



HUMAN RIGHTS analysis



LAW week



Asylum claim of A K M Mohiuddin Ahmed and Refugee law in Canada

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AK M Mohiuddin Ahmed, a convicted murderer of Bangabandhu Sheikh Mujibur Rahman and his family members is now an issue of talks in the country and beyond. The recent movements surrounding him are also concerns in the area of human rights, rule of law and judicial processes.

The attempted deportation of Mr. Ahmed from the USA has been stopped for time being following a private bill moved in the US House Judiciary Committee by a Democrat Congressman from Washington State, Jim McDermott. On Mr. Ahmed's behalf, an asylum application has also reportedly been submitted to the authority concerned of the Government of Canada and which is now pending (as of available information until 06 June 2007). In this backdrop, it is an issue of public interest what is the regime of asylum and international protection of refugees, and more what is the standard of this in Canada.

At the outset, let us look into the international laws on asylum and protection of refugees and whom is it for.

The basis of international legal regime for asylum and protection of refugees are the Universal Declaration of Human Rights (Article 14), UN Convention on the Status of Refugees 1951 (hereafter, the 1951 Convention) and its Protocol of 1967, and other regional and international human rights instruments.

The State could have its own legislation to deal with the issue of asylum and refugee along side being a party to the 1951 Convention and vice versa. In most of the cases, the States party to the 1951 Convention enacted its own legislation following the spirit of the international instrument. So, far 146 State are parties to the 1951 Convention or its Protocol. (Bangladesh is not a party to either of these).

In case of Canada, it is a party to the 1951 Convention and its Protocol of 1967. In addition, it has a domestic legislation titled The Immigration and Refugee Protection Act (2001, c. 27). The Act received Royal Assent on 01 November 2001 and came into force on 28 June 2002 (source: www.laws.justice.gc.ca).

The Act provides the foundation for the Immigration and Refugee Board (IRB) which is in-charge of asylum and refugee issues. The Board is empowered to hear and decide cases on immigration and refugee matters.

The 2001 Act sets out the core principles and

concepts that govern Canada's immigration and refugee protection programmes. These include provisions relating to refugees, sponsorships and removals, detention reviews and admissibility hearings, and the jurisdiction and powers of tribunals.

There are also other relevant legislations in Canada named Immigration and Refugee Protection Regulations. These deal with temporary foreign workers, students, the examination of persons seeking entry, the permanent resident card, residency obligations, the family class, the selection of skilled workers and business immigrants, refugees, humanitarian and compassionate considerations, inadmissibility, detention and release, pre-removal risk assessments and other enforcement-related matters.

The Regulations were registered on 11 June 2002 and the official versions were published on the Canada Gazette web site on 14 June 2002. It came into force on 28 June 2002. There was an amendment to the Regulation in 2004. There are Refugee Protection Division Rules and Federal Court Immigration and Refugee Protection Rules 1993 (amended in 2005).

The Government of Canada, e.g. Immigration and Refugee Board (IRB) in determining status of a refugee does follow the definition of the same provided in the 1951 Convention. According to Section 96 of the Immigration and Refugee Protection Act: "A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion: (a) is outside each of the countries of nationality and is unable or, by reason of that fear, unwilling to avail him/herself of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of his/her former habitual residence and is unable or, by reason of that fear, unwilling to return to that country."

However, if an individual is involved in the following activity he (she as well) would not be eligible for refugee status in Canada: (i) If there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refugee prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations (Schedule of the Immigration and Refugee Protection Act 2001). However, this provision is again taken from Article

1(F) of the 1951 Convention).

The Canadian Immigration and Refugee Board consists of the Refugee Protection Division, the Refugee Appeal Division, the Immigration Division and the Immigration Appeal Division. The Board is composed of a Chairperson and other members are required to ensure the proper functioning of the Board.

So, the question of international protection arises when an individual is in lack of protection from his/her concerned State for the reasons mentioned earlier. However, the individual has to be fleeing from persecution (e.g. a systematic and sustained violations of human rights on the grounds of race, religion, nationality, membership of a special group or political opinion), but not from prosecution (e.g. process of law for having been involved in a crime).

In case of Mr. Ahmed, he has been convicted on murder charges and been fugitive for a long time. He has been convicted by a court of law in Bangladesh following due processes. He could have been gone to the higher judiciary against the decision of the trial court. But he had been absconding (having patronised from the then ruling party and shelter abroad). So, while he is applying for asylum or refugee status now, it is likely that there is a lack of well-founded fear of persecution for him, which is a prerequisite to be considered for refugee status. Mr. Ahmed has apparently been fleeing from prosecution.

With regard to refugee, the objectives of the Canadian Immigration and Refugee Protection Act 2001, among others, are to recognise that the refugee programme is in the first instance saving lives and offering protection to the displaced and persecuted and also to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution. The Act is to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment in the country of origin. Another important objective of the Act is to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

Again the Act aims to enhance the domestic and international interests of Canada and facilitate cooperation between the Government of Canada, foreign states, international organisations and non-governmental organisations and comply with international human rights instruments to which Canada is signatory.

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But in Mr. Ahmed's case, the 9th Circuit Court of Appeals in the USA observes that: "Ahmed failed to prove by a preponderance of the evidence that his in absentia murder trial and conviction in Bangladesh was fundamentally unfair and, thus, deprived him of due process of law. Therefore, the IJ properly relied on the conviction." (The Daily Star, 05 June 2007).

So, commentator like Mashuqur Rahman opined that Mr. Ahmed has failed to convince the US court that his trial was unfair in Bangladesh. Again the US Court observes: "Ahmed is ineligible for asylum and withholding of removal for two reasons:

- Because he engaged in terrorist activity,

- Because he assisted or otherwise participated in the persecution of others on account of their political opinion.

Even his own account of his actions established that he assisted or otherwise participated in the persecution of persons on account of their political opinion." (The Daily Star, 05 June 2007).

So, now it is a point to see how the Canadian authority would/could make a balance between the underlined principles provided in the Immigration and Refugee Protection Act 2001 (which is consistent with the international legal regime for refugees) and the asylum claim of a convicted murderer, Mr. Ahmed.



LAW opinion

POLITICAL APPOINTMENTS

Higher judiciary should revisit the issue

TMA SAMAD

MR. Chief Justice Ruhul Amin's recent candid remark has stirred the whole nation. He has told a hard truth that the damage done to the judiciary in the recent years will take more than 20 years to remedy.

According to Supreme Court sources, there are 68 confirmed judges in the High Court Division and seven in the Appellate Division including the chief justice.

Out of the 68, the appointments of 41 were confirmed during the regime of BNP-led 4 -party alliance government which had appointed 45 additional high court judges. After the authorities appoint an additional judge and the person serves for two years, the chief justice makes a recommendation for confirming his or her appointment based on performance. As a norm, the government always accepts the chief justice's recommendation.

When a judge's appointment is confirmed, he or she can't be removed unless the person voluntarily resigns or a supreme judicial council removes him/her. And that is why the chief justice said it will take 20 years to cleanse the judiciary.

There have been allegations of partisanship and nepotism in relation to most of the 41 confirmations. There are also allegations that some of the 41 judges had been active leaders of BNP. One additional judge happened to be a BNP law maker in the 6th parliament and there is at least one judge against whom there are specific allegations of corruption. The alliance government made the appointments in four installments. In addition they extended the retirement age of the judges allegedly to place a candidate of their choice as the chief of the caretaker government before the 9th parliament election. The move in turn also extended the tenure of controversial judges.

In the last installment of appointments in August, 2004, there were a leader of Islami Chhatra Shibir. Before ending the term in October 2006, the alliance government confirmed the appointments of judges it had appointed including that of Mr. Faisal Mahmud Faizee whose confirmation had not been recommended by the chief justice.

The Supreme Court Bar Association (SCBA) was always vocal and constantly



protested against the appointments of judges on the basis of political affiliation instead of their merit. Under overwhelming pressure and evidence the alliance government through a supreme judicial council for the first time had to remove one of its appointed judges Syed Shahidur Rahman on grounds of corruption.

The SCBA's serious agitation demanding the removal of another judge Mr. Faisal Mahmud Faizee for tampering his LLB certificate from Chittagong University was utterly fought back by the alliance government since 2005. The agitation took a serious turn tarnishing the higher judiciary's image. Now under the present caretaker government the authorities formed another judicial council after Chittagong University had formally

cancelled Mr. Faisal Mahmud Faizee's LLB certificate.

It is absolutely ridiculous that when such protests were raging former law minister Barrister Moudud Ahmed told the BBC in February 2003 that the government action had been taken in line of the constitution and the laws of the land.

Opposing opinions he held his ground till the last confirmations were made in 2006. It will be appropriate to mention that an institution is built over the years through the efforts and merits of many but it can be destroyed by a single person through whims and misdeeds. In our case it happened through a gentleman who is well known as Chanakya in Bangladesh politics.

In this connection it is pertinent to

mention that while a writ petition was moved challenging the takeover of the president as head of the caretaker government and on the day of pronouncement of judgement a slip passed by the Attorney General adjourned the court resulting in violence in the High Court campus. It was a disgraceful and shameful event for the whole nation. And this happening bears the testimony of ill effect of politicisation of institutions.

In view of the facts and circumstances of the issue and foregoing narrative I intend to add the following:

What the chief justice has said reflects the conscience of the whole nation and as a conscious citizen with some patriotic feeling I also feel like others that the nation must be freed from these of such higher judiciary appointments. We have no reason to borne their expenses if they are incompetent and controversial.

It is a matter of great concern and logical also to think that if the corrupt persons are convicted by the special tribunal and thereafter when they will go for appeal to the higher judiciary are likely to get some favour because these justices are the direct beneficiaries of the former BNP-led four-party alliance government and the offenders will try to influence them. Therefore, the removal process should immediately start now so as to ensure that within shortest possible time the desired result could be achieved.

There is a maxim "Justice should not only be done; it must be seen to be done". We have absolute trust that the chief justice with his characteristic grit and determination will make his desired contribution in this respect unfailingly.

I think it would be relevant to quote the former chief justice Mostafa Kamal, "If a judge cannot understand law, cannot appreciate facts, cannot read or dictate judgments in the open court, it is not too difficult to prove that by reason of physical or mental incapacity he has ceased to be capable of properly performing the functions of his office."

"Painful though it may be I see no other way but to invoke the supreme judicial council if such case of incorrigible judges exists" -- he suggested another options by forming a "council of elders" where a group of retired chief justices would operate greats at the request of the chief justice to oversee the functioning of everyone

holding constitutional posts.

At present, the constitution prescribes that a person shall not be qualified for appointment as a judge unless he is a citizen of Bangladesh and has, for not less than 10 years, been an advocate of the Supreme Court, or has for not less than the same period, held judicial office; or has such other qualifications as may be prescribed by law for appointment as a judge. Our parliament has not enacted any law prescribing the other qualifications for appointment as a judge of the Supreme Court. In future, the criteria for selection of judges should be made and strictly followed so as to make sure that poor calibre person in no way can hold this most dignified position.

In neighbouring India and Pakistan a High Court judge requires at least five years for the elevation from High Court to Supreme Court. The absence of such probation in our constitution has given the opportunity to become an Appellate judge on political consideration within 2 years.

Former Supreme Court judge Mr. Golam Rabbani's proposition for people/people-friendly judicial system is a good concept wherein he has highlighted his experience and pros and cons of the judicial system particularly the ethical foundation of the advocates and the jury system.

In my opinion these propositions can be discussed holding a seminar or workshop and a consensus may be obtained and recommend for future guideline in disciplining the judicial system and uproot corruption.

In conclusion, I urge upon the honourable president, chief of the caretaker government, the chief justice and the law adviser to kindly find out a reasonable solution to resolve the burning issue in the greater interest of the public as well as the country.

TMA Samad is a former director of BARC (Dhaka).

Nasim's graft case

Judge feels embarrassed to hold trial

A Dhaka court felt embarrassed to conduct trial of a graft case against detained former home minister Mohammad Nasim while another Dhaka court issued an arrest warrant against Jatiya Party (Manju) leader Anwar Hossain Manju in a criminal case. The hearing on a seven-day remand prayer to interrogate controversial businessman Giasuddin Al Mamun in connection with an extortion case will be held in his presence. Besides, the High Court granted anticipatory bail for three months to former minister Chowdhury Kamal Ibne Yusuf along with three others and ex-BNP lawmaker Nazimuddin Alam and a dozen others in separate criminal cases. Judge Malik Abdullah Al Amin of the Special Court for Dhaka Division felt embarrassed to conduct trial of the graft case against Nasim and AHS Rahman, director of Consolates Limited, filed five years back. The court also sent the case to the Dhaka Metropolitan Sessions Judge's Court saying he could not dispose of the case. After receiving the case file, Judge Mohammad Azizul Haq of the Dhaka Metropolitan Sessions Judge's Court too sent the case to the Third Special Court - set up at Shere-e-Bangla MP Hostel - for its quick disposal. However, it could not be ascertained immediately what caused embarrassment to the judge. - *The Daily Star*, June 4.

UN offers help to recover laundered assets

The visiting UN counter-terrorism team offered technical support in recovering laundered assets from overseas and help Bangladesh Bank's (BB) coordination with other central banks' financial intelligence units (FIU). The 11-member UN delegation head, Sergey Kerev, who is also assessment and technical assistance director of the counter-terrorism committee (CTC), informed the media of this offer after he met BB Governor Salehuddin Ahmed. The high-powered delegation were given a presentation on counter-terror strategies at the Police Headquarters. They also met the director general of Bangladesh Rifles, and the attorney general, to gain an understanding of counter-terror law and their enforcement. The delegation is set to meet intelligence agencies, the Anti-Corruption Commission, port administrators, the UN resident coordinator, bankers association and the NGO Affairs Bureau. Sources said the delegation has been looking into terror funding through various channels, including NGOs suspected of being used for militant activities. Notably, the NGO Affairs Bureau on May 6 cancelled the registration of controversial Kuwait-based NGO, Revival of Islamic Heritage Society, which is suspected of funding militancy. - *The Daily Star*, June 5.

EC moves to free its secretariat from PMO

The Election Commission (EC) is to send a proposal to the chief adviser within a couple of days to promulgate an ordinance in order to free the EC Secretariat from the control of the Prime Minister's Office (PMO), an election commissioner said. "A draft proposal is being prepared for this and will be sent to the chief adviser within a couple of days." Election Commissioner Sahul Hossain disclosed the EC's new move to reporters at his office. "The constitution cannot be amended since no parliament exists now. So, it will have to be done through promulgating an ordinance," he said when asked whether any amendments to the constitution were required for this. However, Chief Election Commissioner (CEC) ATM Shamsul Huda on April 26 said the government does not want to separate the EC Secretariat from the PMO, now the Chief Adviser's Office, as it requires amendment to the constitution. Since then, there has been a debate whether an amendment to the constitution is actually required. Amid growing debate on the issue, the EC wanted to seek the opinions of legal experts but later decided to go ahead with the ordinance promulgation proposal. - *The Daily Star*, June 5.

Short scope for 'legal' money whitening

The government will allow whitening of the legally earned but undisclosed money until July 31. The National Board Revenue (NBR) issued a circular to that effect yesterday. The provision taking effect today will not impose any punishment but a fine. It states that a taxpayer would have to pay in penalty five percent of the total amount to be whitened in addition to the tax at regular rates. "We are offering the opportunity for a certain period on suggestions of different organisations and trade bodies," NBR Chairman Badur Rahman told reporters at his office. He defended the decision saying that it would yield some positive results for the economy. The circular says the facility will not be applicable to ill-gained money. Besides, the people who stand accused or convicted of tax evasion and those who might be charged with similar offence in a future probe by concerned authorities will not be allowed to legalise their money under this provision. - *Prothom Alo*, June 5.

No place for defaulters, tax dodgers, criminals in FBCCI polls

Loan defaulters, tax evaders and persons convicted of crimes, corruption and moral turpitude will not be eligible to contest election of the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) within five years of their conviction, a government handout said. The commerce ministry in a letter to the apex trade body asked it to change rules relating to participation in its election within 15 days from yesterday as per the Trade Organisation Ordinance, 1961. Meanwhile, the FBCCI Election Commission has primarily fixed August 16 for the biennial polls. As per the FBCCI constitution, of the 38 executive committee members of the apex trade body, 12 will be elected from district level chambers and 12 from trade associations, seven will be nominated from the MCCI and six divisional chambers, and seven from leading trade associations. FBCCI president will be elected from the association group this year. - *The Daily Star*, June 6.

EC plan for election

New candidates won't need to wait for 3 yrs

The proposed condition that a candidate will require at least three years of affiliation with a registered party to contest parliamentary polls will not be applicable for the next general elections only so as to enable newly formed parties to participate. Election Commission (EC) is also planning a provision that re-elections will be held in polling centres where 50 percent or more "no vote" are cast. "The condition that a candidate has to have three years attachment with a recognised political party would not be effective for the coming election," Election Commissioner Brig Gen (retd) Sakhawat Hossain told newsmen. He said they changed their plan to encourage honest and competent people to participate in the elections. However, retired government and non-government organisation (NGO) officials will not be able to take advantage of the flexible rule. "A political party has to meet the criteria set by the commission for its registration, a must for getting the EC's permission to participate in the elections," he said. - *The Daily Star*, June 6.

UN team talks counter-terror measures with govt, lawmen

The visiting UN counter-terrorism team discussed local counter-terror measures and implementation of UN counter-terror resolutions with top government and law enforcement officials. The 11-member Counter-Terrorism