



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Case Comment: Mohammad Salimullah & Anr. vs Union of India & Ors.

Somya Singh^a

^aNMIMS, Bengaluru, India

Received 22 July 2021; *Accepted* 16 August 2021; *Published* 19 August 2021

INTRODUCTION

Name of the Petitioners and Respondents

The two petitioners in the present case are **Mohammed Salimullah** and **Mohammad Shaqir**, Rohingya immigrants who fled Myanmar.

There are three respondents, in this case, Respondent no.1 is **Union of India**, Respondent no.2 is **National Human Rights Commission** and Respondent no.3 is **United Nations High Commission for Refugees**.

Deciding Court: Hon'ble Supreme Court of India is the deciding court in this case.

Names of the Judges on the Bench: A Division Bench consisting of the former Chief Justice of India, Sharad Arvind Bobde, Justice Ajikuttira Somaiah Bopanna, and Justice V. Subramanian.

PROCEDURAL HISTORY

In August 2017, a Writ Petition under **Article 32**¹ of the Constitution of India, against the deportation of the petitioners and other Rohingya immigrants residing in India, was filed before the Hon'ble Supreme Court of India by the petitioner in light of the violation of constitutional guarantees provided under Articles 14² and 21³, read along with Article 51(c)⁴ of the Constitution of India.

FACTS

The facts of the case are as follows:

Petitioner no.1 Mr. Mohammad Salimullah is a United Nations Commission of Refugees (hereinafter referred to as UNHCR) registered Rohingya refugee who fled the hostile milieu of the Rakhine state of Myanmar and entered the borders of India on foot in 2012.

Petitioner no.2 is Mr. Mohammad Shaqir, another UNHCR registered refugee, who took shelter in India in 2011. The petitioners are a part of the **Rohingya community**, natively residing in the **Rakhine state of Myanmar**, who self-identify themselves as a **distinct ethnic minority group** with their own language and culture; however, these claims have been rejected by the established government of Myanmar to such an extent that the Rohingya were not included in the list of recognised ethnic groups, thus rendering them '**stateless**'. Stretched over a span of five decades, right after the military coup in Myanmar in 1962, the minority Rohingyans and the majority ethnic Rakhines have been at war with one other in the Buddhist country of Myanmar.

A pattern of intense violence, bloodshed, and grave human rights violation, stimulated through extremist intolerance and ultra-nationalist Buddhist organizations, has been observed against the Rohingya Muslims and other religious groups with the most severe

¹ Constitution of India 1949, art 32

² Constitution of India 1949, art 14

³ Constitution of India 1949, art 21

⁴ Constitution of India 1949, art 51

outbreak being in June-October 2012. Apart from innumerable cases of death, injury, and destruction of property, approximately 1,40,000 Rohingya were displaced, 1,20,000 were placed in internally displaced camps in Rakhine state and overall 10,90,000 Rohingya were declared stateless thus making it a **“textbook example of ethnic cleansing”**.

The Rohingya fled from Myanmar to the neighbouring countries of Bangladesh and India and an estimate of 40,000 persecuted Rohingya live in different parts of India, out of which only 16,500 are registered with UNHCR. On 14 August 2017, according to a Reuters report, a Union Minister of State, told the parliament that the Central government has directed the State authorities to identify and deport all the illegal immigrants including the 40,000 Rohingya refugees and the UNHCR's registration does not hold effect because India is not a signatory to the refugee convention. Aggrieved by the hon'ble minister's statement, the petitioners filed a Writ Petition contending that the suggested order of arbitrary deportation goes against various fundamental disciplines of the Indian Constitution and disrespects the Non-Refoulement policy of the Customary International Law.

ISSUES

The issues at hand are three-fold and prompt us to ponder upon the debatable yet essential questions on **Fundamental Rights and Directive Principles of State Policy of the Constitution of India along with International Law**. Before the hon'ble division bench, the primary issue was that whether the action of deportation of petitioners and other Rohingya immigrants by Respondent no.1 i.e. Union of India violates the former's fundamental right to equality and fundamental right to life and personal liberty under Articles 14 and 21⁵ respectively. Furthermore, whether the respondents are obligated to respect the Conventions and Treaties that form the International law as per the provisions of article 51(c)⁶ of the Constitution. And, lastly, whether the concept of non-refoulement, articulated clearly under Article 33(1) of the United Nations Convention on the Status of Refugees, 1951, is a part of

⁵ art 14 (n 2)

⁶ art 14 (n 4)

customary International Law and binding on all states, irrespective of them being a signatory to it.

ARGUMENTS FROM EITHER SIDE

Petitioner: Before the hon'ble Supreme Court of India, the petitioners' counsel contested the writ petition on three grounds, firstly the international principle of non-refoulement is available to the Rohingya immigrants under Article 21⁷ of the Constitution. As per the Principle of non-refoulement under International Human Rights, Refugee, Humanitarian and Customary Law,

"A State is prohibited from transferring or removing individuals from its jurisdiction or effective control when there are substantial grounds for believing that the person would be at the risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violation⁸."

Furthermore, according to Article 51(c) of the Indian Constitution, "The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration."

The counsel argued that the **immigrants are to be identified as "refugees" under Articles 1A(2) of the 1951 UN Convention on the Status of the Refugees** thus validating the application of the Principle of Non-Refoulement on the Rohingya refugees; also, it is a Directive Principle to respect International Treaties and Principles, hence making the State obligated to not deport the Rohingya refugees the same was also upheld in the cases of **Dong Lian Kham v Union of India⁹** and **Ktaer Abbas Habib Al Qutafi v Union of India¹⁰**.

Secondly, fundamental provisions of Articles 14¹¹ and 21¹² can be availed by non-citizens as well. The Counsel for the petitioners relied heavily on the case of **National Human Rights**

⁷ art 14 (n 2)

⁸ United Nations Convention on the Status of Refugees 1951, art 33(1)

⁹ *Dong Lian Kham v Union of India* 226 (2016) DLT 208

¹⁰ *Ktaer Abbas Habib Al Qutafi v Union of India* 1999 CriLJ 919

¹¹ art 14 (n 2)

Commission v Arunachal Pradesh¹³, in which the Court held that “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 law. 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.”

And lastly, even though India is not a signatory to the United Nations Convention on the State of Refugees, 1951, where the principle of non-refoulement is explicitly coded, it is still a signatory to other essential Conventions and Treaties like the **Universal Declaration of Human Rights, 1948**¹⁴, **International Covenant on Civil and Political Rights, 1966**¹⁵, **Protection of all persons against Enforced Disappearances**¹⁶ and **Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment**¹⁷, which implicitly yet conspicuously raise the issue of non-refoulement of refugees; thus making India obligated to provide shelter to the petitioners. Heavy reliance was made on the International Case of **The Gambia v Myanmar**¹⁸ or the **Rohingya Genocide Case**, where the **International Court of Justice** recognised the ongoing genocide, adopted resolutions, and created provisional measures in order to curb the patterns of ethnic bloodshed and hold Myanmar accountable for the same.

RESPONDENT

In response to the contentions made by the petitioners, the respondents defended themselves on the basis of eleven key points which can be summed up into three major points of contentions. The counsel for the respondents argued that the petitioners are rather identified

¹² art 21 (n 3)

¹³ *National Human Rights Commission v Arunachal Pradesh* AIR 1996 SC 1234

¹⁴ Universal Declaration of Human Rights 1948, art 14

¹⁵ International Covenant on Civil and Political Rights 1966, art 6

¹⁶ Protection of all persons against Enforced Disappearances, art 16 (1)

¹⁷ Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, art 3 (1)

¹⁸ *The Gambia vs Myanmar*

as foreigners by the virtue of Section 2(a) of The Foreigners Act¹⁹, 1946, hence under Section 3 of the Foreigners Act, 1946, the Central Government can **“issue orders restricting, regulating or prohibiting the entry and/or departure of such foreigners.”** Also, this right of the Government to expel a foreigner is unlimited and absolute.

Secondly, since India is not a signatory to the United Nations Convention on the Status of the Refugees or to the 1967 Protocols on the Status of the Refugees, therefore the principle of non-refoulement cannot be applied to a non-contracting State. It further contended that though Articles 14 and 21 can be availed by non-citizens, Article 19(1)(e)²⁰, i.e. the fundamental right to reside and settle in a country can **only be availed by the citizens of India.**

Thirdly, the respondents articulately laid down the issue of a well-orchestrated influx of illegal immigrants for monetary considerations through the porous borders of India thus posing a serious threat to national security. The fact that intelligence agencies have also raised serious concerns regarding the internal security of the country was also pondered upon.

JUDGEMENT

The hon'ble division bench of the Apex Court of India pronounced the judgement in **favour of the respondents** and declared that it is impossible to grant the relief that has been prayed for by the Petitioners; however, the **deportation cannot take place unless the procedure for the same is duly carried out.**

RATIO

The ratio behind the judgement of the bench is three-fold. The bench opined that though a conflict can arise on the enforcement of Article 51(c)²¹ of the Constitution in case India is a signatory or not a signatory to a convention, yet there is no doubt that in an instance of conflict between municipal law and international law, the former prevails. The national courts are restricted to drawing inspiration from international conventions or treaties and in the present

¹⁹ Foreigners Act 1946, s 2(a)

²⁰ Constitution of India 1949, art 19

²¹ art 51 (n 4)

case, the fact that India is not a signatory to an international convention forms the municipal law and the same prevails. It was also thought that the right not to be deported is auxiliary or collaterally linked to the right to settle or reside in the Indian territory mentioned under article 19(1) (e) of the Constitution, and the said article only guarantees the right to citizens; ergo the Rohingya immigrants cannot be given the liberty to settle or reside in any part of the Indian territory. Lastly, the bench opined that serious contentions regarding the porous borders and internal security of India were made by the respondents. In any manner, whatsoever, the security of the State cannot be compromised, thus becoming a ground for non-allowance of Rohingya immigrants on Indian grounds.

CONCLUSION

The judgement pronounced by the Hon'ble bench has been under scrutiny since the moment it was delivered. The Court's decision was labelled as a violation of human dignity and exposure of the Human Rights rhetoric in India and was also criticised for **overlooking the International Customary Law and affirming only the International Statutory Law**. It can be fairly concluded that the principle of non-refoulement does not restrict itself to specific statutes, in fact, its essence can be implicitly found in the very foundation of International Law. Ignorance towards such basic tenets of International Law weakens the validity and applicability of the same, which is a potential reason why instances of human rights violation still exist around the world.

Enough stress needs to be laid down on the duration of the immigrant situation in India. It has been almost a decade since the Rohingya have taken shelter in India and it's no denying that some of them are penetrating into the territory presently as one reads this analysis, but one cannot overlook the ultimate reasons or the severe humanitarian grounds which led them to flee their nation and take refuge in ours. Beyond '**Statelessness**' accompanied with '**Ethnic Cleansing**' and '**Extreme Intolerance**', the Army and other ethnic groups of Myanmar offered death to the Rohingya community and once deportation is given the green signal, it becomes questionable as to where these immigrants will be deported to. Borrowing from the present judgement itself, the due process of deportation needs to be carried out effectively, which

means that unless the tag of being stateless is removed from the Rohingya and they are accepted back in their nation, i.e. Myanmar, India will have to set up numerous detention camps for these immigrants, which was, quite evidently, the position before this judgement was pronounced. Such perspectives force one to think about the practicality of this judgement, which was primarily given on the grounds of uncompromising nature of national security or rather feeling threatened by a persecuted community of 40,000 plus, which was harmlessly settled on Indian soil for about a decade will continue to do so post this judgement.

When it comes to choosing between municipal law and international customary law, the Hon'ble Court gave the ritualistic direction of upholding the former and drawing inspiration from the latter, thus going against its own judgement of the Dong Lian Kham case. Such situations where India keeps evading the refugee crisis by taking the cover of it not being a signatory to a convention presents itself in a bad light internationally and in the end, it can be inferred that the Refugee Policy of India needs a contemporary makeover as it is the need of the hour.