

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 10504 OF 2016

IN THE MATTER OF:

An application under Article 102 of the Constitution of the
People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Refugee and Migratory Movements Research Unit
(RMMRU) represented by its Executive Director Professor
Dr. Chowdhury Rafiqul Abrar, Sattar Bahaban (4th Floor),
179, Shahid Syed Nazrul Islam Sarani, Bijoy Nagar, Dhaka-
1000

.....Petitioner

-Versus-

Government of Bangladesh represented by the Secretary,
Ministry of Home Affairs, Bangladesh Secretariat, Police
Station Ramna, Dhaka-1000 and others

..... Respondents

Dr. Shahdeen Malik with
Mr. Md. Monjur Alam, Advocates

.....For the petitioner.

Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Ms. Purabi Saha, AAG

.....For the respondents

Heard on 02.04.2017, 11.05.2017
& 25.05.2017.

Judgment on 31.05.2017.

Present:

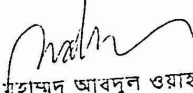
Mr. Justice Moyeenul Islam Chowdhury

-And-

Mr. Justice J. B. M. Hassan

MOYEENUL ISLAM CHOWDHURY, J:

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বাংলাদেশ সুপ্রীম কোর্ট
হাইকোর্ট বিভাগ, ঢাকা।

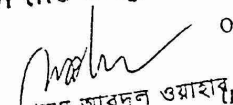
On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the detenu Md. Rafique, son of late Chobi Rahman of village Hainda Para, Police Station Buchidong, District-Akiab, Myanmar, now detained in the Chittagong Central Jail, Chittagong, should not be brought before this Court so that it may satisfy itself that he is not being held in custody without lawful authority and be set at liberty and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts leading to the issuance of the Rule are, in short, as follows:

The petitioner, that is to say, Refugee and Migratory Movements Research Unit (hereinafter referred to as RMMRU) represented by its Executive Director is a centre for refugee and migrant research and advocacy. Since its inception in 1995, RMMRU has been engaged in over fifty primary research studies on refugees, internally displaced persons, stateless people, labour migrants and diaspora communities. These studies have not only contributed to the development of more effective programs, but have also significantly shaped the migration policy of Bangladesh. Through ongoing programs, Media Campaigns and Research Projects, RMMRU has advocated the cause of Rohingya Refugees, Urdu-Speaking Bangladeshis and Female and Migrant workers and have shaped the policies and executive decisions of the Government for more than 20 years. RMMRU in partnership with the United Nations High Commissioner for Refugees (UNHCR), International Labour Organization (ILO), Ministry of Expatriates' Welfare and Overseas Employment etc. has published more than 50 books, research monographs,

policy and advocacy papers. Having worked on refugee and migration issues including advocacy for better and more humane regime for Rohingyas in Bangladesh for more than 20 years, RMMRU has a long impressive and dedicated track record. As such RMMRU is aggrieved by the illegal detention of the detenu Md. Rafique who has been languishing in the Chittagong Central Jail for more than 4(four) years after the expiry of the term of his imprisonment. Anyway, an ejarah was lodged with Lohagara Police Station, District-Chittagong by one A. Mannan, a member of community police against the detenu Md. Rafique and another person, namely, Md. Hassan on the allegations, inter alia, that the informant A. Mannan along with his accompanying force had been patrolling in Choromba Jamadar Para area under Lohagara Police Station on 30.05.2007 and at one stage, the informant-party found the detenu Md.

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Rafique and his cohort Md. Hassan roaming about aimlessly on the eastern side of the house of one A. Rahman. The informant-party challenged them and tracked them down and interrogated them. On interrogation, the detenu and his cohort Hassan told the informant-party that they are the citizens of Myanmar and illegally entered into Bangladesh. The detenu and Hassan failed to provide any valid travel documents to the informant-party. After lodgment of Lohagara Police Station Case No. 26(5)07 dated 30.05.2007 against the detenu and his cohort, the police investigated the case and duly submitted charge-sheet against them. However, on 23.05.2011, the learned trial Magistrate framed charge against the detenu Md. Rafique and his cohort Md. Hassan and the detenu pleaded guilty to the charge framed against him. On the basis of the plea of guilty made by the detenu, the learned Senior Judicial Magistrate, 1st Court, Chittagong convicted him under Section 14 of the Foreigners Act, 1946 and

sentenced him to suffer rigorous imprisonment for 5(five) years and to pay a fine of Tk. 100/-, in default, to suffer simple imprisonment for a further period of one day. The detenu Md. Rafique was arrested on 29.05.2007 and he was awarded the sentence of imprisonment for 5(five) years for contravention of the relevant provisions of the Foreigners Act under Section 14 on 23.05.2011. According to the order dated 23.05.2011, the Senior Judicial Magistrate, 1st Court, Chittagong ordered to deduct the period the detenu had been in jail from the term of his imprisonment as per Section 35A of the Code of Criminal Procedure, 1898. After the conviction and sentence of the detenu by the order dated 23.05.2011, the detenu, according to the direction of the convicting Court and the mandate of Section 35A of the Code of Criminal Procedure, had to suffer imprisonment for about one year more, that is, he was to be released from jail on any day around 30.05.2012; but still he is languishing in jail. Due to the peculiar legal limbo of his being a citizen of Myanmar, the Government of Myanmar can not accept and recognize him as a citizen of Myanmar. So he is not in a position to return to Myanmar. On the other hand, as the detenu is not a citizen of Bangladesh, he can not stay in Bangladesh sine die. He being an undocumented person will be left high and dry in Bangladesh on being released from jail after expiry of his jail term. As per Article 31 of the Constitution of the People's Republic of Bangladesh, the liberty of any person, whether a citizen or a non-citizen, can not be taken away without the authority of law. But the detenu is being held in the Chittagong Central Jail without any lawful authority. If he is released from jail, he may be accommodated in any refugee camp run by the Ministry of Disaster Management and Relief in collaboration with UNHCR in Cox's Bazar. Hence the Rule.

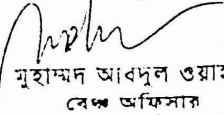
The respondents have not entered appearance and filed any Affidavit-in-Opposition opposing the Rule.

Dr. Shahdeen Malik along with Mr. Md. Monjur Alam has appeared on behalf of the petitioner.

At the outset, Dr. Shahdeen Malik, submits that admittedly the detenu is a foreign national, that is to say, a national of Myanmar and it is also admitted that he entered into Bangladesh without any valid travel document and that is why, he along with his cohort was hunted down by the community police and put behind bars.

Dr. Shahdeen Malik further submits that as the detenu violated the relevant provisions of the Foreigners Act, 1946, he was charged with the offence punishable under Section 14 and since he pleaded guilty to the charge framed

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against him, he was convicted and sentenced on the basis of his plea of guilty by the Senior Judicial Magistrate, 1st Court, Chittagong in G. R. Case No. 125 of 2007 arising out of Lohagara Police Station Case No. 26(5)07 dated 30.05.2007

to undergo imprisonment for 5(five) years and to pay a fine of Tk. 100/-, in default, to suffer simple imprisonment for a further period of one day by the order dated 23.05.2011.

Dr. Shahdeen Malik also submits that it is palpably and patently clear from the order dated 23.05.2011 that the learned trial Magistrate directed the jail authority to deduct the period of detention of the detenu from the sentence of his imprisonment in accordance with the mandate of Section 35A of the Code of Criminal Procedure and the trial Magistrate also made a direction for his deportation to his country Myanmar after expiry of the term of his imprisonment.

Dr. Shahdeen Malik next submits that it is the admitted position that the detenu has been in jail for about 4(four) years after serving out the sentence of imprisonment of 5(five) years awarded to him and in this perspective, he is entitled to be released from the Chittagong Central Jail and if he is released therefrom by this Court, UNHCR undertakes to accommodate him in any refugee camp run by the Ministry of Disaster Management and Relief in partnership with UNHCR as evidenced by Annexure-'E' to the Writ Petition.

Dr. Shahdeen Malik further submits that according to Article 33 of the Convention relating to the Status of Refugees, 1954, 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 and as the detenu is a Rohingya, his life will be in jeopardy if he is pushed back or deported to Myanmar by the Bangladesh Government.

Dr. Shahdeen Malik also submits that according to Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, 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 and as Bangladesh is a signatory to that Convention, the Government can not expel or deport or extradite the detenu to Myanmar where there is a possibility of his being subjected to torture or any other cruel, inhuman or degrading treatment or punishment as a Rohingya.

Dr. Shahdeen Malik next submits that as the period of custody of the detenu in excess of his term of imprisonment is not sanctioned by Article 31 of

the Constitution or any other law of the land, he may be released from jail and as per the assurance given by UNHCR, he will be housed or accommodated in any refugee camp.

We have heard the submissions of the learned Advocate Dr. Shahdeen Malik and perused the Writ Petition and relevant Annexures annexed thereto.

We have already stated that the respondents have not come up with any Affidavit-in-Opposition to oppose the Rule on any ground whatsoever. In that view of the matter, the statements made in the Writ Petition by the petitioner may be deemed to be correct.

It is on record that admittedly the detenu Md. Rafique is a national of Myanmar. It is further admitted that he along with his cohort Md. Hassan was found roaming about at Choromba Jamadar Para area within Lohagara Police Station on 30.05.2007 and the informant-party hunted them down and initiated a

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case against the arrestees under Section 14 of the Foreigners Act, 1946. The record further shows that the detenu Md. Rafique pleaded guilty to the charge framed under Section 14 of the Foreigners Act, 1946 on 23.05.2011. That being so, by the order dated 23.05.2011, the learned Senior Judicial Magistrate, 1st Court, Chittagong convicted and sentenced him to 5 (five) years rigorous imprisonment and to pay a fine of Tk. 100/-, in default, to suffer simple imprisonment for a further period of one day. A reference to the order dated 23.05.2011 also reveals that there is a direction made by the learned Senior Judicial Magistrate to the jail authority to exclude the period of detention of the detenu as an under-trial prisoner from the term of his imprisonment and to push him back to his country after serving out the sentence.

At this juncture, it will be profitable for us if we quote Section 35A of the Code of Criminal Procedure verbatim:

“35A. (1) Except in the case of an offence punishable only with death, when any court finds an accused guilty of an offence and, upon conviction, sentences such accused to any term of imprisonment, simple or rigorous, it shall deduct from the sentence of imprisonment, the total period the accused may have been in custody in the meantime, in connection with that offence.

(2) If the total period of custody prior to conviction referred to in Sub-Section (1) is longer than the period of imprisonment to which the accused is sentenced, the accused shall be deemed to have served out the sentence of imprisonment and shall be released at once, if in custody, unless required to be detained in connection with any other offence; and if the accused is also sentenced to pay any fine in addition to such sentence, the fine shall stand remitted.”

In the present case before us, Sub-Section (1) of Section 35A of the Code of Criminal Procedure is obviously attracted. It transpires that in view of Sub-Section (1) of Section 35A of the Code of Criminal Procedure, the detenu served

out the sentence in full about 4(four) years ago. In other words, the detenu has been in custody well beyond and after the term of his imprisonment. What we are driving at boils down to this: the period of custody of the detenu Md. Rafique, in excess of the term of imprisonment, in the Chittagong Central Jail is not sanctioned either by Article 31 of the Constitution or by any other law of the land. This being the state of affairs, we are led to hold that the detenu has been in jail without any lawful authority after the expiry of the term of his imprisonment of 5(five) years.

It is true that as per Article 33 of the Convention relating to the Status of Refugees, 1954, 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. We can take judicial notice of the fact that the Rohingyas are now being persecuted in Myanmar and by that

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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 behalf of the petitioner, is not a signatory to this Convention of 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 hundreds of thousands of Rohingya refugees have been housed in refugee camps in Cox's Bazar 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 may be secure and free from any intimidation, threat, persecution, coercion and the like. The assurance and commitment of UNHCR is evidenced by Annexure-'E' to the Writ Petition.

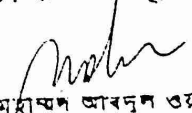
From the foregoing discussions and in the facts and circumstances of the case, we find merit in the Rule. The Rule, therefore, succeeds.

Accordingly, the Rule is made absolute without any order as to costs. It is hereby declared that the detenu Md. Rafique, son of late Chobi Rahman of village Hainda Para, Police Station Buchidong, District- Akiab, Myanmar, now

detained in the Chittagong Central Jail, Chittagong after expiry of his term of imprisonment, is being held without lawful authority and his detention is of no legal effect. Consequently we direct the respondents concerned to set the detenu at liberty immediately and hand him over to the petitioner. The petitioner will, however, take necessary steps in co-operation with UNHCR for the accommodation of the detenu in any refugee camp in Cox's Bazar run by the Ministry of Disaster Management and Relief in collaboration with UNHCR.

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Let a copy of this judgment be immediately transmitted to each of the respondents for information and necessary action.


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সাইকোট বি ৯/৭, ঢাকা

J. B. M. HASSAN, J:

I agree.