
(2011) 08 DEL CK 0301

In the Delhi High Court

Case No : Writ Petition (C) 5386 of 2011 and CM No. 10991 of 2011 (for stay)

Abdul Shukoor

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Constitution of India, 1950 — Article 21
Foreigners Act, 1946 — Section 3(2)

Citation : (2011) 08 DEL CK 0301

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : M. Tarique Siddiqui, for the Appellant; Jatan Singh and Kunal Kahol for UOI and Sumit Chander, for R-5 and 6, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Sahai Endlaw, J.—The Petitioner is an Afghanistan national having "X"-Visa (Multiple Entry) for India valid upto 26th January, 2012; he arrived in Delhi on 29th July, 2011 but was detained at the Airport only for deportation.

2. This writ petition was taken up on urgent listing on 30th July, 2011 when notice thereof was issued and the deportation of the Petitioner was stayed.

3. Mr. Jatan Singh counsel for the Respondents, on 1st August, 2011 informed that the Petitioner till the interim order had not been deported and in pursuance to the interim order had not been deported. Today it is informed that in view of the interim order, the Petitioner who was being detained at the Airport only has been allowed to leave the Airport subject to further orders of this Court. The counsels have been heard.

4. It is the case of the Petitioner that he was married to Ms. Seema Shadmon, an Indian national at Delhi on 7th July, 2010; that he first entered India at Delhi as a refugee on 4th June, 2006; that his wife Ms. Seema Shadmon a citizen of India is residing at Delhi; that since January 2006 he has visited Delhi on valid Visas

about seven times; prior to his marriage, he had on one occasion stayed continuously in Delhi for about two years but after his marriage he went back to Afghanistan along with his wife Ms. Seema Shadmon on 7th May, 2011 and came back to Delhi on 25th May, 2011; that he was making efforts for his wife Ms. Seema Shadmon to go to Afghanistan along with him and for this reason he had to overstay in India after the expiry of his Visa; that he was on 4th May, 2011 penalized with a fine of Rs. 1395/- for such overstay and which he has paid; that on 21st July, 2011 he went back to Afghanistan and was issued a valid Multiple Entry Visa by the Indian Embassy in Afghanistan on 27th July, 2011, valid upto 26th January, 2012. It is his case that he was detained at the Airport and sought to be deported for the reason of the earlier overstay. He contends that having already been penalized for overstay with penalty as aforesaid, he cannot be punished again for the same offence by deportation. The Petitioner in this regard relies on the information pertaining to Afghan nationals published by the Bureau of Immigration of the Ministry of Human Affairs, Govt. of India which prescribes the penalty aforesaid for overstay and five years Visa extension for foreigners married to an Indian National.

5. Mr. Jatan Singh, counsel for the Respondents has argued without filing a counter affidavit. He has handed over a copy of an E-Mail message dated 26th July, 2011 of the Assistant Director, FRRO, Delhi of Look-Out Circulars (LOC) having been issued against 22 Afghan nationals including the Petitioner for staying illegally in India and to ban their entry into India. On enquiry as to why inspite of the said Look-Out Circular, the Indian Embassy in Afghanistan on the next date i.e. 27th July, 2011 granted Visa valid till 26th January, 2012 to the Petitioner, it is stated that the same may be owing to communication gap. Mr. Jatan Singh has in this regard also handed over an Office Memorandum dated 27th October, 2010 on issuance of Look-Out Circulars inter alia prescribing that the person against whom look out circular is issued must join investigation by appearing before the Investigation Officer (IO) or should surrender before the Court concerned or should satisfy the Court that LOC was wrongly issued against him and that LOC can be withdrawn by the authority which had issued it. It is however not disputed that the Petitioner is sought to be deported for overstay in India on an earlier occasion. Reliance is placed on Sections 3(2)(a & c) of the Foreigners Act, 1946 entitling the Central Government to pass an order prohibiting entry by any foreigner into India. On enquiry, it is confirmed that LOC is an interim measure pending blacklisting.

6. The counsel for the Petitioner has contended that there is No. allegation of any criminal offence or of any anti national activity against the Petitioner; that the earlier overstay of the Petitioner was for the reason of his wife being unwell; that the Petitioner in the past also has been frequently visiting India. Reliance is placed on Hasan Ali Raihany Vs. Union of India (UOI) and Others,

7. Per contra, Mr. Jatan Singh relies on Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and Others, Louis De Raedt and Others

Vs. Union of India and others, and Anand Swaroop Verma and Sherab Shenga Vs. Union of India (UOI) and Another, .

8. The five Judges Bench of the Apex Court in Hans Muller of Nurenburg (supra) held that Article 21 of the Constitution guarantees protection of personal liberty to citizen and foreigner alike; No. person can be deprived of his personal liberty except according to the procedure established by law; there can be No. arrest or detention without the person being produced before the nearest Magistrate within 24 hours; that there are implicit in the right of expulsion u/s 3(2)(c) of the Foreigners Act, a number of ancillary rights among them, the right to prevent any breach of the order and the right to use force and to take effective measures to carry out those purposes. It was thus held that the right to make arrangement for an expulsion includes the right to make arrangement 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 to achieve the same. The Supreme Court however further held that "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". It was further held that the Foreigners Act confers the power to expel foreigners and vests the Central Government with absolute and unfettered discretion and there is No. provision fettering this unrestricted right to expel.

9. However a shift is found in Louis De Raedt (supra) and in a subsequent three Judges judgment in Sarbananda Sonowal Vs. Union of India (UOI) and Another, though without noticing Hans Muller of Nurenburg aforesaid. The Supreme Court in the said judgments held that though the power of the Government to expel foreigners is unlimited and unfettered, there can be No. hard and fast rule about the manner in which the person concerned have to be given opportunity of being heard. It was held that foreigners who had entered legally and in the absence of any serious charge against them, may have a right of hearing.

10. Following the aforesaid principle, the Supreme Court in Hasan Ali Raihany (supra) held that considering the Petitioner therein entered in the country legally in pursuance to the permit issued to him, it was fair that the competent authority must inform him the reasons for his deportation and if such a decision is taken, an opportunity to submit representation against the proposed decision be given.

11. The Division Bench of this Court in Anand Swaroop Verma however in the light of the facts that there were serious allegations against the Petitioners held them to be not entitled to any hearing. Another Division Bench in Mohammad Sediq Vs. Union of India (UOI) and Others, had held that the principle of natural justice has to be read into Section 3(2)(c) (supra) and arbitrary exercise of power is not permissible.

12. It thus depends upon the facts of each case, whether the Petitioner is entitled to a hearing or not. Considering that aspect of Human Rights is involved and scope whereof has been expanding over the years, it is found apposite to

follow a later judgment even if of a smaller Bench and which expanded the concept of Human Rights of foreigners.

13. Considering that the Petitioner entered the country under a valid Visa and No. action prohibiting his entry was taken when he had overstayed on an earlier occasion and further considering that the order blacklisting the Petitioner is still to be made and his wife is in this country and yet further considering that there is No. serious allegation against the Petitioner, it is deemed expedient that the procedure for his blacklisting be expedited and he be granted an opportunity to represent there against and only if a final order of blacklisting is passed against him, he be deported from India.

14. The writ petition is therefore disposed of with the directions:

(i) The Petitioner to submit his representation against his blacklisting with the FRRO on or before 10th September, 2011;

(ii) The FRRO to decide on the said representation of the Petitioner on or before 30th September, 2011;

(iii) If the Petitioner remains aggrieved from the decision so taken, he shall have remedies if any in accordance with law;

(iv) Else, the Petitioner be deported immediately thereafter No order as to costs.