



LAW week

Govt. seeks another time extension

The Supreme Court expressed dissatisfaction for delaying the implementation of its directives towards separation of the judiciary when the Attorney General sought a further extension of four months to do so. This is the 18<sup>th</sup> extension sought by the Attorney General since the court issued 12 points directives in its historic judgement in Mazdar Hossains case in 1999. The court advised the Attorney General to convey its sentiment to the Government. Highly embarrassed Attorney General AF Hassan Arif submitted that developments toward implementation of the court's directives were not communicated to him and pleaded for adjournment of hearing on the petition for two weeks. The court adjourned the hearing till 19<sup>th</sup> April but asked the Attorney General to come up with an affidavit citing specific reasons for seeking further extension. - *The Daily Star, 14 April 2004.*

Moudud asks for suspension of policemen

Law, Justice and Parliamentary Affairs Minister Barrister Moudud Ahmed asked the authorities to suspend the policemen who took an attempted murder case in which a 3-year-old child was implicated. The law minister rang up the home secretary and the Inspector General of Police (IGP) on the bizarre matter and asked them to suspend the policemen who took the case after newspapers ran reports on Wednesday 14th April. The 3 years old baby boy Iman Ali, accused in an attempted murder case filed with Sutrapur Police Station, surrendered before the Court of Chief Metropolitan Magistrate, Dhaka on 13th April in his father's lap and prayed for bail. The sensational appearance drew hundreds of onlookers to the court premises, as the baby boy looked horrified at the court environment with lots of policemen, lawyers, journalists and litigants around. Metropolitan Magistrate Mohammad Towfiqul Alam, however, granted bail to Iman upon a bond of Tk 5,000 with two guarantors - the father and one of his lawyers. The prosecution did not oppose the bail petition. - *The Daily Star, 16 April, 2004.*

Special court for money laundering on cards

The Government may setup special court for dealing with money laundering cases, Law, Justice and Parliamentary Affairs Minister said it on Tuesday, April 13<sup>th</sup>. He said the government is now taking opinions of all stakeholders to amend the Prevention of Money Laundering Act, 2002 to make it more effective and dynamic. Speaking at a seminar on "Anti-Money Laundering" which was organised by Citibank NA at a local hotel in Dhaka. He further added "With the introduction of the anti-money laundering law, smuggling and narcotics business has decreased in the country." Lauren Pickett, director Global Anti-Money Laundering Training at Citigroup also spoke at the seminar. - *The Daily Star, 14 April 2004.*

Health minister to face trial on graft charge

Health Minister Khandaker Mosharraf Hossain is to face trial on corruption charges brought by the Bureau of Anti-corruption (Bac) in 1998. His petition for quashing the case pending with the lower court was dismissed by the High Court Division on Sunday 11<sup>th</sup> April. With its order the stay on trial process stands vacated. A division bench comprising Justice Sheikh Rezwana Ali and Justice AFM Ali Asgar pronounced the verdict discharging the rule after a lengthy hearing. Bac filed the case during the Awami League rule against Mosharraf who was minister in charge of Energy and Mineral Resources during the previous BNP regime. He was accused of awarding Tk 678.44 crore work to a foreign company for exploration of Baropukuria coal at Dinajpur without floating tender to accrue personal financial gains and thus caused a loss of Tk 16 crore to the state. Charge sheet was submitted to the court and the trial was on until the High Court Division stayed the process upon the petition for quashing the case. - *UNB, Dhaka, 13 April 2004.*

Baishakhi Mela row reaches Supreme Court

The High Court Division on 13th April directed the City Corporation to submit reports on the steps the corporation has so far taken to maintain and preserve the Dhanmondi playground in line with the Wetland Protection Act 2000. The Bangladesh Small and Cottage Industries Corporation had planned a seven-day Baishakhi Mela on the ground that begins from 14<sup>th</sup> April on the occasion of *Pahela Baishakh*. A division bench of Justice MA Matin and Justice Syed Refat Ahmed has asked the Dhaka City Corporation to say the action it has taken to remove unauthorised structures on the playground. The bench asked the City Corporation to submit the reports within 20 days on a writ petition filed by the Bangladesh Paribesh Andolan and the Institute of Architects Bangladesh for an injunction on the holding of the fair. But the court imposed no injunction on the holding of the fair, marking the Bangla New Year, on the ground, owned by the City Corporation. The industries corporation, however, did not take any permission from the city corporation. Holding such fairs on the playground is in violation of the Wetland Protection Act 2000. The Act does not allow any changes in the design and structure of any open space, playground, park and natural wetland in the metropolitan cities, district headquarters and municipal areas. Bangladesh Paribesh Andolan and the Institute of Architects on Saturday served a legal notice on the City Corporation, the Public Works Ministry and Rajuk to immediately stop the holding of the fair. The notice said holding fairs at such places is a violation of Section 5 of the act. The section bans use of playgrounds for any other purposes. The notice asked the authorities concerned to take steps by 2.30pm on Sunday 11<sup>th</sup> April. Paribesh Andolan and the institute will, otherwise, move to the High Court to seek redress under Article 102 of the constitution. The organisations filed the writ petition on Tuesday 13<sup>th</sup> April at the High Court as there was no move by the agencies concerned by the deadline. - *New Age, 14 April 2004.*

LAWSCAPE



A doctor and a lawyer in two cars collided on a country road. The lawyer, seeing that the doctor was a little shaken up, helped him from the car and offered him a drink from his hip flask. The doctor accepted and handed the flask back to the lawyer, who closed it and put it away. "Aren't you going to have a drink yourself?" asked the doctor. "Sure, after the police leave," replied the lawyer.

\*\*\*\*\*

A doctor and a lawyer were talking at a party. Their conversation was constantly interrupted by people describing their ailments and asking the doctor for free medical advice.

After an hour of this, the exasperated doctor asked the lawyer, "What do you do to stop people for asking you for legal advice when you're out of the office?"

"I give it to them," replied the lawyer, "And then I send them a bill." The doctor was shocked, but however, agreed to give it a try. The next day, still feeling slightly guilty, the doctor prepared the bills. When he went to place them in his mailbox, he found a bill from the lawyer.

\*\*\*\*\*

A woman, who was diagnosed as being terminally ill, was told she needed a brain transplant using a 1-1/2 pound brain. She was also informed that a 1-1/2 pound brain of a surgeon would cost \$500 and a 1-1/2 pound brain of a movie star would cost \$600.

She replied that since her father had been a famous lawyer, she would prefer a lawyer's brain.

"That's fine," she was told, "but that will cost you \$10,000." "What?" she replied incredulously, "If a surgeon's brain only costs only \$500, why does a lawyer's brain cost \$10,000?"

"Do you have any idea how many lawyers it takes to get 1-1/2 pound of brain?" the doctor replied.

Star JUDGEMENT review

Consular notification and death penalty: The ICJ's judgement in Avana

WILLIAM J. ACEVES

In January 2003, Mexico instituted proceedings in the International Court of Justice ("ICJ") against the United States, alleging violations of the Vienna Convention on Consular Relations (Vienna Convention). The Vienna Convention Provides that foreign nationals must be informed, without delay, of their right to communicate with their consulate when they are detained by law enforcement officials. It also requires law enforcement officials to notify the appropriate consulate if the foreign national so requests. In Avana, Mexico argued that the United States had failed to comply with the Vienna Convention in 54 separate cases involving Mexican nationals who had been convicted and sentenced to death. On March 31, 2004, the ICJ issued its ruling in the case, holding that the United States had violated the Vienna Convention in most of those cases and calling for the United States to provide review and reconsideration of the convictions and sentences in the underlying criminal proceedings.

Background

For decades, Mexico has provided consular assistance to its nationals travelling in the United States. In 1942, Mexico and the United States entered into a bilateral consular agreement "because of their geographic proximity and the frequent inter-state travel of their respective citizens. In 1965, Mexico ratified the Vienna Convention in order to supplement its bilateral consular agreements and to pro-

United States have met with limited success. State and federal courts have declined to overturn convictions or suppress evidence when violations of the Vienna Convention have occurred, even in capital cases.

Mexico's Application to the ICJ

On January 9, 2003, Mexico filed an application instituting proceedings against the United States in the International Court of Justice. Mexico's application based on the jurisdiction of the Court on the Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol") that accompanies the Vienna Convention and that both countries have accepted.

The Mexican application alleged that 54 Mexican nationals had been "arrested, detained, tried, convicted, and sentenced to death" in proceedings in which the competent authorities failed to comply with their obligations under the Vienna Convention. These violations "prevented Mexico from exercising its rights and performing its consular functions pursuant to Articles 5 and 36 of the Vienna Convention. As a result of these violations, Mexico argued that it "had suffered injuries in its own rights and in the form of injuries to its nationals.

In a separate request for the indication of provisional measures of protection, Mexico emphasised that three of its nationals-Cesar Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera-faced executions in the next six months. The request

admissibility challenges raised by the United States. The Court found that the jurisdictional challenges were more appropriately addressed at the merits stage. Several admissibility challenges were also dismissed for this reason. The remaining admissibility challenges were dismissed on various grounds. For example, the Court found that exhaustion of local remedies within the United States was not necessary because Mexico was requesting the Court to rule on the violation of rights that it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals. In addition, the Court held that Mexico had not waived its right to bring the case before the ICJ, even if it had delayed in doing so. "[O]nly a much more prolonged and consistent inaction on the part of Mexico . . . might be interpreted as implying such a waiver." The Court also rejected the claim that Mexico's own alleged failure to comply with the Vienna Convention precluded its action against the United States. The Court found that the Vienna Convention was designed to facilitate consular practice and promote friendly relations among member states. "Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim.

Having resolved the jurisdictional and admissibility challenges, the Court then considered the merits of Mexico's claim. First, the Court found that the United States

that review and reconsideration must be effective and must provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." Thus, the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. In addition, the Court stated that review and reconsideration must occur "with a view to ascertaining whether in each case the violation of Article committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." Thus, the Court declined Mexico's request to find that a Vienna Convention violation must automatically result in the partial or total annulment of conviction or sentence. The Court also averred that it was not determining the correctness of any conviction or sentence issued by a U.S. court.

Finally, the Court indicated that such review and reconsideration must apply to both the conviction and sentence. It must also take place within the judicial process and not through the clemency process. "[T]he clemency process as currently practised within the United States criminal justice system . . . is not sufficient in itself to serve as an appropriate means of 'review and reconsideration.'

The Court also focused on prospective relief. First, the Court acknowledged the considerable efforts of the United States to ensure, in good faith, that law enforcement authorities complied with the Vienna Convention. These efforts included extensive outreach efforts by the US State Department to inform state and local law enforcement officials about the Vienna Convention and its attendant obligations. Thus, the Court found

that the U.S. commitment to ensure implementation of specific measures in performance of its obligations under Article 36 constituted a sufficient guarantee and assurance of non-repetition. Second, the Court held that any failure of the United States to inform Mexican nationals of their right to contact their consulate in future cases where Mexican nationals are sentenced to severe penalties would raise a new set of obligations. In these cases, the United States "shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention. . .

Conclusion

For the second time in three years, the International Court of Justice has found the United States to have violated the Vienna Convention on Consular Relations. But the Avana decision is different from the earlier LaGrand decision in several respects. In Avana, the Court indicated that law enforcement officials must inform a foreign national of his or her consular rights once there are grounds to believe that the person is a foreign national. Indeed, the Court suggested that this notice could be issued along with the reading of Miranda rights.

The Court also clarified the meaning of review and reconsideration, a remedy first recognised in LaGrand. The Court held that review and reconsideration requires judicial review and that the clemency process alone is insufficient. Furthermore, the Court held that review and reconsideration requires a determination of whether the Vienna Convention violations caused actual prejudice to the defendant. Such determinations can only be made on a case-by-case basis. While ICJ decisions have no binding force except between the parties and in respect to that particular case, the Court made clear that its analysis in Avana was not limited to Mexican nationals and that it applies with equal rigor to cases involving other foreign nationals.

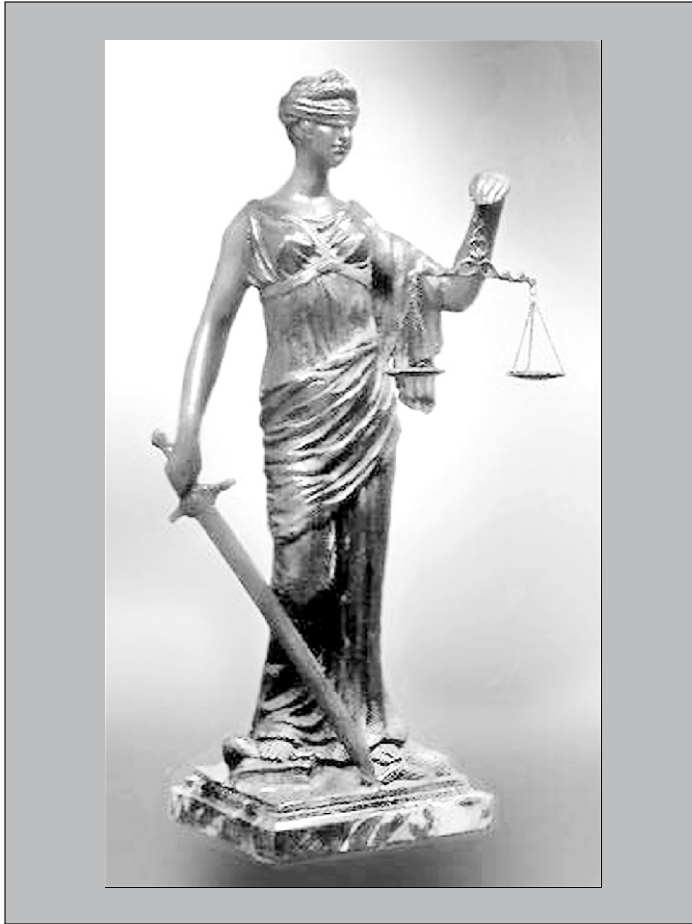
To remedy these violations, the Court held that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals." In order to satisfy the Court's judgement, such review and reconsideration must take into account the rights set forth in Article 36 as well as the relevant portions of the Court's opinion on this issue. The Court indicated

William J. Aceves is a Professor of Law and Director of the International Legal Studies Program at California Western School of Law. Courtesy: American Society for International Law (ASIL).

READER'S queries



Your Advocate



This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

Q: My mother purchased few lands in our Grand Father's village. My mother died in 1995. Since we live in Dhaka, so our maternal cousin used to give the land lease to other people, collected money and handed over the money to our mother. My mother gave all the original papers of those lands to him for proper management. After our mother's death, he stopped giving us money. Recently I met him and told him to return the documents but he refused. I informed my relatives of the matter and they asked him to return those papers but he denied. It is mentionable here that local people informed me that my cousin is trying to grab our land and sell it to others. Under this circumstances I want to know - a) How we can get our land related papers back from him and can he grab our land by using those papers or sell it out to others? b) How can we get back the money, which he has taken by giving lease of those lands to other people? C) At present since we do not have any original document in our hand, can we sell those lands?

MM. Zaman, Asad Avenue, Dhaka.

**Your Advocate:** This is a common social scenario in our country. Most unfortunate aspect of our lives is bulk of civil litigation in our courts arises out of deceptions and fraud resorted to by siblings and near relatives. Confidence and trust are words that sometimes seem ridiculous. Your maternal uncle behaved properly during the lifetime of your mother but changed complexion as soon as she died. This is so natural that the story does not arouse any curiosity in anybody's mind. You have to proceed advisedly in a well-calculated way. Despite everything that has happened if there is any scope for recovery of the deeds from your maternal uncle by peaceful means it is always advisable to avoid litigation.

Now I revert to your specific questions. It is difficult to recover the documents from the possession of your uncle through litigation. If he has any ill intention he will deny having possessed of such document given by your mother. No, he cannot grab or sell out the land if the title of the same still belongs to your mother. For grabbing the land in any manner your uncle must create some document in his name by fabrication or forgery. He must set up his claim or right on some other paper however fake they may be. So the reply is : He can enjoy or sell the land if he has by now created any document purportedly conferring upon him such title or authority. The question of genuineness of the documents is a question to be decided by court. As to the second question, my reply would be equally cautious. Going for recovery of money in the circumstances through legal actions may prove futile. It is again a case of negotiation on personal level. The inherent defect of your whole claim lies in absence of any document as you have indicated in your third question.

Your whole problem boils down to the question whether there is any transfer of title from your mother by any fraudulent means. Firstly your uncle needs be sounded out as to what he wants to say about it. If any foul-play is suspected or floated you have to embark upon collecting the certified copies of your mother's documents and of the documents suspected or claimed to have been created by your uncle. Having collected the certified copies of documents you have to see a good civil lawyer for an appropriate legal action so as to restore your title in the land. And once the title is restored all your other grievances will find easier avenues of redress.

LAW letter



Tremendous !

Really this is a tremendous news for everybody .No doubt, someone may treat this as an interesting news simultaneously. I think most of the newspaper readers have gone through this news on 14 April in almost every leading newspaper of Bangladesh. There have a photo of a middle-aged man with a child in his arms, Iman Ali, three years old. Yes, he is Iman Ali who has got the bail from the CMM court of Dhaka in the cost of 5 thousands taka for having a complain of attempt to murder against him. In the prima facie this question may arise to everyone, is it really possible for a 3 years old child to take an attempt to murder, who does not know the idea of a crime. Even who has no worldly interest at all. No doubt, Iman Ali's brother or his relatives may commit a crime or there may have an enmity with them. But why an innocent child will be the intended victim of it? So, where we are going day by day? Our morality, humanity? Further, in the FIR of the case Iman Ali's name was not included, nevertheless his name has come to the charge sheet. Okay, let the complaint be! But how it is possible to include the name of a child in the charge sheet without having his name to the First Information report? So we may guess that police has taken up the case without investigation. And this is the real condition of our law and order situation in our country. Shame to me having a member of such a society where even an innocent child is also not safe from me! How I will be answerable to the next generation in future? Well, this is the time to escape us from such a worse situation. We should change our mentality that a child should be above of every enmity. After all, the police should be serious during the investigation. Otherwise a furious dangerous time will knock in our door to damn the whole society!

Atahar Ali Khokon, Student of LL.M, Islamic University, Kushtia

Corresponding Law Desk

Please send your mails, queries, and opinions to: **Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email <dslawdesk@yahoo.co.uk>**