

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 12th September, 2011

+ **W.P.(C) 2599/2007**

YARO KHAN @ AHMAD SHAH **Petitioner**

Through: Mr. Bahar U. Barqi, Adv.

Versus

UOI & ORS. **Respondents**

Through: Mr. Ravinder Aggarwal, Adv.

Ms. Zubeda Begum & Ms. Sana
Ansari, Advs. for R-4.

AND

+ **W.P.(C) 4112/2007**

YARO KHAN @ AHMAD SHAH **Petitioner**

Through: Mr. Bahar U. Barqi, Adv.

Versus

UOI & ORS. **Respondents**

Through: Mr. B.V. Niren, Adv. for UOI.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported
in the Digest? | YES |

RAJIV SAHAI ENDLAW, J.

1. The petitioner, in W.P.(C) No.2599/2007 seeks a declaration that he is an Indian citizen by birth and a direction to the respondents to treat him as an Indian national by birth; he also impugns the order dated 13.04.2006 of his deportation from India and seeks to restrain the respondents from taking any action towards his deportation.
2. W.P.(C) No.4112/2007 has been filed impugning the order of cancelling / impounding the Indian passport earlier issued to the petitioner and seeks a mandamus for issuance of a fresh passport to the petitioner.
3. Notice of both the petitions was issued and vide interim order dated 04.04.2007 in W.P.(C) No.2599/2007, which continues to be in force, deportation of the petitioner was stayed.
4. The counsel for the petitioner has argued with reference to W.P.(C) No.2599/2007 and has stated that the result thereof would determine the fate of W.P.(C) No.4112/2007 also.

5. It is not for the first time that the order of deportation of the petitioner has been issued. Prior thereto also, an order dated 05.05.1998 under Section 3(2) of the Foreigners Act, 1946 restraining the petitioner from remaining in India and directing him to depart from India latest by 15.05.1998 was issued. The same was challenged by the petitioner by filing Crl. W.P. No.397/1998. It was the case of the petitioner in that petition that he was born in Guwahati on 13.01.1952; his father came from Pathtoonistan and his mother died when he was just nine months old; that he made an application with the authorities at Kamrup, Assam for grant of Indian citizenship; that the order of deportation was bad since he was lawfully staying in India and since he was not having citizenship or nationality in any other country and was born, brought up, nurtured and had grown up in India.

6. Crl. W.P. No.397/1998 was contested by pleading, that the petitioner was holding a Afghan passport issued at Kabul; that he had however fraudulently obtained an Indian passport issued at Guwahati; that he is a kingpin in Hawala and smuggling business and has amassed wealth through illegal means; that the very fact that he had applied for citizenship was

indicative of his not being an Indian citizen; that the ration card and other documents fraudulently obtained by him by misrepresenting facts did not vest any rights in him.

7. The aforesaid Crl. W.P. No.397/1998 was disposed of vide judgment dated 21.08.1998 of the Division Bench of this Court. It was held, that the very fact that the petitioner claims that he has applied for Indian citizenship was sufficient to repel his contention that he was an Indian citizen; that no material had been brought on record to show that he was born in India; rather the material on record showed that in 1962, he applied as a Pakhtoon national seeking permission to stay in India; that there was no question of having acquired citizenship by mere prolonged stay; that the very fact that he sought permission as a foreigner to stay in India falsified his stand of his being an Indian citizen; that he continued to be a foreigner and had no right to stay in India. However, finding that the order of deportation of the petitioner had been made without hearing him, the writ petition was allowed, the order of deportation set aside with liberty to the respondents to pass a fresh order in accordance with law.

8. Thereafter yet another order dated 18.12.1998 was issued by the respondent Foreigners Regional Registration Officer (FRRO) of deportation of the petitioner. The same was again challenged by the petitioner by filing Crl. Writ Petition No.1107/1998. It was again the claim of the petitioner that he was an Indian national having been born in Guwahati on 10.01.1950 and cannot be treated as an alien.

9. The said Crl. Writ Petition No.1107/1998 was dismissed by a Division Bench of this court vide judgment dated 17.02.1999. It was held:

“The contention of the petitioner that he is an Indian Citizen and was born in India is belied from the fact that he had made an application for grant of Indian citizenship and also an application for permission to stay in India. Learned counsel for the petitioner submitted that the petitioner was misguided in making the application. It is significant to note that the petitioner does not claim to have moved any application to the concerned authorities withdrawing his earlier application

seeking Indian Citizenship and permission to stay in India. It is also not his case that he had made application to the concerned authorities clarifying the position that as he was born in India and is an Indian citizen the application for grant of Indian Citizenship and the application seeking permission to stay in India were made under a wrong advice. It appears that the plea that the petitioner had made the said applications on a wrong advice is an afterthought. The petitioner having applied for Indian Citizenship and for grant of permission to stay in India and having acquired Afghan passport repels the contention of the petitioner that he is an Indian citizen. In *Abdus Samad Vs. State of West Bengal* AIR 1973 SC 505, where the appellant had made an application under Section 5(1)(a) of the Citizenship Act, 1955, for being registered as a Citizen of India, it was held that the application for registration as an Indian Citizen totally repels any plea of citizenship of the appellant. Thus, the claim of the appellant that he had come to Calcutta in 1914 and

therefore, at the commencement of the Constitution he became a citizen under Article 5 (c) of the Constitution did not find favour with the Apex Court.

Learned counsel for the respondent has invited our attention to the International Driving Licence of the petitioner bearing No.7159 issued at Kabul by Kabul Traffic Licence Department and Identity Card No.237658 of the petitioner issued by the Royal Government of Afghanistan on September 30, 1338 (..... Nov. 1958). As against this, the petitioner has not placed on record any material or evidence to show that he was born at Guwahati. We are also not impressed by the submission of the learned counsel for the petitioner that the passport produced by the first respondent as that of the petitioner was never issued by the State of Afghanistan. It is well settled that an alien cannot have a right of permanent abode in India. In *Louis De Raedt Vs. Union of India and Others* AIR 1991 SC 1886, it was held that the fundamental right of the foreigner is

confined to Article 21 and does not include the right to reside and settle in this country. In *Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others* AIR 1955 SC 367, the Supreme Court held that the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the constitution fettering this discretion.”

10. The petitioner preferred Special Leave Petition (Crl.) No.674/1999 against the judgment aforesaid of the Division Bench of this Court and Crl. W.P.No.25/2006 before the Apex Court which were dismissed *in limine*.

11. However notwithstanding the dismissal aforesaid, it appears that the petitioner was not deported; according to the counsel for the respondents, because the petitioner had gone “underground” and which is controverted by the counsel for the petitioner. However, vide order dated 13.04.2006 impugned in W.P.(C) No.2599/2007, the Ministry of External Affairs, New Delhi requested the Embassy of the Islamic State of Afghanistan in New

Delhi to prepare necessary travel documents for deportation of the petitioner.

12. Notwithstanding the findings aforesaid of the Division Benches of this Court in the earlier two writ petitions preferred by the petitioner, the petitioner by way of this writ petition seeks declaration of his Indian citizenship, relying on, i) Certificate of Birth dated 07.09.2006 issued by the Department of Economics and Statistics of the Government of Nagaland under Section 17 of the Registration of Births & Deaths Act, 1969 and ii) a letter dated 16.01.2003 purportedly of the Embassy of the Transitional Islamic State of Afghanistan at New Delhi to the Ministry of Home Affairs, Government of India.

13. The counsel for the petitioner contends that the Birth Certificate establishes the petitioner having been born in India and the letter dated 16.01.2003 (supra) establishes that the Afghan passport which the petitioner was stated to be holding had in fact not been issued by the Government of Afghanistan.

14. The counsel for the petitioner has further contended, that Crl. Writ Petition No.1107/1998 was dismissed because the petitioner had then been unable to prove his birth in India; that since now the petitioner has been able to establish his birth in India making him an Indian citizen by birth, the petitioner is entitled to the declaration aforesaid.

15. Notice of W.P.(C) No.2599/2007 was issued on the aforesaid argument only and the respondents were directed to verify the authenticity of the said Birth Certificate issued by the Government of Nagaland on which the petitioner relies. The same order was reiterated on 12.01.2011.

16. A status report has been filed by the respondents and to which response has been filed by the petitioner.

17. The Birth Certificate produced by the petitioner shows the birth on 10.01.1950 of a male named Yaro Khan at Dimapur with the name of the father as Alim Khan and of the mother as Shap Paro, with permanent address as Dimapur, Nagaland and the date of Registration as 07.09.2006. It

is thus not as if the birth, of which the said Certificate has been issued, was registered contemporaneously; rather the Registration is after 56 years of the birth.

18. It has been enquired from the counsel for the petitioner as to on what basis, the aforesaid birth was got registered i.e. what was produced before the Registrar of Births to show that the birth in fact had taken place. Neither is there any pleading in the petition or proof to the said effect, nor is the counsel for the petitioner able to state so.

19. It has further been enquired from the counsel for the petitioner as to whether the Registrar of Births, Government of Nagaland was informed of the judgment (supra) in the writ petition earlier preferred by the petitioner holding that the petitioner was not a citizen of India. The answer is in the negative; it is stated that the petitioner was not required to so disclose.

20. The status report filed by the respondents of verification of the Birth Certificate aforesaid, though does not controvert the issuance of the Birth

Certificate but states that the documents on the basis of which the said Birth Certificate is stated to have been issued are shown as misplaced in the office of the Registrar of Births of the Government of Nagaland. It is also stated that neither Yaro Khan nor his father Alim Khan were found enrolled in the electoral list of Dimapur on or before 1963 and the other enquiries to ascertain the parentage, domicile and activities etc. or of residence of Dimapur did not yield any result.

21. The petitioner in his response to the aforesaid status report has emphasized that the issuance of the Birth Certificate is not disputed; it is stated that it was the responsibility of the Government of Nagaland to preserve the records on the basis of which the Certificate was issued; that since the petitioner till the year 1963 was only 13 years of age, the question of his name appearing in the electoral rolls did not arise; that he had vide legal notice dated 30.05.2011 to the authorities in Nagaland disclosed that he along with his parents was residing in the rooms of Bari Masjid, Dimapur.

22. I have again enquired from the counsel for the petitioner that even if the documents on the basis of which the Birth Certificate aforesaid was issued have been misplaced from the office of the Registrar of Births, Government of Nagaland, certainly the petitioner would be in possession of the documents by furnishing which the registration was obtained. The counsel for the petitioner states that he has no instructions.

23. The Registration of Births and Deaths Act, 1969 under which the Birth Certificate aforesaid has been issued was itself enacted after 19 years of the birth of the petitioner and came into force in the State of Nagaland on 1st October, 1971. The same requires a birth to be notified immediately and in Section 13(1) thereof permits registration on intimation within 30 days of occurrence; registration thereafter but within one year of occurrence is permitted only with the written permission of the prescribed authority and any registration which has not been registered within one year of occurrence can be only registered by a Magistrate of the first class or a Presidency Magistrate after verifying the correctness of the birth or death. The registration on 7th September, 2006 of the birth on 10th January, 1950, as in

the present case could thus under Section 13(3) of the 1969 Act have been only on an order made by a Magistrate. Neither any such order has been disclosed nor any other explanation furnished. I also entertain serious doubts as to whether registration at all of births occurred prior to coming into force of the 1969 Act could have been made under the said Act and Certificate thereof issued. There is nothing to show that the 1969 Act is retrospective or requires any record to be maintained of the births of prior to the coming into force thereof. I find the Division Bench of the Kerala High Court in ***Usman Vs. Hindustan Machine Tools Ltd.*** 1987 (2) K.L.T. 1028 to have held that the 1969 Act is prospective and regulates only the events that have taken place after coming into force thereof and does not permit registration of a birth occurring prior to coming into force of the Act. I am in respectful agreement with the said view. I may notice that prior to the 1969 Act also, registration inter alia of births was governed by the Births, Deaths and Marriages Registration Act, 1886. I am however unable to find that the said Act extended to the State / Union Territory of Nagaland or to the State of Assam of which Nagaland was earlier a part. Rather, it is stated in the A.I.R.

Manual Civil & Criminal 5th Edn. 1989 that the State of Assam had a separate legislation of registration. No document issued under the contemporaneous law of the births, of the birth if any of the petitioner has been produced.

24. The letter dated 16.01.2003 of the Government of Afghanistan refers to Mr. Yaro Khan as originally an Afghan national and now possessing Indian nationality. It certifies that the Afghan passport purportedly in the name of Mr. Yaro Khan, had not been issued by the Govt. of Afghanistan. The petitioner on the basis of the said letter contends that the passport on the basis whereof he was in the earlier round of litigation held to be an Afghan national, has in fact not been issued by the Govt. of Afghanistan. Upon it being enquired from the counsel for the petitioner as to how the petitioner, if originally an Afghan national as mentioned in the said letter, is shown to have acquired Indian citizenship, the counsel states that in fact the passport to which the said letter pertains was not issued qua the petitioner but qua another person also named Yaro Khan but son of Nik Mohammad. Reliance in this regard is placed on another letter dated 03.07.1998 issued by

Embassy of Islamic State of Afghanistan. It has been enquired as to why the petitioner is relying on the said document if according to the petitioner the same does not pertain to him. No satisfactory answer has again been forthcoming. Also, the letter dated 03.07.1998 was available at the time of earlier litigation and cannot be said to be a fact not available then.

25. I am of the view that the relief claimed by the petitioner of declaration that he is Indian citizen by birth is barred by the principles of *res judicata*. This court having already in the judgments in the earlier two writ petitions aforesaid preferred by the petitioner having held the petitioner to be not an Indian citizen, the Birth Certificate and the letter dated 16.01.2003 subsequently obtained by the petitioner do not relieve the petitioner from the bar of *res judicata*. The principle of *res judicata* is based on two age old principles, namely that it is in the interest of the State that there should be an end to litigation and that no one ought to be vexed twice in a litigation. The doctrine of *res judicata* is common to all civilized systems of jurisprudence. The principle of finality of litigation is based on high principle of public policy. In the absence of such a principle, great oppression may result under

the colour and pretence of law inasmuch as there will be no end to litigation and a rich malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. The plea of *res judicata* is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating issues which have become final (see ***M. Nagabhushana Vs. State of Karnataka*** (2011) 3 SCC 408). The petitioner herein is also found to be such a litigant who has by repetitive litigation succeeded in thwarting his deportation for the last more than one decade.

26. Moreover in the present case the Birth Certificate and the letter from the Embassy of Afghanistan are highly suspect as aforesaid. Mere production thereof would not entitle the petitioner to again seek an opportunity to establish his citizenship of India. This court would not allow its process to be abused. The contention of the petitioner that since the genuineness of the Birth Certificate is not disputed, till the Registrar of Birth traces the documents on the basis whereof registration was effected he

cannot be deported, cannot be accepted when the Birth Certificate is found to have been issued in violation of the Rules for issuance thereof. The Courts cannot be fooled and the Statute mocked at. The law, as Mr. Bumble (in Oliver Twist) said, “is a ass – a idiot”. Now to accept the contention of the petitioner and to start an enquiry as sought would vindicate Mr. Bumble. Recently also, in ***Krishnadevi Malchand Kamathia Vs. Bombay Environmental Action Group*** (2011) 3 SCC 363, the Supreme Court observed that justice is only blind or blindfolded to the extent necessary to hold its scales evenly; it is not, and must never be allowed, to become blind to the reality of the situation, lamentable though that situation may be.

27. I have also enquired from the counsel for the petitioner whether in the matter of claim of citizenship, there can be said to be any exception to the rule of *res judicata*. The counsel of course answers in the affirmative but without any support. He rather seeks adjournment to study the question raised by this Court. I am not inclined to grant any adjournment. It is for the petitioner to make out and prepare a case and no hearing would attain finality if the counsels are permitted adjournments as sought. It may be

noted that it is only under threat meted out on the last date of vacation of the interim order being enjoyed by the petitioner that the arguments are being heard today.

28. I however find the Supreme Court in ***Joseph Pothan Vs. State of Kerala*** AIR 1965 SC 1514 to have observed that though every citizen whose fundamental right is infringed by the State has a fundamental right to approach the Court for enforcing his right but if by a final decision of a competent Court his title to property has been negatived, he ceases to have the fundamental right in respect of that property and therefore, can no longer enforce it and the doctrine of *res judicata* may be invoked.

29. The counsel for the respondents have also argued that the falsity in the case of the petitioner is apparent from the inconsistencies in the pleadings in the earlier writ petitions and now of the petitioner; that while in the earlier writ petitions, it was unequivocally stated that the petitioner was born at Guwahati in the year 1952; it has now been stated that he was born at Nagaland; that while earlier it was said that he was residing here since the

age of 10, it is now stated that he was born here; that in the contemporaneous applications, it was stated that he was originally an Afghan national.

30. The counsel for the petitioner of course has responded that the petitioner is illiterate and acted as per advice from time to time and Nagaland was earlier a part of Assam.

31. I am unable to buy the aforesaid arguments also. The petitioner in the earlier petitions categorically gave the place of his birth as Guwahati but is now claiming the same to be Dimapur. The counsel for the petitioner has also argued that the earlier application for citizenship was on wrong advice. Such arguments cannot be allowed to defeat the ends of justice. The petitioner has approached this Court in the exercise of equity jurisdiction and his conduct disentitles him to any relief.

32. There is thus no merit in W.P.(C) No.2599/2007. The claim of the petitioner for declaration of being an Indian citizen by birth is barred by the

principles of *res judicata* and the new documents furnished by the petitioner are not found, as aforesaid, to help the petitioner. W.P.(C) No.2599/2007 is accordingly dismissed. Consequently, W.P.(C) No.4112/2007 is also dismissed.

33. The petitioner under interim orders of this Court has enjoyed stay of deportation and this Court while disposing of the petition is required to balance equities and to ensure that the petitioner upon dismissal of the petitions is deported. However, opportunity has to be given to the petitioner to avail his remedies in law. The counsel for the petitioner seeks protection for 60 days. The same is allowed.

34. However, to safeguard that the petitioner does not now disappear and in the event of his remedies against this judgment failing, is deported, it is directed to the petitioner to report to the SHO, Police Station having jurisdiction over the area of Balli Maran where the petitioner is stated to be residing everyday at 1600 hours. Upon the petitioner failing to so report, the SHO concerned is directed to immediately take the petitioner into custody.

Unless there is a stay of deportation of the petitioner, the respondents to deport the petitioner immediately after the expiry of 60 days.

35. The petitioner is also burdened with costs of ₹50,000/- of these petitions payable to the respondents within four weeks of today.

**RAJIV SAHAI ENDLAW
(JUDGE)**

SEPTEMBER 12, 2011
'gsr'