

COURT STAMP

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO: 10129 OF 2007
IN THE MATTER OF:

An application made under Article 102 (2) of the Constitution of People's
Republic of Bangladesh

-And-

In the matter of

Md. Sadaqat Khan (Fakku) and 10 others...Petitioners

-Versus-

The Chief Election Commissioner, Bangladesh Election
Commission, Block – 6, Sher-e-Bangla Nagar, Dhaka and
others.....Respondents

Mr. Md. Rafiqul Islam Miah with Mr. Md. Hafizur Rahman
.....For the Petitioners

Mr. Azim Khair Manna, DAG, with Mr. Md. Zafar Imam, AAG
and Mr. Md. Monjur Alam, AAG
.....For the Respondents

Heard on 05-05-08 and judgment 18-05-2008

Present:

Mr. Justice Mohammad Abdur Rashid

And

Mr. Justice Mohammad Ashraful Islam

Mohammad Abdur Rashid, J

The above Rule NISI was issued asking the respondents, the Election Commission and others to show cause as to why they should not be directed to enroll the names of the petitioners as well as other adult Urdu-speaking people living in camps in different parts of Bangladesh in the Electoral Roll and register them as voters.

The petitioners who are eleven in number obtained the above Rule as residents of Football Ground Camp at Mirpur excepting petitioner No, 3, resident of Non-local Relief Camp at Mirpur.

Their common case, in short, is that before and after creation of Pakistan on 14 August 1947, the ancestors of the petitioners as well as other Urdu-speaking Muslims left their home in India and immigrated to the then East Pakistan, settled and started business in different districts. They were recognized as citizens of erstwhile Pakistan and many of them got Government Service in the then East Pakistan.

In course of time, many of them who came from the states Uttar Pradesh, Bihar and Bengal and so on died long before liberation of Bangladesh leaving behind their children in the territory now comprised Bangladesh. Several generations passed before liberation of Bangladesh. After liberation of Bangladesh in 1971, said Urdu-speaking people were housed in 116 camps in different parts of Bangladesh in 1972 with the help of International Committee of Red – Cross,

As they are residing in Bangladesh since before and after liberation of Bangladesh, they are citizens of this country by birth and otherwise and they are therefore entitled to be enrolled in the electoral rolls and registered as voters. On the prayer dated 05-02-76 of Mrs. Rajibun Nessa, mother of petitioner No. 2 and 6 and grandmother of petitioner 7 and 8 for citizenship to the Secretary, Ministry of Home Affairs, a Section officer of said Ministry by his memo 904/IMM/111 dated 30-09-76 informed them that they were citizens of Bangladesh under Article 2 (11) of the Bangladesh Citizenship (Temporary Provision) Order, 1972 (President's Order No. 149 of 1972) hereinafter referred to as PO No. 149 of 1972 and so they were not required to acquire the Bangladesh citizenship afresh. Annexure-A

Lastly on 26-06-07, a Senior Assistant Secretary of the Election Commission informed the Executive Director of Al-Falah, non-governmental organization of Bangladesh in connection with his letter dated 11-06-07 that a letter dated 14-06-07 under the signature of the Chief Election Commissioner was sent to the Chief Adviser for urgent decision on the question of said Urdu-speaking people. A copy of said letter of the Chief Election Commissioner was also annexed hereto as Annexure-B. Thereafter, various news clippings on the conditions of the Urdu-speaking people that appeared on different occasions in the National media were annexed to the writ petition.

It is also stated that registration of voters was completed in the Districts of Rajshahi Rangpur, Khulna and Mymensingh but none of the Urdu-speaking people living in the camps of those Districts was enrolled in the Electoral Rolls of 2007. A coordinating meeting was held at Mirpur Uddyan School on 10-11-07 at the invitation of the Commissioner of Ward No. 3 of Dhaka City Corporation in presence of High Officers of Bangladesh Army, District and Thana Election Officers, Local Assistant Registration Officers, Supervisors, Data/ Information Collectors, Identifier Committee and others for commencement of registration. In the meeting, District

Election Officer referring the instructions of the Election Commission instructed the Supervisors; Data/ Information Collectors, Identifier and other concerned officers not

-3-

to enroll the names of the Urdu-speaking camp dwellers in the on-going registration of voter list. Registration of voters commenced in Dhaka on 20-11-07 But Data collectors did not collect the names of the Urdu-speaking people who are living in different camps of the country and register them as voters in spite of their repeated requests.

Mr. Md. Rafiqul Islam Miah, learned senior advocate for the petitioners took us through the writ petition and submitted that under the Citizenship Act, 1951 and Bangladesh Citizenship (Temporary Provision) Order, 1972 the petitioners and other Urdu-speaking people who are citizens and were already recognized by the government to be citizens of the country and are accordingly entitled to be enrolled in the electoral rolls; and the Election Commission also felt the need of registering such Urdu-speaking people as voters and accordingly, on 14-06-07 wrote to Chief Adviser ; but no decision has yet been communicated to the Election Commission by the Government and consequently , the Urdu-speaking people are illegally excluded from the process for registration of voters.

He narrated to us the deprivation and sufferings of the people for long for want of recognition as citizens and submitted that if they continue to be left out from registration as voters and giving National Identity Card their suffering would further increase.

He also cited an unreported decision of this Division dated 5 May 2002 in the case of Mohammad Abid Khan and others v. Bangladesh and others of writ petition No. 3831 of 2001 and Mukhtar Ahmed v. Bangladesh: (1982) 34 DLR 29. He informed that after the Rule was made absolute eleven petitioners of said Writ Petition No. 3831 of 2001 were enrolled as voters. Urdu-speaking people who are living outside the camps were already registered as voters and National Identity Card but those who are living in aforesaid 116 camps, known as Geneva Camps in different parts of Bangladesh are not being registered as voters.

The Election Commission has not appeared. An affidavit –in-opposition on behalf of respondent No.3, the secretary of Ministry of Home Affairs was filed. In the affidavit, it is stated that according to law the Urdu-speaking people living in Geneva camps are not living temporarily. These camps were set up by the International Committee of Red Cross (ICRC) for these people as halfway homes to Pakistan. Historical background does not automatically make citizens of Bangladesh. The petitioners and/or their forefathers were not born in the territory now called Bangladesh. Citizenship in Bangladesh is determined and regulated by law (Article 6 of the Constitution of Bangladesh)

With regard to Annexure-A dated 30-09-76, it is stated that veracity of the letter could not be ascertained as the files are not supposed to be retain till now. But having regard to existing laws relating to citizenship in Bangladesh, the letter does not seem to be genuine and answering respondents cannot agree with the contents of the letter. With regard to letter dated 26.06.07 Annexure – B. it is however stated

that citizenship issue of the petitioners is to be resolved by the Government by enacting legislation or otherwise.

- 4 -

Positive case of answering respondent is that the Urdu-speaking people living in camps are not Bangladeshis citizens and therefore are not entitled to be included in the voter list. Any such inclusion is illegal and liable to be struck down for having been done, presumably, by suppressing the vital fact of their nationality. Any instruction for not enrolling Non-Bangladeshi persons in the voter list is lawful.

It is further stated that voter list is prepared in accordance with provisions laid down Electoral Roll Ordinance, 2007. Anybody whose name does not appear in the list can move by way of an appeal the appropriate authority unless does not disqualify to be a voter on legal ground. Officers responsible for preparing voter list have to act in accordance with law and they cannot act upon request of the petitioners. With regard to the judgment and order of Writ Petition No. 3831 of 2001, it is also claimed that the solicitor office was instructed to Appellate Division.

Mr. Azim Khair Manna, learned Deputy Attorney General submitted that writ petition on behalf of Urdu-speaking people who are living in 116 camps over the country is not maintainable since they filed the writ petition without exhausting the procedure for being voter in accordance with law.

He also submitted that the petition being enemy aliens or their progeny are not entitled to be Bangladeshi citizens under section 4 (b) of the Bangladesh Citizenship Act, 1951 and article 2B (1) (1) of PO No. 149 of 1972 in view of their loyalty to Pakistan.

Before we proceed to consider the respective cases of the parties before us, we must first mention that who when asked the solicitor office to move the Appellate Division against the aforesaid judgment and order dated 05-05-03 of this Division are missing in the affidavit sworn on behalf of respondent No.3, Secretary of the Ministry of Home Affairs. The affidavit is also silent on the request vide letter dated 14-06-07 sent by the Chief Election Commissioner to the Chief Adviser for resolution of the issue of enrolment of the Urdu-speaking people living in different camps of Bangladesh, and if the letter did not attract any attention of the Government is also missing.

In the letter dated 14-06-07 written by the Chief Election Commissioner to the Chief Adviser his elucidated the condition, status and standing of Urdu-speaking people. Neither the letter nor its contents was denied specifically in said affidavit of respondent No. 3. We can therefore rely upon the letter in order to understand the issue facing us.

In the letter, it is stated that immediate after the independence of Bangladesh, two streams of Urdu-speaking people were to be found in Bangladesh. One group known as the "Stranded Pakistanis" had sworn their allegiance to Pakistan and wanted to go back to that country at any cost. The others, accepted the emerging

reality, swore their allegiance to Bangladesh and merged with the mainstream society and polity.

- 5 -

About 300,000 Urdu-speaking people are now living in Bangladesh. Of them, 160,000 live in 116 camps set up by International Committee of Red Cross (ICRC) at different parts of the country. Many of them were born after 1971 or were minor in that year.

The Election Commission did not face any problem with regard to Urdu-speaking people living all over the country outside the ICRC camps. They are citizens of Bangladesh and have been enlisted in the electoral rolls by following the criteria set for the purpose. But the election commission was facing difficulties to register the Urdu-speaking people living inside the camps as voters due to complications relations to the citizenship of Bangladesh.

The residents of the ICRC camps may be broadly divided into two categories:

- (i) those who swore their allegiance to Pakistan and had in writing expressed their desire to take up residence in that country ; and
- (ii) those who were of minor age at the time of liberation of Bangladesh and were not mature enough to express any preference as to their citizenship even if their parent had opted for Pakistan and those who were born in Bangladesh after 16th December , 1972 (the year might be wrongly quoted in place of 1971)

He also referred to the judgment and order of the aforesaid Writ Petition No. 3831 of 2001. He solicited an urgent decision in the matter of citizenship of the people. .He reasoned that after introduction of National Identity Card as a condition for delivery of a number of services, these people may lose access to many services they currently enjoy. Even renewal of a rickshaw license would require presentation of an ID card and no ID card will be issued to a person who is not a citizen of Bangladesh.

Lastly, it is also stated that the Commission has considered the matter and it was of the view that the time has come to look at the issue objectively and with compassion. The case of the Urdu-speaking people needs to be separated from “stranded Pakistanis” and a decision on their citizenship may be taken expeditiously. It also desired the Chief Advisor may consider holding an inter-ministerial meeting with all relevant government agencies with the participation of Election Commission.

We wanted to hear the Attorney - General upon urgent issue of immense public importance and the communication of the Election Commission but he preferred not to appear. Mr. Deputy Attorney - General who appeared ultimately told us that nothing happen upon such requisition of the Election Commission.

Now, the issue that arose on the aforesaid facts and deserves consideration is whether or not Urdu-speaking living in different camps set up by ICRC of Bangladesh are citizens of Bangladesh.

In the letter of the Election Commission, condition of the Urdu-speaking people in Bangladesh particularly 160,000 who are living in 116 camps set up by the ICRC in

- 6 -

different parts of the country became so clear, which does not need any further material. The Election Commission has also tried to highlight the urgency for resolution of the citizenship on the ground of introduction of the National Identity Card there could not be further wastes if they are given any ID card.

Living aside the ‘ stranded Pakistanis ‘ who had sworn their allegiance to Pakistan, many of them born after 1971 and few of them are minor in that year. Under the citizenship Act, 1951 one may be a citizen of Bangladesh by birth, by descendant and / or by migration or by registration and also incorporation of territory.

Article 6 of the Constitution provides that the Citizenship of Bangladesh shall be determined and regulated by law. The citizens of Bangladesh shall be known as Bangladeshi. There are two laws dealing with the citizenship of Bangladesh, namely, the Citizenship Act, 1951 and Bangladesh Citizenship (Temporary Provision) Order, 1972 (President’s Order No. 149 of 1972) hereinafter referred to as PO No. 149 of 1972.

A resident of Bangladesh may become citizen of the country in various ways under the Citizenship Act, 1951 hereinafter referred to as the Act. All the commencement of the Act on 13-04-51 and thereafter under section 3, 4 and 5 every person who or any of his parents or grandparents was born in the territory now included in Bangladesh shall be a citizen of Bangladesh by birth and descent subject however to certain exceptions by operation of law. Under section 6, 8, 9 and 10 of the Act , certain person may acquire the citizenship of Bangladesh by migration, residing abroad, naturalization and marriage for which certificate and / or registration of specified authority shall be necessary.

PO 149, 1972 came into force on 26-03-71 provides under article 2 that:

“ Notwithstanding anything contained in any of the law, on the commencement of this Order, every persons shall be deemed to a citizen of Bangladesh. –

- (i) who or whose father or grand-father was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25 day of March, 1971 and continues to be so resident or ;
- (ii) who was a permanent resident of the territories now comprised in Bangladesh on the 25 day of March, 1971 and continues to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force;

Provided that if any person is a permanent resident of the territories now comprised in Bangladesh or his dependent is, in the course of his employment or for the pursuit of his studies, residing in a country, which was at war with, or engaged in military operation against Bangladesh and is being prevented from returning to Bangladesh, such person or his dependents, shall be deemed to be resident in Bangladesh.”

Disqualification to the above article is provided under article 2 B, which is hereunder,

- 7 -

- (1) “ Notwithstanding anything contained in article 2 or any other 1 for the time being in force, a person shall not be , except as provided in clause 2), himself to be a citizen of Bangladesh if he –
- (i) Owes, affirms or acknowledges, expressly or by conduct, allegiance to foreign state or
 - (ii) is notified under the provision of Article 2A ;

Provided that a citizen of Bangladesh shall not, merely by reason of being of a citizen or acquiring citizenship of a state specified in or under clause (2) cease to be a citizen of Bangladesh.

- (2) The Government may grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state which the Government may, by notification in the official gazette, specify in this behalf.”

In view of above provisions of the Act and President Order No. 149 of 1972, every person who or whose father or grandfather was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25 day of March, 1971 and continues to be so resident unless disqualified under Article 2 B of PO No. 149 of 1972 shall be citizen of Bangladesh. In the acquisition of such citizenship, the laws have made no discrimination in any way on the ground of ethnicity, language, sex etc.

Members of the Urdu-speaking people wherever they live in Bangladesh if they answer the above qualifications shall become citizen of Bangladesh and in view of the above provisions have already acquired the citizenship of Bangladesh by operation of law and no intervention of the Government is necessary. Such people have accordingly become eligible with the attainment of majority for enlistment as voters under Article 122(2) of the Constitution and the Election Commission is under constitutional obligation to enroll them in the electoral rolls as voters. No functionary of the Republic can deny such rights of the Urdu-speaking people who want to be enrolled as voters.

On the disqualification under Article 2 B of PO No. 149 of 1972, this division had an occasion to deliberate in the case of Mukhtar Ahmed v Bangladesh. By a memorandum dated 05-10-97 the Ministry of Home Affairs informed the petitioner that he was not qualified to be a citizen of Bangladesh because he had registered his name from ICRC form for going over to Pakistan. Considering the

above laws, this Division made the Rule absolute declaring the Notification issued without any lawful authority and was of no legal effect on the view inter alia that,

“ Be that as it may. there is nothing on record to show that the petitioner who is a citizen of Bangladesh has incurred any disqualification to be penalized by deprivation of his citizenship. We are, therefore, of the opinion that after emergence of Bangladesh the petitioner became a citizen of Bangladesh by the operation of law and continues to be a citizen of this country.”

- 8 -

Those who are termed and still call them to be “Stranded Pakistanis” by owing affirming and acknowledging, expressly or by conduct allegiance to a foreign state, say, Pakistan, they may belong to a class and cease to be citizens of Bangladesh. Those who have renounced their citizenship and / or waiting to leave for Pakistan may be left to their fate. The Election Commission is under no obligation to enlist them as voters.

Question of citizenship of Urdu-speaking has got another aspect, which is very important from the constitutional perspective. Miseries and sufferings of such people due to statelessness were time to time reported in the national media, electronic and print. Besides, the reasons mentioned in the letter of the Election Commission, they are constantly denied the constitutional rights to job, education, accommodation, health and a decent life like other citizens of the country. By keeping the question of citizenship unresolved on wrong assumption over the decades, this nation has not gained anything rather was deprived of the contribution they could have made in the nation building. The sooner the Urdu-speaking people are brought to the mainstream of the nation is the better.

Now, with regard to the issue of maintainability of the writ petition without exhausting statutory provisions of enrollment, it would be sufficient to say when the question of citizenship of Urdu-speaking people is left unattended for decades on the constitutional ground that could not be got resolved by individual application. The Chief Election Commissioner having found difficulties in the enrollment of such people wrote to the Chief Advisor for policy direction and till date the Chief Advisor could not find time to give any policy guidance. This question of citizenship could never be decided in statutory forum/. it is well settled that constitutional question can only be decided in properly constituted writ petition under Article 102 of the Constitution.

Mr. Rafiqul Islam Miah also prayed for direction upon the Election Commission for registration of the Urdu-speaking people en block. The petitioners do not appear to represent all such people. Secondly, in the absence of any law, no citizen can be forced to register as a voter and the Election Commission also can not register every citizen against his / her will. Till now, option lies under the law with a citizen to enroll as a voter.

For the reasons aforesaid, we find the petitioners are citizen of Bangladesh and accordingly, eligible and entitled to be enrolled as a voter in the electoral roll.

-9-

In the result, the Rule is made absolute without however any order as to cost.

The Election Commission is directed to enroll the petitioners and other Urdu-speaking people who want to be enrolled in the electoral rolls and accordingly, give them National Identity Card without any further delay.

Let a copy of this order be sent to the Election Commission at once for guidance and necessary action

M.A. Rashid

Md. Ashfaqu Islam. J

I agree

Md. Ashfaqu Islam

A. Begum / 10.06.08

Read by:

Exmn By Signed 11/06/08

