



2024 : DHC : 529



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

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Date of Decision: 23rd January, 2024

+ W.P.(CRL) 21/2024

PRINCE BEN NNAKA

..... Petitioner

Through: Mr. Aditya Singh Deshwal and
Ms. Ridam Arora, Advocates.

versus

STATE NCT OF DELHI & ANR.

..... Respondents

Through: Ms. Rupali Bandhopadhyaya, ASC
(Crl.) for State with Mr. Abhijeet Kumar,
Advocate with Insp. Subhash Chandra, Cyber Cell,
Crime Branch.Ms. Richa Dhawan, Advocate for R-2 with Insp.
Satish Kumar, FRRO, Delhi.**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J. (ORAL)**

1. This petition has been filed by the Petitioner under Article 226 of the Constitution of India read with Section 482 Cr.P.C. assailing an order dated 20.12.2023 passed by learned Additional Sessions Judge, South West District, Dwarka Courts, Delhi, with a consequential direction to release the Petitioner from the detention centre.
2. Background facts necessary and relevant for deciding the present petition are that Petitioner is a Nigerian national married to Ms. Poutholiu



Newmai and has a three years old daughter. A complaint was received from Sh. Bharat Bhushan Kaul alleging that he had been cheated and duped to the tune of Rs.1,27,62,027/- by a group of accused persons who hatched a criminal conspiracy against him on the pretext of selling UKPA Natural Seeds which are used in manufacture of Anti HIV therapy, Parkinson and Ebola diseases etc. FIR No. 481/2016 was registered on this complaint under Sections 420/467/468/471/120B IPC at PS: Vikaspuri. Petitioner was granted bail on 30.01.2018 by learned CMM, South West District, Dwarka Courts. Petitioner was thereafter arrested in another case under Section 14 of the Foreigners Act, 1946 (hereinafter referred to as the 'Foreigners Act') in case FIR No. 55/2021, registered at PS: Maidangarhi.

3. Learned M.M., South District, Saket Courts vide order dated 07.04.2021 convicted the Petitioner as he pleaded guilty and did not claim trial. On the same day, Petitioner was sentenced to imprisonment for the period already undergone by him in judicial custody along with a fine of Rs.500/- for offence under Section 14 of the Foreigners Act. It was further directed that the concerned IO/SHO, PS: Maidangarhi will receive the custody of the convict from jail on 08.04.2021, in case he was not required to be detained in any other case and to take the convict to the deportation centre. It was further directed that if Petitioner was not required to be detained for the trial in case FIR No. 481/2016, PS: Vikaspuri, DCP, FRRO would make appropriate arrangement to deport him to his parent country at the earliest.

4. Petitioner thereafter filed an application for his release and on 30.04.2021, the learned CMM, South West District, Dwarka Courts in case



pertaining to FIR No. 481/2016 directed the office of FRRO to release the Petitioner as per established law/rule and practices considering that Petitioner had been convicted and sentenced to imprisonment undergone and had paid the requisite fine in respect of FIR No. 55/2021 and was on bail in case FIR No. 481/2016, subject to a caveat if he was not required in any other case. Subsequently, an application was filed by FRRO seeking clarification of order dated 07.04.2021, by which Petitioner was convicted and ordered to be kept in deportation centre. This application was disposed of by learned M.M., South District, Saket Courts on 11.05.2021 clarifying that since Petitioner had been ordered to be deported by order dated 07.04.2021, he could not be released from the deportation centre and was liable to be deported as and when the trial of the other case, if any, was concluded.

5. Petitioner filed another application seeking compliance of order dated 30.04.2021 and for his release from the deportation centre, reiterating his stand that he was on bail in one FIR and had undergone the sentence upon conviction with respect to the other FIR and as per Rule 5 of the Foreigners Rules, 1948, he could not be deported outside India as trial in FIR No. 481/2016 had not been concluded. After hearing the parties, learned CMM, South West District, Dwarka Courts disposed of the application vide order dated 15.05.2021 holding that when there was a specific order passed by the learned M.M. to keep the Petitioner in the deportation centre/detention centre/restriction centre, no direction can be issued for releasing the Petitioner. The Court also observed that the only concern of the Court was that Petitioner was required during the trial in India and therefore, he



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must not be deported as per Rule 5 of the Foreigners Rules, 1948, which was being complied by the FRRO.

6. On 20.01.2023, NBWs were issued against the Petitioner for non-appearance as he was not produced before learned M.M. in case FIR No. 481/2016. Notice was issued to FRRO to produce the Petitioner physically in Court on the next date i.e. 10.03.2023. On 05.07.2023, Petitioner was again absent being in the deportation centre and notice was issued to FRRO to produce him on the next date. When the matter came up before the Court on 21.07.2023, it was brought to the notice of the Court by the counsel for the Petitioner that he was not being produced before the Court by the Deportation Officer. Two applications filed on behalf of the Petitioner were taken up by the learned M.M., South West District, Dwarka Courts on the said date. First application was filed for releasing the Petitioner from the deportation centre and second was for a direction to the Deportation Officer to produce the Petitioner before the FRRO for extension of visa. Trial Court disposed of the application on the ground that no further direction was required to be passed by the Court since he was already on bail in the present case and had been directed to be released from custody vide order dated 30.04.2021 passed by the learned CMM, if not required in any other case. On the second application, the Court directed the Deportation Officer to produce the Petitioner before FRRO, R.K. Puram for extension of his visa within seven days of the receipt of the order. Further direction was passed to the FRRO/ Deportation Officer to ensure that Petitioner is produced before the Court of learned CMM, in case FIR No. 481/2016 on every date of hearing. On 03.08.2023, Petitioner applied for extension of his visa.



Revision petition was filed by the Petitioner on 23.11.2023 against the order dated 21.07.2023, which was dismissed vide order dated 20.12.2023 by learned Additional Sessions Judge, South West District, Dwarka Courts on the ground that Petitioner was directed to be sent to deportation centre by an order of the learned M.M., South District, Saket Courts, New Delhi, while passing the order on sentence and the remedy, if any, of the Petitioner was to pursue his matter in the same jurisdiction in the South West District, where an order has already been passed for release of the Petitioner from custody, if not required in any other case. It is this order of the Revision Court, which is assailed in the present petition with a consequential direction for release of the Petitioner from deportation centre.

7. Learned counsel for the Petitioner submits that Petitioner has been released on bail in case FIR No. 481/2016 and in the case under Section 14 of Foreigners Act in respect of FIR No. 55/2021, on his pleading guilty, he was convicted and sentenced to imprisonment already undergone in judicial custody along with fine of Rs.500/-. Fine has been paid by the Petitioner and therefore, there is no reason why the Petitioner should be kept in the deportation centre. It is vehemently urged that the detention of the Petitioner is unlawful and violates the fundamental right of the Petitioner under Article 21 of the Constitution of India. It is contended that the impugned order and the action of the Respondents is directly in the teeth of judgments of this Court in *Emechere Maduabuchkwu v. State NCT of Delhi and Ors.*, MANU/DE/3694/2023 and *Charles Kingsley Okakso v. State (NCT of Delhi)*, MANU/DE/4719/2023, where the Courts have recognized that once an Applicant is released on bail and/or from prison on having undergone his



sentence, he cannot be kept in a detention centre indefinitely as this would violate Article 21 of the Constitution of India.

8. It is also contended that by the impugned order, the Revision Court while passing the impugned order has failed to appreciate that Petitioner after being convicted and sentenced to imprisonment already undergone was within the constructive judicial custody of Courts at South West District, Dwarka Courts. Therefore, the learned Sessions Judge should have entertained the revision petition and set aside the order impugned therein whereby Petitioner was directed to be detained in the deportation centre as the order was directly in contravention of the judgments of this Court.

9. Learned Additional Standing Counsel appearing on behalf of the State, *per contra*, vehemently opposes the petition and argues that the order dated 07.04.2021 by which Petitioner was sent to the deportation centre was passed by learned M.M., South District, Saket Courts. By order dated 11.05.2021, the Court reiterated the order observing that there was no reason to release the Petitioner from the deportation centre and both the orders are unchallenged in the present petition.

10. Ms. Richa Dhawan, learned counsel appearing on behalf of Respondent No. 2/FRRO, relies upon Office Memorandum dated 24.04.2014 issued by Ministry of Home Affairs, which details the procedure regarding imposition of restrictions on foreigners on completion of their jail terms and submits that the action of FRRO is in consonance with the laid down procedures and guidelines. Foreign nationals who reside in India illegally without travel documents/overstay despite expiry of visa/passport



and those accused who have been acquitted/convicted/released by Courts and whose presence in India is not required in any law or other criminal proceedings etc. are kept at restriction centres for deportation/repatriation to ensure their physical availability for expeditious repatriation as soon as travel documents are ready. Even in cases where foreigners are facing serious charges under IPC, NDPS etc. and cases are instituted against them in the Courts, they have to be deported out of India and are thus kept in the deportation centres.

11. I have heard learned counsels for the respective parties and examined their rival contentions.

12. It is an undisputed fact that in case FIR No. 481/2016 Petitioner was arrested but was released on bail on 30.01.2018. Visa of the Petitioner was extended by FRRO till 10.02.2020. On 19.03.2021, Petitioner was apprehended by the Delhi Police in connection with FIR No. 55/2021 under Section 14 of Foreigners Act. On 07.04.2021, learned M.M., South District, Saket Courts sentenced the Petitioner to imprisonment for period already undergone under judicial custody with fine of Rs.500/- and simultaneously directed to restrain him in the deportation centre till his deportation. Efforts by the Petitioner for release from the deportation centre by filing successive applications and revision petition remained unsuccessful and resultantly, Petitioner continues to be under detention since April, 2021.

13. In *Ana Parveen & Anr. v. Union of India & Ors., W.P.(CRL) No. 43/2022*, decided on 29.04.2022, the Supreme Court was dealing with the case of a foreign national who was kept in a detention centre despite completing his sentence. Observing that the detention was not consistent



with the mandate of Article 21 of the Constitution, the Supreme Court directed release of the foreigner and following observations are relevant in this context:-

“11. In this backdrop, we are of the view that it would be appropriate if the Foreigners’ Division of the Union Ministry of Home Affairs takes a final decision on the representation for the grant of a visa/ long term visa having regard to all the facts and circumstances of the case and after assessing the inputs from the security angle. They shall do so independent of the communication which has been addressed by the SSP, Meerut, noted above.

12. At the same time, we are of the view that keeping the detainee, Mohd Qamar in detention would not be consistent with the mandate of Article 21 of the Constitution.

(emphasis supplied)

13. In the facts of the present case and since no security threat or adverse impact bearing on national security has been placed on the record, we are of the view that the detainee, Mohd Qamar should be released on furnishing a personal bond of Rs 5,000 with two sureties of Indian citizens in the like amount. The detainee shall furnish the address of his place of permanent residence in Meerut where he proposes to reside, to the SHO of the police station concerned and report to the local police station on the seventh day of every month pending further orders.”

14. Co-ordinate Bench of this Court in ***Emechere Maduabuchkwu (supra)***, applying the aforesaid judgment of the Supreme Court to the facts of the case before it held that once the foreign national was admitted to bail, there was no reason for keeping him at the detention centre. Relevant passages from the judgment are as follows:-

*“24. In **Bathlomew Lkechukwu @ Charles v. Union of India & Ors.**, W.P. (CRL) 2146/2019 order dated 30th January, 2020, this Court in dealing with a petitioner who was a foreign national and had been acquitted of an offence against which an appeal had been filed by the NCB, observed that the petitioner could not be detained indefinitely in a deportation camp. The said foreign national was either required to be issued a visa or is required to be deported. Even if the person’s presence*



was required in India on account of the appeal filed by the NCB, an appropriate visa was required to be issued to him. Directions were, therefore, issued to either deport the petitioner or release him after providing proper visa within a period of three months.

25. In **Efrance Namatende v. State**, BAIL APPLN. 2214/2022 by order dated 09th January, 2023, this Court noted that for violation of Section 14 of the Foreigners Act there was no requirement that the person is to be confined in an observation home. The bail condition that he would remain in an observation home till he is granted a visa was deleted. A similar order was passed in **Frank Boadu v. State of Govt. of NCT of Delhi**, BAIL APPLN. 1897/2022 order dated 03rd March, 2023.

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30. Finally, and most importantly, in **Ana Parveen & Anr. v. Union of India & Ors.**, W.P.(CRL) No. 43/2022, the Hon'ble Supreme Court was dealing with a foreign national detained and lodged at the detention centre in Delhi pending deportation after having been convicted and completed his sentence under Section 14 of the Foreigners Act. The person in question was a Pakistani national who came to India married an Indian citizen in 1989 had five children who were born in India. A representation had been submitted by him to the Ministry of Home Affairs for release from detention centre and to be allowed to stay at his home on long term visa or any other permit. Seven years had elapsed since he had served out his sentence following the conviction under the Foreigners Act. The Hon'ble Supreme Court directed that it would be appropriate if the Foreigner's Division of the Union Ministry of Home Affairs takes a decision on the representation for grant of a visa/long term visa having regard to all facts and circumstances of the case. Further, in light of mandate of Article 21 of the Constitution, it was directed that since there was no security threat or adverse impact on national security, he should be released on furnishing a personal bond of Rs.5,000/- with two sureties of Indian citizens in the like amount. The detainee would furnish the place address of permanent residence where he proposed to reside and would report to the local police station on the seventh day of every month.

Conclusions

31. In this context, and in the background of all these decisions of various courts and the Hon'ble Supreme Court, the submission of the FRRO that by allowing permission to be released would legitimize their past offence is too simplistic a view in the matter. In the considered opinion of this Court, these situations do present



themselves before courts on multiple occasions, require more calibrated treatment.

32. In any event what must be clarified is that a Court or Magistrates or a Sessions Court cannot as part of enlarging foreign national on bail can also direct the said person to be sent to a detention centre. The Court is not competent to pass such a direction when granting bail as has been conclusively held in various decisions. Detention centres are not for judicial custody but a place where a foreign national is detained on an executive order and is the prerogative of the competent authority under the Foreigners Act.

33. Therefore, what the Ld. ASJ directed by order dated 25th June, 2021 was apposite, by allowing the bail application and admitting him on bail by releasing him from Detention Centre subject to furnishing a personal bond and surety bond of Rs. 01 Lac. Despite that the petitioner was not released on account of the intransigent stand taken by the FRRO in not granting him a visa or permit and issuing the impugned order. This denial was in the teeth of a judicial order of Ld. ASJ, which is not merited considering there was no challenge to the said order by the State. The petitioner once being enlarged on bail cannot be detained without due process of law. The fact that he is facing trial for offences under the Excise Act and the Foreigners Act cannot be held against him, considering he still is to be proved guilty post trial. Right now, is the issue of his freedom.

34. The impugned order was therefore untenable on two counts – one, is that no opportunity was ever given to the petitioner to show cause or even a possibility of a hearing/or representation; and two, that other provisions of the Foreigners Act were not considered i.e. order could have been passed under any provision of section 3(2) of the Foreigners Act. Even Babul Khan (supra) holds that such foreigners without visa may be kept in detention centres “unless the competent authority has passed any order under Section 3(2)(a) to (f) of the Foreigners Act, 1946”. There is no reason why the FRRO cannot consider other possibilities under these provisions i.e. requiring him to be at a particular place (not necessarily a detention centre), imposing restrictions on his movements (like restricting him to an area), regulating his conduct and association with persons; reporting requirements to an authority. There is a vast menu of options available for the FRRO to apply, which may be more in consonance with rights under Article 21, than a summary, plain vanilla order of continuing in the detention centre. Also, there is no reason, as has been observed by the Hon’ble Supreme Court, to not consider grant of a special visa/stay permit to the



petitioner, which recognizes that he is an undertrial of an overstay offence and has to continue in this country for the purpose of trial or otherwise, in case that is not required, choose to deport him.

35. The petitioner has already spent 2 years in confinement in detention centre when the offences that he is charged with under the Excise Act trigger sentence of about 6 months and maximum may extend to 3 years. Even as regards the Foreigners Act offence, he may at the maximum be sentenced for 5 years, of which he has now already been in de facto custody for 2 years.

36. Considering that the petitioner now has a valid passport (having been extended by the Nigerian Embassy), the FRRO/any other competent authority of the UOI is directed to consider his application for visa and /or representation for an appropriate order under the Foreigners Act, in light of what has been stated above by this Court. The said decision may be taken within a period of 8 weeks, with due compliance of principles of natural justice, providing him an opportunity to represent.”

15. Following the aforementioned judgments as well as another judgment of this Court in ***Bathlomew Lkechukwu @ Charles v. Union of India, W.P. (Crl.) 2146/2019***, decided on 30.01.2020, another Co-ordinate Bench of this Court in ***Charles Kingsley Okakso (supra)***, held that once the Applicant was released from prison after having undergone his sentence, he could not be kept in a detention centre indefinitely. The Court directed the release of the Applicant forthwith from the detention centre and further directed that the FRRO shall take a decision with regard to the visa application of the Applicant taking into account that he may be wanted in another criminal cases in India. Relevant paragraphs are as under:-

“12. In Bathlomew Lkechukwu @ Charles v. Union of India, W.P. (Crl.) 2146/2019, a Co-ordinate Bench of this Court vide order dated 30th January, 2020, while dealing with a foreign national who was being kept in a detention centre, despite having been acquitted of the charges, observed that the foreigner could not be kept in a detention centre indefinitely. The relevant observations of the Court are set out below:



“3. Plainly, the petitioner cannot be detained indefinitely. Even if it is found that the petitioner’s presence is required in India on account of the appeal filed by NCB, an appropriate visa is required to be issued to him.

4. The petitioner has been in the said deportation camp since 03.12.2018. The petitioner is either required to be issued a visa or is required to be deported. In any event, he cannot remain in a deportation camp indefinitely.”

(Emphasis Supplied)

13. In light of the aforesaid judgments, once the applicant has been released from prison after having undergone his sentence, he cannot be kept in a detention centre. Continuing to hold the applicant in a detention centre would amount to violation of his rights under Article 21 of the Constitution of India. The applicant cannot be detained in a detention centre indefinitely.

14. Taking into account that the applicant may be wanted in other criminal cases in India and having regard to the other facts and circumstances, the FRRO shall take a decision with regard to the visa application of the applicant.

15. It is directed that the applicant be forthwith released from the detention centre. At the time of his release, the applicant shall furnish his permanent address and mobile number(s) to the FRRO.”

16. From a conspectus of the aforementioned judgments, the only inexorable conclusion that can be drawn is that Courts cannot, as a part of the order enlarging a foreign national on bail or acquitting/discharging or as in this case convicting but sentencing for the period of imprisonment undergone, simultaneously pass a direction to detain the person at a deportation centre. As observed in ***Emechere Maduabuchkwu (supra)***, detention centre is not a place for judicial custody but a place where foreign national is detained on an Executive order and this is the prerogative of the Competent Authority under the Foreigners Act. In light of this observation of the Co-ordinate Bench coupled with the observation that Courts cannot as



a part of enlarging foreign national on bail direct the person to be sent to a detention centre, the argument of the learned ASC that there is no challenge to the order dated 07.04.2021 passed by learned M.M., South District, Saket Courts has no merit. Once the Petitioner was enlarged on bail, he cannot be detained without cause and due process of law. Pendency of trial in case FIR No. 481/2016 also, in my view, cannot be a reason enough to detain the Petitioner, as he is yet to be proved guilty post-trial. Therefore, counsel for the Petitioner is right in contending that the detention of the Petitioner in the deportation centre, in the present circumstances of this case, is illegal.

17. In view of the aforementioned facts and the judgments, it is directed that Petitioner be released forthwith from the deportation centre, subject to the Petitioner furnishing his permanent address and mobile number(s) to FRRO. The mobile phone shall be kept operational and active at all times. Petitioner will continue to report to the local police station every Saturday at 10:00AM. Since the Court is apprised that passport of the Petitioner, which is valid till 27.03.2028, is lying deposited with the Trial Court, no further direction is required in this respect at this stage. It is an uncontroverted position that Petitioner has already furnished bail bonds in the sum of Rs.20,000/- to the satisfaction of the Trial Court. Insofar as the visa of the Petitioner is concerned, it is stated by Ms. Richa Dhawan, on instructions, from the officer of the FRRO department, present in Court, that Petitioner will have to make a fresh application as the earlier application filed by him is no longer valid in view of the rule position that the application remains valid only upto four months from the date of application. Counsel for the Petitioner submits that Petitioner will make a fresh application for visa. If



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and when such an application is filed by the Petitioner, the decision will be taken by the FRRO, in accordance with law.

18. Petition stands disposed of with the aforesaid directions.

19. Copy of the order will be sent to the FRRO, R.K. Puram Office, Delhi for information and necessary compliance.

JYOTI SINGH, J

JANUARY 23, 2024/shivam

Signature Not Verified

Digitally Signed by: KAMAL
KUMAR
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