

Response of Judiciary Towards Refugees in India

2.1 TREND OF JUSTICE IN THE TRIAL COURTS

The discussion in the previous chapter on the legal conditions of refugees in India shows clearly that when a foreigner enters India without the required travel documents, he/she will be prosecuted under the relevant laws unless an exception is made by the rule-making power of the government.¹ The same is true for foreigners who have entered India to escape persecution or fear of persecution.² In this section of the chapter, I focus on some unreported cases decided by the Indian Trial Courts in matters related to refugees and the violation of the rules and orders under relevant laws.

In the case of *State v. Farid Ali Khan*,³ the accused was arrested under the Foreigners Act, 1946 for not being able to show a valid refugee certificate issued by the United Nations High Commissioner for Refugees (UNHCR) and residence certificate issued by the government. However, the accused has all the valid documents but was unable to show them at the time of arrest, and the law allows the accused up to 24 h to produce

¹See Veerabhadran Vijayakumar, 'Judicial Response to Refugee Protection in India' [2000] 12 International Journal of Refugee Law 235; B.S. Chimni, 'Legal Condition of Refugees in India' [1994] 7 Journal of Refugee Studies 378, 380.

²Ibid.

³Court of Metropolitan Magistrate, New Delhi, Decided on: November 1, 1995 <http://www.refworld.org/docid/3f4b8f2e4.html> accessed December 25, 2015.

the documents. No time was given to the accused for this purpose, and on this finding the trial court discharged the accused. However, in *State v. Montasir M. Gubara*,⁴ the accused is a refugee who is staying in India with refugee status. At the time of his arrest he was not able to produce his refugee certificate granted by UNHCR, which was placed before the court when trial started. Nevertheless, the court sentenced him to rigorous imprisonment for 6 weeks along with a fine. The case of *State v. Huson Vilvaraj* was registered under Section 14 of the Foreigners Act, 1946 against the accused, a Sri Lankan refugee.⁵ The accused was arrested by the Delhi police as he was living in Delhi without travel documents. The court convicted the accused and sentenced him to simple imprisonment for 6 months and a fine. The trial court also observed that refugee status does not entitle a person to move about freely in another country, and that the person is always subject to the laws of the country which has accorded him the refugee status.

The case of *State v. Eva Massar Musa Ahmed* was registered under Section 14 of the Foreigners Act, 1946.⁶ The accused is a Sudanese citizen who entered India with an expired Sudanese passport and no travel authorization from the Indian Government. The accused was held in custody for 10 days. She submitted before the court that she had been gang raped in Sudan for converting from Islam to Christianity and subsequently granted refugee status by UNHCR. The trial court, considering the situation of the accused, sentenced her to imprisonment for the days already spent in custody and a small fine.

In the case of *State v. Thang Cin*,⁷ the accused is a citizen of Myanmar who entered India and applied for refugee status from UNHCR in New Delhi. He was arrested before receiving refugee status and was held in

⁴Criminal Case No. 427/P/1994, Court of Additional Chief Metropolitan Magistrate, Mumbai, Decided on: September 3, 1996 http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8fe14,0.html accessed December 25, 2015.

⁵Case No. 443/3 of 1997, Court Metropolitan Magistrate, New Delhi, Decided on: May 6, 1998 http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8f702,0.html accessed December 25, 2015.

⁶FIR No. 278/95, Court of Metropolitan Magistrate, New Delhi, Decided on: October 26, 1995 http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8c084,0.html accessed December 25, 2015.

⁷FIR No. 330/01, Court of Metropolitan Magistrate, New Delhi, Decided on June 3, 2002 http://www.refworld.org/type,CASELAW,IND_MMM,,3f4b90bd4,0.html accessed December 25, 2015.

judicial custody for about 9 months. Afterwards, the accused received refugee status from UNHCR in New Delhi and the court took a lenient view on convicting him under the Foreigners Act, 1946. The court sentenced him to the term already spent in prison and set him free.

In *State v. Mohd Ehsan*,⁸ the petitioner was a refugee against whom an order of deportation was passed by the trial court. However, after submission of the refugee certificate issued by UNHCR before the court, the order of deportation was cancelled. However, he was sentenced to a fine and in case of default sentenced to 6 months of simple imprisonment. In the case of *State v. Benjamin Zang Nang*,⁹ the accused served his sentence of imprisonment under the Foreigners Act. He was ordered deported from India after the completion of his sentence in prison. However, the accused pleaded for the court to send him under the custody of UNHCR to apply for refugee status. This plea was rejected by the court as the court has no jurisdiction to hand him over to UNHCR.

In *State v. Mohd Riza Ali*,¹⁰ the accused was charged under various sections of the Indian Penal Code for holding forged travel documents, as well as under the Foreigners Act. The accused submitted a refugee certificate granted by UNHCR before the court and thus the court released him from the charges under the Foreigners Act, but the trial continues for the offences under the Penal Code. In the case of *State v. Kishan Chand and Habib Iranpur*,¹¹ the second accused pleaded guilty under the Foreigners Act, 1946. The second accused submitted that he is a refugee mandated by UNHCR in New Delhi and that he left Iran because he had suffered persecution. The court sentenced the second accused to 1 month of rigorous imprisonment

⁸FIR No. 435/1993, Court of Metropolitan Magistrate, New Delhi, Decided on March 17, 1994 http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8fa74,0.html accessed December 25, 2015.

⁹GR Case No. 1235/1994, Court of Assistant Chief Judicial Magistrate, Sealdah, 1996 http://www.refworld.org/type,CASELAW,IND_MMM,,3f3223584,0.html accessed December 25, 2015.

¹⁰FIR No. 414/93, Court of the Assistant Chief Metropolitan Magistrate, New Delhi, Decided July 7, 1995 http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8fc24,0.html accessed December 25, 2015.

¹¹Criminal Case No. 66/96, Court of Metropolitan Magistrate, New Delhi, Decided on: May 31, 1996 http://www.refworld.org/type,CASELAW,IND_MMM,IND,3f4b8f8b4,0.html accessed December 25, 2015.

and a fine. In the case of *State v. Mohd. Yaashin*,¹² the accused was charged under the Indian Penal Code for procuring a false passport and travel document to enter India, and was also charged under the Foreigners Act. On the basis of the refugee certificate granted by UNHCR, he was released from the charges under the Foreigners Act. However, the court fined him and in case of default he was sentenced for a period of 30 days. The case of *State v. Chandra Kumar & Others* has received extensive media coverage,¹³ as the trial court in this case not only quashed the order of deportation but also ordered the Government of India to table the Refugee and Asylum Seekers (Protection) Bill, 2006 before the Parliament. The accused was arrested for procuring false documents to leave India and travel to Italy. The prosecution wanted to deport him after he had served his sentence. However, the court decided that to send the refugee-accused back to the refugee camp in Tamil Nadu.

Thus, by and large, the trial courts have been unable to develop any standard practice in cases against refugees. There are many variations, which are primarily a result of reliance on colonial laws which do not deal with the situation of refugees. In some cases the court took a lenient approach to sentencing when a refugee certificate was issued by UNHCR, but finally convicted the refugee. However, there have been decisions by the High Court in which they ordered the withdrawal of the case under the Foreigners Act, 1946 when refugee status was granted to the accused.¹⁴ It is important to note that the trial court can do very little in the case of a refugee situation when the laws of the country make no clear-cut distinction between a refugee and a foreigner. In the next section, I look into the judgments of various High Courts which deal with refugees to extend the ambit of the query of the present chapter.

¹²Case No. 528/2, Court of Metropolitan Magistrate, New Delhi, Decided on: June 4, 1997.

¹³FIR No. 78/10, Court of Metropolitan Magistrate (Dwarka), New Delhi, Decided on: September 20, 2011.

¹⁴See (n 20) and (n 21).

2.2 DECISIONS OF HIGH COURTS AND THE DEVELOPMENT OF PRECEDENCE

There are over one thousand cases initiated by refugees or related to refugees present in India that have come in front of various High Courts of India. It is important to note that with the exception of some sixty cases, all were against decisions of state or other parties under the Acts which were enacted for rehabilitation of displaced persons during the partition of India.¹⁵ There are very few cases concerning refugees that have come to various High Courts of India under the Acts which were enacted under Entries 14, 17, 18 and 19 of List One of Schedule 7.¹⁶ The matters covered under these cases include rights of refugees against deportation and detention, resettlement, repatriation, right of compensation, right to livelihood, acquisition of citizenship and so forth. After careful analysis of the judgments of these cases, some are discussed in the following paragraphs under different categories. These cases reflect the protection of refugees in India and show the extent of protection under humanitarian considerations and international developments by defining the government's power to deal with foreigners exclusively under various central laws.¹⁷ After careful discussion of these cases, an attempt is made to show the trend toward protection of refugees by the High Courts. However, in many of these cases the High Courts were not convinced that refugees constituted a different class distinguishable from other foreigners based on having entered India to escape persecution.

2.2.1 *Settlement/Compensation*

In the case of *Khudiram Chakma v. Union Territory of Arunachal Pradesh and Ors*,¹⁸ the petitioner explained that he along with fifty-six

¹⁵Constitution of India, 1950, Concurrent List, Entry 27: Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

¹⁶Constitution of India, 1950, Union List, Entry 14: Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries; Entry 17: Citizenship, naturalization and aliens; Entry 18: Extradition, Entry 19: Admission into, and emigration and expulsion and passports and visas.

¹⁷Vijayakumar (n 1) 236.

¹⁸High Court of Gauhati, AIR 1992 Gau 105, Decided on: April 30, 1992.

Chakma families migrated from East Pakistan (presently Bangladesh) on March 30, 1964 due to ethnic disturbances. They were first given shelter in a government camp in Assam, thereafter taken to Bettiah of Bihar and finally taken to Abhayapur Block, Tirap District, Arunachal Pradesh in 1966. These families were able to negotiate with the local Raja about their situation, and the Raja gave them some land to cultivate. In 1984 the Chakmas received an order from the state government to move from Joypur village to the vacant lands of two other villages.

On the first issue of this case, the court, after analyzing the provisions of the Constitution of India and the Citizenship Act, 1955, came to the conclusion that the Chakmas are not citizens of India, so they are foreigners.¹⁹ The second issue, of the state government directing the Chakmas to move to another place, was also upheld by the court in connection with the Foreigners Act, 1946 and the Foreigners Order, 1948. In this regard the court also relied on Regulation 5 of 1873, Scheduled District Act 1974, that no person other than a native has any right to acquire land or the product of land within the inner line.²⁰ On the third issue, the Court decided that the decision taken by the government was in conformity with the provisions of the Constitution of India and other laws dealing with foreigners.²¹ However, on humanitarian grounds the court ordered the state government to compensate the Chakmas for the land they had prepared for cultivation. The government also ordered that all arrangements be made for the construction of housing and a water facility before shifting the Chakmas to the new place.²² However, this decision was challenged in the Supreme Court of India, which generated additional litigation and finally resulted in the landmark judgment on refugee protection by the Supreme Court of India.

2.2.2 *Opportunity to Seek Asylum*

The petitioner in the case of *Ms. Zothansangpuui v. The State of Manipur* is a citizen of Myanmar who entered India in order to escape

¹⁹Ibid. Para.16–18.

²⁰Ibid. Para.19–22.

²¹Ibid. Para.23–31.

²²Ibid. Para.32–34

a terrorizing situation created by the Myanmar Army.²³ She was prosecuted by the Chief Judicial Magistrate under various Sections of the Foreigners Act, 1948 and is presently serving her sentence in prison. She submitted a petition to the High Court to rule that she should not be deported back to Myanmar after serving her sentence, and that she be given an opportunity to visit UNHCR to seek asylum in India. The Court ruled in her favor and ordered the state not to deport her for a period of 1 month after the completion of her sentence to enable her to seek asylum in India.

In the case of *Khy-Htoon and Ors v. The State of Manipur*,²⁴ the petitioners are citizens of Myanmar who were on trial for offences under the Foreigners Act, 1946. The petitioners asked for interim bail to allow them to appear before UNHCR in New Delhi to apply for refugee status. The court granted interim bail for 2 months on personal bond, and ordered them to seek refugee status.

In the case of *Mr. Bogyi v. Union of India*,²⁵ the petitioner is a citizen of Myanmar who entered India to escape persecution. He is also an under-trial prisoner charged under various Sections of the Foreigners Act, 1948. He submitted a petition requesting interim bail to enable him to visit New Delhi to seek asylum. The court ordered in favor of the petitioner with the direction that if the petitioner was successful in obtaining refugee status, he would not serve any sentence in prison in the present case leveled against him.

In the case of *U. Myat Kyaw v. State of Manipur*,²⁶ the petitioner entered India with travel documents to flee the political disturbance in Myanmar and approached the authorities after arriving in India. A criminal case was registered under Section 14 of the Foreigners Act, 1948 and the petitioner was placed in judicial custody. The petitioner approached the High Court to request the opportunity to seek refugee status from UNHCR in New Delhi. The court allowed the petition and ordered interim bail for 2 months to allow him to seek refugee status from

²³High Court of Gauhati (Imphal Bench), Civil Rule No. 981 of 1989, Decided on: September 20, 1989.

²⁴High Court of Gauhati, Civil Rule No. 515 of 1990, Decided on: September 11, 1990.

²⁵High Court of Gauhati, Civil Rule No. 1847/89, Decided on: September 17, 1989.

²⁶High Court of Gauhati (Imphal Bench), Civil Rule No. 516 of 1991, Decided on: November 26, 1991.

UNHCR. The court further ordered that because the petitioner might not be able to provide local surety, he would be released on personal bond.

2.2.3 *Deportation*

The case of *Seyed Ata Mohamamdi v. Union of India and Ors* involved a petition to the court not to deport the petitioner to his native country of Iran.²⁷ During the hearing the petitioner was granted refugee status by UNHCR. On the basis of the refugee certificate, the Government of India made a statement that there was no question of deportation of the petitioner to Iran and that he could travel to any country he wished under the resettlement program. As a result of this statement, the court disposed of the petition. In the case of *Mohammad Sediq v. Union of India and Ors*,²⁸ the petitioner was a refugee of Afghan origin who received a refugee certificate from UNHCR in New Delhi in 1987. This refugee certificate was extended on an annual basis until 1999.²⁹ In 1998 the petitioner received the impugned order from the government under Section 3(2)(c) of the Foreigners Act, 1948 to leave India on or before May 15, 1998 and not to re-enter India thereafter.³⁰ The petitioner contended that he had not been given any opportunity for a hearing before the order was issued, and that due to the disturbances in Afghanistan he was not able to return there as he feared he would suffer harm if he did so. The petitioner asked that the order be quashed as a violation of the principles of natural justice, that he be allowed to reside in India as a refugee, and that a direction be issued to exempt the petitioner and other such refugees, as a class or description of foreigners, from the application of the Foreigners Act, 1946.³¹ The court observed that when any refugee is asked to leave the country, he/she must be allowed an opportunity for a hearing; however, the extent of the opportunity will depend on the

²⁷High Court of Bombay, A.D. 1458 of 1994.

²⁸High Court of Delhi, 1998 (47) DRJ 74, Decided on: August 21, 1998.

²⁹Ibid. Para.3.

³⁰Ibid. Para.1.

³¹Ibid.

facts and circumstances of each case.³² Further, the court held that the order passed by the Foreigners Registration Officer, New Delhi is a valid order on account of the activities of the petitioner, which is prejudicial to the security of India and a reasonable opportunity of hearing has to be given to him.³³

In *Ktaer Abbas Habib Al Qutaifi and Anr v. Union of India and Ors*,³⁴ the petitioners are Iraqi refugees who entered India in 1996 and were subsequently granted refugee status by UNHCR in New Delhi.³⁵ The petitioners asked to be handed over to UNHCR instead of being deported to Iraq. The court in this case reflected intently upon international law principles of refugee protection and India's obligations under various human rights instruments.³⁶ Finally, on the basis of the principle of non-refoulement and humanity, the court ordered in favor of the petitioners that they not be deported from India until December 31, 1998 and ordered the respondents to consider the petition as per the law laid down in the judgment.³⁷ In the case of *Dongh Lian Kham and Ors v. Union of India and Ors*,³⁸ both petitioners are citizens of Myanmar belonging to the ethnic Chin community. They entered India in 2009 and 2011 respectively along with their families and were issued refugee certificates by UNHCR in New Delhi valid until 2017.³⁹ On the basis of the refugee certificate issued by UNHCR, the Ministry of Home Affairs (MHA) issued them with long-term visas (LTVs). The petitioners were convicted under the Narcotic Drugs & Psychotropic Substances Act, 1985 by a competent court and served prison terms. After their release from prison, the MHA detained them in a camp and started procedures for deportation. The petitioners contended that if they were to be deported to Myanmar, they would face persecution and their lives would be threatened. The MHA contended that given the conviction of the petitioners, they represented a threat to the security of the nation, and that their involvement in drugs also posed a threat to the social fabric,

³²Ibid. Para.16.

³³Ibid. Para.22 and Para.23.

³⁴High Court of Gujarat, 1999 Cri.L.J 919, Decided on: October 12, 1998.

³⁵Ibid. Para.1.

³⁶Ibid. Para.6–9, 18 and 19.

³⁷Ibid. Para.21.

³⁸High Court of Delhi, 226 (2016) DLT 208, Decided on: 21 December 2015.

³⁹Ibid. Para.3–6.

so the decision was taken by the MHA to deport them.⁴⁰ The petitioners asked that the MHA order be quashed because they are refugees with rights under Article 21 and Article 14 of the Constitution of India, and based on the principle of non-refoulement of customary international law.⁴¹ The court observed that the government has the power to expel any foreigner from the territory of India and there is no law or provision of the Constitution that can affect this power of the government. However, the prohibition of deportation of refugees to a country where they will face persecution can be regarded as a guarantee under Article 21 of the Constitution of India, as non-refoulement protects the life and liberty of a human being, irrespective of his/her nationality.⁴² Finally, the court, in consideration of the good conduct of the petitioners in social life and their family status, ruled that the MHA, in consultation with UNHCR, should find an opportunity to deport the petitioners to a third country other than Myanmar and that the petitioners shall not be deported from India until a decision is made on this issue.⁴³

2.2.4 *Repatriation and Resettlement*

A petition to direct the government to stop the involuntary repatriation of Sri Lankan refugees to their native place came before the court in the case of *Gurunathan and Others v. The Government of India and Others*.⁴⁴ The Government of India came up with a plan to the effect that Sri Lankan refugees would not be sent back to their native place against their will and that there would be no force used in the process. Considering that as a guarantee, the court disposed of the petition. The issue of involuntary repatriation again came before the Madras High Court in *P. Nedumaran and Dr. S. Ramadoss v. Union of India and Another*,⁴⁵ in which case the court disposed of the petition with a decision similar to that in the previous case.

⁴⁰Ibid. Para.20.

⁴¹Ibid. Para.13–15.

⁴²Ibid. Para.26 and 30.

⁴³Ibid. Para.32 and 33.

⁴⁴High Court of Madras, W.P. Nos. 6708 and 7916 of 1992.

⁴⁵High Court of Madras, W.P. No. 12298 and 12343 of 1992, Decided on: August 27, 1992.

In the case of *Aung Thant Min v. Union of India*,⁴⁶ the petitioner had previously been granted interim bail by order of the High Court of Gauhati to seek refugee status from UNHCR. The petitioner duly received the status and the refugee certificate. The present petition came before the court to direct the government to issue him an exit visa to travel to Canada under the UNHCR resettlement program. The Government of India had no objection to this petition, and the Government of Manipur is in the process of withdrawing the case against the petitioner under the Foreigners Act, 1946. On the basis of the above, the court ordered the government to issue an exit visa to the petitioner. The case of *Saifullah Bajwa v. Union of India* came to the court with a request to withdraw a writ petition against the Government of India as the petitioners had been granted resettlement by UNHCR.⁴⁷ This case first came before another bench of the High Court in 2008 with a request to direct the government to provide asylum to the petitioners as they had been persecuted in Pakistan and to release them into the custody of UNHCR in New Delhi.⁴⁸ In that case, it was revealed that the Government of India was not inclined to grant asylum, and put the petitioners in Tihar Jail. The court ordered that UNHCR be allowed to intervene and directed the government not to deport the petitioners to their country of origin. Finally, the petitioners were given the opportunity to resettle in another country by UNHCR, and the petition was withdrawn.

2.2.5 Detention

The case of *Ramsingh v. State of Rajasthan* is a revision petition before the Court.⁴⁹ The petitioner is a Pakistani citizen who came to India during the 1971 war and stayed at a refugee camp. It is alleged by the state that the petitioner crossed the border back into Pakistan in 1972 and then re-entered Indian territory in 1973, and thus he was charged under Section 14 of the Foreigners Act, 1946 and Rule 3 of the Passports (Entry into India) Rules, 1950. The petitioner was convicted and sentenced to rigorous imprisonment by the

⁴⁶High Court of Delhi, W.P. (CRL) 110 of 1998, Decided on: March 4, 1998.

⁴⁷High Court of Delhi, W.P. (CRL) 465/2011, Decided on: December 9, 2011.

⁴⁸High Court of Delhi, W.P. (CRL) 1470/2008, Decided on: December 2, 2010.

⁴⁹High Court of Rajasthan, 1978 WLN (UC) 90, Decided on: March 15, 1978.

Chief Judicial Magistrate, which decision was further affirmed by the Sessions Judge in 1977. In this case the court, after careful examination of the records of the lower court, found no evidence to prove the petitioner had left India in 1972. Finally the court held that the petitioner was entitled to the benefit of the doubt and acquitted him of the charges.⁵⁰

In the case of *Kalavathy v. State of Tamil Nadu*,⁵¹ the division bench of Madras High Court dealt with the contention of the petitioners that the detention order under Section 3(2)(e) of the Foreigners Act, 1946 is in violation of Articles 14, 21 and 22 of the Constitution of India.⁵² The state of Tamil Nadu was accused of ordering refugees of Sri Lankan origin to reside in special camps. The state contended that only a small proportion of the Sri Lankan refugees who might have association with militant organizations in Sri Lanka were ordered to stay in special camps.⁵³ The court, considering the rival contentions, held that classifying refugees and ordering them to stay in special camps does not violate the provisions of the Constitution, and thus the state has the power under the Foreigners Act, 1948 to do so, and further that it is not a total restriction of the movement of the foreigner.⁵⁴

In the case of *Yogeswari v. The State of Tamil Nadu*,⁵⁵ the son of the petitioner was detained under Section 3(2)(e) of the Foreigners Act, 1946. The detainee is a Sri Lankan refugee who was granted bail by the court of competent jurisdiction for charges against him under various Sections of the Indian Penal Code. However, before his release from prison the detainee received a detention order under the Foreigners Act. The court in this case held that detention under the Foreigners Act has to be in compliance with Article 21 and Article 22(4) of the Constitution of India and that as a pre-constitutional Act it does not contain safeguards, and thus the division bench of the court quashed the detention order under the Foreigners Act.⁵⁶

⁵⁰Ibid. Para.5 and 6.

⁵¹High Court of Madras, 1995-2-LW(Crl)690, Decided on: April 28, 1992.

⁵²Ibid. Para.1-8.

⁵³Ibid. Para.9.

⁵⁴Ibid. Para.18-26.

⁵⁵High Court of Madras, Habeas Corpus Petition No. 971 of 2001, Decided on: April 10, 2003.

⁵⁶Ibid. Para.20 and 24.

In *Premavathy v. State of Tamil Nadu*,⁵⁷ it was decided by the division bench of Madras High Court, where similar contentions were raised by the petitioners, that the state was detaining them under Section 3(2)(e) of the Foreigners Act, 1948 in violation of their rights contained under Articles 14, 21 and 22 of the Constitution of India. The two previous contradicting judgments of the division bench of Madras High Court, one in Kalavathy and another in Yogeswari, set the stage for this case. However, in this case the division bench sided with the Kalavathy case and held that restricting the movement of the foreigners by the order of the state under Section 3(2)(e) of the Foreigners Act cannot be termed preventive detention and does not violate the provisions of the Constitution of India.⁵⁸ However, the court finally directed the state to review those detention decisions every 2 years and to provide more facilities to the special camps.⁵⁹

In the case of *Selvakulendran v. State of Tamil Nadu*,⁶⁰ the petitioner is a Sri Lankan refugee who entered India in 1989 and stayed in India with his family in Tiruchirappalli, Tamil Nadu.⁶¹ It is very important to note that the petitioner and his family members were given ration cards by the Civil Supplies Department and their names were included in the voter list. The petitioner was arrested by the police under various Sections of the Indian Penal Code, and after spending some time in prison the petitioner was granted bail. However, he was not released from the prison and an order was passed by the government under Section 3(2)(e) of the Foreigners Act, 1948 requiring the petitioner to reside in the special camp for Sri Lankan immigrants and prohibiting him from leaving the boundaries of the special camp without permission from the District Collector.⁶² The court held that the right to move throughout the territory of India is not available to a foreigner, and that

⁵⁷High Court of Madras, 2004 Cri.L.J 1475, Decided on: November 14, 2003.

⁵⁸Ibid. Para.27–38.

⁵⁹Ibid. Para.39–42.

⁶⁰High Court of Madras, Habeas Corpus Petition No. 1249 of 2005, Decided on: March 15, 2006.

⁶¹Ibid. Para.2.

⁶²Ibid. Para.10.

particularly in this case it was reasonable to impose this restriction on the petitioner because of his criminal conduct.⁶³ In the case of *Maheswaran v. State of Tamil Nadu*,⁶⁴ the petitioner, a Sri Lankan refugee, was arrested by the police as a suspect in the bomb blast at Madras Airport in 1984. He was tried and finally acquitted of the charges by the trial court in 2004. In the meantime, while he was awaiting trial, the state government issued an order under Section 3(2)(e) of the Foreigners Act, 1948 to confine the petitioner to a special camp for Sri Lankan refugees.⁶⁵ The petitioner challenged this order through this writ petition. The court held that under the Foreigners Act the government is empowered to restrict the movement of foreigners in consideration of the security of the state.⁶⁶ The court also observed that there was no absolute restriction of the petitioner's movement by this order of the government, and dismissed the petition.⁶⁷

In the case of *Premanand v. State of Kerala*,⁶⁸ the petitioner was charged under Section 13 and 14 of the Foreigners Act, 1948 and Section 3 of the Passports (Entry into India) Act, 1920.⁶⁹ The petitioner in this case is a Sri Lankan refugee who was residing in a refugee camp in Chennai. He along with some other Sri Lankan refugees came to Alwaye, Kerala at the instruction of Mr. Ramesh, who would arrange to send them to Australia for a better life. The Kerala police apprehended the refugees and brought a case under the Sections mentioned above. The present petition was for bail, which the High Court of Kerala granted on condition of a bail bond of 10,000 rupees and the refugee-petitioner returning to the refugee camp in Chennai.⁷⁰ The Refugee Rehabilitation Commissioner was ordered to keep watch over the petitioner and make him available before the trial court as and when

⁶³Ibid. Para.13.

⁶⁴High Court of Madras, Habeas Corpus Petition No. 1208 of 2005, Decided on: March 21, 2006.

⁶⁵Ibid. Para.2.

⁶⁶Ibid. Para.8.

⁶⁷Ibid. Para.9.

⁶⁸High Court of Kerala, 2013 (3) KLJ 543, Decided on: July 12, 2013.

⁶⁹Ibid. Para.1.

⁷⁰Ibid. Para.9.

required. In *B. Sivashankar v. State of Tamil Nadu*,⁷¹ the petitioner is another Sri Lankan refugee. He is in judicial custody in a case under various Sections of the Indian Penal Code and the Foreigners Act, 1946. The petitioner received the impugned detention order under the National Security Act, 1980 from the state and filed this petition challenging that order.⁷² Though, no bail application was pending before any court regarding the original criminal case of the petitioner, the state, anticipating his release on bail, made this impugned detention order. The court found the reason for the detention to be vicious in character as there was an absence of cogent materials for arriving at this subjective satisfaction.⁷³ The court also found a violation of Article 22(5) of the Constitution of India in this case, and finally quashed the detention order.⁷⁴ *T. Sathishkumar v. State of Tamil Nadu* was a related case on the same issues and was decided by the court similarly.⁷⁵

2.2.6 *Service Matter and Livelihood*

The case of *Digvijay Mote v. Government of India and Anr* came before the court with a request to direct the government to provide food for the children of Sri Lankan refugees who are staying and studying in a residential school in Karnataka.⁷⁶ The Government of Karnataka arranged for the supply of food, and thus the court disposed of the petition without discussing its merit. In the case of *Satish Kumar Singh and Ors v. Union of India (UOI) and Ors*,⁷⁷ the petitioners requested a ruling that Tibetan nationals employed with the Central Tibetan Schools Administration (CTSA) ought not to be regularized or given permanent employment because CTSA is an organization governed by the Central

⁷¹High Court of Madras, Habeas Corpus Petition No. 2718 of 2013, Decided on: June 25, 2014.

⁷²Ibid. Para.1.

⁷³Ibid. Para.11.

⁷⁴Ibid. Para.12, 14, 17.

⁷⁵High Court of Madras, Habeas Corpus Petition No. 2721 of 2013, Decided on: June 25, 2014.

⁷⁶High Court of Karnataka at Bangalore, WAN No. 354 of 1994, Decided on: February 17, 1994.

⁷⁷High Court of Delhi, W.P. (C) Nos. 1006/2003 and 6161-63/06, Decided on: April 20, 2006.

Civil Services Rules. The CTSA was established in 1961 for the education of the children of Tibetan refugees, and 236 Tibetan refugees were given employment with the CTSA.⁷⁸ During the proceedings, the Government of India issued a notification that a one-time exemption would be made to regularize the 236 Tibetan refugees then working with CTSA, and that no more Tibetan refugees would be appointed to regular posts under CTSA in future.⁷⁹ After this notification the court found that the issue had been resolved and dismissed the petition.

2.2.7 *Acquisition of Indian Citizenship*

In the case of *Smt. Shishuwala Pal and Anr v. Union of India and Ors*,⁸⁰ the petitioners—mother and son—were citizens of East Pakistan who came to India during the 1971 war as refugees. They were rehabilitated in a refugee camp, but later moved to their relative's residence in Madhya Pradesh. The second petitioner studied up to Bachelor's level in India and was elected in the Panchayat election in 1983 from Madhya Pradesh.⁸¹ After the said election, the petitioners were arrested by the police for deportation to Bangladesh. The petitioners asked for a direction to restrain the respondents from treating them as foreign nationals and from taking them into custody for deportation outside India.⁸² The court, after considering the provisions of the Citizenship Act, 1955, held that the petitioners were not citizens of India but were still foreigners.⁸³ It was the domain of the Government of India to decide whether they would be allowed to stay in India on humanitarian grounds, and the petitioners had statutory remedy under the Citizenship Act, 1955.⁸⁴ With these observations the court dismissed the petition.

In the case of *Namgyal Dolkar v. Govt of India, Ministry of External Affairs*,⁸⁵ the Delhi High Court clarified the position of the law that every child born in India between January 26, 1950 and July 1, 1987,

⁷⁹ Ibid. Para.11.

⁷⁸ Ibid. Para.2, 3, 9, 10.

⁸⁰ High Court of Madhya Pradesh, AIR 1989 MP 254, Decided on: October 31, 1988.

⁸¹ Ibid. Para.2.

⁸² Ibid. Para.1.

⁸³ Ibid. Para.11.

⁸⁴ Ibid.

⁸⁵ High Court of Delhi, W.P (C) 12179/2009, Decided on: December 22, 2010.

irrespective of the parents' nationality, is an Indian citizen by birth. This case was raised when Namgyal Dolkar, the child of Tibetan parents, was denied an Indian passport by the Regional Passport Officer (RPO), Delhi. When dealing with the petition the court noted that the petitioner was born within the cut-off dates mentioned in the Citizenship (Amendment) Act, 1986, and therefore there is no doubt that she is a citizen of India by birth. The court quashed the RPO's order dated March 24, 2009 on the grounds that the petitioner is a citizen of India and directed the RPO to reconsider the petitioner's application for an Indian passport within a period of 8 weeks. Finally, the petitioner was issued an Indian passport.⁸⁶

In the case of *Sasikumar v. State of Tamil Nadu*,⁸⁷ the petitioner was born on March 10, 1987 in Trichy Government Hospital. The parents of the petitioner are refugees who came to India after the outbreak of war in Sri Lanka. The petitioner challenged the validity of the order of detention in a camp for Sri Lankan refugees passed on September 4, 2008 under Section 3(2)(e) of the Foreigners Act, 1946, as the petitioner is a citizen of India by birth under Section 3(1)(a) of the Citizenship Act, 1955.⁸⁸ The government contended that the petitioner is a Sri Lankan citizen and can be detained under the powers conferred on the government under the Foreigners Act, 1946. However, the court, after carefully considering the provisions of the Citizenship Act, 1955, held that the petitioner is a citizen of India by birth as he was born before the cut-off date of July 1, 1987.⁸⁹ The court quashed the order of detention by the state government.

The case of *Tenzin Choephag Ling Rinpoche v. Union of India* came before the Karnataka High Court for the same reason as was decided by the Delhi High Court in 2011 in the case of Namgyal Dolkar.⁹⁰ The petitioner in this case, Tenzin Rinpoche, was born November 18, 1985 in Dharamsala, Kangra District, Himachal Pradesh. The petitioner applied for an Indian passport and the application was denied by a letter

⁸⁶Vandana Kalra, 'Citizen Nymgal' *Indian Express* (January 27, 2011).

⁸⁷High Court of Madras (Madurai Bench), W.P. (MD) No. 10080 of 2008 and M.P. (MD) No. 2 of 2008, Decided on: August 25, 2011.

⁸⁸Ibid. Para.1-6.

⁸⁹Ibid. Para.14 & 15.

⁹⁰High Court of Karnataka at Bangalore, W.P. No. 15437 of 2013, Decided on: August 7, 2013.

of the RPO dated February 19, 2013 after consulting with the MHA, whereby it was stated that children born to Tibetan parents could not automatically claim citizenship in India. The court finally relied on the judgment of the Delhi High Court and ruled that the petitioner is a citizen of India and entitled to receive an Indian passport.⁹¹

In the case of *Sri Gopal Das v. The Union of India and Ors*,⁹² the petitioner was identified as a foreigner of Bangladeshi origin by the Foreigners Tribunal, Silchar in 2012. He brought this petition to quash the order of the tribunal, claiming that he was born in 1968 in India. It was also contended that even if the petitioner had come from Bangladesh, as a Hindu he was subject to persecution there and so should not be deported and should be granted Indian citizenship. The court held that this was a political issue and so was not a consideration in the forum of the court.⁹³ The court found no merit in the contention and held that the foreigner be detained and deported to his country of origin.⁹⁴

The case of *Nityananda Malik and Ors v. State of Meghalaya and Ors* resolved an important question relating to citizenship of India for persons who came to India before March 24, 1971 from Bangladesh and their children.⁹⁵ The forty petitioners in this case are children of refugees from Bangladesh. Their forefathers entered India around 1961 and were rehabilitated in Meghalaya. The petitioners' citizenship certificates were seized by the Deputy Commissioner of the district on the grounds that they are not citizens of India. The affidavit filed by the Union of India made the case clear for the court to decide the matter, as it mentioned that as per the understanding between India and Bangladesh, persons who came to India on or before March 24, 1971 would not be sent back to Bangladesh.⁹⁶ The court held that the petitioners are citizens of India by birth and that their names have to be included in the electoral roll, and dismissed the petition.⁹⁷

⁹¹Ibid. Para.11 & 12.

⁹²High Court of Gauhati, WP(C) 2134 of 2013, Decided on: August 30, 2013.

⁹³Ibid. Para.15.

⁹⁴Ibid. Para.12.

⁹⁵High Court of Meghalaya, WP(C) No. 235 of 2010, Decided on: May 15, 2014.

⁹⁶Ibid. Para.6 & 7.

⁹⁷Ibid. Para.9–11.

2.3 AMBIT OF PROTECTION AND THE JURISPRUDENCE DEVELOPED BY INDIAN HIGH COURTS

Considering the decisions of cases in various High Courts, it can be pointed out that there is a compassionate regime of protection available to refugees in India in general, but only when the refugees reach the higher courts to appeal the decisions of the government or trial courts. In specific matters of compensation for resettlement, opportunity to seek refugee status, repatriation and the right to Indian citizenship, the High Courts have shown courage in deciding cases in favor of refugees, both on humanitarian grounds and based on law. It has been seen in various High Court judgments that India's international obligations to protect refugees were discussed along with the humanitarian traditions of Indian culture. However, there have been conflicting judgments in matters relating to detention and deportation, as discussed in the two previous sections of this chapter. It is noteworthy that the High Courts have based their decisions on the facts and circumstances of each case. For instance, in cases concerning deportation, some decisions have affirmed deportation instantly, while others have passed an interim order to restrict deportation for the time being. In all these cases, importantly, national and other security reasons have played a very important role in these decisions. In cases of detention, again, there has been much ambiguity in the decisions of the same High Court (High Court of Madras) when the division benches were given different judgments. Finally, the right of the state to restrict the movement of a refugee is recognized as a sole right that cannot be called detention. The following points are more clearly stated to clarify the stand taken by the various High Courts:

1. Article 21 is available to protect a non-citizen within the Indian territory and it implies by interpretation the principle of non-refoulement. However, this does not confer any right to reside or resettle in India, or to unrestricted movement in India.
2. The power of the government to expel foreigners is absolute if their stay is contrary to the security of the state.
3. In cases of repatriation of refugees, it should be voluntary in nature subject to the security of the state.
4. Children of refugees are entitled to the right to Indian citizenship if they were born between January 26, 1950 and July 1, 1987.

5. In matters involving respect for international legal principles, the court will apply these principles in a harmonious manner.
6. The relevant international conventions and treaties are not binding unless made law by the Parliament. However, the government has an obligation to respect them.
7. The government has an obligation to ensure the protection of refugees when they have been granted refugee status by UNHCR.

2.4 THE SUPREME COURT IN REFUGEE PROTECTION

It is important to note that the flow of cases regarding matters of refugee protection in the High Courts, as discussed in the previous sections, is not great. There are several possible reasons for the small number of cases, but it is noteworthy that appeals of cases decided in the High Courts or fresh cases in the Supreme Court are also very few in number. The general trend of justice delivery could be described under these circumstances as: refugees are fined and sentenced under relevant laws dealing with foreigners; sometimes, if they are lucky, they have the chance to appeal that order before a higher court with the help of a compassionate lawyer or an NGO, and often the case is decided in the refugee's favor.⁹⁸ However, at the same time, judgments on refugee protection are limited to individual cases and do not apply to all persons in the same category or circumstance. Nevertheless, the way the Supreme Court of India has interpreted the Constitution in its decisions to highlight the duty of the state to accord refugee protection is phenomenal. In its several decisions, the Supreme Court has employed international human rights law provisions to uphold the obligation of refugee protection. In this section of the chapter, I analyze all the judgments of the Supreme Court of India on matters related to refugees and their protection.

First, however, it is important to clarify the point that many court decisions on refugee matters have taken as precedent two cases decided by the Supreme Court that restricted the rights of refugees. In the case of *Hans Muller of Nuremburg v. Superintendent, Presidency Jail, Calcutta and Others*,⁹⁹ the Supreme Court in 1955 declared that the Foreigners

⁹⁸Ranabir Samaddar, 'Introduction' in Ranabir Samaddar (ed), *Refugee and the State: Practices of Asylum and Care in India 1947–2000* (SAGE, New Delhi 2003) 50.

⁹⁹Supreme Court of India, 1955 AIR 367, Decided on: February 23, 1955.

Act confers on the central government the absolute and unfettered discretion to expel a foreigner from India, and that there is no provision to limit this discretion in the Constitution.¹⁰⁰ In the case of *Louis De Raedt v. Union of India and Others*,¹⁰¹ the Supreme Court observed that the fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in India as mentioned in Article 19(1)(e), which is applicable only to citizens of India.¹⁰² These two cases dealt exclusively with the factual circumstances of foreigners who entered India for a purpose other than to escape persecution. The court decisions to restrict the rights of refugees that were made on the basis of these two decisions failed to distinguish between two classes of persons—refugees and other foreigners. This was the judicial trend for a long time, mostly in the High Courts, but recent decisions by the Supreme Court have shown the way towards this distinction in the Chakma cases. It can also be argued that the observations made in the Chakma cases should become the standard of law in distinguishing between refugees and other foreigners as different categories.

2.4.1 Cases of Chakma Refugees

State of Arunachal Pradesh v. Khudiram Chakma came before the Supreme Court as a special leave petition against the decision of the Gauhati High Court discussed previously in this chapter.¹⁰³ In the case before the Gauhati High Court, the decisions were: the Chakmas are not citizens of India; the state government's order to move the Chakmas is lawful; the Chakmas do not have any right to acquire land or the products of the land within the inner line; and the state government should compensate the Chakmas on humanitarian grounds. Both parties in the case before the Gauhati High Court proffered separate special leave petitions against the order: the Chakmas appealed the first three directions, while the state government appealed the last direction regarding compensation to the Chakmas.

¹⁰⁰Ibid. Para.35.

¹⁰¹Supreme Court of India, 1991 AIR 1886, Decided on: July 24, 1991.

¹⁰²Ibid. Para.13.

¹⁰³Supreme Court of India, AIR 1994 SC 1461, Decided on: April 27, 1993.

The Chakmas contended that they are citizens of India under Section 6-A of the Citizenship Act, 1955 as they came to Assam in 1964 from the specified territory, which is prior to the cut-off date of January 1, 1966.¹⁰⁴ The state government pointed out two important conditions which must be fulfilled to be a citizen of India under the Section 6-A: one must be a person of Indian origin who came to Assam before January 1, 1966 from the specified territory, and be an ordinary resident of Assam as it existed in 1985, that is, at the time of signing of the Assam Accord.¹⁰⁵ The Chakmas entered Assam in 1964, but they are not resident in Assam as in 1985 they moved to Arunachal Pradesh. The Supreme Court accepted the contentions of the state government in this regard and affirmed the decision of the Gauhati High Court that Chakmas are not citizens of India.¹⁰⁶ The state government further contended that as the Chakmas are not citizens of India, the government has the power under the Foreigners Act, 1946 to direct the Chakmas to live in a particular place or restrict their entry to any protected place.¹⁰⁷ The Supreme Court also affirmed this contention and relied on the order of the Gauhati High Court in this regard.¹⁰⁸ The state government contended that the donation of land to the Chakmas by the local Raja was not valid as per Bengal Eastern Frontier Regulation, 1873 and the Foreigners Order, 1948, and this was also accepted by the Supreme Court.¹⁰⁹ The last matter in this case remained to be decided, that is, the order of compensation by the Gauhati High Court in favor of the Chakmas on the event of being evicted. The Supreme Court in this specific matter considered the position of Chakmas as refugees and quoted Blackburn and Taylor thus:

Article 14 of the Universal Declaration of Human Rights, which speaks of the right to enjoy asylum, has to be interpreted in the light of the instrument as a whole, and must be taken to mean something. It implies that although an asylum seeker has no right to be granted admission to a foreign State, equally a State which has granted him asylum must not later

¹⁰⁴Ibid. Para.28–30.

¹⁰⁵Ibid. Para.32–34.

¹⁰⁶Ibid. Para.59–65.

¹⁰⁷Ibid. Para.53–54.

¹⁰⁸Ibid. Para.72.

¹⁰⁹Ibid. Para.35, 42, 66.

return him to the country whence he came. Moreover, the Article carries considerable moral authority and embodies legal prerequisite of regional declarations and instruments.¹¹⁰

However, the court, finally considering refugees and aliens in the same category, and as per the laws established by the Bengal Eastern Frontier Regulation, 1873 and the Foreigners Act, 1946, ruled that compensation in this case was not required.¹¹¹ After the final decision of the above case in the Supreme Court, the Chakmas experienced increased pressure from several political organizations within the state of Arunachal Pradesh. The Chakmas started contacting various organizations across the country to help them in the struggle for their rights in India. Finally, this matter came before the National Human Rights Commission (NHRC), resulting in a landmark case on refugee protection in India. This case dealt with rival contentions by the central and state government over the issue of citizenship of Chakmas, but finally a writ of mandamus was issued as requested by the NHRC.

The case of *National Human Rights Commission v. State of Arunachal Pradesh and Anr* came before the Supreme Court of India by virtue of Section 18 of the Protection of Human Rights Act, 1993.¹¹² The NHRC filed this petition to safeguard the life and liberty of the Chakmas within the state of Arunachal Pradesh. The issue of protection of life and liberty and the denial of Indian citizenship to the Chakmas came to the notice of the NHRC through a letter from the People's Union for Civil Liberties (PUCL) in 1994.¹¹³ The NHRC, after receiving the letter from the PUCL, started functioning as per the mandate under the Protection of Human Rights Act, 1993. However, after a year of intervention by the NHRC there was little hope for the Chakmas, as political pressure was being put on them to leave Arunachal Pradesh and the state government was not taking action to safeguard the Chakmas. The NHRC was also doubtful about its own efforts to sustain the Chakmas in their own habitat, and decided to approach the Supreme Court to seek appropriate relief.¹¹⁴

¹¹⁰Ibid. Para.79.

¹¹¹Ibid. Para.80–82.

¹¹²Supreme Court of India, (1996) 1 SCC 742, Decided on: January 9, 1996.

¹¹³Ibid. Para.5.

¹¹⁴Ibid. Para.8.

The request by the NHRC to the court was to process the application of the Chakmas for Indian citizenship under Section 5(1)(a) of the Citizenship Act by the state and central government and to safeguard the life and liberty of Chakmas in the face of the political pressure to leave Arunachal Pradesh. The state of Arunachal Pradesh contended that it had taken adequate security measures to safeguard the Chakma villages with the posting of Central Para Military Forces there and that there was no threat of infringement on the life and liberty of the Chakmas. The state government also contended that the Chakmas are not citizens of India as per the decision of the Supreme Court in the case of *State of Arunachal Pradesh v. Khudiram Chakma*, so the state of Arunachal Pradesh can ask the Chakmas to leave the state.¹¹⁵ The second respondent in this case, Union of India, testified before the court about its willingness to grant citizenship to the Chakmas under Section 5(1)(a) of the Citizenship Act on the basis of the Joint Statement of the Prime Ministers of India and Bangladesh in 1972, and with regard to the children of these Chakma families who were born before July 1, 1987 having a legitimate claim to Indian citizenship by birth.¹¹⁶ However, the Union of India further contended that the state of Arunachal Pradesh had not forwarded the application for granting Indian citizenship to the Chakmas to the MHA as required under the Citizenship Act, 1955 and the Citizenship Rules, 1956.¹¹⁷

The Supreme Court considered the contentions of all the parties and rejected the argument by the state of Arunachal Pradesh that the lives and personal liberty of the Chakmas were not in danger in the state of Arunachal Pradesh, concluding that they were in danger due to political pressure as well as economic blockades in the Chakma villages and that the Chakmas are entitled to protection under Article 21 of the Constitution of India.¹¹⁸ Secondly, rejecting the contention of the state of Arunachal Pradesh on the issue of citizenship of Chakmas, they decided that the previous judgment of the Supreme Court was conclusive only with regard to Section 6-A of the Citizenship Act and has no relevance with regard to fresh applications by Chakmas under

¹¹⁵Ibid. Para.11–14.

¹¹⁶Ibid. Para.10.

¹¹⁷Ibid.

¹¹⁸Ibid. Para.15 and 16.

Section 5(1)(a) of the Citizenship Act.¹¹⁹ The pro refugee stand of the Supreme Court in this case is well illustrated by the following observation:

We are a country governed by 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 personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons ... to threaten the Chakmas to leave the State ... the State government must act impartially and carry out its legal obligations to safeguard the life, health and well being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, constitutional and statutory, to be considered for being registered citizens of India.¹²⁰

Finally, the Supreme Court issued the following directions to the state of Arunachal Pradesh and Union of India by way of writ of mandamus and disposed of the petition¹²¹:

1. The life and personal liberty of each and every Chakma residing within the state shall be protected, if necessary by the use of paramilitary forces.
2. Chakmas shall not be evicted from their homes except in accordance with law.
3. The quit notices and ultimatums should be dealt with by the first respondent in accordance with the law.
4. The applications made for registration as citizens of India by Chakmas under Section 5 of the Act shall be forwarded by the Collector to the central government.
5. While the Chakmas' applications for citizenship are pending, they shall not be evicted.

¹¹⁹Ibid. Para.17–19.

¹²⁰Ibid Para.20.

¹²¹Ibid. Para.21.

The judgment in this case, the first of its kind for any of the refugee groups in India, made a remarkable contribution to the development of a framework for protecting refugees within Indian territory. A subtle derivation from the above trend would stand to claim that the obligation to protect refugees is paramount. The directions in this case were mostly implemented by the state, though the issue of granting citizenship remains in question.

In the case of *Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh and Ors v. State of Arunachal Pradesh and Ors*,¹²² which came before the Supreme Court in 2007, it was contended that the state of Arunachal Pradesh had not complied with the direction to forward the applications for citizenship by the Chakmas to the central government. The Union of India in its reply contended that it had taken the decision to grant citizenship to the Chakmas of Arunachal Pradesh, and that for the materialization of the granting of citizenship the applications had to be forwarded to the MHA by the local Collector in whose jurisdiction the Chakmas are residing. The MHA received the applications directly in their office and forwarded them to the Collector for his comments, as per the requirement of the Citizenship Rules, 1956. However, with the exception of some that received negative comments, most of the applications had not reached the MHA.¹²³ After hearing all the parties, the court ordered the respondents to confer citizenship rights on the Chakmas within 3 months of the date of the order.¹²⁴ The observation made by the court is very important as it clearly indicates the right of the Chakmas to Indian citizenship:

We find merit in the contention of the petitioners. It stands acknowledged by this Court on the basis of stand of the Government of India that the Chakmas have right to be granted citizenship subject to the procedure being followed. It also stands recognized by judicial decisions that they cannot be required to obtain any Inner Line permit as they are settled in the State of Arunachal Pradesh.¹²⁵

¹²²Supreme Court of India, WP (Civil) No. 510 of 2007, Decided on: September 17, 2015.

¹²³Ibid. Para.6, 10, 11.

¹²⁴Ibid. Para.20.

¹²⁵Ibid. Para.16.

Though the Chakmas' right to Indian citizenship has been recognized by the Supreme Court in two landmark cases, the process remains unfinished.

2.4.2 *Cases Relating to Refugees of Other Nationalities*

The Supreme Court of India has at times acted in conformity with the principle of non-refoulement and has stayed orders of deportation from India while the application for refugee status is pending. These decisions can be seen as evidence that the laws applicable to other foreigners are not applicable to refugees. In the case of *Dr. Malavika Karlekar v. Union of India and Anr*,¹²⁶ the Supreme Court ordered that twenty-one nationals of Myanmar who have applied for refugee status cannot be deported to Myanmar while the decision is pending with UNHCR. In *N. D. Pancholi v. State of Punjab and Others*,¹²⁷ as well as in *The Mailwand's Trust of Afghan Human Freedom v. State of Punjab & Ors*,¹²⁸ the Supreme Court ordered that the refugees shall not be deported from India without the notice of the court.

The pending litigation filed by Swajan, a non-governmental organization in Assam, in *Swajan and Anr v. Union of India and Anr* before the Supreme Court of India is deciding the question of granting refugee status to the minorities of Bangladesh who entered India after March 25, 1971 to escape persecution.¹²⁹ However, as discussed in the previous chapter, the Government of India already issued a Gazette Notification regarding this matter, to provide refuge to the minorities of Bangladesh as well as Pakistan, on September 7, 2015. The matter is still pending before the Supreme Court for final orders.

2.5 CONCLUSION

Throughout the chapter an effort has been made to list and analyze all the important judicial decisions that will contribute to the conceptualization of the general trend of justice delivery in matters relating to

¹²⁶Supreme Court of India, WP (CRL) No 583 of 1992, Decided on: September 25, 1992.

¹²⁷Supreme Court of India, WP (CRL) No 243 of 1988, Decided on: June 9, 1988.

¹²⁸Supreme Court of India, WP (CRL) No 125 and 126 of 1986.

¹²⁹Supreme Court of India, WP Civil No. 243 of 2012 (Pending).

refugees. It has been found that the inconsistency of decision-making by trial courts has given a space to refugees for further litigation in the High Courts, resulting in a binding but complex jurisprudence. The conflicting or narrow nationalist kind of decision-making by the High Courts (in the 1990s) at times has given refugee sympathizers (such as the NHRC, the PUCL and Swajan) and concerned refugee groups (such as the Chakmas) the courage to come before the Supreme Court of India seeking redress as per the standards laid down by the comity of nations. It is also important to note that in the historical case of the Chakmas, the Supreme Court made the humanitarian space for the Chakmas, while the Union of India was busy primarily accusing the state of Arunachal Pradesh and the state of Arunachal Pradesh was not acting to protect the lives and liberty of the Chakmas. Though in a realistic situation there might be a conflict between the humanitarian situation and political considerations, here the Supreme Court of India created the space based on real considerations of life and liberty. To conclude this discussion of the judicial decisions of the Supreme Court, I can argue that the following points can be taken as granted in a refugee situation:

1. India is bound by the principle of non-refoulement subject to the condition that the presence of the concerned refugee poses no danger or threat to the security of the country. The lives and liberty of refugees in India are protected by Article 21 of the Constitution of India. Refugees and other foreigners represent two different categories of persons.
2. The Constitution of India mandates that the state shall endeavor to foster respect for international law and treaty obligations in the dealings of organized people with one another. Thus the comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction.
3. The provisions of the international law instruments which elucidate and effectuate the fundamental rights guaranteed by the Indian Constitution can be relied upon by the courts as facets of those fundamental rights, and thus can be enforced by national courts.

Refugee Law in India

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Shuvro Prosun, S.

2017, XXVIII, 213 p. 33 illus., Hardcover

ISBN: 978-981-10-4806-7