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Challenges to Asylum Seekers in the Criminal Justice System: Case Study from India

Poulomi Bhadra, Sanjeev P. Sahni

Introduction

In December 2015, the winter session in Lok Sabha witnessed the introduction of three bills on refugee asylum by Dr Shashi Tharoor[1], Rabindra Kumar Jena[2] and Feroze Varun Gandhi.[3] This was the first time since 1952 that a bill on refugee jurisprudence was proposed in the Parliament, although the need for it had been noticed and mentioned by several members previously. Tharoor's Bill, that preceded that of Jena's and Gandhi's, claimed to " […] put India at the forefront of asylum management in the world."[4]

For a country that has had a long history of sheltering refugees, the absence of a clear refugee legislation, especially at the turn of the 21st century, is surprising. In its history of granting protection to forced migrants and refugees, as of 2016, nearly 1,10,098 come from

[1]The Asylum Bill, 2015, 334 of 2015, Lok Sabha ('Tharoor's Bill').

[2]The Protection of Refugees and Asylum Seekers Bill, 2015, 290 of 2015, Lok Sabha.

[3]The National Asylum Bill, 2015, 342 of 2015, Lok Sabha.

[4]Shashi Tharoor, The Quint, Three Laws for a More Liberal India, December 18, 2015, available at https://www.thequint.com/opinion/2015/12/16/three-laws-for-a-more-liberal-india.

Tibetan China and 63,162 from Sri Lanka (data from UNHCR), around 7,693 from Afghanistan and 15, 563 from Myanmar (data from India). In 2017, India received 2,07,665 refugees and asylum seekers in the country. These refugees were primarily housed in the documented 39 Tibetan settlements, 400 Pakistani Hindu settlements and 110 camps for Srilankan refugees, all but one of which are situated in Tamil Nadu.[5] Despite being sought prolifically for asylum, the lack of a formal asylum regime can be attributed to various ideological and political reasons, primarily the volatile political borders it shares with its neighbours. Because India is not a signatory to the 1951 Refugee Convention or the 1967 Protocol, the indigenous Foreigners Act, 1946 and the Passport Act, 1967 are the currently existing legislations which govern refugees. These laws make no distinction between migrants, refugees and foreign visitors and are strictly deportation oriented in lieu of criminal or illegal activities committed by such 'foreigners' on Indian soil.

Most importantly, these Acts are lacking severely in the principle of non-refoulement that forms a foundation of international refugee jurisprudence and compels the host country to extend protection to refugees by preventing their return to the countries from which they fled and where they may be in danger of persecution or harm otherwise on the basis of their "race, religion, nationality, membership of a particular social group or political opinion". In the few cases where the asylum seekers have had recourse to some due process in court, any suggestion that the courts have recognised the principle of non-refoulement is false. In this study, we focus on the case of State vs Chandra Kumar and others[6] finalised in the Dwarka Court, New Delhi in September 2011 to highlight the unconstitutional costs to rights and freedoms that a refugee faces,

[5]G Seetharaman, Economic Times, October 06, 2018, available at https://economictimes.indiatimes.com/news/politics-and-nation/nrc-row-where-does-india-stand-on-refugees/articleshow/66102150.cms?from=mdr.

[6]Arul Sharma, Of Nurenburg vs Superintendent, Presidency Jail …., September 20, 2011, available at https://indiankanoon.org/doc/37056325/

especially in criminal trials, owing to the lack of a wholesome, refugee centred legislation in the country.

THE CASE

The convict was a Sri Lankan Tamil refugee residing in a refugee camp in India since 1990. He was travelling to Italy in order to eke out a better life when he was apprehended by the immigration authorities for invalid travel documents and was charged with the offences of cheating, impersonation and forgery under the section 14 of the Foreigners' Act.

According to the defendant, he was allegedly duped by a travel agent. However, he did possess the required valid papers to stay in India, including a refugee certificate. In moving for a plea bargain under the provisions incorporated in the Code of Criminal Procedure, 1973, Chandra Kumar pleaded guilty and was convicted of the abovementioned offences.

He had already been in judicial custody for a period of almost 6 months by this time. An Indian citizen who may have committed similar crime would have served the maximum penalty for the offence by now,and would have been free to enjoy their freedom of movement in the country. On the other hand, the Additional Public Prosecutor in this case, on instructions from the State, argued for an order of deportation to be part of the sentence, despite the fact that the defendant did not pose any perceivable threat to national security and interest by attempting to travel on a forged passport.

Not only is this in clear violation of the non-refoulement principle which is the most essential component of refugee asylum, as recognized by the United Nations Human Rights Commission,[7] and to which India is bound by customary international law, it also brings forth the absolute power to enforce unfettered discretion in refugee

[7]UNHCR, Note on Non-Refoulement (Submitted by the High Commissioner) 1, EC/SCP/2 (August 23, 1977), available at http://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html.

deportation and the lack of judicial review within the legal framework for refugees and asylum seekers in India.

CRITICISM OF THE JUDICIAL PROCESS

1. Non-Refoulement

Although the Additional Public Prosecutor had contended that the present court has the power to issue an order of deportation under Section 3 (2) of the Foreigners Act, 1946, the aforementioned provision indicates that this is a prerogative reserved for the Central government only, and not the Courts or the State Government. This was also supported by the Supreme Court in Hans Muller of Nurenberg vs Superintendent, Presidency Jail, Calcutta & others, 1955, AIR SC 367: "20. […] The right to expel is conferred by Section 3(2)(C) of the Foreigners Act, 1946 on the Central Government and the right to enforce an order of expulsion and also to prevent any breach of it, and the right to use such force as may be reasonably necessary "for the effective exercise of such power" is conferred by Section 11 (1), also on the Central Government. [….] 22. The Foreigners Act, 1946 confers the right of expulsion on the Central Government. Therefore, a State Government has no right either to make an order on expulsion or expel."

Many scholars postulated that the Article 21 of the Constitution of India, in mentioning 'person' instead of 'citizen', confers to all citizens and non-citizens on its soil the same fundamental rights to protection of life and personal liberty. In this case, considering that the convict has clearly shown disinclination in returning to Sri Lanka, owing to apprehension for one's safety or abuse, he cannot be compelled to leave the country, in compliance with the international law and treatise. Although India has not ratified the UN Convention on Refugees 1951 and Protocol 1967, it should embody the principles stated in the Article 33.1 of the Convention "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

According to the Article 51 of the Constitution of India, the State must foster respect for international law, even without the obligation of a treaty, such as ones that forbade the state to return a person to a place where they fear persecution. However, when the Foreigners Regional Registration Office (FRRO), New Delhi submitted the documents required to facilitate Kumar's deportation, paragraph 2 of the Government order F. No. 25019/3/97F dated 02.07.1998 (issued by the Under Secretary to the Government of India) read as follows: "2.However, there have been cases where foreigners either overstay illegally, go underground or engage themselves in undesirable/illegal activities. In minor offences, action is taken to deport the foreigners by serving them with Leave India Notices u/s 3 of the Foreigners Act. For serious offences like long overstay, commission of offences under various other Acts like IPC, NDPS, Customs etc., cases are instituted in the court of laws and the foreigners may undergo long periods of imprisonment awarded by court. Finally, in both these cases, the foreigners have to be deported out of India."

It can be clearly argued here that contrary to the popular claims of the acknowledgement of international rights of refugees under the premise of Article 51, the Constitution fails to invest refugees on Indian soil with the fundamental right against refoulement. It can be argued that the disinclination to create a communal or regional or case-specific legal structure to asylum law comes essentially from the need for political expediency.[8] The provisions under the Foreigners Act allows the Centre to identify foreigners and control their movements within and without, activities and residences, especially when interred in refugee camps. Furthermore, Notification no. F. 22(29)/91PPF4058 dated 22.08.1991 issued by the Delhi Administration and Government of India's Notification no. 4/3/56(II)F.I dated 30. 09.1992 clearly delegates to the FRRO, from the Central Government, powers to deport under the Foreigner's Act,

[8]Bhairav Acharya, The Law, Policy, and Practice of Refugee Protection in India, Public Interest Legal Support and Research Centre, December 2004, available at https://www.researchgate.net/publication/256016766_The_Law_Policy_and_Practice_of_Refugee_Protection_in_India.

1946. This overarching power of deportation has been further delegated through the ranks to the point where in many States, a mid-level police officer can order a foreigner to leave India without adequate reason or due process.[9] One of the arguments presented by the convict's counsel in reply to the statement issued by the Deputy Secretary, Ministry of Home Affairs, was that Part 2 of the Annexure VI explicitly states no policy for deportation of the Sri Lankan Tamil refugees living in Indian camps. The absence of an enforceable asylum law allows the government to treat each case for asylum request and appeal with limited due process, which in turn allows it to be purely used to gratify current political interests.[10]

2. Humanitarian Grounds to Avert Deportation

The counsel for the convict raised queries regarding any specific modalities with regards to deportation of Sri Lankan refugees, and also if it was possible for the convict to apply for citizenship to avoid deportation. The Foreigners' Division at the Ministry of Home Affairs provided the following clarification that the convict was a liability of Sri Lanka and was therefore, to be repatriated. This did not explain the clear mandates under which the convict was being deported; as rightly pointed out by his counsel, he had valid documents to stay in India and was in possession of a refugee certificate. The Government order F. no. 25019/3/97F.III is only applicable when foreigners overstay illegally, which is not the case here. Also, it was contented that the government cannot be indiscriminate in its order for deportation, and that the commission of lesser crimes that do not threaten to jeopardize national security cannot be equated with grave offences such as sedition, murder, rape

[9]The Foreigners Act, 1946, § 12; State v. Ashfaq Ahmad, 1960 SCC OnLine All 93 : AIR 1961 All 115, 16-17; Abdul Jalil v. State, (1962) 1 Cri LJ 13, 6; Firoz Meharuddin v. SDO, 1960 SCC OnLine MP 58 : AIR 1961 MP 110, 23-24. But see State v. Abdul Rashid, 1960 SCC OnLine Pat 99 : AIR 1961 Pat 112, 15

[10]Kallol Bhattacharjee, The Hindu, Baloch leader Bugti to seek asylum in India, September 21, 2016, available at http://www.thehindu.com/news/national/will-soon-applyfor-asylum-in-india-baloch-leader-bugti/article9124389.ece

etc. and must receive some exemption from deportation. In addition, there are various instances when Indian High Courts have stayed deportation orders on humanitarian grounds[11] such as in Louis De Raedt Vs Union of India, AIR 1991 SC 1887, Hasan Ali Raihany V Union of India (2006) 3 SCC 705, NHRC V State of Arunachal Pradesh & Another, AIR 1996 SC 1234, Dr. Malavika Karlekar V Union of India & Another, Writ Pet. (Crl. No.) 583 1992, Suo Moto V State of Rajasthan, RLW 2005 (2) Raj 1385, 2005 (4) WLC 163, Zothansangpuli V State of Manipur, Civil rule no 981 of 1989, Seyed Ata Mohamamdi V Union of India & Others, AD 1458 of 1994, U. Myat Kyaw & Others V State of Manipur & Others, Civil rule no 516 of 1991, State of Arunachal Pradesh V Khudiram Chakma, AIR 1994 SC 1461, Khy Htoon & Others Vs State of Manipur, Civil rule no. 515 of 1990, Vishaka & Others v State of Rajasthan & Others, 1997 (6) SCC 241 etc. The defense counsel relied on these precedence to plead for an opportunity for the convict to be able to approach in UNHCR, Delhi to avert deportation.

Secondly, the burden of establishing reasonable evidence for this fear of persecution is contingent on the refugee, however the law implies that this fear be justifiable and does not require to be proven beyond doubt, as upheld in INS Vs Cardoza-Fonsenca, 480 U.S. 421 (1987). The convict has demonstrated, in his affidavit, a very reasonable and justifiable fear of persecution on repatriation to Sri Lanka : "[…..] if I am deported to the Sri Lanka, the Sri Lankan army will put me in jail without any enquiry on the suspicion of militancy/terrorism. They will kill me and it is also very important to mention herein that I came to India for the purpose of only to save my life. […..] The Hon'ble Court may consider the present situation of Sri Lanka as per UN Panel Report so far 40,000 common people has been killed by the Sri Lankan Army and there is no hope, no guarantee to secure my life in Sri Lanka. […]" The UN Panel report mentioned here, titled Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, asserts the atrocities against

[11]Arul Sharma, Of Nurenburg vs Superintendent, Presidency Jail …., September 20, 2011, available at https://indiankanoon.org/doc/37056325/

the Tamilian minority by the Sinhalese majority in Sri Lanka, which remains unresolved and in continued violation of human rights. In the lack of a clearly defined qualifiers for persecution, it can be assumed that fear of safety of life and freedom qualifies as a reasonable fear. As long as there is evidence of a pattern of persecution based on political opinion, religion, race, nationality or membership to a particular social group, the fears of the refugee can be inferred to be well founded. It is not necessary for the convict to show that "the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."[12]

3. Criminal Responsibility of Refugees in Host Country

As per the paragraph 2 of the Annexure VI mentioned earlier, any refugee in India who is involved in an illegal or criminal activity as per the Indian Penal Code should be dealt in accordance with the provisions made by the criminal law of the State, which does not provide for deportation for this kind of an offence[11]. Additionally, paragraph (iii) of the Government order no. 370 (dated 10.09.1996) states that "(iii) Srilankans who have arrived in India from January 1993 onwards may be dealt with in accordance with the existing legal provisions as applicable to any other foreigners." This is discussed here for furthering the discussion on this aspect, however, this does not apply in this particular case as the convict came to India prior to 1993. The Court in this case had sent a request to the UNHCR to intervene in the resolution, however, there was, at first, a claim to immunity from due legal process. After it was assured that UNHCR intervention was required in the role of a consultation, in order to arrive at a informed decision, a assurance of consideration was received but no response followed. It is not clear why the UNHCR was reluctant to participate without the endorsement of the Ministry of External Affairs, but it is equally paradoxical that although India is a member of the Executive Committee of the High Commissioner's

[12]US Supreme Court, Immigration and Naturalization Service C Cardoza-Fonseca, 480 U.S. 421 (1987).

Programme (EXCOM) that provides assistance to the UNHCR, and that it allows the UNHCR to operate on its territory, yet India resists being part of the legal instrument which forms the basis of UNHCR's functions.

Conclusion

The analysis of the above mentioned case brings into questions the constitutionality of the Foreigners' Act 1946 that does not distinguish 'foreigners' from migrants or refugees, where refugees are victims of special circumstances and in requirement of greater humane instruments that tourists. But at the same time, its treatments of criminal penalties for such refugees and migrants seem to be in violation of the equal protection granted under Article 14. India's reluctance to become a signatory to the UN Convention and Protocol on the pretext that the instruments included in these conventions is primarily Euro-centric seems farcial considering that many aspects of our Constitution and legislative laws are derived from western/European traditional influences and concepts. In place of a multi-lateral travel regime[13] between India and the states from which migrants are received, the government has settled for bilateral agreements with countries such as Nepal[14] and Bhutan[15] with regards to domestic and relevant international measures, including Tibetan migrants and refugees.[16] As mentioned earlier, the absence of an enforceable, refugee centred asylum law and the reluctance to create

[13]Consolidated version of the Treaty on European Union, October 26, 2012, 2012 O.J. (C 326/1) 13, Art. 3(2); Consolidated version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326/1) 47, Arts. 21(1) and 45; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 […], 2004 O.J. (L 158).

[14]Treaty of Peace and Friendship between the Government of India and the Government of Nepal, July 31, 1950, 94 U.N.T.S. 1302, Art. 7.

[15]India-Bhutan Friendship Treaty, February 8, 2007, Art. 5, available at https://mea.gov.in/ Images/pdf/india-bhutan-treaty-07.pdf

[16]Ministry of Home Affairs, Order Regulating Entry of Tibetan Nationals into India, S.R.O. 1108 (Notified on December 26, 1950).

one maybe provoked by the costs of socio-economic protection. However, there is no perceptible reason for India's inability to confer minimum rights of non-refoulement to refugee and asylum seekers while also protecting state interests.[17] As jean Allain mentioned in his article, non-refoulement is a norm of *jus cogens* and no deviation from it is permissible, irrespective of whether the State is a party to the 1951 Convention or not.[18] On the other hand, it is imperative that the State should respect and accommodate the rules of international law in its municipal law even without express legislative sanction. The provisions of such international laws and conventions that India is a signatory to, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Genocide Convention 1948, the International Covenant on Civil and Political Rights 1966, Convention on the Elimination of all Forms of Discrimination against Women 1979, International Covenant on Economic Social and Cultural Rights 1966, Convention on the Rights of Child 1989 and the Universal Declaration of Human Rights 1948, are in agreement with and elucidate the fundamental rights that are instituted in our Constitution and can be safely enforced by our Courts in the spirit of constitutionality and upholding fundamental human rights.

[17]H. Knox Thames, Washington College of Law, India's Failure to Adequately Protect Refugees, available at https://www.wcl.american.edu/hrbrief/v7i1/india.htm ("India's argument that the Refugee Convention places the burden on the host state […] is unfounded because signing the agreement would allow UNHCR to provide greater assistance to the refugee population […]"). For an explanation of the concept of territorial asylum, see Kay Hailbronner & Jana Gogolin, Asylum, Territorial in Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum ed., 2013), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/ law-9780199231690-e757 (Last visited on December 2, 2016).

[18]Jean Allain, The Jus Cogens Nature of Non Refoulement, 13 International Journal of Refugee Law (2001), 533