

IN THE SUPREME COURT OF INDIA
[CIVIL ORIGINAL JURISDICTION]
WRIT PETITION [CIVIL] NO.793 OF 2017

In the matter of

Mohammad Salimullah & Anr.

... Petitioners

Versus

Union of India & ors.

...Respondents

SUR REJOINDER ON BEHALF OF UNION OF INDIA

I, Mukesh Mittal s/o Shri V.P. Mittal, Joint Secretary [Foreigners] in the Ministry of Home Affairs, aged about 57 years having my office at National Stadium, Ministry of Home Affairs, New Delhi, do hereby solemnly affirm and state as under:

1. I am functioning as Joint Secretary [Foreigners] in the Ministry of Home Affairs, Union of India. In my official capacity and being duly authorised and being fully conversant with the facts and circumstances of the subject matter of the writ petition I am filing this sur-rejoinder. I state and submit that I have gone through, perused and understood the relevant records and material with respect to the subject matter of the petition based upon which I am filing this Sur Rejoinder to place the following legal as well as factual position for kind consideration of this Hon'ble Court.
2. I state that the Answering Respondent is served with an Affidavit in Rejoinder filed by the Petitioner to the Affidavit in Reply filed by the Answering Respondent. I crave leave to file this affidavit in Sur-Rejoinder.
3. At the very outset, I very respectfully reiterate the respectful submissions made in the counter affidavit already filed to the effect that the subject matter of the petition would be essentially a core

executive function in the realm of policy making for the country viz. take decision with respect to dealing with illegal immigrants. Such decisions are taken on a case to case basis and are based upon several facts, situations and considerations. The considerations, including diplomatic considerations, internal security considerations, potential demographic changes, possibility of law and order, sharing of national resources, sustainability of an additional burden on the resources of the country etc. are some of the considerations which are kept in mind by the executive which this Hon'ble Court would not go into, re-evaluate and based upon such re-evaluation would substitute its satisfaction in place of the satisfaction reached by the executive as a part of administrative governance.

4. I very respectfully pray that this question of the maintainability of the petition, the extent of power of judicial review, if any, and availability of fundamental rights to the petitioners [who are admittedly illegal immigrants] so as to invoke Article 32 of the Constitution of India may be addressed and decided first before examining the petition on merits.

I hereby reiterate the contents of my Affidavit in Reply and deny all facts stated in the Rejoinder under reply except those which are specifically and unequivocally admitted by me hereunder.

5. I respectfully submit that by way of this Sur-Rejoinder, I am dealing with the issues raised therein and, therefore, not responding to the rejoinder parawise. I, however, deny all the facts stated, contentions raised and grounds submitted except those specifically admitted by me. I respectfully submit that my not dealing with the petition para-wise may not be treated as my having admitted the truthfulness or otherwise of any of the contents thereon.
6. I state and submit that broadly the rejoinder covers three issues :

- (i) The issues raised based upon the Government of India's Notification dated 7.9.2015;
- (ii) The issue emanating from the Circular dated 8.8.2017 issued by the Ministry of Home Affairs;
- (iii) The issues based upon certain Declaration and / or other international instruments and its interpretation given by the Petitioner.

7. I state and submit that as pointed out hereinabove, any administrative decision taken by the executive with respect to illegal immigrants in question in each case depends upon the variety reasons, empirical data, facts, potential danger to internal security, the number of illegal immigrants involved, disturbances in the social fabric of the country or any particular part thereof, possibility of law and order problem arising in the country or any part thereof, demographic changes and its extent etc. Considering the very nature of such a decision which are to be taken on a case to case basis, there cannot be any comparison or claim of discrimination based upon some earlier decision taken with respect to one set of illegal immigrants vis-à-vis another set of illegal immigrants.

The comparison, therefore, between the factors which went into consideration of the administrative decision making culminating into the Notifications dated 7.9.2015 and 18.7.2016 cannot be compared with the decision with respect to Rohingyas who are about 40,000 approximately in number, having other options and most disturbingly the continuing of a systematic influx of illegal immigrants in an organised manner into India through agents and touts.

At the cost of repetition, it may be pointed out that illegal influx of Rohingyas, in substantially significant numbers, have started into the territory of India since 2012-13 and the Central Government has contemporaneous inputs from security agencies and other authentic material indicating linkages of some of the unauthorised Rohingya immigrants with Pakistan based and other terror organisations and similar organisations operating in other

countries. Over and above the said serious security concerns already in existence, the more disturbing part is that there is an organised and systematic influx of illegal immigrants from Myanmar through agents and touts facilitating illegal and unauthorised entry of immigrant Rohingyas into India.

It is observed that some Rohingyas are indulging in illegal / anti national activities i.e. mobilization of funds through hundi/hawala channels, procuring fake/fabricated Indian identity documents for other Rohingyas and also indulging in human trafficking. They are also using their illegal network for illegal entry of others in India. Many of them have managed to acquire fake/fraudulently obtained Indian identity documents i.e. PAN Card and voter cards. It is also found that some of the Rohingyas figure in the suspected sinister designs of ISI/ISIS and other extremists groups who want to achieve their ulterior motives in India including that of flaring up communal and sectarian violence in sensitive areas of the country. The fragile north-eastern corridor may become further destabilised in case of stridency of Rohingya militancy, which the Central Government has found to be growing, if permitted to continue. There is also a serious potential and possibility of eruption of violence against the Buddhists who are Indian citizens who stay on Indian soil, by the radicalized Rohingyas. Some of the Rohingyas with militant background are also found to be very active in Jammu, Delhi, Hyderabad and Mewat, and have been identified as having a very serious and potential threat to the internal/national security of India. Considering the fact situation in the present case, any comparison with any past decision is misconceived.

The Government takes the decision about the actions to be taken "in accordance with the law" keeping several factors into consideration including the aforesaid facts which are based upon the contemporaneous inputs and authenticated material and in the best interest of the country. Such decision are an essential part of core executive function of the executive while discharging its duties under the constitution.

In light of the what is stated in the earlier Affidavit and what is stated hereinabove, the Government of India was not only justified but was duty-bound to issue the Circular dated 8.8.2017 with a view to ensure its primary obligation to protect the fundamental rights of its own citizens.

8. I respectfully submit that so far as the contentions based upon the Declarations / Resolutions / international instruments and some individual views expressed by the Indian representatives are concerned, the said contentions are devoid of any merits.

India, as a sovereign State, is fully conscious, aware and responsible about its obligations emanating from various international instruments which deal with its interaction globally and its actions domestically. As a sovereign State, India will always honour such obligations which are binding obligations.

Having said that it is reiterated that India is not a signatory to United Nation Convention of 1951 and the Protocol of 1967 issued thereunder. The said Convention / Protocol is, therefore, not binding upon India and no other Declaration / Resolution / Convention / international treaty or instrument of any kind is in force which prohibits India, as a sovereign nation, to exercise its right of deporting illegal immigrants in accordance with laws of India and thereby protecting the fundamental rights of its own citizens more particularly in the interest of national security.

9. I state and submit that reliance placed upon the New York Declaration, 2016, Declaration of Territorial Asylum, Universal Declaration on Human Rights etc. is misplaced since these Declarations are mere recommendations and aims at reminding, reinforcing, and ensuring implementation of obligations specifically assumed under legally binding international instruments by States that become party to them. They, at the most, seeks to encourage non-party States to become party to such instruments and accept the obligations flowing from them. The obligations of *non-refoulement* is essentially covered by the provisions of the 1951 Refugee Convention, to which India is not a party. It is thus clear

that reliance upon any other Declarations / Resolutions etc. is not only misplaced but does not confer any legally enforceable rights either upon the petitioners or anyone else which can justify prayers for issuance of a writ of this Hon'ble Court under Article 32 of the Constitution of India.

10. I respectfully submit that similarly though India is a party to the Convention on the Rights of the Child, 1989, this is not a Convention under which refugees' status and *non refoulement* are addressed. As pointed out hereinabove, these matters are regulated essentially under the provisions of 1951 Refugee Convention to which India is not a party.
11. I respectfully state and submit that reference to New York Declaration for Refugees and Migrants, 2016, as made in para 11 of the Rejoinder, is also misplaced. The main thrust of this instrument is to have a global impact on matters relating to refugees and migrants. The said instrument is not a legally binding instrument which fact is recognized in para 21 and 65 of the said Declaration itself.

It is submitted that the remarks made by the Indian representatives or general views expressed by them at some Symposium on World Humanitarian Summit or elsewhere cannot be elevated to the level of a legally binding document based upon which a writ of this Hon'ble Court can be prayed for. It is submitted that India's participation at discussions in the global summits or otherwise in which issues pertaining to refugees are being discussed, cannot be construed as India having accepted any binding legal obligation and having given up its right to act as per its laws with illegal immigrants and thereby abdicating its obligation of protecting fundamental rights of its own citizens. There is, obviously, a reason why there is a well laid down process and procedure in favour of signature and ratification of each of the international conventions by various States. There cannot be any binding obligation either.

The above referred facts, if read with the Rejoinder would show that while India is a party to some international conventions pertaining to human rights / refugees, there is no binding legal obligation on Government of India with respect of *non-refoulement* flowing from any binding international instrument.

12. So far as reference to notice issued by the National Commission for Human Rights is concerned, the Government of India has placed its facts before the said Commission by way of reply.
13. I submit that the illegal immigrants would not get and cannot claim any of the fundamental rights which are otherwise available to non-citizens as the term “non-citizens” would necessarily mean persons, not citizens of India, is in India on a valid travel document. The framers of the Constitution of India would not have envisaged a situation where thousands and thousands of people would be flowing into this country entering illegally without any valid travel documents and start claiming fundamental rights as non-citizens.
14. I respectfully submit that rest of the averments made in the Rejoinder are general in nature, reiteration of already stated contentions, some statements made by some individuals etc. It is submitted that the petitioners cannot pray for a writ of this Hon'ble Court based upon such statements and news reports.

DEPONENT

VERIFICATION

Verified and signed on this 3rd day of October, 2017. That contents of para 1 to 14 of the above sur-rejoinder is true and correct to my knowledge and belief and nothing material has been concealed therefrom.

DEPONENT