

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Adnan Iqbal Chaudhry.

C.P. No. D-4506 of 2018

[Shabana Noor Ahmed versus Director General Immigration and Passport and others]

Petitioner : Mst. Shabana Noor Ahmed through
Mr. Irfan Ali, Advocate.

Respondents : Mr. Muhammad Zahid Khan, Assistant
Attorney General for Pakistan along with
S.I. Ibrahim Khan, I.O. FIA AHT Circle,
Karachi.

Date of hearing : 28-08-2018

Date of Decision : 12-10-2018

JUDGMENT

ADNAN IQBAL CHAUDHRY J. -

1. The Petitioner is aggrieved of the fact that her son, namely Syed Junaid Hassan Hasni (hereinafter 'Junaid'), a Pakistani citizen holding a Pakistani passport, who was working in Dubai UAE on a residence visa (*iqama*), has been denied the collection of his renewed passport by the Consulate General of Pakistan in the UAE on account of a criminal case pending against him (Junaid) in Pakistan.

Copy of Junaid's passport annexed to the petition shows that his visa for UAE was valid till 11-01-2017 and his passport was valid till 27-06-2017. Also annexed to the petition is a letter dated 06-08-2017 by Al Buheirah Police Station, Sharjah UAE, addressed to the Ministry of Interior UAE (alongwith an English translation), which states that on 25-09-2016 Junaid's passport had been detained by the said Police Station in relation to a case against him that alleged "*presenting the cheque with bad faith or intentions*", but that on 06-08-2017 Junaid's passport was returned to him. It appears that by the time Junaid got his passport back as aforesaid, both his visa and

his passport had expired, hence the aforesaid letter by Al Buheirah Police Station to explain Junaid's over-stay in the UAE. The Petitioner has also filed copies of documents to show that on getting his expired passport back from Al-Buheirah Police Station, on 09-08-2017 Junaid applied to the Consulate General of Pakistan at UAE for renewal of his passport. The receipt/token issued to Junaid read that his renewed passport would be ready for collection by 21-08-2017.

2. It is the Petitioner's case that when her son (Junaid) had gone to the Consulate General of Pakistan at UAE to collect his renewed passport, he was denied the same on the ground that he was accused in a criminal case registered in Pakistan by the FIA; that the particulars of the said case were never provided to Junaid; that due to the withholding of his renewed passport by the Consulate General of Pakistan at UAE, Junaid is stranded in the UAE since 21-08-2017 and is being subjected to fine by the authorities over there for his over-stay. The Petitioner made her own enquiries to discover that FIR No.214/2017 dated 30-06-2017 had been registered against Junaid at the FIA AHT Circle, Karachi, under Section 22(b) Emigration Ordinance, 1979, and the case was pending before the Special Judge (Central-II) Karachi. Per the FIR, a copy of which is on record, one Najam Nishat Shagufta (the complainant) alleged that she and her friend Adnan Nazeer, had be defrauded by Junaid into remitting to him a sum of Rs.450,000/- to Rs.500,000/- via Western Union on the promise that he (Junaid) would procure employment for them at Dubai. According to the Petitioner, she had approached both Najam Nishat Shagufta (the complainant) and Adnan Nazeer, and she claims that both of them had agreed to drop the case against Junaid, and to that effect both Najam Nishat Shagufta and Adnan Nazeer provided the Petitioner with affidavits (on the record) stating that the FIR was lodged due to a misunderstanding and that it had later transpired to them that Junaid was not involved in the alleged fraud.

A lady claiming to be Najam Nishat Shagufta, the complainant of the FIR, had accompanied the Petitioner when this petition was being heard by us, and owned her affidavit referred to above. One Ms. Shama Ali also appeared alongside the Petitioner and stated that she was the Attorney of Junaid and had travelled from the UAE to inform this Court that no case is pending against Junaid in the UAE. The Petitioner submits that Junaid is ready and willing to come to Pakistan to face the criminal case against him, but until his renewed passport is released to him, he is prevented from doing so; that in the meanwhile he remains stranded in the UAE and is being subjected to heavy fines for his over-stay in the UAE. Therefore she prayed for directions to release Junaid's renewed passport and to allow him to travel to Pakistan.

3. The FIA (Respondent No.3) opposed the release of Junaid's passport, and to avoid repetition their stance is discussed *infra* in our discussion of the case.

4. We have heard the parties and perused the record.

While Sections 3 and 4 of the Passports Act, 1974 prohibit a citizen from departing from and entering into Pakistan without a passport, the said Act does not stipulate conditions for the issue/grant or for the refusal to issue/grant a passport. What it does stipulate in Section 8 is that the Federal Government has the power to cancel, impound or confiscate a passport after the passport has been issued/granted. In the case at hand, it can conceivably be said (without holding so), that this is not a case of refusal to issue/grant a passport, but a case of impounding a passport inasmuch as, the record suggests that Junaid's passport was ready for collection but its delivery was refused.

5. Regards the matter of the issue/grant of a passport, since the Passports Act, 1974 does not stipulate conditions for the issue, or for the refusal to issue a passport, the question arose whether the Federal

Government has any discretion to issue or to refuse to issue a passport when applied for so as to restrict a citizen's Fundamental Rights to be dealt with in accordance with law, of liberty and of freedom of movement enshrined in Articles 4, 9 and 15 of the Constitution of the Islamic Republic of Pakistan, 1973. In the case of *Government of Pakistan v. Dada Amir Haider Khan* (PLD 1987 SC 504) the Supreme Court of Pakistan held that the freedom of movement in Article 15 of the Constitution was subject to regulation, and that regulation was the Passports Act, 1974; therefore it cannot be argued that a passport is to be granted to an applicant by way of right inasmuch as, the discretion to issue or not to issue a passport is incidental to the power to regulate the exit of any person out of Pakistan and his return thereto thereafter. The facts of the case of *Dada Amir Haider Khan* were that his application for the issue of a passport was declined without assigning reasons. When he petitioned the High Court, the reason disclosed before the Court for refusing his passport application was that he was an old political worker having "communist thought". In those circumstances the question framed by the Supreme Court for decision was whether while refusing to issue passport, the discretion vested in the authorities to issue or refuse to issue a passport was properly exercised inasmuch as, it was established law that a discretion vested in a public authority must be exercised fairly, reasonably and in good faith. In the circumstances of the case, it was held that the ground disclosed for denying the passport was not a reasonable ground on which a citizen's liberty to travel abroad could be curtailed. The law that was then approved and laid down by the Honourable Supreme Court of Pakistan was as follows:

- (a) that a citizen has a legal and Constitutional right to be issued a passport, save that it may be refused in accordance with law;
- (b) that before a citizen is refused the grant of a passport, he/she has to be given an opportunity of placing his case before the relevant authority, and a decision is then to be taken on the question after a fair and reasonable inquiry into the matter;

- (c) that in cases where it is not in the public interest to disclose full reasons for refusing a passport, the decision should state that in view of the sensitivity of the matter the disclosure of detailed reasons for refusal was not in the public interest.

In *Dada Amir Haider Khan* the appeal of the Government against the decision in favor of Dada Amir Haider Khan was dismissed by holding that the refusal to issue a passport to him was without lawful authority because he was never heard before the refusal, nor were the grounds of refusal communicated to him.

6. As regards the matter of impounding a passport, Section 8 of the Passports Act, 1974 reads as under:

“8. Power to cancel, impound or confiscate passport.

1. A passport issued by or on behalf of the Federal Government shall be the property of the Federal Government and may by an order under the hand of a Secretary to the Government of Pakistan or an officer authorized by the Federal Government in this behalf be required to be returned and shall also be liable to be cancelled, impounded or confiscated by like order.

2. Subject to subsection (3), before making an order under subsection (1) in respect of the passport issued to any person, the Federal Government shall give such person notice in writing calling upon him to show cause why the order shall not be made:

Provided that no such notice need be given in the case of an order impounding a passport if it is necessary in the opinion of the Secretary or such other officer to take immediate action, but an opportunity to show cause against the making of the order shall be afforded to the person to whom the order relates, within two weeks from the making of the order.

3. If the Federal Government has reason to believe that the person in respect of whose passport it is proposed to make an order under subsection (1) is, or has been engaged in subversive activities or in activities which are prejudicial to the interest of Pakistan or to Pakistan’s relations with any foreign power, it shall not be necessary to give to such person the notice provided for in subsection (2) or to afford him an opportunity of being heard.

4. Any person in respect of whose passport an order under subsection (1) has been made in the circumstances referred to in

subsection (3) may, within thirty days of the date of the order, apply to the Federal Government for a review of the order, and the decision of the Federal Government in review shall be final.

5. Any expenditure incurred by the Federal Government on the repatriation to Pakistan of a citizen of Pakistan who gets stranded or becomes a destitute while he is in a foreign country, or for other reason, shall be recoverable, as an arrear of Land Revenue."

Though under sub-section 1 of Section 8 Passports Act, 1974, a passport issued, may by an order be required to be returned, cancelled, impounded or confiscated, but sub-section 2 of Section 8 requires that before making such an order, the Federal Government shall give such person a notice in writing to show cause why the order shall not be made, unless the matter is such that it requires immediate action, in which case the opportunity to show cause shall be afforded within two weeks from the making of the order. It is only for cases that fall in sub-section 3 of Section 8 that the requirement of giving an opportunity to show cause is dispensed with, i.e. where the Federal Government has reason to believe that the person is, or has been engaged in subversive activities, or in activities which are prejudicial to the interest of Pakistan or to Pakistan's relations with any foreign country. The remedy of a review provided for in sub-section 4 of Section 8 is only available to a person whose case falls in sub-section 3.

7. Sub-section 2 of Section 8 Passports Act, 1974 as it stands today, is pursuant to an amendment brought by Act No. XV of 1992, which in turn was pursuant to a pronouncement made by the Shariat Appellate Bench of the Supreme Court of Pakistan in the case of *Federal Government of Pakistan v. Government of Punjab* (PLD 1991 SC 505). At the time the said pronouncement was made, the proviso to sub-section 2 of Section 8 Passports Act, 1974 read: "Provided that no such notice need be given in the case of an order impounding a passport for a period not exceeding four months and such order which shall take effect as soon as it is made." Thus, the effect of the

erstwhile proviso was that the show-cause notice envisaged in sub-section 2 of Section 8 could be dispensed with for a period of 4 months in case of impounding a passport. That erstwhile proviso to sub-section 2 of Section 8 was declared to be repugnant to injunctions of Islam, and it was observed that the dispensing of the show-cause notice provided for by sub-section 2 of Section 8 could only be done for serious cases that were specifically mentioned in sub-section 3 of Section 8 Passports Act, 1974.

In the case of *Syed Sami Ullah Al Quadri v. Federation of Pakistan* (2009 CLC 1314) a writ was sought from a Division Bench of this Court to declare that the blacklisting of the petitioner's passport by the FIA was unlawful, and to declare that the petitioner being a citizen of Pakistan had the right to move freely by going abroad and returning back without any hindrance. In the facts of that case, the petitioner was detained by the FIA on his arrival to Pakistan and his passport was detained with an endorsement that the passport was blacklisted. This was done on a complaint of the Embassy of Pakistan at Muscat. It was alleged by the petitioner that the complaint was at the behest of private respondents with whom the petitioner had a family dispute. The petitioner contended that the action of the FIA infringed upon the petitioner's Fundamental Rights in Articles 4, 9 and 15 of the Constitution and that any detention of the petitioner's passport could only be made by following the procedure laid down in Section 8 Passports Act, 1974. The learned Division Bench examined Section 8 Passport Act, 1974, and after noticing that no opportunity of hearing had been provided to the petitioner as required by sub-section 2 of Section 8, and that there was no allegation that the petitioner was believed to be engaged in subversive activities within the meaning of sub-section 3 of Section 8, the learned Division Bench held that the actions of the official respondents were in violation of the petitioner's Fundamental Right in Article 15 of the Constitution and also against the principle of natural justice that was codified in Section 8 Passports Act, 1974.

8. In view of the law discussed above, be this a case of refusal to issue a passport, or a case of impounding a passport, either ways Junaid was entitled to an opportunity to explain himself before being refused his passport. There is nothing to show that Junaid was ever given any notice to show-cause be that under sub-section 2 of Section 8 Passports Act, 1974 or otherwise as required by the case of *Dada Amir Haider Khan (supra)*. No order passed under sub-section 1 of Section 8 Passports Act, 1974 to cancel or impound Junaid's passport has been placed before us by the Respondents, nor has any document been placed before us by the Respondents to show that the grounds of denying a passport to Junaid were ever communicated to him.

9. Per the comments filed on behalf of the FIA, the money wired by the complainants was received by Junaid at the U.A.E. on the promise of procuring employment for the complainants at Dubai; that Junaid was not an authorized overseas employment promoter, hence the offence under Section 22(b) Emigration Ordinance, 1979 and FIR No.214/2017 which was pending before the Special Judge (Central-II) Karachi as Complaint No.306/2017 wherein Junaid has been declared a Proclaimed Offender. Per the FIA since Junaid was an absconder from the said case, the FIA wrote a letter dated 06-07-2017 to the Director General Immigration & Passport to blacklist Junaid pursuant to Clause 51(B)(ii) read with Clause 21(b) of the Passport and Visa Manual 2006. Per the comments of the FIA, Junaid along with other accused persons is also nominated in another FIR No.20/2016 registered under Sections 6(1)(g) Passport Act, 1974 read with Section 22(b) Emigration Ordinance, 1979, and thus he is a habitual offender.

10. In our view, the reliance placed by the FIA on Clause 51(B)(ii) and Clause 21(b) of the Passport and Visa Manual 2006 to blacklist Junaid, is misplaced for the following reasons. Firstly, the alleged offence under Section 22(b) Emigration Ordinance, 1979 is not a subversive activity of the nature specified in sub-section 3 of Section

8 Passports Act, 1974 so as to dispense with the show-cause notice required by sub-section 2 of Section 8 before impounding a passport. For the same reason, it cannot be a ground to deny the opportunity of an explanation before refusing to issue a passport as required by the case of *Dada Amir Haider Khan (supra)*. Secondly, from the extract of the Passport and Visa Manual 2006 placed before us and reproduced below, it will be seen that blacklisting under Clause 51(B) read with Clause 21(b) thereof, can at best be invoked to check an exit from Pakistan, not an entry into Pakistan.

“51. Procedure for blacklisting

(A) If any Passport Issuing Authority finds that a certain citizen of Pakistan is fit to be blacklisted for passport facilities, it would refer the matter to the Director General, Immigration and Passports giving such person’s full particulars and reasons for his blacklisting. The Director General, Immigration and Passports will obtain the orders of the Ministry of Interior in the matter, where necessary.

(B) Federal Government is vested with powers to regulate the departure from Pakistan and visit abroad of its citizens under the provisions of “Passport Act, 1974” and “The Exit from Pakistan (Control) Ordinance, 1981”. In order to check the exit of individuals from Pakistan, Black List / Exit Control List are maintained. The inclusion into and deletion from Exit Control List is the sole prerogative of the Ministry of Interior. Brief description of Black List categories ‘A’ & ‘B’ as under: -

(i) Category ‘A’: Under this category the names of those persons are placed who are believed to be involved in anti-State activities or whose visit to foreign countries is considered to be prejudicial to the State interest, or, whose visit abroad is banned from security point of view. The names in this list are included or removed by the Ministry of Interior.

(ii) Category ‘B’: Under this category, the names of those persons are placed who are involved in the offences punishable under section 6 of Passport Act 1974 or those who were refused passport under Para 21 of Passport & Visa Manual. The names of persons are also included in this list on the recommendations of government agencies / departments as well as those who are deported / repatriated from abroad. Director General, Immigration and Passport is competent to place and remove names in this list.”

“21. Refusal of Passport

A Citizen of Pakistan should not be refused a passport when he/she applies for it except in classes of cases defined as under:-

(a)

(b) Persons believed on good evidence to be wanting to flee from Pakistan to avoid prosecution for a criminal or other offence."

11. Therefore, Clauses 51(B) and 21(b) of the Passport and Visa Manual 2006 could only have been invoked had Junaid been in Pakistan and wanting to leave Pakistan. Even in that case, it has been consistently held by the Superior Courts of this country in cases arising from the Exit From Pakistan (Control) Ordinance, 1981 that mere pendency of a criminal case is not sufficient justification for prohibiting a citizen from exiting Pakistan and for interfering with his Fundamental Right of freedom of movement enshrined in Article 15 of the Constitution of the Islamic Republic of Pakistan, 1973. See the cases of *Federal Government v. Ayyan Ali* (2017 SCMR 1179); *Gen. (Retd.) Pervez Musharraf v. Pakistan* (PLD 2014 Sindh 89), upheld in *Federation of Pakistan v. General (Retd.) Pervez Musharraf* (PLD 2016 SC 570); *Ayyan Ali v. Federation of Pakistan* (2017 PCrLJ 920).

12. The pronouncement of law by the aforesaid case-law is that a citizen's Fundamental Right of freedom of movement under Article 15 of the Constitution cannot be impeded merely due to pendency of a criminal case against him. Having said that, we are also at a loss to understand that on the one hand the FIA alleges that Junaid is wanted in criminal cases in Pakistan, and on the other hand it prevents Junaid from returning to Pakistan. When confronted with this aspect of the case, S.I. Ibrahim Khan for the FIA had no answer except that Junaid may apply to the Consulate General of Pakistan at UAE for an 'Emergency Passport' under Clause 33 of the Passport and Visa Manual 2006, which is a one-time permit for entry into Pakistan, and which reads as follows:

"33. Emergency Passport for repatriation from abroad

(1) Single sheet emergency passports valid only for return to Pakistan, withholding the passport of such persons, may be issued by Pakistan Missions abroad to: -

(a) Undesirable Pakistan nationals residing abroad, such as forgers/racketeers in passports, smugglers, and human traffickers etc.

(b) Persons who fall destitute abroad.

(c) *Persons to be deported by foreign governments.*

An emergency passport is meant only to enable its holder to return to Pakistan. In no circumstances should it be endorsed for any other country.

.....
.....

(5) *Period of validity of the emergency passport should be such to enable its holder to reach Pakistan from the concerned foreign country. The cost of such passports should be included in the repatriation charges of the concerned individuals that are to be recovered in Pakistan from him or his guarantor. But in cases where a foreign government decides for any reason to deport a Pakistan national from her countries at her own expense, emergency passports should be issued gratis to such individual and expenditure on his / her photographs should be met by the concerned Pakistan Missions from the fund for contingencies.*

(6) *The mission concerned should also send particulars of the emergency passport issued by them alongwith the passports, if any, previously held by the repatriate and also detailed report about the concerned individual to the Directorate General, Immigration and Passports. The Immigration Authorities to whom the above referred individual will surrender the emergency passport on his arrival in Pakistan, should forward the same to the Director General Immigration and Passports and hand-over such individual to the Federal Investigation Agency for investigation and appropriate legal action.*

(7) *On the basis of grounds of repatriation of such individual the Director General Immigration and Passports may decide his/her blacklisting in category 'B' for future passport facilities and cancellation of passport in consultation with the Ministry of Interior, if considered necessary cases for blacklisting under category "A" should be referred to Ministry of Interior."*

Clause 33 of the Passport and Visa Manual 2006 shows that an Emergency Passport is issued when a citizen is being repatriated from abroad for eventualities specified in sub-clause 1 of Clause 33. Per para 11 of FIA's comments, Junaid's case falls under sub-clause 1(a) of Clause 33 i.e. he is an "*Undesirable Pakistani national residing abroad.....*". However, in our view, absent a determination by a court of law to that effect, Junaid cannot be labeled as such. That goes against the very foundation of criminal law that a person is innocent until proven guilty.

13. In the end we can do no better but to quote the Honourable Supreme Court of Pakistan from the cases of *Mian Shahbaz Sharif v.*

Federation of Pakistan (PLD 2004 SC 583) and *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD 2007 SC 642) respectively as follows:

“..... it could not be denied that Article 15 of the Constitution bestows a right on every citizen of Pakistan to enter or move freely throughout Pakistan and to reside and settle in any part thereof. It is a settled proposition of law that the right to enter in the country cannot be denied but a citizen can be restrained from going out of the country. The petitioner is a citizen of Pakistan and has a Constitutional right to enter and remain in the country.”

“It is well settled by now that every citizen has an inalienable right to enjoy the protection of law and to be treated in accordance with law and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. No action detrimental to such Fundamental Rights can be initiated except in due course of law.”

“Be as it may, in the case of citizens of Pakistan, there is a Fundamental Right to enter Pakistan from outside and therefore, any restriction of such right will be an invasion of this Article. The imposition of restrictions by requirement of permits, etc., is justified as a reasonable restriction in the public interest. But a law which subjects a citizen to the extreme penalty of a virtual forfeiture of a citizenship upon conviction for a mere breach of the permit regulations or upon a reasonable suspicion of having committed such a breach can hardly be justified upon the ground that it imposes reasonable restriction upon the fundamental right to reside and settle in the country, in the interest of the public.”

14. For what has been discussed above, and for the foregoing reasons, the acts of the Respondents in denying to Syed Junaid

Hassan Hasni his renewed passport is violative of Articles 4 and 15 of the Constitution of the Islamic Republic of Pakistan, 1973, and contrary to Section 8 of the Passports Act, 1974. Therefore, the Respondents are directed to release to Syed Junaid Hassan Hasni his renewed passport at the Consulate General of Pakistan at UAE within a week.

Petition stands disposed of in the above terms.

JUDGE

JUDGE

Karachi

Dated: 12-10-2018