there still exist compelling reasons justifying the passing of the order of detention. It was held that it is not necessary that in the order of detention such awareness of the detaining authority has to be indicated. It is enough if it appears from the grounds of detention that the detaining authority is aware of the fact that the detenu is already in detention. In the cited case also, the detenu was indulging in dealing with smuggled gold biscuits on a large-scale and subjective satisfaction was reached by the detaining authority that if order of detention is not passed the detenu is likely to indulge in same type of prejudicial activity in future. The factum of detenu being in judicial custody was to the knowledge of the detaining authority before detaining authority reached the necessary subjective satisfaction for passing the detention order. It is true that on mere fact that the detenu is likely to be released on bail the detention order cannot be clamped in order to put an obstacle in the right of the detenu to obtain an order of bail in a criminal case, but it will depend on the facts of each case in order to determine whether an order of detention, can be made or not against a particular detenu who is already in judicial custody. So, where there is enough material present in the grounds of detention to show that a particular detenu has been indulging in prejudicial activities continuously in a consistent manner, the detaining authority can from the subjective satisfaction. In such a case the order of detention should be made to preventing such a detenu to indulge in such prejudicial activity in future if his release on bail is imminent. So, I hold that in the present case, the order of detention is based on sufficient material in this respect.

(15) No other point has been urged.

I, hence, find no merit in this petition which I, hereby, dismiss and discharge the rule.

Premavath Rajathi Vs. State of Tamil Nadu

High Court of Madras

**H.C.P. Nos. 1038, 1101, 1118, 1119, 1120, 1121,
1122, 1123, 1085, 1170 and 1226 of 2003**

Decided On: 14.11.2003

Hon'ble Judges: V.S. Sirpurkar and M. Thanikachalam, JJ.

ORDER

V.S. Sirpurkar, J.

1. This judgement will dispose of H.C.P. Nos.1038, 1111, 1118, 1119, 1120, 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, 1085, 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 make 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.(Cri.) 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. Cri.. 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 judgement 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 judgement of the co-ordinate 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 judgements 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* (MANU/SC/0105/1973 : 1973CriLJ1801) 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.* (MANU/SC/0119/1975 : 1975CriLJ1111), 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. Cri. 393 as also the Bombay High Court judgement in *Bawalkhan v. B.C. Shah* AIR 1960 Bom 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 judgement of the Supreme Court in *Louis De Raedt v. Union of India* (MANU/SC/0422/1991 : [1991]3SCR149) as also the earlier view expressed in *Hans Muller v. Superintendent, Presidency Jail, Calcutta* (MANU/SC/0074/1955 : 1955CriLJ876). 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 judgement 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 judgement. 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 judgement 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 judgement and, therefore, that judgement should be restricted to the facts in that case. Learned counsel also further argued that judgement cannot be a final authority because some questions, which were

raised in the subsequent judgement in Yogeswari case, cited supra, were not raised before that Bench and, therefore, that judgement 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 judgement 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 judgement in Yogeswari case, cited supra, was finalised. In the later part of the judgement 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* (MANU/SC/0685/2002 : 2002CriLJ4089), 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 judgement 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 judgement. We have very carefully scanned each paragraph of the said judgement 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 reasons and had also considered the judgement 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. (Cri.) 692. He further states that the special leave petition against the judgement 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."

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 judgement, 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 judgement 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 judgement. This is apart from the fact that in Kalavathy's judgement, 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 judgement 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 Chinnappillai 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 judgement and would have a binding effect under Art. 141 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 Anr., v. Synthetics And Chemicals And Another (MANU/SC/0616/1991 : 1993(41)ECC326) 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 paragraphs 40 and 41 of the aforementioned judgement. One more reason is that as per the learned Public Prosecutor, however, the decision in Yogeswari's case is per incurium of the judgement of the Supreme Court in Chinnappillai's case, cited supra. Shri Kumar, however, further submits that there would be no question of the said decision being per incurium of Chinnappillai case because, the decision in Chinnappillai case is no judgement nor a law declared. It is for this reason that we have pointed out that the judgement in Chinnappillai case is in fact a 'law declared'. For reference, see the judgement of the Supreme Court in Supreme Court Employees Association v. Union of India (MANU/SC/0054/1990) 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. (MANU/SC/0616/1991 : 1993(41)ECC326 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 judgement very carefully. In the first place, we reiterate that the judgement in Chinnappillai 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 Chinnappillai'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 judgement. 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 judgement 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 judgement of the Supreme Court,

which confirms the earlier Division Bench judgement 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 judgement in Sarwan Singh and another v. Kasturi Lal (MANU/SC/0071/1976 : [1977]2SCR421) 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 propriety 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. 21 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 Chinnappillai case because it is not in our domain to consider the judgement of the Apex Court. The judgements 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, reiterated 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 stay 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* (MANU/SC/0184/1978 : 1978CriLJ1741), 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 than 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.

All the observations made in paragraphs 39 to 42 would be treated as the directions by this Court to the state government.

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

Ktaer Abbas Habib Al Qutaifi Vs. Union of India & Ors.

1999 CRI.L.J.919 GUJARAT HIGH COURT
Spl Civil appln No 3433 of 1998 dated 12-10-98

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'.

2. 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 someth 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.

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 emphasised 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.

Refugees and UNO

subjected to arbitrary arrest, detention or exile.

8. 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 Francis Xavier Dos Remedios 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 noncitizens. 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)1 SCC742 :(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 (para20 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. 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 de Raedt 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 Ar 19(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 Cri LJ 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.
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. 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:

“Any one 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 LJ 43, 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) 1 SCC 416 (1997 Cri LJ 743), 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 Sri Lankan 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.

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 sense 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, the 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.
 - (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.

In the instant case, the petitioners are refugees certified by UNHCR. Say of the petitioners that their 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 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.

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.

Louis De Raedt Vs. Union of India & Ors.

**1991 (3) Supreme Court Cases 554
Writ Petition (Civil) No. 1410 of 1987**

The Judgement of the Court was delivered by

SHARMA, J.- By these three petitions under Article 32 of the Constitution, the petitioners who are foreign nationals, have challenged the order dated July 8, 1987 whereby their prayer for further extension of the period of their stay in India was rejected and they were asked to leave the country by July 31, 1987.

2. According to his case, Mr Louis De Raedt has been staying in India continuously since 1937 excepting on two occasions when he went to Belgium for short period in 1966 and 1973. It has been contended that by virtue of the provisions of Article 5 (c) of the Constitution of India the petitioner became a citizen of this country on November 26, 1949, and he cannot, therefore, be expelled on the assumption that he is a foreigner. Referring to the Foreigners Act it was urged that power under Section 3 (2) (c) could not be exercised because the Rules under the Act have to be framed so far. Alternatively, it has been argued that the power to expel an alien also has to be exercised only in accordance with the principles of natural justice and a foreigner is also entitled to be heard before he is expelled. For all these reasons it is claimed that the impugned order dated July 8, 1987 being arbitrary should be quashed and the authorities should be directed to permit the petitioners to stay on..

4. The Main ground urged by the learned counsel is based on Article 5 of the Constitution ,

9. The argument is that since Mr Louis De Raedt was staying in this country since 1937, that is, for a period of more than five years immediately preceding the commencement of Constitution, he must be held to have duly acquired Indian citizenship. There is no force in the argument of Mr Verghese that for the sole reason that the petitioner has been staying in this country for more than a decade before the commencement of the Constitution, he must be deemed to have acquired his domicile in this country and consequently the Indian citizenship. Although it is impossible to lay down an absolute definition of domicile, as was stated in *Central Bank of India v. Ram Narain* it is fully established that an intention to reside forever in a country where one has taken up his residence is an essential constituent element for the existence of domicile in the country. Domicile has been described in *Halsbury's Laws of England* (4th Edition, volume 8, paragraph 421) as the legal relationship between individual and a territory with a distinctive legal system which invokes that system as his personal law. Every person must have a personal law, and accordingly every one must have a domicile. He receives at birth a domicile of origin, which remains his domicile, wherever he goes, unless and until he acquired a new domicile. The new domicile, acquired subsequently,

is generally called a domicile of choice. The domicile of origin is received by operation of law at birth and for acquisition of a domicile of choice one of the necessary conditions is the intention to remain there permanently. The domicile of origin is retained and cannot be diverted until the acquisition of the domicile of choice. By merely leaving his country, even permanently, one will not, in the eye of law, lose his domicile until he acquires a new one. This aspect was discussed in *Central Bank of India v. Ram Narain* where it was pointed out that if a person leaves the country of his origin with undoubted intention of never returning to it again, nevertheless his domicile of origin adhered to him until he actually settles with the requisite intention in some other country. The position was summed in Halsbury thus:

“He may have his home in one country, be he deemed to be domiciled in another.”

Thus the proposition that the domicile of origin is retained until the acquisition of a domicile of choice is well established and does not admit of any exception.

1. For the acquisition of a domicile of choice, it must be shown that the person concerned had a certain state of mind, the *animus manendi*. If he claims that he acquired a new domicile at a particular time, he must prove that he has formed the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is sufficient.
2. Coming to the facts of the present cases the question which has to be answered is whether at the commencement of the Constitution of India the petitioners had an intention of staying here permanently. The burden to prove such an intention lies on them. Far from establishing the case which is now pressed before us, the available materials on the record leave no room for doubt that the petitioners did not have such intention. At best it can be said that they were uncertain about their permanent home. During the relevant period very significant and vital political and social changes were taking place in this country and those who were able to make up their mind to adopt this country as their own, took appropriate legal steps. So far the three petitioners are concerned, they preferred to stay on, on the basis of their passports issued by other countries, and obtained from time to time permission of the Indian authorities for their further stay for specific periods. None of the applications filed by the petitioners in this connection even remotely suggests that they had formed any intention of permanently residing here.
3. None of the cases relied upon on behalf of the petitioners is of any help of them. The case of *Mohd. Ayub Khan* was one where the appellant had made an application

to the Central Government under section 9 (2) of the Indian Citizenship ACT, 1955 for the determination of his citizenship. Section 9 (1) says that if any citizen of India acquired the citizenship of another country between January 26, 1950 and the commencement of the Citizenship Act, he ceased to be citizen of India and sub-section (2) directs that if any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by the prescribed authority. Mohd Ayub Khan was a citizen of this country at the commencement of the Constitution of India and was to leave the country for the reason that he had obtained a Pakistani Passport. The question which thus arose in that case was entirely different. The case of Kedar Pandey v. Narain Bikram Sah, does not help the petitioners at all. On a consideration of the entire facts and circumstances this Court concluded that “ the requisite animus Manendi as has been provided in the finding of the high court is correct”. The respondent Narain Bikram Sah ,who claimed to have acquired Indian citizenship , had extensive properties at large number of different places in India and had produced many judgements showing that he was earlier involved in litigation relating to the title, going up to the High Courts in India and some time the Privy Council Stage. He was born at Banaras and his marriage with a girl from Himachal Pradesh also took place at Banaras and his children were born and brought up in India. Besides his other activities supporting his case, he also produced his Indian passport. In the case before us the learned counsel could not point out a single piece of evidence or circumstances which can support the petitioners case, and on the other hand they have chosen to remain here on foreign passports with permission of Indian authorities to stay, on the basis of the said passports. Their claim as pressed must, therefore, be rejected.

4. The next point taken on behalf of the petitioners, that the foreigners also enjoy some fundamental rights under the Constitution of this country is also of not much help to them. The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country as mentioned in Article 19(1) (e), which is applicable only to the citizens of this country. It was held by the Constitution Bench in *Hans Muller of Nuremburg v. Superintendent, Presidency Jail, Calcutta* that the power of the government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion. It was pointed out that the legal position on this aspect is not uniform in all the countries but so far the law that operates in India is concerned, the executive government has unrestricted right to expel a foreigner. So far the right to be heard is concerned, there cannot be any hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his case and it is not claimed that if the authority concerned had served a notice before passing the impugned order, the petitioners could

have produced some relevant material in support of their claims of acquisitions of citizenship, which they failed to do in the absence of a notice.

5. The last point that the impugned order (Annexure IV) was passed by the Superintendent of Police, who was not authorised to do so, is also devoid of any merit. The order was not passed by the Superintendent of Police; the decisions was of the central Government which was being executed by the Superintendent, as is clear from the order itself.
6. For the reasons mentioned above, we do not find any merit in the petitions, which are accordingly dismissed, but without costs.

National Human Rights Commission Vs. State of Arunachal Pradesh and another

**1996 Supreme Court Cases (1) 742
Writ Petition (C) No. 720 of 1995[†],
decided on January 9, 1996**

The Judgement 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.

- 1 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.
- 2 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.

- 3 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.
- 4 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.
- 5 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.

- 6 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.
- 7 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 India and Khudiram Chakma* case this Court held that foreigners are entitled to the protection of Article 21 of the Constitution.
- 8 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 11-1-1966 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 case, 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.

- 9 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.

- 10 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.
- 11 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.

12. The petition shall stand so disposed of.

Sarbananda Sonowal Vs.Union of India (UOI) and another

Writ Petition (Civil) No. 131 of 2000

Decided On: 12.07.2005

2. ...The principal grievance of the petitioner is that the IMDT Act is wholly arbitrary, unreasonable and discriminates against a class of citizens of India, making it impossible for citizens who are residents in Assam to secure the detection and deportation of foreigners from Indian soil. The Foreigners Act, 1946, applies to all the foreigners throughout India, but the IMDT Act which was enacted subsequently with the professed aim of making detection and deportation of the illegal migrants residing in Assam easier has completely failed to meet even the standards prescribed in the Foreigners Act... In pursuance of this provision, the Citizenship Act, 1955 was amended by Act No. 65 of 1985 and Section 6A was inserted with the heading "Special Provisions as to Citizenship of Persons covered by the Assam Accord." It provides that the term "detected to be a foreigner" shall mean so detected under the Foreigners Act and the Foreigners (Tribunals) Order, 1964 framed thereunder. Under the said provision a person of Indian origin as defined under Section 6-A(3) who entered into Assam prior to 1st January, 1966 and has been resident in Assam since then is deemed to be a citizen of India. However, if such a person entered into Assam between 1st January, 1966 and before 25th March, 1971 and has been detected to be a foreigner under the Foreigners Act then he is not entitled to be included in the electoral list for a period of 10 years from the date of detection. This amendment of the Citizenship Act makes it clear that the question of determination or detection of a foreigner is to be governed by the provisions of the existing Central legislation, viz. the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964.

...

7. During talks between the Prime Ministers of India and Bangladesh in February, 1972, the Prime Minister of Bangladesh had assured the return of all Bangladesh nationals who had taken shelter in India since March 25, 1971. Accordingly a circular was issued by the Government of India on 30.9.1972 setting out guidelines for action to be taken in respect of persons who had come to India from Bangladesh. According to this circular, those Bangladesh nationals who had come to India before 25 March 1971 were not to be sent back and those who entered India in or after the said date were to be repatriated..."

8. ...The application of IMDT Act, 1983 in Assam virtually gives the illegal migrants, in the State, preferential protection in a matter relating to the citizenship of India. This is clearly unconstitutional and violative of the principles of equality...
9. ...The petitioner has also filed a reply to the additional affidavit filed on behalf of the State of Assam, where besides reiterating his earlier pleas, it is averred that the Indian National Congress representatives from North East have themselves alluded to the problem of illegal migration in the past... The infiltrations are not only by minorities of Bangladesh but also from the majority Muslims. In absolute terms, the number of Muslims crossing into India is likely to be much larger than that of non-Muslims... It is further averred in paragraphs 9 and 10 of this affidavit that the Law Commission of India in its 175th Report on the Foreigners (Amendment) Bill, 2000 (submitted in September 2000) has also dealt with this issue. While noting that entry of illegal migrants and other undesirable aliens into India has posed a grave threat to our democracy and the security of India, especially for the eastern part of the country and Jammu and Kashmir, the Law Commission has observed that influx of migrants from Bangladesh has remained unabated and has acquired frightening proportions...
11. ...There is a tendency to view illegal migration into Assam as a regional matter affecting only the people of Assam. It's more dangerous dimensions of greatly undermining our national security, is ignored. The long cherished design of Greater East Pakistan/Bangladesh, making in-roads into strategic land link of Assam with the rest of the country, can lead to severing the entire land mass of the North-East, with all its rich resources from the rest of the country. They will have disastrous strategic and economic consequences... Mr. Inderjit Gupta, the then Home Minister of India stated in the Parliament on May 6, 1997 that there were 10 million illegal migrants residing in India... In the case of Muslims the Assam growth rate was much higher than the All India rate. This suggests continued large scale Muslim illegal migration into Assam... Pakistan's ISI has been active in Bangladesh supporting militant movement in Assam. Muslim militant organisation have mushroomed in Assam and there are reports of some 50 Assamese Muslim youths having gone for training to Afghanistan and Kashmir... The silent and invidious demographic invasion of Assam may result in the loss of the geostrategically vital districts of lower Assam. The influx of these illegal migrants is turning these districts into a Muslim majority region. It will then only be a matter of time when a demand for their merger with Bangladesh may be made. The rapid growth of international Islamic fundamentalism may provide for driving force for this demand. In this context, it is pertinent that Bangladesh has

long discarded secularism and has chosen to become an Islamic State. Loss of lower Assam will sever the entire land mass of the North East, from the rest of India and the rich natural resources of that region will be lost to the Nation.”

14. ...In *Union of India v. Ghaus Mohammed* AIR 1961 SC 1526, the Chief Commissioner of Delhi served an order on Ghaus Mohammad to leave India within three days as he was a Pakistani national. He challenged the order before the High Court which set aside the order by observing that there must be prima facie material on the basis of which the authority can proceed to pass an order under Section 3(2)(c) of the Foreigners Act, 1946. In appeal the Constitution Bench reversed the judgement of the High Court holding that onus of showing that he is not a foreigner was upon the respondent.
16. It needs to be emphasised that the general rule in the leading democracies of the world is that where a person claims to be a citizen of a particular country, the burden is upon him to prove that he is a citizen of that country...
17. There is good and sound reason for placing the burden of proof upon the person concerned who asserts to be a citizen of a particular country. In order to establish one's citizenship, normally he may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Some times the place of birth of his grand parents may also be relevant like under Section 6-A(1)(d) of the Citizenship Act. All these facts would necessarily be within the personal knowledge of the person concerned and not of the authorities of the State. After he has given evidence on these points, the State authorities can verify the facts and can then lead evidence in rebuttal, if necessary. If the State authorities dispute the claim of citizenship by a person and assert that he is a foreigner, it will not only be difficult but almost impossible for them to first lead evidence on the aforesaid points. This is in accordance with the underlying policy of Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
18. Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he has to lead evidence to prove the said fact. In *Shambhu Nath Mehra v. The State of Ajmer*, MANU/SC/0023/1956 it was held as follows:

“Section 106 is an exception to S. 101.”...

19. Section 9 of the Foreigners Act regarding burden of proof is basically on the same lines as the corresponding provision is in U.K. and some other Western nations and is based upon sound legal principle that the facts which are peculiarly within the knowledge of a person should prove it and not the party who avers the negative.
21. The provisions of the IMDT Act may now be examined...Some of the provisions of the Act which are relevant are being reproduced below :
 - (a) Overriding effect of the Act. - (1) The provisions of this Act or of any rule or order made thereunder shall have effect notwithstanding anything contained in the Passport (Entry into India) Act, 1920 or the Foreigners Act, 1946 or the Immigrants (Expulsion from Assam) Act, 1950 or the Passport Act, 1967 or any rule or order made under any of the said Acts and in force for the time being...
24. In view of Section 3(1)(c) of the IMDT Act, an illegal migrant is a person with respect to whom all the three conditions, namely, (i) has entered India on or after 25th March, 1971; (ii) is a foreigner which means he is not a citizen of India; and (iii) has entered India without being in possession of a valid passport or other travel documents or any other lawful authority in this behalf, are satisfied...
28. The analysis of the provisions of IMDT Act and the Rules made thereunder clearly demonstrate that the provisions thereof are very stringent as compared to the provisions of Foreigners Act, 1946 or Foreigners (Tribunals) Order, 1964, in the matter of detection and deportation of illegal migrants...
31. Section 14 of the Foreigners Act (after amendment by Act No. 16 of 2004) provides for imprisonment which may extend to five years and fine. Section 14-A and 14-B of the Foreigners Act provide punishment for a term which shall not be less than two years but may extend to eight years and also fine which shall not be less than ten thousand rupees but may extend to fifty thousand rupees. Section 14-C provides the same punishment for abetment of any one of the above offences. Thus, the punishment provided under the Foreigners Act is more severe than under the IMDT Act.
32. The foremost duty of the Central Government is to defend the borders of the country, prevent any trespass and make the life of the citizens safe and secure. The Government has also a duty to prevent any internal disturbance and maintain law and order...The modern war may involve not merely the armed forces of

belligerent States but their entire population... The framers of the Constitution have consciously used the word "aggression" and not "war" in Article 355.

33. Shri M. Jaipal of India advocated that in view of "modern techniques of coercion" the definition of aggression should have included "economic pressures" and "interventionary and subversive operations."...
35. In the later part of nineteenth century large number of Chinese labour had started going to U.S.A. The U.S. Congress passed legislations to restrict and then to totally stop their entry in the country (Case: 130 U.S. 581 Chae Chan Ping v. United States)
36. Lord Denning in his book "The Due Process of Law"... Thus, one of the most respected and learned Judges of the recent times has termed the influx of persons from erstwhile colonies of Britain into Britain as "invasion". The word "aggression" is, therefore, an all comprehensive word having very wide meaning. Its meaning cannot be explained by a straight jacket formula but will depend on the fact situation of every case....
37. The report of the Governor, the affidavits and other material on record show that millions of Bangladeshi nationals have illegally crossed the international border and have occupied vast tracts of land like "Char land" barren or cultivable land, forest area and have taken possession of the same in the State of Assam. Their willingness to work at low wages has deprived Indian citizens and specially people in Assam of employment opportunities. This, as stated in the Governor's report, has led to insurgency in Assam. Insurgency is undoubtedly a serious form of internal disturbance which causes grave threat to the life of people, creates panic situation and also hampers the growth and economic prosperity of the State of Assam though it possesses vast natural resources.
38. This being the situation there can be no manner of doubt that the State of Assam is facing "external aggression and internal disturbance" on account of large scale illegal migration of Bangladeshi nationals. It, therefore, becomes the duty of Union of India to take all measures for protection of the State of Assam from such external aggression and internal disturbance as enjoined in Article 355 of the Constitution. Having regard to this constitutional mandate, the question arises whether the Union of India has taken any measures for that purpose.
39. There being no corresponding provision like Section 9 of the Foreigners Act which places the burden of proof upon the person concerned who claims to be an Indian citizen, which is absolutely essential in relation to the nature of inquiry being conducted regarding determination of a person's citizenship (where the

facts on the basis of which an opinion is to be formed and a decision is taken are entirely within the knowledge of the said person) has made the task of the law enforcement agencies of the State not only difficult but virtually impossible...

45. As mentioned earlier, the influx of Bangladeshi nationals who have illegally migrated into Assam pose a threat to the integrity and the security of the north-eastern region...
48. We consider it necessary here to briefly notice the law regarding deportation of aliens as there appears to be some misconception about it and it has been argued with some vehemence that aliens also possess several rights and the procedure for their identification and deportation should be detailed and elaborate in order to ensure fairness to them.
49. ...Reference has also been made to Article 13 of the International Covenant of 1966 on Civil and Political Rights which provides that an alien lawfully in the territory of a State Party to the Covenant may be expelled only pursuant to a decision reached by law, and except where compelling reasons of national security otherwise require, is to be allowed to submit the reasons against his expulsion and to have his case reviewed by and to be represented for the purpose before the competent authority... A belligerent may consider it convenient to expel all hostile nationals residing or temporarily staying within its territory; although such a measure may be very harsh on individual aliens, it is generally accepted that such expulsion is justifiable. Having regard to Article 13 of the International Covenant on Civil and Political Rights, 1966, an alien lawfully in a State's territory may be expelled only in pursuance of a decision reached in accordance with law.
- ...
57. To sum up our conclusions, the provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 are ultra vires the Constitution of India and are accordingly struck down.

State of Arunachal Pradesh Vs. Khudiram Chakma and others

Civil Appeal Nos. 2182 and 2181 of 1993

Decided on April 27, 1993

The judgement of the court was delivered by

S. MOHAN, J. — Leave granted.

2. Both these civil appeals arise out of the judgement of the Guahati High Court dated April 30, 1992 rendered in C.R.No .166 of 1984. The short facts are as under.
4. The appellant along with his family members and other 56 families migrated to India on March 30, 1964 from erstwhile East Pakistan, now Bangladesh, due to disturbances prevailing at that time. They took shelter in a government Camp Abhoypur Block in Tirap District.
5. The appellant and other 56 families are known as Chakmas of the erstwhile East Pakistan. They being the refugees are given shelter in Government camp in Ledo in the district of Dibrugarh, Assam. Later on, in 1996, they were shifted to the camp at Miao within the State of Arunachal Pradesh
7. In the year 1996, the state government drew the scheme known as Chakma Resettlement Scheme for these refugees. Areas were earmarked for their settlement in different parts of the State and accordingly they were asked to move to the areas earmarked for them. In all, 5 Schemes were sanctioned for their settlement (comprising about 3100 families of refugees)at the cost more than Rs 2 crores.
8. The appellants along with 56 families were allotted lands in the villages of Gautampur and Maitripur. There were already a good number of Chakma refugee families who were allotted lands and were living peacefully. The appellant instead of residing in the allotted areas under the Resettlement Scheme drawn by the Government, strayed away from it and negotiated with the local Raja namely Ningrunong Singpo of Damba for an area of one sq. mile of his private land and got eh same from the said Singpo through an unregistered deed dated November 20, 1972.
9. The said State would contend that the said transfer is illegal because as per section 7 of the BERF¹, 1873 (Regulation 5 of 1873) no person, who is not a native of the District, would acquire any interest in the land or the produce of the land beyond

the inner line without the sanction of the state government or such officer as the state government may appoint in this behalf. On the contrary, the stand of the appellant is that since the date of donation they have been residing and cultivating the said land they have developed the area for habitation purposes.

17.g. The High Court of Gauhati formulated three questions for determination:

1. Whether the writ petitioner and the 56 Chakma families now settled in Joypur village, Miyo Sub-Division, Arunachal Pradesh are citizens of India or foreigners?
 2. If they are not citizens of India, whether the authorities concerned have right to give directions to these Chakma people to move to another place?
 3. Whether the impugned order dated February 15, 1984 is arbitrary, devoid of reason and violative of the provisions of the Constitution?
- i. The High Court on an elaborate consideration of the provisions of Citizenship Act, came to the conclusion that the language of Section 6_A of the Citizenship Act is very clear. It states that persons who have come into Assam before January 1966 from the specified territory and who have been ordinarily resident in Assam since the date of their entry shall be deemed to be citizens. Admittedly, the petitioners therein would not fall under this category as they stayed in Assam for a short while in 1964. Accordingly, they will not be citizens of India.
- j. On the second question, the High Court referred to Section 7 of the Bengal Eastern Frontier Regulation, 1873. That section specifically prohibits the acquisition of interest in land by other than the natives of the district without the sanction of the state government. Admittedly, there was no sanction of the State Government in favour of the petitioners under the said Regulation, which is applicable to Arunachal Pradesh. Besides, clause 9(2) (a) of the Foreigners Order, 1948 prohibits acquisition of land or any interest thereon or within the prohibited area by any foreigner. Clause 9(2) (b) states that the local authority may impose conditions regarding acquisition of land or any interest thereof or any other matter deemed necessary in the interest of public safety. There was no controversy that the place where Chakmas were staying is within the inner line which is protected area notified by the state government.
- k. In view of the facts, the High Court came to the conclusion that the petitioners had no right to seek a permanent place of abode in that area. The authority had every right requiring them to shift.
- l. On the third question, after going through the various files produced by the state government, in the court, the High Court found various complaints against these

Chakmas. They were indulging in procuring arms and ammunition and were actively associating with antisocial elements. Accordingly it was concluded that the impugned order is not devoid of any reason.

- m. Lastly, the High Court, on humanitarian grounds, directed the state government to give adequate compensation in the event of these Chakmas being evicted from the place. The State of Arunachal Pradesh has preferred SLP (C) No. 12429 of 1992 while Khudiram Chakma has filed SLP (C) No. 13767 of 1992.
- p. In *Louis De Raedt v. Union of India* this Court took the view that the fundamental rights are available to foreigners as well, including Article 21 of the Constitution.
- r. The appellants cannot claim to be citizen of India by invoking Section 6-A of the Citizenship Act as amended and incorporated on December 7, 1985 in pursuance of the Assam Accord. In order to get the benefit of Section 6- A two conditions mentioned in sub-section (2) of the said section must be satisfied simultaneously
 1. The persons who are of Indian origin (viz. undivided India) came before January 1, 1966 to Assam from the specified territory; and
 2. have been "ordinarily resident" in Assam (as it existed in 1985) since the date of their entry into Assam.
- s. Insofar as the appellants were residing in Miao Sub-Division of Tirap District, Arunachal Pradesh since 1968 they did not satisfy these conditions. As to what exactly is the meaning of "ordinarily resident" could be seen from *Shanno Devi v. Mangal Sain*.
- t. It is true that this Court in *Louis De Raedt* took the view that even a foreigner has a fundamental right, but that fundamental right is confined only to Article 21 and does not include the right to move freely throughout and to reside and stay in any part of the territory of India, as conferred under Articles 19 (1) (d) and (e). Such a right is available only to the citizens. The appellants being foreigners, cannot invoke Article 14 of the Constitution to get the same right denied to them under Article 19 since Article 14 cannot operate in regard to a right specifically withheld from non-citizens. In support of this submission, reliance is placed on *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Addl. Collector of Customs and Louis De Raedt*.
 - a. The land donated in favour of the appellants by Raja Ningrunong Singpo of Damba by donation deed dated November 20, 1972 is illegal. Section 7 of the

Bengal Eastern Frontier Regulation, 1873 and Clause 9 of the Foreigners Order, 1948, which are applicable to Arunachal Pradesh, specifically prohibit such transfer without prior permission of state government. No such permission, in this case, was obtained. The tribals of North- Eastern States are historically protected races. Part X of the Constitution of India contains provisions and laws governing them. The decision regarding settlement of foreigners is a matter of policy. It is well –settled in law that the Court does not interfere in a matter of government policy since it is for the Government to decide.

- b. On the question of natural justice before passing the impugned order dated February 15, 1984 the learned counsel, producing the relevant material from the file, would urge that it is not correct to state that the order came to be issued all of a sudden. There is abundant material to show that the question of eviction was an ongoing process, right from 1978. Many notices were issued over a period of years to shift to Villages Maitripur and Gautampur. There were protests from Chakmas. From the file it is seen that the appellant was aware of the shift order dated September 26, 1983. There was also an oral hearing of the same. It was because of the complaints filed by the residents of the locality against the appellant and in view of the report that they were indulging in procuring arms and ammunition and were in close contact with anti-social elements. Taking an overall view of the matter, the impugned order came to be passed. On ground realities, natural justice is fully satisfied.
- c. In support of the above submissions the learned counsel relied on the following cases:

R.v. Secretary of State for the Home Department ex parte Cheblak

Lord Bridge of Harwich, pp. 723-F o 724-G; Lord Templeman, ,p. 725- J, 726- A to C; Lord Ackner, pp. 731-H, 732 G-H, 735 F-J; Lord Lowry, p. 737 D-J in Brind v. Secretary of State for the Home Deptt.

Council of Civil Service Unions v. Minister for the Civil Service.

McInnes v. Onslow Farne

J.R. Vohar v. India Export House Pvt. Ltd.

Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi.

Satya Vir Singh v. Union of India

- A. Earlier we were referred to Bengal Eastern Frontier Regulation , 1873 Clause of the said Regulations status thus:

“ It shall be lawful for the state government to prescribe and from time to time to alter by notification in the Official Gazette a line to be called ‘ The Inner Line “ in each or any of the above named districts.

The state government may, by notification in the Arunachal Pradesh Gazette prohibit all citizens of India or any class of such citizens or any persons residing in or passing through such districts from going beyond such line without a pass under the land and seal of the Chief Executive Officer of such district or of such other officer, as he may, authorise to grant such pass; and the state government may, from time to time, cancel or vary such prohibition.”

- k. Clause 7 is important. That reads as follows:

“It shall not be lawful for any person, not being a native of the district comprised in the preamble of this Regulation, to acquire any interest in land or the product of land beyond the said ‘Inner Line’ without the sanction of the state government or such Officer as the state government shall appoint in his behalf.

Any interest so acquired may be dealt with as the state government or its said Officer shall direct.

The state government may also, by notification in the Arunachal Pradesh Gazette extend the prohibition contained in this section to any class of persons, natives of the said districts, and may from time to time in like manner cancel or vary such extension. “

- L. Under section 3 of the Foreigners Act of 1946, the Central Government may, by order, make provision of prohibiting, regulating or restricting the entry of foreigners into India. In exercise of power conferred under Section 3 of the said Act Foreigners Order of 1948 dated February 10, 1948 was issued. Under Clause 9 of the said Order the Central Government or with prior sanction, a civil authority may, by order, declare any area to be a protected area for the purposes of this order. On such declaration, the civil authority may, as to any protected area, prohibit any foreigner or any class of foreigners from entering or remaining in the area, impose on any foreigner or class of foreigners entering or being entered in the area, such conditions as may be mentioned under Claus 9. Clause 9 of the Foreigners Order of 1948 in sub-clause (2) prohibits the acquisition of any land or any interest thereon within the prohibited area by any foreigner.
- M. Under clause 9 the authorities concerned, by an order, may prohibit any foreigner, form remaining in any part of the protected area, as stated in the Foreigners’ Protected Area Order of 1958 which includes the territory of Arunachal Pradesh.

- N. Examined in this light, the donation by Raja is clearly invalid.
- O. However, the memorandum dated April 26, 1976 issued by the Extra Assistant Commissioner Miao states that the agreement between the appellant, Khudiram Chakma and the local Raja dated November 20, 1972 has been approved by the Deputy Commissioner. That is again mentioned in the direction given by the Executive Magistrate Miao on May 30, 1977. The effect of approval by the Deputy Commissioner will be considered later.
- P. In this factual background the question arises whether the appellants could claim citizenship under section 6-A of Citizenship Act of 1955.
- Q. As rightly urged by Mr. K.K. Venugopal , learned counsel for the State of Assam, two conditions are required to be satisfied under the sub-section(2).
They are:
- (i) Persons who are of Indian origin (undivided India) came before January 1, 1966 to Assam from the specified territory; and
 - (ii) Have been ' ordinarily resident ' in Assam as it existed in 1985 since their date of entry in Assam.
- R. The appellants were no doubt persons of Indian origin. They came to Assam prior to January 1, 1966, namely March 31, 1964 from the then East Pakistan, (presently Bangladesh) which is undoubtedly one of the specified territories under section 6-A (1) (C) .
- S. Assam, as seen from section 6_A (1) (a), means the territories included in the State of Assam immediately before the commencement of the Citizenship Act, 1985.
- T. It is the common case that Chakma people entered into Assam and stayed their for some time in Ledo within Dibrugarh District. Thereafter, they shifted to Miao, Arunachal Pradesh. According to the appellant, since the territory of Arunachal Pradesh in 1964 was included in the State of Assam, they would be entitled to the benefit of Sect ion 6-A. This contention overlooks the fact that the Immigrants (Expulsion from Assam) Act, 1950 (Act X of 1950) applied to the territories presently forming part of Meghalaya, Nagaland, and Arunachal Pradesh. However, by the North- Eastern Areas (Reorganisation) Act, 1971, the territories of Arunachal Pradesh were excluded from the purview of the Immigrants (Expulsion from Assam) Act of 1950.

62. Turning to Condition No-2 the requirement is ordinarily resident in Assam from the date of entry till the incorporation of Section 6-A, namely, December 7, 1985. As to the meaning of 'ordinarily resident' we may refer to Shanno Devi (Smt) v. Mangal Sain to clarify the line.

"It is not necessary that for every day of this period he should have resided in India. In the absence of the definition of the words 'ordinarily resident' in the Constitution it is reasonable to take the words to mean resident during this period without any serious break."

63. Insofar as the appellants and the Chakmas were residing in Miao Sub-Division of Tirap District in Arunachal Pradesh long before 1985 they cannot be regarded as the citizens of India. We find it difficult to appreciate the argument of Mr. Gobinda Mukhoty, learned counsel, that the accident of the appellants living in Arunachal Pradesh should not deprive them of citizenship. In this connection, it is worthwhile to note that Section 6-A of the Citizenship Act came to be incorporated by Amending Act as a result of Assam Accord. If law lays down certain conditions for acquiring citizenship, we cannot disregard the law. As laid down in Kennedy v. Mendoza-Martinez "Citizenship is a most precious right".

75. It is true that fundamental right is available to a foreigner as held in Louis De Raedt v. Union of India. (SCC p. 562, para 13)

a. "The next point taken on behalf of the petitioners, that the foreigners also enjoy some fundamental rights under the Constitution of this country, is also of not much help of them. The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country, as mentioned in Article 19 (1) (e), which is applicable only to the citizens of this country.

b. As such Articles 19 (1) (d) and (e) are unavailable to foreigners because those rights are conferred only on the citizens. Certainly, the machinery of Article 14 cannot be invoked to obtain that fundamental right. Rights under Articles 19 (1) (d) and (e) are expressly withheld to foreigners.

76. Blackburn and Taylor speaking on the right to enjoy asylum in Human Rights for the 1990s state as page 51 as under:

"The most urgent need of fugitive is a place of refuge. His or her most fundamental right is to be granted asylum. The Universal Declaration of Human Rights addressed this issue in deceptive language. To the inexperienced reader there is great comfort in Article 14 (1) of that Declaration, which provides that" Everyone has the right to seek and enjoy in other countries

asylum from persecution, it seems tolerably clear, however, that the right to enjoy asylum means no more than the right to enjoy it if it is granted."

Again at page 52 it is stated thus:

"Article 14 of the Universal Declaration of Human Rights, which speaks of the right to enjoy asylum, has to be interpreted in the light of the instrument as a whole; and must be taken to mean something. It implies that although an asylum-seeker has no right to be granted admission to a foreign State, equally a State which has granted him asylum must not later return him to the country whence he came. Moreover, the Article carries considerable moral authority and embodies the legal prerequisite of regional declarations and instruments"

Warwick McKean, dealing with the equality in the treatment of aliens, states in Equality and Discrimination under International Law at page 194 as under:

"It has long been recognised that persons who reside on the territory of countries of which they are not nationals possess a special status under international law. States have traditionally reserved the right to expel them from their territory and to refuse to grant them certain rights which are enjoyed by their own nationals, e.g. the right to vote, the hold public office or to engage in political activities. Aliens may be prohibited from joining the civil service or certain professions, or from owning some categories of property, and States may place them under restrictions in the interest of national security or public order. Nevertheless, once lawfully admitted to a territory, they are entitled to certain minimum rights necessary to the enjoyment of ordinary private life."

At pages 195-96 it is stated thus:

"General international law provides that aliens should not be discriminated against in their enjoyment of property rights once they have been acquired. If alien property is nationalised whereas the property of nationals remains unaffected then that fact is discriminatory and prohibited under international law. As Fitzmaurice points out, it has long been recognised that in certain matters, e.g. the general treatment of foreigners in a country, or compensation for property which may be expropriated or nationalised, non-discrimination as between persons of different nationality or against foreigners as compared with persons of local nationality, amounts to a rule of international law, the breach of which gives rise to a valid claim on the part of the foreign government whose national is involved."

77. Certainly, if the acquisition had been legal, compensation could have been awarded. But in view of the Bengal Eastern Frontier Regulation, 1873 and clause 9 (3) of the Foreigners Order, 1948 we do not think this is a case for award of compensation.

78. Though we have held that the principles of natural justice have been fully complied with in this case, we record the statement made by learned counsel for the State that the Chief Minister is ready to hear the respondents (appellant herein) or any representative of their group. Accordingly we direct that an opportunity be afforded to the appellants by the Chief Minister and grant such relief as he deems fit. We make it clear that it will be a *s post-* decisional hearing.
79. Accordingly we dismiss civil appeal arising out of SLP (C) No. 13767 of 1992 filed by Khudiram Chakma while civil appeal arising out of SLP (C) No. 12429 of 1992 filed by State of Arunachal Pradesh is allowed. However, there shall be no order as to costs.

¹ Bengal Eastern Frontier Regulation

M/S V.O. Tractoroexport, Moscow Vs. M/S Tarapore and Company and another 1970 (3) Supreme Court Reporter 53

**M/S V.O. Tractoroexport, Moscow Vs.M/S Tarapore and Company and another
Civil Appeal Nos. 1208, 1209, 1833 and 1834 of 1964,
decided on 28th October, 1969**

The following Judgements of the Court were delivered by

GROVER, J.—These connected appeals which involve points of importance and interest in international commercial arbitration arise out of a suit instituted on the original side of the High Court of Judicature at Madras by M/s Tarapore & Co. against M/s V.O. Tractaroexport, Moscow.

15. Now, as stated in Halsbury's Laws of England, Volume 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.
16. We may look at another well-recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well-established sense which they had in municipal law. (See *Barras v. Aberdeen Steam Trawling & Fishing Co. Ltd.*³)

30. The appeals fail and are dismissed but in view of the peculiar nature of the points involved, there will be no order as to costs.

The Judgement of the Court was delivered by

RAMASWAMI, J.— I regret I am unable to agree with the judgement pronounced by Grover, J.

40. The view that I have expressed is also consistent with the rule of construction that as far as practicable the municipal law must be interpreted by the courts in conformity with international obligations which the law may seek to effectuate. It is well settled that if the language of a section is ambiguous or is capable of more than one meaning the protocol itself becomes relevant for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. In the words of Diplock, L. J., in *Salomon v. Commissioners of Customs and Excise*:

"If the terms of the legislation are clear and unambiguous they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see Ellerman Lines Ltd v. Murray⁷) and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."

Applying this principle to [the present case it is manifest that Article 2 of the Convention which is contained in the Schedule to the Act imposes a duty on the court of a contracting State when seized of such an action to refer the parties to arbitration. Section 3 of the Act must, therefore, be read in consonance with this international obligation and any interpretation of Section 3 which would restrict the obligation or impose a refinement not warranted by the Convention itself will not be justified.

49. Thus he may have a personal remedy in one country and a remedy only against the goods in another; or a remedy against land in one State but no such remedy in

another. The rule, therefore, is that a plea of *lis alibi pendens* will not succeed and the court will order a stay of proceedings unless the defendant proves vexation in point of facts. He must show that the continued prosecution of both actions is oppressive or embarrassing, an onus which he will find it difficult to discharge if the plaintiff can indicate some material advantage that is likely to result from each separate action. Each case, therefore, depends upon the setting of its own facts and circumstances. In the facts of the present case I am of opinion that no case for injunction has been made out and the order of Ramamurti, J., dated April 12, 1968 allowing the application of respondent No. 106 of 1968 should be set aside. I would accordingly allow the appeal Nos. 1208 of 1969 and 1833 of 1969 with costs.

III
UNREPORTED JUDGEMENTS

IN THE HIGH COURT OF DELHI
Akbar and others Vs. Union of India and others

Crl M. (M) No. 2140/2000

Decided On: 14.07.2000

Hon'ble Judge: R.S. Sodhi, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Mr. J.K. Dambla, Adv.

For Respondents/Defendant: Mr. K.C. Mittal, Standing Counsel

ORDER

R.S. Sodhi, J.

Crl. M. (M) 2140/2000

1. Learned counsel for the petitioner has contended that by an order dated 14th August, 1954, the power to examine persons whether they are foreigners is vested with the civil authorities who may examine any person and that power also includes the power to deport those who have in any manner infringed the Foreigners Act, 1946. He further submits that the police in this case have been making indiscriminate arrests and have singled out members of the family rather than dealing with the family as a unit. To elaborate this he submits that in many cases either the wife is picked up and the husband and the children are left or the husband is picked up and the wife and children are left or the children are picked up and the wife and husband are left out. This he craves besides being arbitrary compounds the misery of those who are left behind. I have heard learned counsel for the respondent State who has drawn my attention to Section 3 of the Act which empowers the Foreigners Regional Registration Officer (FRRO) to identify and deport those who are staying in India in contravention of the Act. This power has been validly delegated upon the DCP FRRO by the Lt. Governor u/s 3(1) of the Act. The learned counsel for the State submits that if there have been any aberrations as stated by the learned counsel for the petitioner they shall be looked in to and all such aberrations shall be taken care of. On the question of law raised by the learned counsel for the petitioner in as much as in the Foreigners Order 5(A) the power lies with the civil authority to deal with the matter and the police is not a civil authority, is not sustainable. Police is a part of the civil administration and it cannot be said that is not a civil authority under the order. The learned counsel for the petitioner has shown me ration cards and election cards which he claims have

been issued to person who are sought to be deported and he claims that once a ration card or an election card is issued to a person he is deemed to be an Indian citizen. This argument of his also does not find favour with me. Merely because ration card has been issued does not ipso-facto confer citizenship. Conferring of citizenship is an Act which is governed by law: A Foreign national cannot automatically be deemed to be an Indian citizen without complying with the procedure established by law in this respect. Learned counsel for the petitioner also points out that most of the people who are identified to be Bangladeshis by the Administration are hoarded together and deported across the boarder where they are normally fired upon by the Bangladeshi force and if they return they are attacked by the Indian forces. If such a thing is happening it must be stopped immediately. The procedure for deportation must be scrupulously followed so as to minimise misery and/or any violation of human rights. Learned counsel for the State strongly refutes the contention of the counsel for the petitioner that any high handiness is being shown in deporting the foreigners. He submits that there is a regular procedure adopted for deportation and it is not even conceivable that persons are pushed across the border merely to be killed. Such stories are made up only to gain sympathy and are figments of fertile imagination. I propose not to take the matter further. However, if there be any incident that violates any human right or statutory right it will be open for the individual to approach this Court with their grievance.

2. The petition is dismissed accordingly.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**Mr Anthony Omondi Osino Vs. FRRO**

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2033 OF 2005

Mr. Mihir Desai for the petitioner

Mr. H. V. Mehta, Public Prosecutor for Union of India.

Mr. Y. S. Shinde, A. P. P. for the State.

CORAM: SMT. RANJANA DESAI & ANOOP V. MOHTA, J. J.

DATED: 5 OCTOBER 2005.

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

Our attention has been drawn by Mr. Mehta, the learned counsel appearing for the Union of India to a letteras 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.”

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.

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 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.

(Smt. Ranjana Desai, J)

(ANOOP V. MOHTA).

Sd/

Section Officer

High Court Appellate Side True Copy #

DISTRICT: SOUTH 24-PARGANAS.

IN THE HIGH COURT OF CALCUTTA

Ba Aung and another Vs. Union of India and others

APPEAL FROM CONSTITUTIONAL WRIT

JURISDICTION

(MANDAMUS APPEAL)

APPELATE 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

In Re: CAN 3708 of 2006

On 12 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 21 of December 2006.

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 12 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.

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

THE GAUHATI HIGH COURT

**High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram,
Arunachal Pradesh.Civil Appellate SideCivil Rule No.1847/89.**

Mr. Bogy Vs. Union of India

PRESENT

Hon'ble the Chief Justice

Hon'ble Mr.Justice Phuken

For the Petitioner :- Mr. Nandita Haksar

Mr. N. Kotehwar Singh,

Mr. Hrishikesh Roy,

Mr. D. Dass,adv.

For the Respondent :

17.11.89

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 unsuccessful 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 HIGH COURT OF KARNATAKA AT BANGALORE**On the 17th day of February 1994****Present****The Hon'ble MR.S.B.Majumdar, Chief Justice****And****The Hon'ble MR.Justice N.D.V. Bhat****Writ appeal number 354 of 1994****Digvijay Mote Vs. Government of India and another**

This appeal is filed against the order passed by the learned single judge in W.P.This appeal coming on for preliminary hearing this day,Chief Justice delivered the following:

Judgement

1. This appeal is directed against the order passed by the learned single judge in a pending writ petition moved by the appellant (party-in-person) as a public interest litigation for enforcing the rights of 150 children being Srilankan Tamilians. They are staying in residential school in Karnataka, which is situated in Jakkur near Bangalore. These children are said to have come for studies in primary and secondary education courses in Tamil and English. They were earlier staying in refugee camps with their parents in Tamil Nadu and Orissa. From these two camps these children have come to the aforesaid place for pursuing their studies. In the writ petition various reliefs were prayed for and at the stage of notice ad interim order was not granted. The petitioner has, therefore, filed this appeal.
2. The appellant (party-in-person) submitted before us that some ad interim order is required to be issued in this connection so that these children who are otherwise starving may keep their body and soul together because they are studying in residential school where there are no funds to maintain them and it was likely that some of them may die out of starvation and therefore, the learned single judge should have passed some ad interim order on adhoc basis so that these children can avoid starvation deaths.
3. In this appeal we have issued notice to the respondents i.e, Government of India and Government of Karnataka. We are happy to note that pursuant to the notice issued by us, on humanitarian grounds, respondents-2 has agreed to provide, without prejudice to the rights and contentions of both the sides, some basic requirements such as food, tea etc., to these children subject to further orders in the writ petition. Mr.Farooq, the learned government advocate produced before

us a photostat copy of the proceeding of the meeting held in the chambers of the chief secretary to government at 12.30 a.m. on 5.2.1994. On humanitarian grounds the following decision was taken:

“Department of women and children welfare through the social welfare department will be requested to take appropriate measures to provide basic amenities to the children lodged in the camp on humanitarian consideration .”

4. Mr. Farooq informed us that he has been instructed to submit, subject to the orders of this Court that the Social Welfare Department will see to it that an adhoc arrangement is made on the spot in the residential school to provide food on the same line as provided in the Government Hostels and Ashrams which will include, tea twice a day, morning breakfast, lunch, and dinner. It is made clear that these arrangements will be made on adhoc basis with a view to see that the concerned inmates do not starve. Mr.Farooq made it clear that the food will be provided on the spot from 20-2-1994. We highly appreciate this good gesture on the part of the state government. It is made clear that this arrangement is purely on humanitarian grounds and it is voluntary made by the state government without any prejudice to the rights and contentions of both the sides and subject to the further orders which the learned single judge may pass after hearing both the sides in the writ petition which we are told is at the stage of admission. In the light of the above, this arrangement will continue for sometime. We should not be understood to have expressed any opinion on the merits of the writ petition. In short, all questions are kept open.
5. It is obvious that respondent-2 will carry out the directions as contained in this order and as agreed to before us. It will be open to the departmental authorities who will be supplying the foods on spot to take co-operation of any of the inmates in this regard.
6. This appeal is disposed of subject to the directions issued as aforesaid with the consent of both sides.

Sd/- Chief Justice

Sd/- Judge

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Gurinder Singh and others Vs. Union of India

CrI. W.P. 871 of 1994.

Present Ms. Sumbul Rizvi Khan, Advocate
and 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 JUDICATURE AT MADRAS

(Special Original Jurisdiction)

Gurunathan and others Vs. The Government of India and others

Tuesday, the twenty second day of March, One Thousand Nine Hundred and Ninety Four.

Present:- The Honourable Mr. Justice Venkataswami and The Honourable Mr. Justice Jayasimha Babu.

W. P. Nos. 6708 and 7916 of 1992

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 Ruvaiddamma, 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.

ORDER: 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 DELHI AT NEW DELHI**Extraordinary Criminal, Original Writ Jurisdiction****Criminal Writ Petition No. 658 of 1997**

In the matter of:

**Mst. Khadija A.K.A. Kjudija and others Vs.
Union of India and others**

4.12.97

Present: Mr. Deepak Kumar Thakur for the petitioners

Mr. S.K. Aggarwal for Respondents along with

SI Heera Lal, FRRO, New Delhi

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

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.

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.

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 CrI.Ms. are disposed of, in the above terms.

Copy of the order be given Dasti to counsel for the parties. Sd/

Y.K. Sabharwal

Judge

Sd/

A.K. Srivastava

Judge

December 19,1997

HIGH COURT OF DELHI AT NEW DELHI
Ms. Lailoma Wafa Vs. U.O.I. and others

31.07.1998

Present: Mr.D.K. Thakur for the petitioner

Mr.S.K. Aggarwal for respondent No.1

Mr. Sarabjit Sharma for respondent No.2

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

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.

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

SUPREME COURT OF INDIA

Record of Proceedings

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

(for prel. hearing)

The Maiwand's Trust of Afghan Human Freedom Petitioners Vs. State of Punjab and others

Date: 28.02.1986: This Petitions were called on for hearing today.

Coram : Hon'ble Mr. Justice O.Chinappa Reddy

Hon'ble Mr Justice V.Khalid

For the Petitioners : Mr V.M. Tarkunde, Sr.Adv.

Mr.B.R. Agarwala and

Miss Vijayalakshmi Menon, Adv.

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.
/True Copy/

IN THE HIGH COURT OF DELHI AT NEW DELHI

Criminal Writ Petition No.60 of 1997.

**Mr. Majid Ahmed Abdul Majid Mohd. Jad Al-Hak Vs. Union
of India and others**

Present: Ms.Sumbul Rizvi Khan with Mr. Ajit Singh for the Petitioner.

Mr. S.S. Gandhi for respondent 2 and 3

Crl.W.60/97

Learned counsel for the respondent has pointed out that the petitioner has no valid case or ground to stay in this country. The Maharashtra Government has already passed an order dated 31st December, 1996 directing him to leave the country. However, on behalf of petitioner it is submitted that the said order has not been served on the petitioner so far. The learned counsel for the petitioner has also made a grievance about the petitioner not being provided with basic necessities like food and medical aid etc. while he is being detained at the Refusal Room at the Indira Gandhi International Airport. The Counsel for the respondents however, denies this. In any case, it is ordered that at least the basic necessities like food and medical care should be provided to the petitioner so long as he is being detained at the said place.

Learned counsel for the respondents further points out that it has not been so far decided as to which place the petitioner will be deported. Till such a decision is taken, the petitioner will be kept at the place where he is being presently detained. The learned counsel further states that steps are being taken to expeditiously decide as to where the petitioner is to be deported. Nothing further survives in this petition. The same stands disposed of.

Sd/-

Arun Kumar

Judge

N.G.Nandi J.

January 30,1997. Kalra.

IN THE HIGH COURT OF DELHI AT NEW DELHI
Mr. Malika Marui Safi Vs. State of Delhi

25-4-1997

Present: Mr. Deepak Kumar Thakur for the petitioner

Mr. Anil Soni for the State.

Cri.M.(M) No.1135/97

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.

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.

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.

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.

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.

Petition stands disposed of.

April 25,1997

Sd/-Manmohan Sarin

Judge

SUPREME COURT OF INDIA**Record of Proceedings****Writ Petition (Crl.) No.243 of 1988 (for Prel. Hearing)****N.D. Pancholi Vs. State of Punjab and others**

Date:9.6.1988

This Petition was called on for hearing today.

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

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

IN THE HIGH COURT OF JUDICATURE AT MADRAS**10.04.2003/Habeas Corpus Petition No. 971 of 2001****P. Shanmugam, J. and S.K. Krishnan, J. Yogeswari Vs. The State of Tamil Nadu and others****ORDER**

P. Shanmugam, J. – 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. 2954 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 CrI. 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 Sri Lanka, 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 489D 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 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 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 CrI. 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 Constitutional.

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 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 judgement of Division Bench of this court in **Kalavathy Vs. State of Tamil Nadu** [1995 (2) L.W. (Cr.) 690 (2)] and contended that the points raised by the petitioner in this case are squarely answered in the said judgement. By referring to the order passed by the Supreme Court in 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 traveling 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 judgement 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 repeals of an enactment 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, be general or special order, specify. The Foreigners Act, 1946, which is a pre-Constitutional 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 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 Sub-section (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 Constitutions.

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 Sub-section 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-à-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 CrI.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 unauthorisedly and as refugees.

(iv) Insofar as the detenu in this case is concerned, he has entered into India along with the petitioner herein authorisedly, 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 judgement 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 possessions 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 unauthorisedly, 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 judgement. 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 22 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 leveled 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 Section 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 JUDICATURE AT MADRAS

Dated: 14-11-2003

Coram:

The Hon'ble Mr. Justice V.S. Sirapurkar

And

The Hon'ble Mr. Justice M. Thanikachalam

H.O.P. Nos.1038, 1118, 1119,1120,1121,
1122,1123,1085,1170 and 1226 of 2003

Premavathy e Rajathi and others Vs. The State of Tamil Nadu and others

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

For petitioners: Mr. B. Kumar, Senior Counsel

In HOP No 1118 to 1123/03
1085, 1170 and 1226/03 for Ms. Sudha Ramalingam

For petitioner in HOP Nos.
1038 and iiiii of 2003 Mr. P.V.S. Giridhar

For Respondents:: Mr. I, Subramanian
Public prosecutor

In all HOPs Assisted by Mr. A. Navaneebhakrishnan
Addl. Public prosecutor

COMMON ORDER

V.S.SIRPURKAR, J.

This judgement 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 make 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.(Cri.) 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. Cri.). 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 judgement 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 judgement 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 judgements 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 as 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. (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 e Swamy Geethananda v. Union of India* (1991 L.W. CrI. 393) as also the Bombay High Court judgement 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 judgement 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 judgement 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 judgement. 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 judgement 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 judgement and, therefore, that judgement should be restricted to the facts in that case. Learned counsel also further argued that judgement cannot be a final authority because some questions, which were raised in the subsequent judgement in Yogeswari case, cited supra, were not raised before that Bench and, therefore, that judgement 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 judgement 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 judgement in Yogeswari case, cited supra, was finalised. In the later part of the judgement 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 judgement 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 judgement. We have very carefully scanned each paragraph of the said judgement 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 reasons and had also considered the judgement 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 traveling 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. (Cri.) 692. He further states that the special leave petition against the judgement 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 judgement, 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 judgement 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 judgement. This is apart from the fact that in Kalavathy's judgement, 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 judgement 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 judgement 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 Kalavathys case is sub silentio n 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 judgement. One more reason is that as per the learned Public Prosecutor, however, the decision in Yogeswaris case is *per incurium* of the judgement of the

Supreme Court in Chinnapillais 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 judgement nor a law declared. It is for this reason that we have pointed out that the judgement in Chinnapillai case is in fact a 'law declared'. For reference, see the judgement 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 judgement very carefully. In the first place, we reiterate that the judgement 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.

20.3As 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 judgement. 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 judgement 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 judgement of the Supreme Court, which confirms the earlier Division Bench judgement 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 judgement 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 propriety 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 judgement of the Apex Court. The judgements 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, reiterated 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 stay 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 than 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.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Raju Vs. The State of Tamil Nadu and others

DATED: 27. 07.2005

CORAM

THE HONOURABLE MR. JUSTICE P. D. DINAKARAN

WRIT PETITION NO. 24063 OF 2005 AND

W. P. M. P NO. 26235 OF 2005

Writ petition filed under Article 226 of the Constitution of India praying to issue writ of mandamus directing the fourth respondent to pay the compensation to the petitioner for the death of his daughter Hirthika in the tsunami waves, granted by the First and Second Respondents. For petitionerM/s. D. Geetha For RespondentMr. E. Sampathkumar, GA

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 Tamilnadu 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 Srilankan Citizen by birth. He came to India along with his family from Srilanka due to the internal disturbances in Srilanka in the year 1990. He was placed at the Vaniyaru Refugee Camp, Pappireddipatti Taluk Dharmapuri District in Tamilnadu 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 HIGH COURT OF JUDICATURE, APPELLATE SIDE AT
BOMBAY**

A.D.1458 OF 1994

Syed Ata Mohamamdi Vs. Union of India and others

CORAM G.D.Kamat and Vishnu Saha, JJ

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.

THE HIGH COURT OF PUNJAB AND HARYANA, CHANDIGARH**Criminal Writ Side****Criminal Writ Petition No.499 Or 1996****Shah Ghazai and another Vs. Union of India and others**

Criminal Writ Petition under Articles 226 of the Constitution of India praying that this Hon'ble Court may be pleased to:

- i) Issue a writ, order or direction in the nature of Mandamus / Prohibition and /or otherwise quash the Deportation order referred to in the appended Annexure;
- ii) Kindly order the release of the petitioners into the custody of UNHCR, 14, Jorbagh, New Delhi
- iii) Pass such other orders as may be deemed fit and proper in the facts and circumstances of the case;
- iv) Prior notice to the Respondents and filing of the certified copies of annexure P7, P8, P9 and P10 may be dispensed with.
- v) The writ petition be allowed with costs. It is further prayed that the operation and implementation of the impugned deportation order may be stayed during the pendency of the Writ Petition.

Dated the 21st February, 1997.

PRESENT

THE HON'BLE MR. JUSTICE S.S. SUDHALKAR

For the Petitioner : Mr.S.R. Khan, Advocate

For the Respondent : Mr. Parminder Singh, AAG, Punjab
Mr.D.D. Sharma,
Advocate for Union of India

ORDER

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.

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.

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.

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.

This petition stands disposed of accordingly.

Sd/- S.S. Sudhakar
Judge
21.2.1997

IN THE HIGH COURT OF DELHI AT NEW DELHI**Criminal Writ Petition No-110 of 1998****Shri Shar Aung a.k.a Aung Thant Min Vs. Union of India**

4-3-1998

Present: Mr. Deepak Kumar Thakur for the petitioner.

Mr. Rakesh Tikku for respondent no.1

Mr. K.H.Nobin Singh for respondent no.2.

Cr1.w.110/98

The petitioner is a Burmese national. He was involved in the movement for democracy and human rights under leadership of Daw Anug San Suu Kyi and as a result of army action had to leave his country along with numerous who were involved in the said movement. He took refuge in Manipur (India) from 1988 to 1989. Thereafter, the petitioner proceeded to Mizoram but was stopped by the Manipur police when he arrived at Singhat on 5.3.1989 and was arrested since he had no travel documents. FIR No.18 (3) 89 SGT was registered at police station Singhat for offence under section 14 of the Foreigners Act 1946. It is stated that now a case is pending in the court of C.J.M, Churachandpur, Manipur. The petitioner was granted a bail by an order passed by the Guwahati high court, Imphal bench on 11.9.1990 to enable him to contact the UNHCR at New Delhi. It is now stated that the petitioner has been granted visa to travel to Canada under resettlement

programme. This petition was filed by him seeking directions against respondent no.2 to withdraw the prosecution pending against the petitioner for the offence under section 14 of the Foreigners Act 1946 and to direct the respondents to release the petitioner and permit him to leave India and travel to Canada.

After notices were issued, appearance has been put in on behalf of respondents. Learned counsel for respondent no.2, on the last date stated that as far as the communication received by the resident commissioner, Manipur stationed at New Delhi from the additional secretary, home, Government of Manipur, necessary instructions had been issued to the director of prosecution, Manipur to move the court of Judicial Magistrate, Churachandpur to withdraw the case under FIR No. 18(2) 89 SGT of P.S Singhat for offence under section 14 of the Foreigners Act against

the petitioner. Adjournment was sought thereafter by Mr.Tikku to take appropriate instructions.

Mr. Tikku states that central government and the ministry of home affairs has no objection to grant of exit visa to the petitioner subject, however, that prosecution pending in the court of C.J.M is withdrawn and intimation is conveyed to respondent no.1. It is also stated that the moment ministry receives the information from the Manipur government that the case has been withdrawn, the ministry will grant exit permit to the petitioner since there is no other objection for granting such exit permit.

In view of the statement of Mr.Tikku, no further orders are required to be passed in this petition except that on the receipt of the information, exit permit will be issued forthwith. The petition stands disposed of.

Copy of this order be given Dasti to learned counsel for the parties.

sd/- Devinder Gupta

judge

sd/-N.G.Nandi

judge

March 04, 1998

DISTRICT MUNSIF CUM JUDICIAL MAGISTRATE COURT
ALANDPUR
C.c. No.151/98

State Vs. Asghar Nikookar Rahimi

Cr.No.660/96

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.

ORDER

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 filed 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
7. 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, in 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.(1981CrlJ1704) 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 CrI.L.J.950, (Delhi High Court), Dalveer Bhandari J.

Smt. Urmila Agnihotri, Petitioner, Vs. State and another, Respondents.

CrI. Revn. No. 205 of 1991, D/-6.2.1992

Customs Act (52 of 1962), Sc.132,135-offence of smuggling-sentence-Reduction of-Nonconsideration 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 fine 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 settled 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)”

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 fine may be imposed and order accordingly.

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
Sd/
Judicial Magistrate, Alandur

IN THE COURT OF RAVINDER DUDEJA, M M, NEW DELHI
State Vs. In Re Eva Massar Musa Ahmed

FIR No-278/95

U/S 14 Foreigners Act

P.S. K.M. Pur

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

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 fine 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

IN THE COURT OF RAVINDER DUDEJA, M M, NEW DELHI
In Re Eva Massar Musa Ahmed Vs. State

FIR No-278/95

26-10-95 Pr: None for State

Accused on bail with counsel

Accused has moved an application for pleading guilty through her counsel. She has pleaded guilty to the charge u/s 14 Foreigner's Act framed against her. I am satisfied that accused has pleaded guilty voluntarily without any fear or coercion.

Heard

Vide separate judgement, accused is convicted u/s 14 Foreigner's Act & is sentenced to imprisonment already undergone by her in custody during the course of investigation and trial & a fine of Rs 2500/ in default of payment of which accused shall undergo S.I. for 3 more days.

File be consigned to R.R.

Sd/

IN THE COURT OF MS. SEEMA MALNI, M.M. DELHI
State Vs. Farid Ali Khan

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.

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 other wise 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 THE COURT OF METROPOLITAN MAGISTRATE, 22ND
COURT. ANDHERI, MUMBAI**

(Judgement U/sec .355 of Cr.P.C.)

State Vs. Gafoor Zarin and others

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 in default 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 SHRI GURDEEP SINGH: METROPOLITAN
MAGISTRATE, DELHI**

FIR No. 583/97

State Vs. Hudson Vilvaraj

1. Brief Statement of the Reasons for the Decision:

The accused Hudson Vilvaraj was sent up for trial by police of PS Paharganj on the allegations that on 12.9.97 at about 5.00 p.m., at Karan Guest House, Paharganj, he was found living at Karan Guest House, Paharganj without any travel document being a Sri Lankan National.

2. The accused was supplied with necessary copies and after finding prima facie offence punishable U/S 14 of Foreigners Act, he was charged to which he pleaded not guilty and claimed trial.
3. The prosecution in support of their case examined one witness.PW.1.SI Venu Gopal who proved the disclosure statement of the accused.Ex.PW.1/A, seizure memo of register of Guest House Ex.PW.1/B and arrest memo of accused.Ex.PW.1/C. The accused moved an application for pleading guilt to the charge. In view his application the prosecution evidence was closed and statement of accused was recorded u/s 281 Cr.P.C. The accused admitted the prosecution case and stated that he was found at Paharganj without any travel document and claimed that he was a refugee at Chennai. However, he chose not to lead any defence evidence.
4. I have heard Id. APP for the State and counsel for the accused. I have also gone through the record.
5. P.W.1 SI Venu Gopal testified that on 13-9-97 he was posted as SI at Operation Cell, New Delhi Range, Lodhi Colony and were checking the hotels at Paharganj. At about 4.30 p.m. they received a secret information regarding the suspicious person staying in Karan Guest House, Ghee Mandi , Paharganj. They found the accused staying in room No.4 and he was a Sri Lankan National. He pretends himself to be an Indian in hotel record. He could not produce the visa or permission to stay in India and any valid document entitling to stay in India. Thereafter, the accused was arrested.
6. During the course of proceeding, the accused claimed that he was having the refugee status and requested for its verification. The verification report was sent by Nepal Singh, Desk officer, Ministry of Home Affairs(Rehabilitation Division)

and by report it was confirmed that the accused is a Sri Lankan National and was staying at 7-B, Anna nagar, Subramaniya Puram, Trichy-20.

7. The testimony of P.W.1 has gone unrebutted and prosecution has proved that the accused was found living in the Territory of Union of India without any valid travel document. The accused has also admitted to his statement U/S 281 Cr.P.C. the prosecution case which can be read in favour and against him to find out his guilt and otherwise.
8. Accordingly, the prosecution has proved beyond reasonable doubt the offence punishable U/ S 14 of Foreigners Act, against accused Husdon Vilvaraj. He is accordingly convicted.

Announced in the Open Court on 06/05/98

(Gurdeep Singh)
Metropolitan Magistrate
Delhi

Hearing on the point of sentence

Present : Ld. APP for the State.

Convict in J/C with counsel.

It is submitted that the convict is a poor person and is living at refugee at Chennai. Therefore, a lenient view is prayed for.

The refugee status does not entitle a person to move about freely in another country and the person is always subject to be laws of the country which has accorded him to refugee status. The accused has clearly committed the offence. However, since he was refugee and in that effect he was not allowed to move about freely without the travel document. He is entitled to a lenient view. Keeping in view the facts and circumstances of the case, I am of the considered opinion that that the ends of justice would be met in sentencing the convict to SI for 6 months and fine of Rs 1000/ In default of payment of fine he shall further undergo 15 days SI. Benefit of Section 428 Cr.P.C be given to the accused .Copy of judgement be given to the accused free of cost. File be consigned to Record Room.

Announced in the open court on 6-5-98.

(Gurdeep Singh)
Metropolitan Magistrate
Delhi

**IN THE COURT OF SHRI BHARAT PARASHAR,
METROPOLITAN MAGISTRATE, DELHI**

State Vs. Jamil Ahmed

FIR No.445/89

Brief statements of reasons for the decision:

Briefly stated the facts of the prosecution case are that on or before 27/9/89 accused Jamil Ahmed, an Afghan National entered into India by dishonestly inducing the Immigration Authorities of India to allow him to enter into India on the basis of a visa bearing No.3095/89 dated 25/2/89 which subsequently was detected to be forged and which he had reason to believe to be forged and he dishonestly used the said visa as genuine. Accordingly he was challenged for the offence U/s. 420/ 471 IPC and 14 Foreigners Act 1946.

After due compliance of section 207 Cr.P.C charge for the offence U/s 420/471 IPC and 14 Foreigners Act was framed to which the accused pleaded not guilty and claimed trial.

To further its case the prosecution examined six witnesses namely PW1 H.C Arji Ram, PW2 Const.Jagbir, PW3 S.I.Satbir Singh, PW4 Kishore Dudani, PW5 Const Sanjay Kumar and PW6 S.I Har Pal Singh. Accused was then examined U/S 313 Cr.P.C. He then examined as DW1 in his defence. PW1 H.C Arji Ram was the duty officer who recorded FIR Ex.PW1/A.

PW2 S.I Satbir stated that on 29/8/89 he was discharging his duties at FRRO. At about 2.15 p.m accused Jamil Ahmed came and presented his passport and registration papers to him. Upon checking it was found that visa Ex.P1 at page No.13 of his passport Ex.P1 was forged. Accordingly he prepared Rukka, Ex. PW3/A and send the accused alongwith passport through constable Sanjay Kumar to P.S.I.P. Estate for further necessary action.

PW5 H.C Sanjay Kumar corroborated the testimony of PW3 S.I Satbir Singh in material particulars.

PW4 Sh. Kishore Dudani was the section officer, Ministry of External Affairs, He stated that 5/9/89 upon receiving a letter from S.H.O P.S.I.P Estate dated 2/9/89, regarding verification of visa bearing No. 3095/89 dated 25/2/89, allegedly issued from Kabul, he got the same verified as to its genuineness from First secretary (counsler) through telex . However a message Ex. PW4/B was received that the said visa was issued to some other person different from accused on 16/2/89 and in fact 25/2/89 was a

holiday for the Embassy and no visa was issued on that day. He then vide his letter Ex. PW4/A dated 8/9/89 conveyed the said information to S.H.O. P.S.I.P Estate.

PW6 S.I Har Pal Singh was the I.O of the case. He stated that on 29/8/89 he was handed over a copy of FIR Ex.Pw1/A. Rukka Ex.PW3/A and passport Ex.P1 alongwith accused Jamil Ahmed by H.C Jagir Singh and constable Sanjay Kumar. Passport was seized vide memo. Ex. PW5/A and was sent for verification to Ministry of External Affairs vide application Ex.PW4/A. After receipt of reply that the said visa is forged and after completion of investigation he submitted the challan to court for trial.

PW2 Const. Jagbir corroborated the testimony of PW6 S.I. Harpal Singh in material particulars.

In his statement U/S 313 Cr.pc accused denied having knowledge as to whether the said visa was forged or not. Though he admitted that he was an Afghan National and is having a status of refugee in India at present. He further stated that he fled from his country due to civil war and the visa was obtained by him through a travel agent. In his examination as DW1 accused stated that he fled from Afghanistan due to civil war and denied having any knowledge as to whether the said visa is forged or not. He further stated that he is now registered as a refugee in the United Nations High Commissions and is now gainfully employed in India imparting training in Taekwando in different schools.

I have heard the arguments adduced at the bar and carefully perused the record. In the present case Ld. Counsel for accused has not anywhere disputed the verification of the said visa conducted by the authorities in India vide which it was held that the visa possessed by the accused was forged. The only contention on behalf of accused is that, he had no knowledge as to whether the said visa was forged or not. However in facts and circumstances of the case as discussed by me above and specifically in view of the unimpeached testimony of the prosecution witnesses, I find no substance in the above contention of Ld. Counsel for the accused, I have been unable to find any circumstances in the crossexamination. The prosecution witness which may favour the accused or may lead me to disbelieve the clear, unimbuguous testimony of the prosecution witnesses.

In his statement U/S 313 Cr.p.c and his examination as DW1 also accused has admitted his being an Afghan National. In view of my above discussion, I am thus of the considered opinion that the prosecution is successful in bringing home the guilt of the offence U/S 420/471 IPC and 14 Foreigners Act.1946.

Announced in open court
Today on 8-6-1994

(Bharat Parashar)
M.M. Delhi

Order on Sentence

Vide my separate order accused Jamil Ahmed has been convicted for the offences u/s 420/471 IPC and 14 Foreigners Act 1946. I have heard the convict and his counsel on the point of sentence. It has been submitted that convict is of young age about 25 years and he has already lost whole of his family in the civil war in Afghanistan. It has further been submitted that the convict has already been granted refugee status by UNHCR. A certification to that effect was also placed on record. It has also been submitted that convict has since employed himself gainfully in imparting training in various schools in the discipline of taekwando. He has also been awarded a number of certificates for his outstanding performance in the same in various international and national event. Photocopies of the same have also been placed on record. A lenient view has thus been prayed for the convict.

Convict Jamil Ahmed, an Afghan National cheated the Immigration Authorities of India in gaining entry on the basis of a visa which subsequently was 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 Aghanistan and consequent migration of its residents to neighbouring countries is a matter of common knowledge. The United Nations in cooperation with the Governments of various countries including that of India has been making efforts to rehabilitate the migrating Afghan nationals. And in perusance of these efforts they have been granted refugee certificates so that they may be given necessary assistance as and when required. Further, keeping in view the fact that the convict has since gainfully employed himself in India and has brought laurels to the country in the discipline of taekwando. Further he has been facing trial since 1989 and has not once abused the bail granted to him. I therefore deem it a fit case which warrant a lenient view.

Convict has been in custody for about 15 days in the present case. I therefore, sentence him to the period of imprisonment already undergone by him, and to pay a fine of Rs. 4,000/- for the offence u/s 420/471 IPC and 14 Foreigners Act 1946. In default of payment of fine he shall undergo simple imprisonment for a period of two months. I further direct that after the completion of period of sentence he be deported from India as per law. A copy of the order be given free of cost to the convict.

(Bharat Parashar)

M.M. Delhi

TRANSLATION OF THE JUDGEMENT DT. 31.5.96**State Vs. Kishan Chand And Habib Iranpur****Criminal Case No.66/96.**

Present:

Public Prosecutor on behalf of the State,
Ms. Sumbul Rizvi Khan on behalf of the co-accused,
Accused Habib Iranpur present under Judicial direction,
Accused Kishan Chand present in person

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

Arguments heard. Accused Kishan Chand pleads not guilty to the above charge and seeks discharge.

Accused Habib 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.

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.

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.

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

The trial of Accused Kishan Chand shall continue. To come up on 3.9.96.

Signed

Senior Civil Magistrate

**IN THE COURT OF SH. M.P. SINGH, SESSIONS JUDGE,
MAHARAJGANJ**

S.T.No. 6 of 1994

State Vs. 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.**

ORDER

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 Ist 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 time 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.

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.

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 desposed 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.

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 METROPOLITAN MAGISTRATE, 14TH
COURT, GIRGAUM, MUMBAI.**

C.C. NO. 66/P/2002 (LAC No. 207/2002)

State Vs. Majad Abdul Raheman Darendash

ORDER

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.

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 fine 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

IN THE COURT OF V.K. MALHOTRA, M M DELHI**State Vs. Mohd. Ehsan**

FIR No-435/93

U/S 14 Foreigners Act

17-3-94

Accused with counsel Ms Sumbul Rizvi Khan

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 letteer dated 8-3-94 was written to Bulwant Singh, incharge, PP Amar Colony, Lajpat Nagar, New Delhi is filed on record.

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.V K MALHOTRA, ACMM**State Vs. Mohd. Riza Ali**

FIR No. 414/93

P.S. IGI Airport

Present: A.P.P. for the State.

Accused on bail with counsel.

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.

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 filed 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.

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 fine of Rs 10,000/ in default six months S.I. is sufficient to meet the ends of justice. It is ordered accordingly.

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

6-7-95

Present: Accused with counsel.

Balance fine of Rs 6000/ deposited by the accused.

File be consigned to R.R.

ACMM/ &7-7-95

IN COURT OF SHRI BHARAT PARASHAR: MM: DELHI
State Vs. Mohd. Yaashin

FIR No: 289/97

1.9.97

Present : APP for the State

Accused on bail

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 effect 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.

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 efforts to rehabilitate migrating Afghan nationals and in pursuance of those efforts they have been granted refugee certificates so that they may be given necessary assistance as and when required.

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 fine he shall further undergo simple imprisonment for a period of 30 days.

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 ADD CHIEF METROPOLITANMAGISTRATE,
37TH COURT, ESPLANADE, MUMBAI.**

C.C. NO.427/P/1994

State Vs. Montasir M. Gubara

ORDER

Accused present with Adv.Sayed Akhtar. Today accused pleads guilty to the charge framed and explained to him u/sec. 7(3) (iii) Foreigners Order r.w. Sec.14 of the Foreigners Act.1946. Plea of accused separately recorded and accepted.

On the quantum of sentence, heard A.P.P. and Advocate for accused. Adv. For accused has produced a certificate from Union Nations disclosing accused is allowed to stay in India as refugee till 13.6.97. Hence leniency is shown, as when accused was arrested, he did not possess the requisite certificate.

Accused is convicted u/sec.7(3)(iii) Foreigners' Order r.w. 14 of Foreigners Act, 1946, accused is sentenced to suffer R.I. for 6 weeks and to pay a fine of Rs.500/- i/d to suffer R.I for 2 weeks.

Custody period undergone by accused, set off is given.

Accused to report to S.B.II C.I.D. Commonwealth section from time to time and show the certificate granted from the office of U.N.O. till 13.06.97.

Sd/

(S.N. CHIMADE)

Addl. Chief Metropolitan Magistrate.
37th Court, Esplande, Mumbai

**IN THE COURT OF SH.B.W.PAWARJ.M.F.C.CANTONMENT
COURT, PUNE**

R.C.C.No.162/94

State of Maharashtra Vs. Mustafe Jama Ahmed

Offence u/s 14 of Foreigner's Act

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

Chargsheet.

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 alongwith 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.

Date;21.4.1994

-Sd-

**IN THE COURT OF THE CHIEF JUDICIAL MAGISTRATE
CHURACHANDPUR, MANIPUR**

**State Vs. Shri K. Htoon Htoon S/o Uhla Htoon and
4 others....**

**F.I.R. 18(3)89 SGT.P.S.
(U/S 14 Foreigners Act.)**

ORDER

Dt. 23rd December, 1994

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.

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.

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.

Furnished the copies of this order to the Director of prosecution for the State, and the accused for information.

Sd/

(Kh.Brajachand Singh)

Chief Judicial Magistrate/Churachandpur,

Manipur

**IN THE COURT OF THE CHIEF JUDICIAL MAGISTRATE OF
KOZHIKODE**

Chief Judicial Magistrate.

Dated, the 2nd day of January, 1990

Calendar Case No.406 of 1996

State Vs. Teresi

JUDGEMENT

1. In Crime No.334/96 of the Kasaba Police Station the accused stands charge-sheeted by the Sub Inspector for the offence under Section 3(2)(a) and (c), punishable under section 14 of the Foreigners Act.
2. The prosecution case is that the accused who is a citizen of Sudan came to India without Passport or Visa, and from Bombay she reached the White Lines Hotel at Kozhikode and remained there. Thus the accused committed the offences under the aforesaid sections.
3. Accused is produced. She is defended by a counsel. Copies of all relevant records supplied to her. Both sides were heard. Charge for the offences under the aforesaid sections framed, read over and explained to the accused .She under stood and pleaded guilty. I am satisfied that her plea is voluntary, and so accepted.
4. In the result the accused is found guilty for the offences under section 3(2)(a) and (c) of the Foreigners Act, punishable under section 14 of the above said Act.

Pronounced by me in open court this the 2nd day of January, 1997,

(Sd.)

Chief Judicial Magistrate

The accused was heard on the question of sentence .She submitted that it was withvalid Passport and visa she effected entry to India and is a student of the Quaide Mkleth College (Men), Medavakkam, Madras, and so, in the matter of sentence leniency may be shown to her.According to her she missed the Passport and Visa. No such document produced. She produced photocopy of a Certificate dated 24-9-96 issued by the Principal-in-Charge of the Qaide Milleth College for Men, Madavakkam, Madras. The same is one certifying that the accused Teresa is studying for B.B.M.Final of the above-said College during 1996-1997.Considering these circumstances I am inclined to take a lenient view in the matter of the sentence. The accused is convicted and sentenced to

simple Imprisonment for 45 (forty five days and also to pay a fine of Rs 1000/ (Rs.One thousand only.In default of payment of fine she will undergo Simple Imprisonment for a further period of one month. She is entitled to get set off as provided under section 428 of the Code of Criminal Procedure. She was under detention for a period of 46 days. Therefore on payment of the fine amount the accused will be released and handed over to Smt.Chinnammu Sivadas, Social Services Officer of the United Nations High Commissioner for Refugees, New Delhi, who is present before court today, and that too, on her application. In case the fine amount is not paid, the accused will be sent to District Jail, Kozhikode, with Committal warrant for the execution of default sentence.

Dated, this the 2nd day of January,1997.

(Sd.)

Chief Judicial Magistrate.

**IN THE COURT OF SHRI SANJAY GARG: METROPOLITAN
MAGISTRATE: NEW DELHI**

State Vs. Thang Cin Thawn

FIR NO.330/01

P.S. Ch.Puri

U/S 14 F.Act

JUDGEMENT

a) Sl.No.of the case	1341/2
b) Name of the complainant	State
c) Date of commission of the offence	15-9-01
d) Name of the accused	Mr.Thang Cin Thawn
e) Offence complained off	U/S 14 Foreigner Act.
f) Plea of the accused	Pleaded not guilty
g) Final order	Convicted
h) Date of such order	3-6-2002

Brief statement of reasons of such decision:

1. Briefly stated allegation against the accused are that on 15-9-01 at 9.20am at Nayay Marg near visa gate US Embassy New Delhi, he was found without any visa and passport granted by Indian Govt. Accused being Burma national was required to enter India after getting visa from Indian High Commission. After investigation police filed the challan against the accused for the offences under section 14 of Foreigners Act, 1946.
2. After supplying copies of the challan, charge under section 14 of foreigners Act was given to the accused to which he pleaded not guilty and claimed trial.
3. In support of its case prosecution examined four witnesses. PW1 Ct.Om Prakash along with IO arres accused and he proved arrest memo of the accused Ex PW1,disclosure statement of the accused Ex PW1/B and personal search memo of the accused Ex PW1/C.PW2 ASI Devi Ram was on duty outside the US Embassy whwn accused reached there .PW3 is Yashbeer Singh who proved his register EX p. PW4 SI Mahinder Singh, IO of the case proved rukka EX P4 DD No.5 A Ex PW5/B.

4. On the basis of incriminating evidence against accused, statement of accused was recorded under Section 3 wherein accused admitted all the prosecution allegation. Accused stated that to avoid the atrocities being committed by the local Govt. he ran away from his country i.e Burma and came to India for protecting and approached the U.S.Embassy for financial help and there he was false implicated by the police.
5. Heard the arguments and carefully perused the case file.
6. PW2 ASI Devi Ram deposed that on 15-9-01 he was posted at visa gate in front of U.S.Embassy and accused came there and at visa gate he was walking in a suspicious circumstances. He interrogated the accused who told that he is a Burma national. He asked him to show his passport and visa. But accused failed to do so. Accused also failed to tell about his correct address. He gave written message at P.S. Ch.Puri and SI Mahinder Singh came to spot. His statement was recorded by SI Mahinder Singh. During cross PW2 he had not enquired about visa and passport of the accused from Burma Embassy.
7. PW4 SI Mahinder Singh is IO of the case that on 15-9-01 at 9.20 a m he received DD No.5 A an Ct.Rama Kant reached at Nayay Marg visa gate. Accused was handed over to him by ASI Devi Ram .He was told that accused was not having any visa and passport. He came to police station along with accused and there he interrogated the accused. Accused made a disclosure statement that he wants a refugee status and want to go to USA Embassy. Accused also disclosed that he had crossed over to the India without any passport or visa. He prepared the rukka got the FIR registered. Accused was arrested. I-card of the accused was taken into possession. He made the investigation regarding stay of the accused. He came to know that accused was stayed at Cama Hotel with his two friends. During PW4 stated that he had not varified from the Burma Embassy about the document of the accused.
8. Accused has been charged for the offence under S.14 of Foreigners Act.1946. Section 3 of the Act prescribes that anyone entering into India should enter with proper passport and visa given by Indian Government. It stands admitted by the accused during his statement recorded under section 313 Cr.P.C. that he is Burma national and had come to India after crossing the border illegally without any visa from Indian Government.
9. In the light of various facts and circumstances discussed above, I hold this opinion that prosecution has successfully proved that accused was found in India without

any visa or permission from the Indian Government to visit India and thereby committed an offence punishable under section 14 of Foreigners Act 1946. I thereby hold the accused guilty and convict him accordingly.

Announced in the open court

(Sanjay Garg)

On 3-6-2002

Metropolitan

Magistrate

New Delhi

Order on Sentence

Heard the arguments on the point of quantum.

Convict is stated to be 31 years of age having his family constitutes 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 belong 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.

Convict in o/c since 15.9.01. He is in o/c for the last eight and half months. The convict has produced original certificate issued by United Nation High Commission for refugee in Delhi, granting him refugee status for 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 under gone by him as under trail 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

(Sanjay Garg)

3.6.2002

MM: New Delhi

THE GAUHATI HIGH COURT

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

IMPHAL BENCH

Civil Rule No.516 OF 1991

**U. Myat Kyaw and another Vs. State of Manipur
and another**

PRESENT

The Hon'ble Justice W.A. Shishak

The Hon'ble Justice S. Barman Roy

For the petitioner :Ms.Nandita Haksar, Advocate

For the respondents :Advocate General Manipur

Date of order : 26.11.91

ORDER

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 lodged in Manipur Central Jail.

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.

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.

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 GAUHATI HIGH COURT

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

Imphal Bench

Civil Rule No.981 of 1989

Ms. Zothansangpuii Vs. State of Manipur and another**PRESENT**

The Hon'ble Mr. Justice S.N. Phukan

The Hon'ble Mrs. Justice M. Sharma

For the petitioner: - Miss Nandita Haksar &
Mr. N. Koteswar Singh, Advocates.

For the respondents: - Addl. Central Govt. standing Counsel &
Learned Senior Govt. Advocate

ORDER

20.9.89

The petitioner Ms. Zothasangpuii 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's 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.

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.

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.

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 COURT OF SH. ARUL VARMA : LD. METROPOLITAN
MAGISTRATE (SPECIAL COURT – 2) : DWARKA COURTS :
NEW DELHI**

In the matter of:

FIR No. : 78/10. PS : IGI Airport.

U/s : 419/420/468/471/120B IPC & 14 Foreigner's Act.

State Vs. Chandra Kumar & Others.

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. 25019/3/97F.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 overstays, 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)/91PPF4058 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 reliance on the following judgements:
 - (i) Hasan Ali Raihany Vs. Union of India, (2006) 3 SCC 705.

- (ii) Dr. Malavika Karlekar Vs. Union of India & Another, Writ Pet. (Crl. No.) 583 1992.
 - (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. 24063 of 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. 25019/3/97F.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 jeopardise 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, dacoity etc.

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 Sri Lanka.
- India is bound by the Customary International Law and consequently the **principle of nonrefoulement** 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 noncitizens 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 organised 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 enactment 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 personhood 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 Mahabharatha 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 51a 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 illtreatment 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 consist 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 EuroCentric 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 westerncentric/ EuroCentric 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 31 March 2011 of the United Nations titled “Report of the SecretaryGeneral’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 ethnonationalist 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 statesponsored 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 victimised 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 will occur.
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. CardozaFonseca*, 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 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 at <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 nonrefoulement. 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, CardozaFonseca 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 nonrefoulement, 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 civilisation, 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 noncitizens 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 judgements 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. 25019/3/97f.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 judgements of the Hon'ble Supreme Court of India, and to have some deliberations on this aspect.

In *Hans Muller of Nuremburg 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 an 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 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 are 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 judgements 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. 25019/3/97F.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 nonrefoulement 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 nonrefoulement 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 nonrefoulement 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 nonrefoulement.”

*The first tentative mention of the norm of nonrefoulement as *jus cogens* was broached by the Executive Committee in Conclusion No. 25 of 1982, **where the States members determined that the principle of nonrefoulement ‘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 jeopardised in some States by expulsion and refoulement of refugees or by measures which do not recognise 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 nonrefoulement had acquired the level of a norm of *jus cogens* when it determined that the ‘principle of nonrefoulement 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 asylumseekers have been refouled and expelled in highly dangerous situations; recall that the principle of nonrefoulement 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 nonrefoulement 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 nonrefoulement has found expression in various meetings of EXCOM where it has been unanimously reiterated that the fundamental humanitarian principle of *nonrefoulement* 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 nonrefoulement 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 nonrefoulement 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 can the provisions of international covenants/conventions 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 ‘nonrefoulement’ 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 nonrefoulement 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 judgement of Hon’ble Guwahati High Court has not explicitly mentioned or elaborated upon the principle of nonrefoulement, 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 nonrefoulement in its treaty sence (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 (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."*
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 jeopardised.

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 refole the convict herein when his human rights are likely to be jeopardised.
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 nonrefoulement.

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 enactment 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 Organisation 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 thron 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 nonrefoulement;

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 wellfounded 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 subsection (1) of this section, a refugee or asylum seeker may be removed from India only if,
- (a) he has been convicted by a final judgement of a crime against peace, a war crime or a crime against humanity and constitutes a danger to the community; or
-”

The nonobstante 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 XXIA 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 penalised 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 noncitizens 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 to one'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 form.

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 nonrefoulement 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 nonrefoulement 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.
96. Copy of this order be sent to the Secretary, Legislative Department, Ministry of Law and Justice, Government of India to table a copy of the Refugee and Asylum Seekers (Protection) Bill, 2006 before the Parliament.
97. Copy of this order be furnished to the Ld. Public Prosecutor.
98. Copy of this order be also given to the convict as prayed for.
99. Copy of this order be also provided to the DCP, FRRO.
100. Copy of this order be also sent to the Tahsildar, Sri Lankan Refugee Camp, 62, Gummidipoonidi Taluk, Thiruvallur District, Tamil Nadu 601201.

Announced in the open Court on 20.9.2011.

(Arul Varma)
Metropolitan Magistrate
(Special Court 2), Room No. 210,
Dwarka Courts, New Delhi.

THE HINDU
21-09-2011

pd
B-3-L

Magistrate: How can court become party to persecution of refugee?

Delhi court rejects Centre's plea to send back Sri Lankan Tamil

J. Venkatesan

NEW DELHI: "Handing over a refugee to Sri Lanka where he fears persecution will make us nothing short of abettors," a magistrate court here said on Tuesday. It turned down the Centre's plea to deport a Tamil refugee, who has been in India for the past 20 years.

In his order, Arul Varma, Metropolitan Magistrate, Court-II, Dwaraka courts, said: "It is unfortunate that in spite of [our] having an impressive record of welcoming refugees, we do not have a national law in place to cater for the specific needs of this class."

The court said: "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, and 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 pleasure or for any kind of economic gain. They take chances as they do not have choices."

The judge said the need for enacting comprehensive legislation to deal exclusively with the problems of refugees had arisen from time immemorial, and finally, pursuant to extensive deliberations on a Model National Law: The Refugee and Asylum Seekers (Protection) Bill, 2006 was drafted. But "it is unfortunate that despite its having been drafted after due deliberations and after various rounds of consultations by

• "Indians and non-citizens are to be treated equally as far as Article 21 is concerned"

• "The court cannot retrograde itself to the position of a mute spectator"

eminent jurists including the former Chief Justice of India, P.N. Bhagwati, this Bill has not seen the light of the day."

The court said:

"Presently, the refugees are dealt with under the Foreigners Act, 1946 and the rules framed thereunder. Refugees are treated as foreigners under the extant laws of our country. However, it will be extremely important to understand that a refugee cannot be placed on the same platform on which illegal migrants, tourists and other 'foreigners' are placed.

"There have been a plith-

ora of instances wherein Indian courts 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 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 subordinate courts to follow. India needs to live up to its humanitarian goals."

In the instant case, Chan-

dra Kumar has been staying at a refugee camp at Tiruvalur in Tamil Nadu from 1990. He wanted to eke out a better living in Italy but while leaving India, he was apprehended by immigration authorities as he did not possess valid travel documents. Thereafter, he was charged with cheating, impersonation and forgery and other offences under the Foreigners Act 1946. He moved an application for plea bargaining. An order on sentence ought to have been passed forthwith. However, the Additional Public Prosecutor, on instructions from the government, contended that an order of deportation should form part of the order on sentence.

Rejecting the plea for deportation, the court, relying on several Supreme Court

judgments, said Indians and non-citizens "are to be treated equally as far as Article 21 of the Constitution (right to life and liberty) is concerned. 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. How can the court become a party to the persecution of an individual? The court cannot retrograde itself to the position of a mute spectator."

Since the convict had already been incarcerated for about six months, the court said the sentence already undergone was sufficient punishment and that he should forthwith report back to the tahsildar, Sri Lankan Refugee Camp, Gummidipoondi Taluk.

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(CRL) 1470/2008

Saifullah Bajwa Vs. UOI And Ors.....

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

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 Katakai, 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.

Having heard learned counsel for the parties, we are inclined to extend the time for a further period of six weeks.

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

W.P.(CRL) 1470/2008

Saifullah Bajwa and Anr. Vs. Uoi and Ors

Coram: Hon'ble the Chief Justice
Hon'ble Mr. Justice Manmohan

ORDER

02.12.2010

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.?

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 court's 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-re-foulement and the right to seek asylum.?

Thank you,

(UNHCR New Delhi)

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."

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.

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.

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

W.P.(CRL) 465/2011

Saifullah Bajwa Vs. Union of India

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

09.12.2011

Crl.M.A.No.19142/2011

ORDER

1. The learned counsel for the petitioner seeks permission to withdraw the petition in view of the fact that the prosecution against the petitioners has already been withdrawn by the State.
2. It has been further stated that as a consequence of the withdrawal, the petitioners will be permitted to settle in the countries Canada and United States in terms of the directions given by the High Commission for refugees.
3. The learned counsel for the respondent does not have any objection.
4. In view of the statement made before this Court. The petition is dismissed as withdrawn.
5. Dasti under the signature of Court Master.
6. The earlier date i.e. 12.12.2011 stands cancelled.

V.K. SHALI, J

December 09, 2011



Iceland

Norway

Sweden

Finland

United Kingdom

Denmark

Neth.

Estonia

Latvia

Belarus

Ireland

Pol.

Ger.

Ukraine

France

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Italy

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Spain

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Tur

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Lebanon

Western Sahara

Algeria

Libya

Israel

Egypt

Mauritania

Mali

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Chad

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Senegal

Guinea-Bissau

Sierra Leone

Liberia

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REFUGEES AND THE LAW

REFUGEES AND THE LAW



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