

(2025) 01 DEL CK 1708

In the Delhi High Court

Case No : Bail Application No. 1872 Of 2024

Aizaz Kilicheva @ Aziza @ Maya

APPELLANT

Vs

State Nct Of Delhi

RESPONDENT

Date of Decision : 21-01-2025

Acts Referred:

Indian Penal Code, 1860 — Section 34, 109, 120B, 174A, 366B, 370, 419, 420, 465, 466, 467, 468, 471, 474
Foreigners Act, 1946 — Section 3, 5, 14, 14A
Immoral Traffic (Prevention) Act, 1956 — Section 3, 4, 5

Citation : (2025) 01 DEL CK 1708

Hon'ble Judges : Anup Jairam Bhambhani J

Bench : Single Bench

Advocate : Prashant Mendiratta, Somyashree, Samar Pratap Singh, Neha Jain, Tarang Srivastava, Amit Tiwari, Rahul Bhaskar, Chetanya Puri

Final Decision : Disposed Of

Judgement

Anup Jairam Bhambhani J.

1. While considering a bail petition filed by a foreign national, is it permissible for this court to also direct the State authorities to grant to such person a visa to enable the foreign national to continue to reside in the country and participate in pending criminal proceedings?

This is the question that has presented itself in this matter.

2. Though the present petition was filed only for grant of regular bail in case FIR No.148/2022 dated 22.07.2022 registered under sections 3/4/5 of the Immoral Traffic (Prevention) Act, 1956 ('ITP Act') at P.S.: Crime Branch, Delhi ('subject FIR'), the proceedings acquired added complexity as regards the jurisdiction of this court to direct the State authorities to also grant an appropriate visa to the petitioner.

3. Consequent upon completion of investigation in the case, offences under

sections 366-B/370/419/420/465/466/467/468/471/474/109/ 120-B/34/174-A of the Indian Penal Code, 1860 ('IPC') and under section 14 of the Foreigners Act, 1946 ('Foreigners Act') were also added by way of the charge-sheets and supplementary charge-sheets filed by the prosecution.

4. Pertinently however, on 02.02.2024 the Investigating Officer ('I.O.') made a statement before the learned trial court, stating that as per the investigation conducted and evidence gathered, offences only under section 14 of the Foreigners Act and 174-A of the IPC are attracted against the petitioner.

5. Pursuant thereto, vide order dated 02.02.2024 charges have been framed by the learned trial court against the petitioner under section 14 of the Foreigners Act and section 174-A of the IPC.

PETITIONER'S SUBMISSIONS

6. It is the petitioner's case that she was entrapped by some persons and called to India through Nepal in December 2019; that her passport was taken away by some individuals posing as Indian officials outside the Indian Embassy in Nepal on the assurance that she will be granted a 05 year work-visa/permit upon her arrival in India; and that the petitioner also paid Rs.5 lacs to the said individuals for obtaining such visa.

7. Mr. Prashant Mendiratta, learned counsel appearing for the petitioner has made the following principal submissions in support of the bail plea :

7.1. That the petitioner has been falsely implicated in case FIR No.148/2022, in which she has been in judicial custody ever since the date of her arrest i.e., 11/12.07.2023;

7.2. That the petitioner has been charged only with offences under section 14 of the Foreigners Act and section 174-A IPC; and the statement of the I.O. recorded before the learned trial court shows that no other incriminating material has been found against the petitioner. Pertinently, the offences charged attract a maximum punishment of 05 years of imprisonment along with fine; against which the petitioner has already suffered judicial custody of about 1½ years as of date;

7.3. That the only reason why the petitioner has been kept behind bars is that she allegedly entered India illegally and/or overstayed after expiration of her visa; and those allegations are a matter of trial, which the petitioner is ready and willing to face;

7.4. That since the petitioner's passport already stands deposited with the learned trial court, the petitioner cannot leave the country; and there is therefore no likelihood of the petitioner fleeing from justice;

7.5. That, most importantly, if this court is inclined to grant to the petitioner regular bail, she cannot be detained at a detention centre/restriction centre only for the reason that she has also been charged under section 14 of the Foreigners

Act;

7.6. That the petitioner undertakes to be bound by any condition that the court may impose while granting bail; however she ought not to be detained at a detention centre/restriction centre, since that would defeat the very purpose of granting to the petitioner liberty by admitting her to bail in the subject FIR; and

7.7. That in order to resolve the anomaly as to her visa status in India, the petitioner proposes to regularise her visa status in the country by filing the requisite application before the Foreigners Regional Registration Office ('FRRO'), after she is released on bail by this court.

STATE'S & FRRO'S SUBMISSIONS

8. Insofar as the issue of enlarging the petitioner on regular bail in the subject FIR is concerned, the State (through the Prosecution Branch) has opposed the grant of that relief on the following main grounds:

8.1. In the subject FIR as initially registered, the State alleges that the petitioner was part of a group of co-accused persons including one Ali Sher and Meredov Ahmed, who were running a human trafficking and prostitution racket in Delhi and Gurugram by offering paid sex services through women of foreign origin.

8.2. The prosecution case is that they deployed a decoy customer, and discovered a certain location in Malviya Nagar, New Delhi, where ladies of foreign origin were being brought and offered for paid sex through agents, Mohd. Arup and Chande Sahni. They say that when the premises was raided, the I.O. discovered that several ladies were housed in that place and were being offered for illicit purposes; and the ladies were unable to produce any travel or citizenship documents, and it would appear, that the passports and other travel documents relating to them were being held inter-alia by the petitioner.

8.3. Furthermore, the prosecution alleges that in the course of investigation it also transpired that the petitioner herself did not possess a valid passport or visa; and was therefore staying in India illegally.

8.4. The prosecution further alleges that during this entire period, the group of persons with whom the petitioner was involved, engaged not just in running a prostitution racket, but also in cross-border human trafficking and sex slavery, by getting foreign women into India on various pretexts and thereafter forcing them to engage in prostitution.

8.5. In support of their allegations, several incriminating circumstances have been cited by the prosecution against the petitioner.

9. On a closer reading of the status report filed by the I.O. it is noticed, that it says that charges against the present petitioner – Aziza Kilicheva – have been framed by the trial court vide order dated 15.03.2023 under sections 370/120-B IPC read with sections 3/4/5 of the ITP Act and section 14 of the Foreigners Act. However, a perusal of the record shows that charges against the present

petitioner have been framed vide order dated 02.02.2024 only under section 14 of the Foreigners Act and section 174-A of the IPC. It would appear that the I.O. is confusing the present petitioner – Aziza Kilicheva – with another co-accused in the case – Jumayeva Aziza. The I.O. is directed to ensure that this confusion does not recur.

10. Evidently therefore, post conclusion of investigation, the learned trial court has not found any material on record that would warrant framing of charge against the petitioner for any offence other than section 14 of the Foreigners Act and section 174-A of the IPC.

11. Since in the course of preliminary hearings in the matter, the travel antecedents of the petitioner and the question of whether she was at all entitled to remain in India had arisen, vide order dated 04.07.2024 this court had called upon the FRRO to respond as to whether, if this court was poised to granting regular bail to the petitioner in the subject FIR, would the FRRO issue to the petitioner an appropriate category visa to enable her to remain in India to defend herself against the charges framed against her, without being rendered an 'illegal alien' in the country.

12. It was necessary for the FRRO to take a stand on the issue, since even if this court was to grant to the petitioner regular bail in the subject

FIR, this court was not willing to allow the petitioner to leave the country and thereby evade the process of trial in the case.

13. The gist of the FRRO's accusation against the petitioner is that she is a national of Uzbekistan who, according to the FRRO, had arrived in India on 14.03.2012 As per FRRO's records on a tourist visa and over-stayed for about 07 years, until she was forced to leave the country by way of an 'exit permit' granted by the FRRO, Lucknow on 25.05.2019. On the other hand however, in the status report filed by him, the I.O. says that she entered India on a 'tourist visa' in 2015, which visa was valid until April 2015. The FRRO says that since the petitioner had over-stayed the period of her visa by about 07 years, she was 'blacklisted' by the FRRO, meaning thereby that she was debarred from entering India again. This discordance in the stand of the FRRO and that of the I.O. is however not germane to the decision of the present petition, since that aspect would be subject matter of the trial that the petitioner is facing in relation to the offence under the Foreigners Act.

14. The FRRO in fact even contests the position taken by the State before the learned trial court, to argue that though charges have been framed against the petitioner only for the offences under section 14 of the Foreigners Act and section 174-A of the IPC, according to the FRRO the petitioner deserves to be prosecuted, not for the offence under section 14 but for the offence under section 14-A of the Foreigners Act, which entails more serious consequences.

15. The FRRO draws attention to sections 14 and 14-A of the Foreigners Act,

which read as follows:

14. Penalty for contravention of provisions of the Act, etc.— Whoever. —

(a) remains in any area in India for a period exceeding the period for which the visa was issued to him;

(b) does any act in violation of the conditions of the valid visa issued to him for his entry and stay in India or any part thereunder;

(c) contravenes the provisions of this Act or of any order made thereunder or any direction given in pursuance of this Act or such order for which no specific punishment is provided under this Act,

shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him.

Explanation. — For the purposes of this section, the expression 'visa' shall have the same meaning as assigned to it under the Passport (Entry into India) Rules, 1950 made under the Passport (entry into India) Act, 1920 (34 of 1920).

14-A. Penalty for entry in restricted areas, etc.— Whoever.—

(a) enters into any area in India, which is restricted for his entry under any order made under this Act, or any direction given in pursuance thereof, without obtaining a permit from the authority, notified by the Central Government in the Official Gazette, for this purpose or remains in such area beyond the period specified in such permit for his stay; or

(b) enters into or stays in any area in India without the valid documents required for such entry or for such stay, as the case may be, under the provisions of any order made under this Act or any direction given in pursuance thereof,

shall be punished with imprisonment for a term which shall not be less than two years, but may extend to eight years and shall also be liable to fine which shall not be less than ten thousand rupees but may extend to fifty thousand rupees; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of Section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting court why such penalty should not be paid by him.

(emphasis supplied)

16. The FRRO says that as per their earlier policy, they would grant an 'X-Misc. Category' visa to foreign nationals who were facing criminal charges in India in exercise of their powers under clause 5(2)(b) of the Foreigners Order 1948 ('Foreigners Order'), which authorizes the FRRO to refuse to let the foreign national leave India if the person's presence is required in India to answer a

criminal charge.

17. Clause 5(2)(b) of the Foreigners Order reads as under :

5. Power to grant permission to depart from India.—

(1) *****

(2) Leave shall be refused if the civil authority is satisfied that :-

(a) *****

(b) the foreigner's presence is required in India to answer a criminal charge;

18. It is further the FRRO's contention, that even the X-Misc. Category visa was not granted to foreign nationals who are facing trial for violation of the provisions of the Foreigners Act since such violation is a continuing offence; and granting a visa of any category to such foreign national would itself violate the provisions of the said statute.

19. In any case, the FRRO says, that as per the extant policy, they have discontinued the issuance of X-Misc. Category visa except where the State has filed an appeal against an acquittal; or unless the High Court specifically directs them to grant such visa on an appeal filed by a foreign national. Para 9 of Status Report dated 28.08.2024 filed by the FRRO.

20. It is submitted that if bail is granted to the petitioner, the court may either specifically direct the FRRO to renew the visa of the foreign national; or in the absence of a valid visa, direct that the petitioner be transferred to a detention centre/restriction centre meant for illegal immigrants.

21. The court is also informed that the issue of under-trials and convicted foreign nationals seeking visa renewal is pending consideration before a larger Bench of this court in CRL. REF. No. 2/2021 titled Court on its Own Motion vs. State; and therefore that question may not be addressed by this court in the present proceedings.

22. The FRRO further points-out that in keeping with the desirability for expeditious deportation of foreign nationals, by judgment dated 03.06.2010 passed by a Division Bench of this court in Writ Petition (Civil) No.4663/2008 titled Gabriel O. Ajisafe & Ors. vs. Foreigners' Regional Registration Office & Ors. the Division Bench has permitted/directed the prosecuting agencies to follow certain guidelines (proposed by the State) for ensuring expeditious disposal of appeals relating to foreign nationals within stipulated time-frames, which should also be the advisable course of action in the present case, without granting any additional relief to the petitioner in the meantime.

23. Insofar as the judgment of a Co-ordinate Bench in Emechere Maduabuchkwu vs. State (NCT of Delhi) & Anr. 2023 SCC OnLine Del 3323 is concerned, the FRRO submits, that they have preferred Special Leave Petitions bearing SLP (CRL.) Nos.7285-7286/2024 challenging the view taken by the Co-ordinate

Bench in those cases, which SLP is pending before the Supreme Court. They point-out, that in the said case the Co-ordinate Bench of this court has, in essence and substance, ruled that once a foreign national is granted bail, the foreign national cannot thereafter be detained at a detention centre/restriction centre for violation of any visa conditions. In the said case, the Co-ordinate Bench had directed the release of an under-trial foreign national who was granted bail by the Sessions Court, but by way of a subsequent executive order, was detained in a detention centre/restriction centre and was attending trial from such centre; and the Co-ordinate Bench directed the release of the person from the detention centre/restriction centre, with a direction that the visa application of the foreign national be considered by the competent authority. To be clear, at the stage when the Co-ordinate Bench directed the release of the foreign national from the detention centre/restriction centre, he did not hold a valid Indian visa.

24. The legal contention raised by the FRRO arising from the aforesaid submissions is that section 3 of the Foreigners Act authorizes the Central Government to impose restrictions on the movement of a foreign national within India; that this is a sovereign function to be performed by the Central Government; and that therefore a court may not pass any directions to the Central Government regarding exercise of its powers under section 3, either by directing the release of a foreign national detained in a detention centre/restriction centre, or by directing the issuance of any particular category of visa to such person.

25. Attention is drawn to section 3 of the Foreigners Act, which reads as under :

3. Power to make orders.—(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

(a) * * * * * (cc);

(d) shall remove himself to, and remain in, such area in India as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) * * * * * (viii)

(ix) otherwise regulating his conduct in any such particular as may be prescribed

or specified;

(f) *****

(g) shall be arrested and detained or confined;

and may make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

(3) Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (e), or clause

(f) of sub-section (2).

(emphasis supplied)

26. The FRRO argues that contravention of section 14 of the Foreigners Act contemplates the more innocuous violations of visa requirements and conditions, such as over-staying the period of a valid visa, or indulging in an act violating the conditions of a valid visa, or for some other infraction for which no specific punishment is provided under the statute. On the other hand, section 14-A of the Act encompasses the more egregious violations such as entering a restricted area without permit; or staying in India without valid documents or for contravention of directions issued in that behalf.

27. It is pointed-out that contravention of section 14 of the Foreigners Act may invite punishment for a term which may extend to 05 years in addition to fine; but violation of section 14-A of the Foreigners Act invites a minimum punishment of 02 years, which may extend to 08 years, along with fine.

28. It is submitted that the present petitioner was issued an exit-permit directing her to leave India since she had overstayed her visa by 07 years after entering the country in 2012 and was 'blacklisted' and debarred from re-entering India. However, in egregious contravention of the provisions of section 14-A of the Foreigners Act, the petitioner again entered India, this time without any visa of any type whatsoever, and then engaged in nefarious activities.

29. The FRRO accordingly contends that the petitioner deserves to be charged and tried for the more egregious offences contained in section 14-A of the Foreigners Act.

ANALYSIS & CONCLUSIONS

30. After a very cautious consideration of the rival contentions raised by the parties, it is seen that the petitioner's case involves two distinct aspects; and it is necessary not to conflate the two.

31. The two aspects are : one, the petitioner's position as an under-trial facing charges under section 14 of the Foreigners Act and section 174-A of the IPC for past infractions of visa rules; and two, the petitioner's position as a foreign

national, who continues to remain in India without any valid visa.

32. In relation to the first aspect, namely of being an under-trial facing criminal charges in India, the petitioner is presently being detained in 'judicial custody' under orders of a court, from which custody she seeks release on bail.

33. In relation to the second aspect, which has arisen in the course of present proceedings, the petitioner is liable to be detained at a 'detention centre/restriction centre' in 'executive detention' as it were, under executive orders which the Central Government is empowered to issue through the FRRO, in exercise of its powers under section 3 of the Foreigners Act and clause 5 of the Foreigners Order.

34. In the opinion of this court, though in both cases i.e. judicial custody or executive detention, the petitioner faces deprivation of her liberty, the nature of deprivation of liberty is different and distinct. In the first case, namely her custody for prosecution under section 14 of the Foreigners Act and under section 174-A of the IPC by a criminal court, the petitioner is in the custody of the court, namely 'judicial custody' or jail, as it is known in common parlance.

35. On the other hand, the imminent risk of the petitioner being detained at a detention centre/restriction centre arises from the powers vested in the Central Government (acting through the FRRO) under section 3 of the Foreigners Act, which provision authorises the Central Government to issue directions even with respect to a particular foreigner, prohibiting or regulating or restricting their entry or departure or continued presence in India. Such detention is quite self-evidently not a judicial function performed by the Central Government but a purely executive act, which the sovereign government of the country is empowered to do under their statutory powers conferred by the Foreigners Act and the Foreigners Order.

36. In the present case, addressing the matter of the petitioner's judicial custody does not present much difficulty. Considering that charges have been framed against the petitioner only under section 14 of the Foreigners Act and section 174-A of the IPC; that the petitioner has already suffered judicial custody of about 1½ years as an under-trial; that investigation against her is long-over and her custody is therefore not required, releasing the petitioner from judicial custody on bail, by imposing requisite conditions does not present much of a challenge.

37. However, on appreciating the stand taken by the FRRO, premised on the fundamental fact that grant or refusal of permission to enter, be present-in or depart from India, is clearly a sovereign function entrusted by the Foreigners Act and the Foreigners Order to the Central Government, this court is of the view that it is not the remit of this court to step into that role in a bail petition.

38. To be absolutely sure, the scope of a bail petition is only to consider whether or not, in a given case, an under-trial (or a convict seeking suspension of

sentence) is to be released from the custody of the court, namely 'judicial custody' to the custody of a surety. *Sunil Fulchand Shah vs. Union of India*, (2000) 3 SCC 409, para 24. It is not the remit of this court while dealing with a bail petition to verify, or endorse, or direct grant of any visa status to a foreign national, who has sought the relief of enlargement on bail.

39. This court is of the view, that whether the passport or visa of a foreign national is valid or not, is not a matter within the scope of adjudication in a bail petition.

40. Furthermore, if on being released from judicial custody after complying with the conditions of a bail order, the State seeks to take action against such person for not possessing a valid passport and/or a valid visa; and issues a direction for the person's detention or seeks to take other coercive measures as may be permissible under section 3 of the Foreigners Act and clause 5 of the Foreigners Order, in the opinion of this court, such action cannot be subject matter of adjudication in a bail petition.

41. Ergo, bail proceedings relate only to the release of a person from 'judicial custody' and cannot be employed to seek release from 'executive detention'.

42. This court must hasten to add, that a foreign national aggrieved by any action taken by the Central Government under the Foreigners Act or the Foreigners Order would of course be at liberty to resort to such other legal remedies as may be available in law, before the appropriate governmental department, forum, or court of law in properly constituted legal proceedings but not in a bail petition.

43. The anomaly is that if a foreign national is released from judicial custody on bail while facing charges under section 14 or section 14-A of the Foreigners Act, how can the same foreign national be detained again at a detention centre/restriction centre by executive order for violation of the very same provisions of section 14 or 14-A of the Foreigners Act.

44. In the opinion of this court, this anomaly is misconceived, and the answer to it lies in appreciating the following aspect : a foreign national is charged under section 14 or section 14-A of the Foreigners Act to be tried for contravention of those provisions committed in the past and may be released from judicial custody on bail, while facing those charges; but the same person may be placed in executive detention by the Central Government towards enforcement of the provisions of section 14 and section 14-A of the Foreigners Act for the future period.

45. In the present case, the petitioner also contends that there is no doubt in her mind that the moment she is released from jail, she would be escorted straight to a detention centre/restriction centre, that is not an apprehension that this court can accept so readily, since section 3 of the Foreigners Act gives to the Central Government options to adopt different measures for different persons,

such as requiring the person to reside at a particular place (not necessarily a detention centre /restriction centre) or imposing other restrictions on movements within India. Section 3(2)(e)(i) and (ii) of the Foreigners Act, 1946. No matter the certitude expressed by the petitioner, it would be speculative to conclude as to what exact measure the Central Government would adopt in relation to the petitioner.

46. As a sequitur to the foregoing discussion, the present petition is disposed-of admitting the petitioner – Kilicheva Aziza @ Maya Aziza d/o Fayzulla – to regular bail in case FIR No.148/2022 dated 22.07.2022 registered at P.S.: Crime Branch, Delhi; and directing that the petitioner to be released from judicial custody forthwith, subject to the following conditions :

46.1. The petitioner shall furnish a personal bond in the sum of Rs.50,000/- (Rs. Fifty Thousand Only) with 02 local sureties in the like amount, one of which must be from a family member, to the satisfaction of the learned trial court;

46.2. The petitioner shall not leave the National Capital Region of Delhi without prior permission of the learned trial court and shall ordinarily reside at the address as per prison records/as mentioned in the petition;

46.3. The petitioner shall furnish to the Investigating Officer/S.H.O. a cellphone number on which the petitioner may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;

46.4. The petitioner shall surrender her passport to the learned trial court (if not already done so) and shall not travel out of the country without prior permission of the learned trial court;

46.5. The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial; and

46.6. In case of any change in his residential address/contact details, the petitioner shall promptly inform the I.O. in writing.

47. Since the petitioner is facing trial and is therefore appearing before the learned trial court from time-to-time, it is not considered necessary to impose a reporting requirement as a condition of regular bail.

48. It is made clear that nothing in this order is to be construed as interdicting any action that the Central Government/FRRO may take against the petitioner arising from any alleged contravention of any provisions of the Foreigners Act or any other law governing the entry, continued presence, or exit of the petitioner, in or from India. Needless to clarify however, that without the prior permission of the learned trial court, no action shall be taken by the Central Government

against the petitioner that detracts from the direction issued by this court that the petitioner shall not leave the National Capital Territory of Delhi while on regular bail.

49. Nothing in this order shall be construed as an expression of opinion on the merits of the pending matter before the learned trial court.

50. A copy of this order be sent to the concerned Jail Superintendent forthwith.

51. The petition stands disposed-of in the above terms.

52. Other pending applications, if any, are also disposed-of.