

**IN THE SUPREME COURT OF INDIA**

**Criminal Original Jurisdiction**

**(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)**

**Writ Petition (CRL.)      O F 2018**

Fazal Abdali,

N-4/A, Aqsa Apartment,

Abul Fazal Enclave,

New Delhi-110025

.....Petitioner

Versus

1. Union of India

Through its Secretary

Department of Home Affairs

North Block, New Delhi

... Respondent No. 1

2. State of West Bengal

Through its Secretary

Department of Home Affairs

Writers' Building, Kolkata

West Bengal

...Respondent No.2

3. State of Tripura

Through its Secretary

Department of Home Affairs

New Secretariat Complex,

PO: Secretariat, Agartala,

West Tripura -799010

...Respondent No. 3

4. State of Manipur

Through its Secretary

Department of Home Affairs

New Secretariat,

Manipur-795001

...Respondent No.4

5. State of Assam

Through its Secretary

Department of Home Affairs

3rd floor, Assam Secretariat,

Dispur, Guwahati-781006

...Respondent No.5

**To,**

**THE HON`BLE CHIEF JUSTICE OF INDIA & HIS  
LORDSHIP`S COMPANION JUDGES OF THE HON`BLE  
SUPREME COURT OF INDIA.**

**THE HUMBLE PETITION OF  
THE PETITIONER ABOVE NAMED**

**MOST RESPECTFULLY SHOWETH:**

1. The Petitioner by way of this public interest petition under Article 32 of the Constitution of India challenges the incarceration of

the Rohingyas even after the completion of their respective sentences awarded by the respective authorities under Article 21 of the Constitution of India because being incarcerated even after the completion of sentence is violation of Rohingya's rights to life, health, dignity, equality and to be free from inhuman and degrading treatment.

- 1A. The Petitioners have not approached the concerned authority for the same relief.
2. The petitioner herein is Fazal Abdali, is resident at N-4A, Aqsa Apartment, N Block, Abul Fazal Enclave, New Delhi-110025. The email address is abdali.fazal@gmail.com and contact number is +91-9891463167. The Aadhar card details is 515253595419 and PAN number is BHSPA8075P. The petitioner is an advocate bearing a registration number D/2789/2013, fighting for the rights of refugees since 2013. The annual income of the petitioner is Rs.3, 20,000.
3. The Respondents have incarcerated the Rohingyas even after the completion of their sentences by the competent authorities. There have been no steps taken for the release of these Rohingyas.
4. The cause of action in this matter arises where the sentence of punishment awarded by the competent authorities under the relevant provisions of law is completed and still the Rohingyas

are incarcerated in the respective jails and shelter homes of the respondent states.

5. The nature of injury in this instant case, by the way of incarceration of the Rohingyas even after the completion of sentence is the cruelty and violation of their basic fundamental rights as protected by the Constitution of India.
6. There is no civil, criminal or revenue litigation involving the petitioner, which has or could have so legal nexus with the issues involved in the public interest litigation.
7. The petitioner who is an advocate practising at Delhi. He visited the Rohingyas concerned with this petition who are lodged in Dum Dum Correctional Home in West Bengal and collected information regarding Rohingyas who have been incarcerated in jails in the respondent states. All of them were arrested and charged under section 14 of the Foreigners Act, 1946 and were sentenced accordingly. All of them including women and children have completed their period of sentence and yet remain incarcerated in jail. The list of the Rohingyas who continuing in jail even though they have completed the period of sentence in West Bengal, Assam, Manipur and Tripura is herein marked and annexed as **Annexure P-1 ( Page No \_\_\_\_\_ to \_\_\_\_\_**.
8. As can be seen from Annexure A, almost all the 61 persons are asylum seekers and refugees in that they came to India fleeing persecution by the Myanmar Government and hence they cannot

be treated as if they are mere foreigners that have entered India without valid documentation. It is the submission of the Petitioner that these refugees who have been granted asylum by the UNHCR in India and have been provided with refugee identity cards cannot be arrested and kept in jail. Rather they must be treated as valid refugees and allow to stay in the Rohingya refugee settlements in various parts of India subject to the routine reporting requirements. This is how they must be allowed to live in India pending regaining of normalcy in Myanmar and voluntary repatriation by the Rohingya community. Thus they ought not to be treated as criminals.

9. That by a representation dated 18.01.2018 petitioner approached the National Human Rights Commission with a letter with Daily Dairy Number: 12525/2018, which stated as under:

"To,

The Chairperson

National Human Rights Commission

Manav Adhikar Bhawan Block-C,

GPO Complex, INA, New Delhi, Delhi 110023

Subject: - Gross violation of Right to Life and liberty of refugees and asylum seekers languishing in jails and shelter homes after having served their full sentence.

Dear Sir,

That I am an advocate fighting for the rights of the refugees and asylum seekers since 2013. This complaint is being filed for about sixty two refugees and asylum seekers registered by United Nations High Commissioners for Refugees (UNHCR), India, languishing in jails and shelter homes after having served their full sentence.

These sixty-two refugees and asylum seekers are Rohingyas, who have a well-founded fear of persecution in the country of their origin on account of their minority ethnic community status. They have all completed their full sentence and have an apprehension of being deported to Myanmar. They should be released and handed over to the UNHCR, India so that they could be linked with the community for better life.

Article 21 of the Constitution guarantees the right of personal liberty and thereby prohibits any inhuman, cruel or degrading treatment to any person whether he is Indian national or foreigner. Languishing in jail after completion of sentence is deprivation of personal liberty which is violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness.

These refugees and asylum seekers are internees at West Bengal, Assam, Manipur and Jammu and Kashmir at different detention centres and shelter homes. I am attaching along

with this complaint, a copy of the list of sixty-two internees with the details of their detention centre.

I humbly request you to intervene in the matter, so that these refugees and asylum seekers should be released and handed over to the UNHCR, India, at the earliest.

Thanking You.

Complainant

Advocate Fazal Abdali”

10. However, when he went to enquire with the NHRC at the enquiry section he was informed that since the issue relating to Rohingyas was pending in the Supreme Court the NHRC was not proceeding with the matter.
11. The matter pending in the Supreme Court in which the petitioner has been engaged to brief senior counsel is Writ Petition (C) 870 of 2017 in the matter of Mohammad Yunus vs. Union of India. This was filed on behalf of 7,000 Rohingyas living in settlements in Jammu.
12. That the petitioner relies on the Internal Guidelines on Refugees of the Union of India dated 29.12.2011 and the directions issued by the Union of India dated 08.08.2017.
13. The constitutional basis of the petition before the Supreme Court was Article 21 of the Constitution of India which protects the right to life not only of citizens of India but any person within the territory of India. Hence the Indian Constitution protects

foreigners as well. Since deportation would affect the right to life of the Rohingyas, the injunction of their deportation would be based on the constitutional rights set out in Article 21 of the Constitution of India.

14. The logical end result would be that though India has not signed the Refugee Convention 1951, the principle of non-refoulement would inhere in Article 21 and hence it would be constitutionally binding on the Indian state not to do any act that would jeopardise the safety of the Rohingyas.

15. That India had accepted the Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The relevant paragraphs of the Advisory Opinion dated 26.1.07 are as follows:

“21. The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens*. It includes, as a fundamental and inherent component, the prohibition of non-refoulement to a risk of torture, and thus impose an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments. The prohibition of arbitrary deprivation of life, which

also includes an inherent obligation not to send any person to a country where there is a real risk that he or she may be exposed to such treatment also forms part of customary international law. The prohibition of refoulement to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties is in the process of becoming customary international law, at the very least at regional level ”

16. That the Petitioner relies on the statement by India at the 63<sup>rd</sup> Meeting of the Standing Committee of the Executive Committee of the High Commissioners Programme at Geneva on 24-26 June 2015 where India stated:

“We thank the UNHCR for its meticulous preparation and comprehensive documentation and various reports for this meeting. India remains committed to contribute towards UNHCR's activities for protection of Refugees, as per its mandate and we may like to ensure our continued support to UNHCR's endeavours for the cause of Refugees and other persons of concern.”

17. That along the same lines was the statement of the Indian Ambassador at the Permanent Mission of India on 7.10.15

during the General Debate in the 66<sup>th</sup> Session of the Executive Committee of the UNHCR where India stated:

"12. Mr Chairperson, we once again reiterate our commitment towards a constructive and cooperative engagement with UNHCR in its efforts to effectively address the ever growing complex refugees situation globally."

### Indian Case Law

18. That the Supreme Court in the case of the Chakma Refugees where in State of Arunachal Pradesh vs. Khudiram Chakma (1994 Supp(1) SCC 615), while referring to certain text books the Supreme Court used the following quotation:

"Everyone has the right to seek and enjoy in other countries asylum from persecution".

19. That the Supreme Court of India National Human Rights Commission vs. State of Arunachal Pradesh (1996 1 SCC 742) also in respect of 65,000 Chakma refugees who fled from East Pakistan (now Bangladesh) made the following observations:

"16. It is, therefore, clear that there exist and present danger to the lives and personal liberty Chakmas, in Louis De Readt v. Union of India and KhudiramChakma case this court held that

foreigners are entitled to the protection of Art 21 of the Constitution.

20. We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g. the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No state Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life,

health and well-being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, constitutional and statutory, to be considered for being registered as citizens.

21. In view of the above, we allow this petition and direct the first and second respondent, 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 Chakmas 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 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 as is necessary to protect the lives and liberty of the Chakmas;"

20. A similar principle was culled out by the Delhi High Court in WP (Crl) 1884/2015 in the case of DonghLian Kham vs. Union of India where, in respect of refugees from Myanmar the Court relied on the government of India Standard Operating Procedure for dealing with refugees in para 24 of the decision quoted as follows:

“24. Government of India, Ministry of Home Affairs (Foreigners Division) has set out a standard operating procedure to deal with foreign national who claim to be refugees. These standard operating procedures are in the nature of internal guidelines and, therefore they are required to be followed. Few of those internal guidelines are relevant for the purposes of considering the request made in the petition.

(ix) It may be noted that economic immigrants i.e., foreigners who have arrived in India in search of economic opportunities without any fear of persecution, WILL NOT be eligible for LTV. If such people are detected, the cases will be investigated promptly and the persons will be prosecuted under the Foreigners Act.

(x) In cases where the foreign national is considered not fit for grant of LTV, a decision to this effect

will be conveyed by MHA to the FRRO/ FRO within a period of three months from the dated of claim of the foreigner. The foreigner will be confined to a detention centre under the provisions of Foreigners Act; Steps will be initiated in such cases for deportation of the foreigner through diplomatic channels.

(xi) In case it is decided that the case is not fit to warrant LTV or that LTV cannot be renewed, MHA will consider all possible alternatives including deportation to the home Country and consultation with UNHCR for a third country option.

(xii) In cases in which diplomatic channels do not yield concrete results within a period of six months the foreign national who is not considered fit for grant of LTV, will be released from detention centre subject to collection of biometric details, with conditions of local surety, good behaviour and monthly police reporting as an interim measure till issue of travel documents and deportation.”

21. Further, the Delhi High Court then held as under in the same case:

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

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

22. Similarly, the Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi vs. Union of India* (1999 CRI.L.J. 919) in respect of Iraqi refugees laid down the law as follows:

PRINCIPLE OF NON - REFOULMENT

"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 scene 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'

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

(1) The International Convention 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

obligation are to be respected. The courts may apply those principles in domestic law, provided such principles are not inconsistent with domestic law.

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

20. In the instant case, the petitioners are refugees certified by UNHCR. Say of the petitioners that 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 inspire 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 UNHRC 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."

23. That the Kerala High Court in Premanand vs. State of Kerala (2013 (3) KLJ 543), in respect of Srilankan refugees, the High Court held as under:

"6. Status of petitioners as refugees is not disputed. No legislation has been enacted by the Parliament governing the refugees so far and that being so all existing Indian laws apply to them also. Refugees too fall within the definition of "foreigner" under the Foreigners Act. Provisions of that Act and also the Orders passed there under apply to them also S. 2(a) of the Foreigners Act, 1946 defines a foreigner as 'a person who is not a citizen of India.' However, it is to be noticed, when issues relating to or concerning refugees arose for consideration the Apex Court emphasising that the 'right to life' enshrined under Article 21 of the Constitution mandated that no one can be deprived of his or her life and personal liberty

without the due process of law, has applied the common law precepts and also the obligations arising from international law under United Nations 1951 Convention and its 1967 Protocol, though India is not a signatory to them.

7. Article 1 paragraph 2 of the United Nations 1951 Convention defines the 'refugee' thus:-

A person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.

Where a person is forced to leave his mother country for the reason of being persecuted for one or other reason stated under the above definition, and takes refuge in our country a number of factors have to be taken into account in considering the applicability of the laws like Foreigners Act and the Orders there under against such person though he too falls within the

definition "foreigner" as not a citizen of India. He stands on a different footing from a foreigner or any illegal emigrant who entered the country without valid passport or travel document. Though the definition 'foreigner' under the Foreigners Act takes in a refugee also the circumstances under which he was forced to leave his mother country and given the status of refugee on entry into the country, necessarily have to be given due consideration taking note that every single situation pertaining to refugees is replete with human rights as well. But all the same too much humanitarian consideration in the case of refugees is also not possible without having regard to the considerations of national security. We cannot overlook the security aspects involved, more so in the present scenario where external agencies with the aid of anti-national elements inside the country are making attempts to destabilise the foundation of the Republic. A dispassionate view having regard to the security considerations and also human rights issues involved has to be taken in matters connected with the refugees by the law enforcement agencies and more so by the courts

when any issue relating to them arise for consideration.

8. The Supreme Court of India has in number of cases stayed deportation of refugees even where claim for refugees status was pending determination, provided a prima facie case has been made out for grant of 'refugees' status. In Chakma refugee case Supreme Court declared that no one shall be deprived of his or her life or liberty without the due process of law."

9. India Constitution does not contain any specific provision which obliges the State to enforce or implement treaties and conventions. The Supreme Court has held in a number of decisions in Gramophone Company of India Ltd v. Birendra Bahadur Pandey AIR 1984 SC 667 :: 1984 ICO 325 , Jolly George Varghese v. Bank of Cochin, AIR 1980 SC470:: 1980 ICO 41 that international convention law must go through the process of transformation into municipal law before such international law becomes internal law. The decision are also to the effect that in a case where there is no conflict between international law and domestic law and international law sought to be

applied are not in contravention of the spirit of the Constitution the court may apply international law more so when it is necessary to advance the ends of Justice. If there is conflict between internal law and international law, no doubt, internal law has to prevail.

### International Case Laws

#### European Court of Human Rights

24. Apart from the constitutional law protection there are decisions of the European Court of Human Rights that the principle of non refoulement in international law has been raised to the level of jus cogens. The following observation in the decision of case of Hirsi Jamaa vs. Italy (Grand Chamber. Application Number 27765/09 dated 23.2.12) is particularly important for countries like India who tend to defend return of refugees on the specious argument that the state has not signed the Refugee Convention:

“With this extension and content, the prohibition of refoulement is a principle of customary international law; binding on all States, even those not parties to the UN Refugees Convention or any other treaty for the protection of refugees. In addition, it is rule of

Jus Cogens, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted (Articles 53 of the Vienna Convention on the Law of Treaties and Art 42 & 1 of the Refugee Convention and Article VII & 1 of the 1967 Protocol.)”

High Court of Kenya

25. The decision of the High Court of Kenya at Nairobi (Constitutional and Human Rights Division) in the Matter of Threatened and Eminent Refoulement of Refugees and Asylum Seekers of Somali Origin by the Government of Kenya [2017 eKLR) is also along the lines of the European Court of Human Rights decision and the relevant part is as follows:

“Because of its wide acceptance, it is UNHCRs considered views, supported by jurisprudence and the work of jurists, that the principle of non - refoulement has become a norm of customary international law. (18). This view is based on consistent State practise combined with a recognition on the part of States that the principles has a normative character. As outlined above, the principle has been incorporated in international treaties adopted at

the universal and regional level to which a large no. of states including Kenya have now become parties. Moreover, the principle has been systematically reaffirmed in Conclusion of the Executive Committee and in resolutions adopted by the General Assembly, thus demonstrating international consensus in this respect and providing important guidelines for the interpretation of the aforementioned provision.”

#### Hong Kong

26. Along the same lines is the decision of the Court of Final Appeal of the Hong Kong Special Administrative Region in the case of C, KMF, BF and Director of Emigration (FACV 18, 19 & 20/2011) where the Court of Final Appeal held as under:

“52. The International Criminal Court has declared the principle of non-refoulement to be a norm of customary international law. In *Situation en Republique Democratique du Congo: Le Procureur c. Germain Katanga et Mathias Ngudjolo Chui*, ICC-01/04-01/07, International Criminal Court (ICC), 9 June 2011, at paras. 67 and 68, the International Criminal Court, in the context of witnesses applying for asylum in the Netherlands,

the Court referred inter alia to the 1948 UDHR, the 1951 Convention and the 1967 Protocol:

"68. The "non-refoulement" principle is considered to be a norm of customary international law and is an integral part of international human rights protection. All individuals are entitled to enjoy its application by a State."

#### Australia

27. Along the same lines is the decision of the Migration and Refugee Division in Case Number 1606601 of Australia which held:

" 59. Information from DFAT indicates that Rohingya in Myanmar face a high level of official discrimination; have been subjected to targeted communal violence including as recently as September 2014, and remain at high risk of further violence and societal discrimination, particularly in the Rakhine state.<sup>10</sup> DFAT refers to credible observers assessing the government's response to outbreaks of violence against Rohingya as deeply inadequate "with security services reportedly standing by as Rakhine mobs

attacked Muslim villages, and at times, participating in attacks,” in 2012. “Police forces have failed to prevent or effectively respond to several large-scale disturbances and rioting.”<sup>11</sup> “Overall DFAT assesses that Rohingya in Myanmar are unlikely to have access to effective state protection.”

60. Having considered the evidence and country information the Tribunal is satisfied that the applicant faces a real chance of serious harm in Myanmar. The Tribunal finds that the essential and significant reason for the harm is his race / ethnicity (s.91R(1)(a)); the serious harm involves systematic and discriminatory conduct as it would be deliberately and intentionally inflicted (s.91R(1)(c)). There is no effective state protection and relocation is not a safe or reasonable option for the applicant. For the reasons outlined above, the Tribunal is satisfied that the applicant has a well-founded fear of persecution in Myanmar, a country of his former habitual residence.

63. In assessing the applicant’s claims of fearing persecution in Bangladesh, the Tribunal notes

the information from DFAT which indicates that communal violence against Rohingya occurs<sup>14</sup>. Information from USDOS refers to the exploitation and abuse of Rohingya in Bangladesh. USDOS reports that Rohingya in Bangladesh are unable to work legally; have limited freedom of movement beyond the refugee camps; have minimal access to education for children and only inside the camps; and have limited access to basic medical care. In addition USDOS reports that Rohingya who are unregistered have no legal protection and were sometimes arrested because the government viewed them as illegal economic migrants.<sup>15</sup>In addition, independent reports refer to the Bangladesh government having returned Rohingya to Myanmar and is considering returning Rohingya in the future to Myanmar, a country where the applicant has a well-founded fear of persecution.

67. After assessing the evidence the Tribunal is satisfied that the applicant faces a real chance of serious harm in Bangladesh, including the risk of refoulement to Myanmar, a country where the

Tribunal has found he has a well-founded fear of persecution.

70. After assessing the evidence the Tribunal is satisfied that the applicant faces a real chance of serious harm on cumulative grounds in Malaysia, for reasons of his race / ethnicity (Rohingya). The applicant's race / ethnicity is the essential and significant reason for the harm feared and the serious harm involves systematic and discriminatory conduct. The Tribunal is satisfied the applicant has a well-founded fear of persecution in Malaysia (s.91R(1)).

"For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s. 36(2)(a).

"

### Bangladesh

28. Closer to India is a decision of the Supreme Court of Bangladesh, High Court Division, Writ Petition 12492 of 2016 dated 31.5.17 where the Court held:

" We take judicial notice of the fact that the Rohingyas are now being persecuted in Myanmar and by that reason, hundreds of thousands of Rohingyas have entered into Bangladesh illegally in order to save themselves from being persecuted and tortured at the hands of the law - enforcing apparatus of Myanmar. At this stage, a pertinent question arises as to whether Bangladesh is a signatory to this Convention of 1954. Bangladesh it is asserted on the behalf of the petitioner, it is not a signatory to this Convention 1954. If it is so, then what will be the implication of Article 33 of that Convention in relation to the detenu? Though Bangladesh has not formally ratified the convention relating to the Status of Refugees, yet all the refugees and asylum-seekers from scores of countries of the world to other countries have been regulated by and under this Convention for more than 60(sixty) years. This Convention by now has become a part of customary international law which is binding upon all the countries of the world, irrespective of whether a particular country

has formally signed, acceded to or ratified the Convention or not.

Indisputably Bangladesh is a signatory to the Convention against torture and other Cruel Inhuman or Degrading Treatment or Punishment, 1987. Article 3 of this Convention of 1987 provides that 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.

Regard being had to the present scenario of persecution and torture of Rohingyas in Myanmar, if the detenu is pushed back or deported or extradited to Myanmar, he may suffer persecution or torture and even his life may be at stake. The record shows that thousands of Rohingya refugees have been housed in refugee camps in Cox's Bazaar and those camps are being run by the Ministry of Disaster Management and Relief, Government of Bangladesh in active partnership and co-operation with UNHCR. As UNHCR has undertaken to accommodate the detenu in a refugee camp and if he is

accommodated there as per the assurance and commitment given by UNHCR, his life maybe secured and free from any intimidation, threat, persecution, coercion and the like.

Accordingly, the Rule is made absolute without any order as to cost. It is hereby declared that the detenu Saha Miah, son of late Jalal Ahammed of village Youngsong (Kitarbill), Police Station Aikap, District Buchidong, Myanmar, now detained in the Rangamati District Jail, Ranagmati after expiry of his term of imprisonment is being held without lawful authority and his detention is of no legal effect. The petitioner will, however take necessary steps in cooperation with UNHCR for the accommodation of the detenu in any refugee camp in Cox's Bazaar run by the Ministry of Disaster Management and Relief in collaboration with UNHCR.

#### Grounds

29. Hence the Petitioner moves before this Hon'ble Court by way of this petition on, inter alia, following grounds:

- A. Because the Rohingyas incarcerated in jail are asylum seekers and refugees and are protected by the principle of non-refoulement which has attained status of jus cogens.
- B. Because the catena of judgements and juristic opinions above stated converge into single non-negotiable principle of non-refoulement that – a refugee cannot be deported forcibly especially to a country whence he faces persecution. This is an integral part of Article 21 – the right to life.
- C. Because being incarcerated in jail even after the completion of sentence is violation of Article 21 of the Constitution of India which guarantees the right of personal liberty and thereby prohibits any inhuman, cruel and degrading treatment to any person.
- D. Because being incarcerated in jail even after the completion of sentence is violation of Article 14 of the Constitution of India which guarantees justness, fairness and reasonableness.
- E. Because there is no legal justification for the continued incarceration of the Rohingya refugees who have completed their period of sentence in jail.
- F. Because there is, in any case, no legal justification for the arrest and criminal prosecution of Rohingya refugees who cross the border and enter India without valid documentation

because they were fleeing persecution and the law relating to foreigners entering India without valid documentation is eclipsed by refugee law and the Guidelines of the Union of India abovementioned which distinguishes between mere foreigners and refugees.

G. Because in view of the above, all the Rohingya refugees are entitled to be freed from jail and stay in any of the Rohingya refugee settlements subject to the usual requirements of reporting to the local police station.

H. BECAUSE the petitioner has not filed any other Petition/Petitions with similar or same reliefs before any Court, including this Hon'ble Court or any other court.

### **PRAYERS**

On the basis of the factual situation emerging quite clearly petitioner seeks the following reliefs:

- a) Issue a writ of mandamus or any other appropriate writ, order or direction to all the respondents to set at liberty all the Rohingya refugees in the jails and shelter homes in the respondent states on disclosing their destination for residence and on the undertaking to report to the local police station.

b) Pass any such further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

**AND FOR THIS ACT OF KINDNESS, THE PETITIONERS  
AS IN DUTY BOUND SHALL EVER BE GRATEFUL.**

Satya Mitra

(Advocate for the Petitions)

Place: New Delhi

Drawn by: Fazal Abdali

Date: