

1999 CRI.L.J. 919
(GUJARAT HIGH COURT)
N.N. MATHUR. J

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

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

registered themselves as refugees with the UNHCR. The certificate dated 3rd March 1998 reads as follows:

"UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES"

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

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

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

Sumbul Rizvi Khan
Associate Protection Officer
For UNHCR Chief of Mission

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

REPLY:

2. A counter affidavit has been filed by Miss Usha Rani, Section Officer in Foreigners Division in the Ministry of Home Affairs, Government of India, at New Delhi. An objection has been taken with respect to the maintainability of the petition on the ground that the petitioners have no constitutional or fundamental rights to file the present petition as they have entered in the territory of Union of India without any valid travel documents. It is also submitted that the powers under the Foreigners Act, 1946 especially under Section 3(2)(c) and (d) has been entrusted to the State Government. This power includes the power to deportation, movements, residence of foreign nationals staying illegally in India. With respect to the condition in Iraq, it is stated that the present situation in Iraq is substantially improved and there is no war like situation. It is also stated that many such Iraqis are returning from India to Iraq. It is further stated that, in compliance of the directions of this Court dated 22nd May 1998 based on refugee certificate issued by UNHCR, the petitioners have been handed over to UNHCR and they have been accorded extension up to 30th December 1998 i.e till Iraqi Embassy, New Delhi issue necessary travel documents for the purpose of sending the present petitioners to Iraq. It is further stated that the petitioners cannot be given permanent status of Indian Citizen on account of several administrative exigencies and from the point of view of National Security, which cannot be disclosed before this Court on the ground of National Security.

CONTENTIONS:

3. It is contended by Mr. Bhushan Oza, learned counsel for the petitioners that the petitioners' though foreign nationals, their fundamental rights to

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

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

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

REFUGEES AND UNO

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

"The Indian perception is informed by a profound regard for 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 Mahabharata and Ramayana, the great epics of India, we find inviolable rules of ethics and kindness to be observed even by warring rulers in battlefields. One may conclude that the Indian Constitution in enacting fundamental duties in Article 51-A has cast on every citizen the duty to promote harmony among all the peoples of India, to have compassion for living creatures and to develop humanism and abjure violence. Thus, humanitarianism legality and concern for refugee status are writ large in the Indian ethos. Its noble tone and temper is in keeping with the Delhi Declaration signed by Rajiv Gandhi and Gorbachev (1989) expressing the finest spirit of India's composite cultural heritage as it advocates a Non-violent World Order and war-free global humanity.

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

Article 3:

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

Article 5:

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

Article 6:

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

Article 9:

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

UNHCR:

8. Soon after coming into force United Nations Charter on December 10, 1948, the General Assembly of the UNO adopted and proclaimed universal declaration of human rights. By resolution of 3rd December 1949, United Nations General Assembly decided to establish a High Commissioner's office for Refugees. The Statute of the office of U.N. High Commissioner for Refugee was adopted by general assembly on 14th December 1950. The assembly also called upon the Governments to cooperate with the High Commissioner in performance of his functions concerning refugees falling under the competence of his office. In accordance with the statute the work of the High Commissioner is humanitarian and social and of an entirely non political character. The High Commissioner reports annually to the General Assembly through the economic and social council. The office of the High Commissioner for Refugees has engaged in activities in countries of actual or potential return aimed at making effective the fundamental human rights of refugees to return to their own countries. They include the negotiation-often within tripartite frameworks involving countries of asylum, the country of origin and UNHCR office. They also include, monitoring the situation of returners on the ground, for the dual purpose of preventing discrimination or victimization and of providing objective information upon which remaining refugees and displaced persons can base their decision to return. UNHCR claims to have helped million of Refugees return home voluntarily. It also helps in the disintegration of the refugees back into their country, through small community based projects and income generating activities. In the host country, refugees are helped to become self reliant through training. In limited situations, UNHCR help refugees to resettle in third country. The role of UNHCR in the repatriation of Tamils to Sri Lanka from India has been mentioned in particular.

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

9. There is no law in India which contain any specific provision obliging the State to enforce or implement the international treaties and conventions

including the implementation of International Humanitarian Law (IHL). Amongst the domestic legislation, the only law that directly deals with the principle of IHL is the Geneva Convention Act, 1960. The main objectives of the Act is to implement the provisions of the 1949 Conventions relating to the punishment for grave breaches and prevent and punish the abuse of Red Cross in other emblems. The apex court in *Rev. Mons. Sebastian Francisco 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 non-citizens. The preamble of the Constitution which declares the general purpose for which the several provisions of the Constitution have been made to, "assure the dignity of the individual" which is also the basic objective of the international humanitarian law. The Art 21 of the Constitution of India guarantees the right of life and the personal liberty. A person cannot be deprived of right of life and liberty, except according to the procedure established by law.

11. The Apex Court in case of *National Human Rights Commission V. State of Arunachal Pradesh*, reported in (1996)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 (para 20 of AIR);

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

In the said case, National Human Rights Commission in a PIL under

Article 32 of the Constitution sought to enforce rights under Article 21 of about 65,000 Chakmas. A large number of chakmas from erst while East Pakistan were displaced by Kaptai Hydal power project in 1964. They had taken shelter in Tripura and Assam. Since large number of refugees had taken shelter in Assam, the State Government expressed its inability to

rehabilitate. As such, a discussion took place between the Government expressed its inability to rehabilitate. As such, a discussion took place between the Government of India and NEFA administration and it was decided to send some of the Chakmas for the purpose of resettlement to the territory of the present day Arunachal Pradesh. Now they have settled there and developed and established social, economic and religious ties. A group of Chakmas made representation for the grant of citizenship, but no decision was taken thereon. The relations between citizens of Arunachal and Chakmas deteriorated, as such they complained that they were subjected to repressive measures with a view to forcibly expel them. NHRC found prima facie case, to the extent that the State Government was working in coordination with a local organisation known as AAPSU with a view to expel Chakmas. The apex court held that State Government was under constitutional and statutory obligation to protect the threatened groups. The court directed the State of Arunachal Pradesh to protect the life and liberty of Chakma refugees.

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

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

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

people have been killed. The petitioners claiming compensation for the family of the deceased persons, placed reliance on Article 9(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 LJ43, wherein the Court held that provisions of international conventions to which Australia is a party, especially on which declares universal fundamental rights, may be used by the Courts as a legitimate guide in developing the common law. The apex court after referring the said Australian Case and its own decisions in Nilabari Behera (1993) 2 SCC 746 : (1973 CriLJ 2899) and D.K. Basu (1997) 1 SCC 416 : (1997 CriLJ 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 Srilankan Refugees will not be sent back to their native place without their consent.

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

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

17. The unreported decisions referred to above indicates that Union or the State Government till now as a policy have not objected to give custody of registered refugees to UNHCR. Mr. Bhushan Oza, the learned counsel has also made it clear that the petitioners only seek to bide their time in India till the situation in Iraq improves, thereby enabling them to return to their own country.

PRINCIPLE OF NON-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 since also amply supports the conclusion that today the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent."

PRINCIPLE FOR ENFORCEMENT OF HUMANITARIAN LAW:

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

(1) The International Conventions and Treaties are not as such enforceable by the Government, nor they give cause of action

to any party, there is an obligation on the Government to respect them.

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

(3) Article 21 of the Constitution of India guarantees right of life on Indian Soil to a non-citizen, as well, but not right to reside and settle in India.

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

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

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

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

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

20. In the instant case, the petitioners are refugees certified by UNHCR. Say of the petitioners that 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 relevant part of the report is extracted as follows:-

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

Death Penalty:

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

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

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

21. Consequently, this special Civil application is allowed and the respondents are directed to consider the petitioner's prayer in accordance

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