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**CASE COMMENTARY**

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**Non-Refoulement:  
Rohingyan Muslims- Where would they go?**

- *Bilal Nabi*\*

**Abstract**

*Mohd. Salimullah v. Union of India* (2017)<sup>1</sup> started as a usual case of two refugees seeking asylum but is ending up as a decision that would determine the destiny of 40,000 Rohingya Muslims. In the modern world where in countries worldwide monitor every action by other countries and associate with them based on their reputation. Indian judiciary is on the verge of setting up a very precarious precedent that would tarnish the image of India as an amicable state and set a blemish mark on India's commitment to human rights. This case dwells on the principle of non-refoulement which guarantees that no one should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment, and other irreparable harm.

**Case Background:**

It all started in December of 2011 when the petitioners (two Rohingyas) fled from their camp in Myanmar, as ethnic cleansing by Myanmar's army started. The army persecuted an already marginalized Rohingya Muslim community in the Rakhine state because of their religious and ethnic differences. The gravity of this case cannot be understood without considering what they went through. According to a report<sup>2</sup> 25,000 Rohingyas killed, 18,000 women and girls got raped, 36,000 were burned alive. They were subjected to all kinds of marginalization and sectarian violence in Myanmar for a long time, as a result, some fled to Southeast Asian countries and some to India and Bangladesh. For their stay in India, refugees filed a writ petition seeking basic amenities to ensure humane conditions in their settlement as mandated by International Law. (Art. 3 of The Refugee Convention, 1951<sup>3</sup>)

**Principle of Non-Refoulement:**

The principle of non-refoulement is inscribed in various International Laws, but most elaborated in Art. 33(1) of The Refugee Convention, 1951<sup>4</sup> stating, "No Contracting State shall expel or return ('refouler') a refugee in any manner ... where his life or freedom would be threatened...." If a person has a legitimate fear of being persecuted if returned to his/her country, then the deporting country is under the obligation not to deport him/her. Non-refoulement binds a state to annul the extradition of a person to another state where there is a substantial possibility that the person would be subjected to torture and degrading treatment.<sup>5</sup> India is a signatory of Universal Declaration of Human Rights, 1948<sup>6</sup> and its Art. 14(1) mentions that "everyone has the right to seek and to enjoy in other countries asylum from persecution" which makes India a guardian of refugees.

**Reason of Filing:**

On 8<sup>th</sup> August 2017 the Ministry of Home Affairs, Government of India issued a letter to the Chief Secretaries of all the State Governments/UT Administrations, alerting the intelligence and

law enforcement agencies about the influx of migrants, and initiating deportation processes of all refugees residing in the territory.

In response to this circular, petitioner filed their writ petition in the court. After more and more refugees came in India petitioners in this case figuratively turned from two to thousands. For them, it was not a case they could afford to lose.

The matter was mentioned by Advocate Prashant Bhushan before the Supreme court; a three-judge bench comprising of Chief Justice Dipak Misra, Justice A.M. Khanwilkar, and Justice D.Y. Chandrachud on 2<sup>nd</sup> October 2018.

### **Arguments by Appellant:**

There are three bastion points by which this case is moving forward:

- (i) Article 21 which guarantees personal liberty even to non-citizens, would be violated if the principle of refoulement (forceful return) is enforced (*Dongh Lian Kham & Anr. v. Union of India & Anr.*<sup>7</sup>), as it subjects these people to possible persecution.
- (ii) The rights guaranteed under Articles 14 and 21 are available even to non-citizens<sup>8</sup>, hence, they are to be treated as equals and to be allowed to live.
- (iii) Even though India is not a signatory to the United Nations Convention on the Status of Refugees 1951<sup>9</sup> (International convention to set out rights to refugees and legal obligations of states to protect them), it is a party to the Universal Declaration of Human Rights 1948<sup>10</sup>, International Convention the Rights of the Child<sup>11</sup>, 1992 and Covenant of Civil and Political Rights<sup>12</sup>, 1966 and hence, India is obligated to withheld non-refoulement.

Appellants were trying to establish a nexus between petitioners being refugees and India's obligation under International Laws and under articles 14 and 21; praying to apply the non-refoulement principle. On the other hand, respondents took a different approach by persuading the court not to consider the petitioners as refugees but as foreigners. This would bypass the non-refoulement principle and give the Central Government absolute power in this regard.

**Arguments by Respondent:**

The contentions on behalf of the Respondent were:

- (i) (Two Rohingya) whose deportation is being challenged, and application has been filed, are foreigners within the meaning of Section 2(a) of the Foreigners Act, 1946<sup>13</sup>; and Section 3 of the Foreigners Act empowers the Central Government to issue orders for prohibiting, regulating or restricting the entries of foreigners into India or their departure therefore in this regard Government has an absolute and ultimate power to expel any foreigner.
- (ii) Defence contested Articles 14 and 21 may be available to non-citizens, the fundamental right to reside and settle in this country guaranteed under Article 19(1)(e) is only available to the citizens<sup>14</sup> therefore, if the Centre refuses, they are not permitted to stay.
- (iii) India is not a signatory either to the United Nations Convention on the Status of Refugees 1951 or to the Protocol of the year 1967<sup>15</sup> (protocol states that refugee convention is an obligation on countries to follow) consequently, India is under no international obligation and shall not take any refugees.

Legal proceedings of this case were still going after four years since the writ was filed. The judgment was still pending but that did not stop the Government to start detaining refugees.

**Interim Relief:**

Newspaper reports appeared in the first/second week of March 2021, 150-170 Rohingya refugees were detained in a sub-jail in Jammu and are facing deportation back to Myanmar. The reports also appeared in The Wire<sup>16</sup>, The Hindu<sup>17</sup>, and The Guardian<sup>18</sup> that there are more than about 6500 Rohingyas in Jammu and that they have been illegally detained and jailed in a sub-jail now converted into a holding center. Refugees were once again detained but this time by a foreign nation.

The petitioner rushed back to the court praying for an interim relief grant. The court made a decision; the interlocutory application was dismissed. Reasons for dismissal were mainly two-

First, a threat to internal security of India. Second, right not to be deported, is an ancillary of Art. 19(1)(e), and Art. 19 is not guaranteed to illegal migrants. And precedent of this was taken from *Jaffar Ullah v. Union of India* (2018)<sup>19</sup>. In the present case, similar relief was filed to challenge the detainment of Rohingya in the State of Assam and to improve their basic health care facilities in their camps, both of which were dismissed by the Supreme Court on 4<sup>th</sup> October 2018.

### **New Developments:**

A new precedent has come to light that might change the opinion of the court. On 3<sup>rd</sup> May 2021, a division bench comprising of Chief Justice Sanjay Kumar and Justice Lanusungkum Jamir at Manipur High Court<sup>20</sup> observed thus:

“The principle against refoulement, i.e., the forcible return of refugees to a country where they are liable to be subjected to persecution, can prima facie be read into Article 21 of the Indian Constitution”

This precedent from a high court has the potential to change the course of this case. Still moving on in this case and having a favorable outcome is highly unlikely. But in India delaying this type of case for few more years can be considered as a victory for the petitioners.

### **Conclusion:**

India's hospitality is world-renowned and is exquisitely inscribed as 'Atithi Devo Bhava'(the guest is equivalent to God) but this decision may rack this image. Around 143 countries are part of the refugee convention whereas, India is vehemently opposing it and also making these dicey precedents which would portray India as a refugee intolerant state and would adversely affect Indian geopolitics in the long run. Even if India denies citizenship to these refugees but India must follow the principle of non-refoulement as can be considered as the cornerstone of refugee and humanitarian laws.

**Endnotes:**

\* Bilal Nabi, a student at Aligarh Muslim University, Faculty of Law.

1. WP(C) 793/2017

2. Ontario International Development Agency (OIDA), “Forced Migration of Rohingya-The Untold experience” pg. 68 (2018) available at:< [https://www.researchgate.net/publication/326912213\\_Forced\\_Migration\\_of\\_Rohingya\\_The\\_Untold\\_Experience](https://www.researchgate.net/publication/326912213_Forced_Migration_of_Rohingya_The_Untold_Experience)>

3. The Refugee Convention, art. 3 available at:< <https://www.unhcr.org/4ca34be29.pdf>>

4. *Id.*, art. 33.

5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(Part I) available at:< <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>

6. Universal declaration of human rights, art. 14 available at:< <http://www.un.org/en/universal-declaration-human-rights/>>

7. WP(CRL) No.1884/2015, Delhi High Court

8. *Olga Tellis & Ors v. Bombay Municipal Corporation*, 1986 AIR 180

9. Supra note 3

10. Supra note 5

11. Convention on the Rights of the Child, 1992, available at:< <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>

12. International Covenant on Civil and Political Rights, 1966, available at:< <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> >

13. Foreigners Act, 1946, available at:< <https://www.mha.gov.in/sites/default/files/TheForeignersAct1946.pdf> >

14. *Sarbananda Sonowal v. Union of India*, WP(C) 131/2000

15. Protocol relating to the Status of Refugees, available at:< <https://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf>>

16. “Nearly 150 Rohingya Detained in Jammu, Raising Spectre of Deportation” *The wire*, 7<sup>th</sup> March 2021.

17. “Panic grips displaced Rohingyas in Jammu” *The Hindu*, 7<sup>th</sup> March 2021.

18. “India detains Rohingya refugees and threatens to deport” *The Guardian*, 8<sup>th</sup> March 2021.

19. I.A.No. 142725 of 2018

20. W.P.(Crl.) NO. 6 OF 2021, Manipur High Court