

(2021) 05 MAN CK 0001

In the Manipur High Court

Case No : Writ Petition (Crl.) NO. 6 Of 2021 With Miscellaneous Cases [Writ Petition No. (Crl.)] NO.1, 2 Of 2021

Nandita Haksar

APPELLANT

Vs

State Of Manipur

RESPONDENT

Date of Decision : 03-05-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 19(1)(d), 19 (1)(e), 21, 51, 141

Citation : (2021) 05 MAN CK 0001

Hon'ble Judges : Sanjay Kumar, CJ; Lanusungkum Jamir, J

Bench : Division Bench

Advocate : Nandita Haksar, R.K.Umakanta, S.Suresh

Final Decision : Allowed

Judgement

[1] The petitioner, Ms. Nandita Haksar, a human rights advocate, appears as a party-in-person. Her prayer in this writ petition is to allow the seven

named Myanmar citizens, who entered India illegally, to travel to New Delhi to seek protection from the United Nations High Commissioner for

Refugees (UNHCR).

[2] The petitioner's narrative: After the military coup in neighbouring Myanmar during February, 2021, the military junta banned Mizzima, an

established Myanmar media and news service, and arrested/detained several of its journalists. Of the seven Myanmar persons that this writ

petition is concerned with, Mr. Pau Khan Thawn and Ms. Cing San Lun, his niece by marriage, are journalists, while Mr. Si Thu Aung is a

reporter/video-journalist, all working with Mizzima. The remaining four are Ms. Niang Go Man, wife of Mr. Pau Khan Thawn, and their three minor

children, Master Nang Sian Mung (aged 10 years), Master Nang Khan Hau (aged

9 years) and Ms. Dim Sian Huai Nuam (aged 5 years). They fled their country fearing persecution and physical danger after the coup and the violence that broke out thereafter. They entered India and took shelter at Moreh in Tengnoupal district, Manipur. They sought the help of the petitioner as they feared that they would be sent back to Myanmar by the Assam Rifles, an Indian armed force, as they had come without proper travel documents. The Ministry of Home Affairs, Government of India, had directed the authorities of the border States in the North-East of India and the Assam Rifles to check the flow of illegal migrants coming into India from Myanmar, vide letter dated 10.03.2021. The petitioner pointed out that this communication did not draw a distinction between a "migrant" and a "refugee". However, letter dated 29.03.2021 was issued by the Government of Manipur stating that it would come to the aid of Myanmarese nationals who had illegally entered the State. Given these circumstances and as the seven Myanmarese individuals are handicapped in approaching this Court on their own, the petitioner/party-in-person espouses their cause and seeks their safe passage to approach the UNHCR at New Delhi for protection.

[3] By order dated 17.04.2021, this Court suo motu impleaded the Ministries of Home Affairs, Defence and External Affairs of the Union of India, represented by the respective Secretaries, and adjourned the case to enable the State and the Central Governments to put forth their stands. On 20.04.2021, an adjournment was sought by the learned counsel for the State and Central Governments as they were unable to complete instructions. However, taking note of the petitioner's prayer for interim relief, this Court directed the State authorities to arrange for the safe transport and passage of these seven persons from Moreh to Imphal. This order was passed in view of the threat of apprehension and deportation faced by them at that location. Pursuant to the above order, they were brought to Imphal and are presently stationed at the local residence of the petitioner. Further, as permitted by this Court, their details and particulars were checked by the Senior Immigration Officer at Moreh before they were brought here.

[4] No affidavits-in-opposition were filed by either the State or the Central Governments. Notwithstanding the same, arguments on merits were advanced by Ms. Nandita Haksar, the petitioner/party-in-person; Mr.

R.K.Umakanta, learned Government Advocate for the State of Manipur; and

Mr. S.Suresh, learned ASG, appearing for the Union of India. The case is therefore amenable to final disposal.

[5] The two miscellaneous applications filed by the petitioner/party-in- person, seeking to place on record certain additional documents, are allowed

and the documents are taken on record, subject to just exceptions.

[6] At the outset, the admitted position is that these seven Myanmarese citizens illegally entered India. They did not have the requisite travel

documents. However, the question is whether they can be categorized as â??migrantsâ??. The word â??migrantâ?? is ordinarily understood to refer

to a person who moves from one place to another, especially in order to find work or better living conditions. The word â??refugeeâ??, on the other

hand, refers to a person who is forced to leave his/her country in order to escape war, persecution or natural disaster. The category to which these

seven Myanmarese persons belong is perhaps clearly demonstrable from the conditions that compelled them to flee Myanmar and illegally enter India!

[7] India is not a signatory to the Geneva Refugee Convention, 1951, and the New York Protocol of 1967. It is however a party to the Universal

Declaration of Human Rights, 1948. Article 14 thereof declares that everyone has a right to seek and to enjoy in other countries asylum from

persecution. India is also party to the International Covenant on Civil and Political Rights, 1966. This Covenant was entered into in recognition of the

fact that certain inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world; and that these

rights derive from the inherent dignity of the human person. Notably, India was one amongst the 193 member countries of the UN General Assembly

that endorsed the â??Global Compact on Refugeesâ??, as recently as on 17.12.2018. This Compact formulates a framework for more predictable

and equitable responsibility-sharing and provides a blueprint for Governments, International Organizations and other stakeholders to ensure that host

communities get the support they need so that refugees can lead productive lives. Its key-objectives are: to ease the pressure on host countries;

enhance refugee self-reliance; expand access to third-country solutions; and support conditions in the countries of origin for return in safety and

dignity. In this milieu, it would be relevant to note that Article 51 of our

Constitution casts a non-enforceable duty upon the "State" to promote international peace and security, apart from fostering respect for international law and treaty-obligations in the dealings of organized peoples with one another.

[8] Though India's policy on "refugees" remains rather opaque, if not obscure, and asylum seekers are straightaway branded as

"foreigners", if not worse, certain protections are guaranteed under Articles 14 and 21 of our Constitution even to those who are not Indian

citizens. As long back as in the year 1996, in *National Human Rights Commission vs. State of Arunachal Pradesh & another* [(1996) 1 SCC 742], the

Supreme Court observed thus:

"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 the 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;"

[9] In effect, even a "foreigner" is entitled to protection of life and personal liberty under Article 21 of our Constitution [see also: *Louis De*

Raedt Vs. Union of India and others [(1991) 3 SCC 554] and *State of Arunachal Pradesh vs. Khudiram Chakma* [1994 Supp. (1) SCC 615]. It is in

the context of Article 21 that the principle of "non-refoulement" assumes great significance. "Non-refoulement" is a principle of

international law that provides a refugee or asylum seeker with the right to freedom from expulsion from a territory in which he or she seeks refuge or

from forcible return to a country or a territory where he or she faces a threat to life or freedom because of race, religion, nationality, membership in a

social group, or political opinion [Courtesy: Merriam-Webster Dictionary]. The media coverage that has surfaced from within Myanmar after the

military coup, even if discounted to some extent, leaves this Court in no doubt that these Myanmarese persons, given their links with the banned

Mizzima Media Organization, face imminent threat to their lives and liberty if they return.

[10] Inalienable rights, recognized by the international community as pointed out

hereinabove, inhere in every individual human being naturally and our Constitution also recognizes this by not limiting certain rights that are deemed fundamental, and more particularly the right to life and personal liberty under Article 21, to citizens only. The far-reaching and myriad protections afforded by Article 21 of our Constitution, as interpreted and adumbrated by our Supreme Court time and again, would indubitably encompass the right of non-refoulement, albeit subject to the condition that the presence of such asylum seeker or refugee is not prejudicial or adverse to the security of this country. Therefore, though India may not be a signatory to the Refugee Convention of 1951, its obligations under other international declarations/covenants, read with Article 21 of our Constitution, enjoins it to respect the right of an asylum seeker to seek protection from persecution and life or liberty-threatening danger elsewhere. Be it noted that the petitioner's prayer presently is only to safeguard that right by enabling these seven persons to approach the UNHCR at New Delhi for protection.

[11] While so, Mr. S.Suresh, learned ASG, would press into service provisions of the Foreigners Act, 1946; the Foreigners Order, 1948; and the Registration of Foreigners Act, 1939; in support of his contention that these seven persons, who admittedly entered the country illegally, should first face the consequences of their unlawful acts and cannot be granted protection by this Court, ignoring patent violations of domestic laws. He would further assert that the Constitutional freedoms available under Article 19 are limited to citizens and these seven persons cannot claim such freedoms under Articles 19(1)(d) and 19 (1)(e), with regard to moving freely or residing/settling in any part of the territory of India. He would place reliance on the observations of the Supreme Court to this effect in *Chairman, Railway Board, and others Vs. Chandrima Das (Mrs.) and others* [(2000) 2 SCC 465]. On the same lines, Mr. R.K.Umakanta, learned Government Advocate, would argue that domestic laws must prevail in the first instance, as such illegal entry from a neighbouring country, if condoned by this Court, would set an unhealthy precedent and open the floodgates. He would further contend that the letter dated 29.03.2021 issued by the Government of Manipur is not reflective of any policy decision and was only intended for the benefit of certain identified Myanmarese nationals, who were injured and required medical care and attention.

[12] The aforesaid arguments of the learned counsel for the State and the Central Governments proceed on a rather narrow and parochial

consideration of the larger issues that arise in this case. The seven Myanmarese individuals in question are not "migrants", as normally

understood, but are "asylum seekers". They did not enter our country with the clear-cut and deliberate intention of breaking and violating our

domestic laws. They fled the country of their origin under imminent threat to their lives and liberty. They aspire for relief under International

Conventions that were put in place to offer protection and rehabilitation to refugees/asylum seekers. In such a situation, insisting that they first answer

for admitted violations of our domestic laws, as a condition precedent for seeking "refugee" status, would be palpably inhuman.

[13] That apart, they are only seeking safe passage to approach the UNHCR at New Delhi for protection and are not asserting any rights or freedoms

under Article 19 of the Constitution. Their claim would be traceable to Article 21 and not to Article 19 of the Constitution. As already detailed at

length hereinabove, their claim for such Constitutional protection cannot be denied. Even in *Chairman, Railway Board, and others vs. Chandrima Das*

(Mrs.) and others (supra), the Supreme Court ultimately held that the Bangladeshi citizen who had come to India illegally was entitled to be treated

with dignity and to the protection of her person, as guaranteed under Article 21 of the Constitution. The Supreme Court further observed that as a

national of another country, she could not be subjected to treatment which was below dignity nor could she be subjected to physical violence or

outrage of her modesty. Her right under Article 21 was therefore held to be violated and the "State" was found liable to pay her compensation.

[14] Further, though an argument was advanced about the possible threat that these Myanmarese persons may pose to the security of our country, no

material is produced in support of the same. On the other hand, the documents placed on record reflect that Mr. Pau Khan Thawn and his wife, Ms.

Niang Go Man, were both certified as "refugees" by the UNHCR earlier and they remained in India along with their sons, Master Nang Sian

Mung and Master Nang Khan Hau, who also had such UNHCR certification. They returned to Myanmar after peace was restored there. Similarly,

Mr. Si Thu Aung was sanctioned a "Visa Gratis" by the Indian Government as recently as in January, 2020, which clearly indicates that he was

not perceived to be a threat to our country. The contentions to the contrary are therefore purely speculative, born of a fertile imagination.

[15] The argument that the State of Manipur did not manifest a policy decision in its letter dated 29.03.2021, addressed to the Deputy Commissioners

of the five districts bordering Myanmar, does not merit consideration. If it had not been reflective of a policy decision, it would not have been

addressed to the authorities of all the bordering districts. Further, the letter itself does not indicate that it was intended for the benefit of particular

individuals. On the other hand, the "Subject" portion of the letter reads: "Illegal entry of Myanmarese Nationals". It was therefore an

expression of the State's policy on the subject issue at that point of time.

[16] At this stage, it may be noted that cases of this nature are neither new nor of recent origin. In 1989, Ms. Zothansangpuii, a Burmese refugee,

who illegally entered this country and suffered conviction and imprisonment under our domestic laws, approached the Imphal Bench of the Gauhati

High Court, vide Civil Rule No. 981 of 1989, seeking safe passage to Delhi to seek political asylum. By order dated 20.09.1989, a Division Bench

permitted her to go to Delhi to seek protection. It is stated that she was then settled in Australia by the UNHCR.

In the same year, the Gauhati High Court again had occasion to deal with a similar claim in Civil Rule No.1847 of 1989 filed by one Mr.Bogyi, an

under-trial Burmese detenu. He approached the Court fearing deportation to Burma and praying for an opportunity to obtain political asylum. By order

dated 17.11.1989, a Division Bench of the Gauhati High Court directed his release upon furnishing security to enable him to go to Delhi to seek

protection. It appears that he was thereafter shifted by the UNHCR to Norway. Yet again, the Gauhati High Court dealt with a like issue in Civil Rule

No. 515 of 1990, filed by Khy-Htoon and others, refugees of Burmese origin. This case was disposed of on 11.09.1990, permitting their release on

interim bail to enable them to go to Delhi for the purpose of obtaining refugee status. It is stated that they were then settled in other countries by the

UNHCR. The Imphal Bench of the Gauhati High Court again dealt with this issue in Civil Rule No.516 of 1991. This case was filed by one U. Myat

Kyaw and one Nayzin, Burmese refugees, seeking protection. By order dated 26.11.1991, a Division Bench directed their release on interim bail to

enable them to go to Delhi for that purpose. This Court is informed that these persons were also settled abroad by the UNHCR. Be it noted that, in

none of these cases, these individuals had to face the full consequences of their illegal acts before seeking 'refugee' status.

On similar lines, in *Dr. Malavika Karlekar vs. Union of India and another* [Writ Petition (Criminal No.) 583 of 1992 dated 25.09.1992], the Supreme

Court directed twenty one Burmese persons, who were likely to be deported from Andaman Islands to Burma, not to be deported till the question of

their status was determined as their applications for refugee status were pending and as they posed no danger or threat to the security of our country.

[17] It may also be noted that though India has no clear refugee protection policy or framework, it does grant asylum to a large number of refugees

from nearby countries. India usually respects the UNHCR's recognition of the status of such asylum seekers, mainly from Afghanistan and

Myanmar. Refugee Status Determination (RSD) is undertaken by the UNHCR in India for conferring such status and for consequential

documentation. However, the UNHCR has its office only at New Delhi and not at the Indian borders. It is only after the UNHCR completes the

processes and accords 'refugee' status that the role of India's Foreigners Regional Registration Offices (FRROs) may come into play.

While so, in response to the petitioner/party-in-person's e-mail on the subject, the UNHCR at New Delhi sent an e-mail stating that the new

arrivals from Myanmar who wished to approach it for registration may do so once they are in Delhi and provided phone/mobile numbers. Therefore, it

would be essential for these seven Myanmar persons to first approach the UNHCR at New Delhi and only thereafter, the Union of India would be

in a position to take a call as to whether they can be granted refugee status and asylum in India, as was done earlier. In the alternative, the UNHCR

would be at liberty to rehabilitate these people in host countries under the 1951 Refugee Convention. In either event, these persons cannot be made to

face persecution, if not a threat to their very lives and liberty, by being deported to their home country.

[18] Reliance placed by Mr. R.K. Umakanta, learned Government Advocate, on the recent order dated 08.04.2021 of the Supreme Court in

Mohammad Salimullah and another vs. Union of India and others [Interlocutory Application No. 38048 of 2021 in Writ Petition (Civil) No. 793 of 2017]

is of no avail. The said order was an interlocutory order and no ratio was laid down therein, constituting a binding precedent under Article 141 of the

Constitution. Further, denial of interim relief in that case turned upon a perceived threat to the internal security of our country and the possibility of

illegal â??immigrantsâ?? being provided safe passage due to the porosity of our borders. Neither of those aspects arises in this case.

[19] On the above analysis, this Court finds it just and proper to extend protection under Article 21 of the Constitution to these seven Myanmarese

persons and grant them safe passage to New Delhi to enable them to avail suitable protection from the UNHCR. Some of them seem to be in

possession of their passports but in any event, their details and particulars have been noted by the Immigration authorities of our country. There shall

accordingly be a direction to the FRRO at Imphal airport to immediately provide them with temporary identification cards to enable them to travel to

New Delhi by air, if such identity proofs are necessary. The State and Central Governments shall facilitate their travel to New Delhi and shall not

cause any obstruction. The petitioner/party-in-person states that she will make the required arrangements for purchase of their air-tickets and would

also arrange for their stay at New Delhi, pending consideration of their claims for â??refugeeâ?? status by the UNHCR. This assurance is taken on

record. Further, the petitioner/party-in-person shall ensure that these seven persons approach the Officer-in-Charge of the Parliament Street Police

Station or the jurisdictional Police Station at New Delhi to register their names, local addresses and whereabouts, pending consideration of their claims.

[20] The writ petition is accordingly allowed with the above directions.

MC[W.P.(Crl.)] No. 1 of 2021 and MC[W.P.(Crl.)] No. 2 of 2021 are also allowed.

In the circumstances, there shall be no order as to costs.