

ITEM NO.2

COURT NO.8

SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

WRIT PETITION (CRL.) NO(s). 310 OF 2005

BHIM SINGH

Petitioner(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(with appln.(s) for permission to intervene in the writ petition and c/delay in filing detailed affidavit in pursuance to the direction of this Hon'ble Court dated 20.04.2007 and modification of Court's order and modification/clarification and c/delay in filing counter affidavit and clarification/modification of Court's order and office report)

WITH

W.P. (CRL.) NO. 82 of 2010

Date: 28/02/2012

These Petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE R.M. LODHA
HON'BLE MR. JUSTICE H.L. GOKHALE

Counsel for the parties

Prof. Bhim Singh, petitioner-in-person
Mr. Monoher Singh Bakshi, Adv.
Mr. K.K. Baid, Adv.
Mr. S.S. Dahiya, Adv.
Mr. L.S. Bakshi, Adv.
Mr. P.V. Yogeswaran, Adv.

Mr. Satish Vig, Adv.

WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

UOI

Mr. P.P. Malhotra, A.S.G.
Ms. Binu Tamta, Adv.
Mr. Vijoy Kr. Prasad, Adv.
Mr. B.K. Prasad, Adv.
Mr. Vikas Bansal, Adv.
Mr. S. Wasim A. Qadri, Adv.
Mr. B.K. Prasad, Adv.

State of U.P.

Mr. Ratnakar Dash, Sr. Adv.
Mr. S.K. Dwivedi, AAG
Mr. Ashutosh Kr. Sharma, Adv.
Mr. Pradeep Misra, Adv.
Mr. Suraj, Adv.

Ms. Kamini Jaiswal, Adv.

Mr. Arun K. Sinha ,Adv.

Mr. Anil K. Jha ,Adv.

State of NCT of Delhi

Mr. Wasim A. Quadri, Adv.

Mr. Vikas Bansal, Adv.

Mr. C.K. Sharma, Adv.

Mr. B.V. Balram Das, Adv.

Mrs. Anil Katiyar, Adv.

Mr. Chandra Prakash Pandey ,Adv.

Mr. Praveen Swarup ,Adv.

Mr. Vijendra Kumar, Adv.

Mr. Javed Mahmud Rao,Adv.

Mr. Shaikh Chand Saheb, Adv.

State of Jharkhand

Mr. Ratan Kumar Choudhuri ,Adv.

Mr. Arun Kumar Beriwal ,Adv.

Mr. Colin Gonsalves, Sr. Adv.

Ms. Amiy Shukla, Adv.

Ms. Jyoti Mendiratta ,Adv.

WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

3

State of Rajasthan

Ms. Archana Pathak Dave, Adv.

Mr. Milind Kumar ,Adv.

Ms. Ankita Chaudhary, Adv.

Mr. Vipin Kumar Jai ,Adv.

State of J & K

Mr. Sunil Fernandes, Adv.

Mr. Krishanu Adhikary, Adv.

Ms. Astha Sharma, Adv.

State of Punjab

Mr. Kuldip Singh, Adv.

Mr. R.K. Pandey, Adv.

Mr. H.S. Sandhu, Adv.

Mr. Mohit Mudgil, Adv.

State of Haryana

Mr. Manjit Singh, Addl. Adv. Gen.

Mr. Tarjit Singh, Adv.

Mr. Kamal Mohan Gupta, Adv.

UPON hearing counsel the Court made the following

O R D E R

In pursuance of our order dated January 24, 2012, an additional affidavit has been filed by Shri Payingattery Venkiteswaran Sivaraman, Director (Foreigners) in the Ministry of Home Affairs, Government of India, on behalf of the respondent No. 1. It is stated that the order of this Court dated January 24, 2012 has been brought to notice of all the State Governments/Union Territory Administrations

vide Ministry of Home Affairs letter dated February 1, 2012.

The State Governments/Union Territory Administrations have been advised to ensure that all Pakistani prisoners and Pakistani fishermen under arrest, detention or imprisonment are provided Consular Access within three months of arrest.

WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

4

In modification of the earlier policy, it is stated that Consular Access programme is now being arranged every quarter, i.e., February, May, August and November every year with a view to ensure that all Pakistani prisoners and Pakistani fishermen are provided Consular Access within three months of their arrest in terms of the provisions in the Agreement on Consular Access.

We find that there is some ambiguity in para 2(1) and para 2(5) of the policy guidelines for repatriation of Pakistani prisoners who have completed their sentence. Para 2(1) states that immediately on arrest of Pakistani national, the State Government/Union Territory Administration concerned shall send the details of Pakistani nationals arrested within 24 hours to (a) Ministry of Home Affairs (Foreigners Division), (b) Ministry of External Affairs (Consular Division) and (c) Intelligence Bureau. The Agreement on Consular Access (2008) makes a provision that immediate notification of any arrest, detention or imprisonment of any person of the other country shall be provided to the respective High Commission. In the policy guidelines, it needs to be clarified that as soon as the State Government/Union Territory Administration sends the details of the Pakistani nationals arrested to the above

Ministries and the agencies and such details are received by
WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

5

the Government of India, a notification of arrest, detention or imprisonment of a Pakistani national shall be provided to

the Pakistan High Commission.

In para 2(5) of the policy, it is stated that States/ Union Territory Administrations concerned shall ensure that a Pakistani prisoner/Pakistani fisherman is provided Consular Access immediately after the arrest of the Pakistani national but in no case at least six months before completion of the sentence awarded to him/her. This is again not in conformity with the modified policy noted above. We are now informed by Mr. P.P. Malhotra, learned Additional Solicitor General, that necessary modification has been made in para 2(5) of the policy. In this regard, he referred to the letter dated February 1, 2012 sent by the Ministry of Home Affairs (Foreigners Division) to Principal Secretary (Home) of all State Governments/Union Territory Administrations and DGPs of all State Governments/Union Territory Administrations.

In para 11 of the additional affidavit filed Shri Payingattery Venkiteswaran Sivaraman, it is stated that there are 37 Pakistani prisoners who have completed their sentence but they could not be repatriated as their nationality has not been confirmed by the Pakistan High Commission so far. It is also stated that besides, in respect of 11 Pakistani fishermen, Government of Gujarat has WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

6

informed that no offence has been registered and they have no objection to their repatriation to Pakistan. However, in respect of these 11 Pakistani fishermen also, nationality has yet not been confirmed by the Pakistan High Commission. The list of these 37 Pakistani prisoners and 11 Pakistani fishermen is placed on record as Annexure G. Of the 37 Pakistani prisoners who have completed their sentence, 21 are stated to be mentally challenged. Most of these 21 persons have completed their sentence in 2007, 2008 and 2009, but their nationality has not been confirmed by the

Pakistan High Commission though it appears that Consular Access with regard to them was provided a few months before the completion of their sentence. It is indeed unfortunate that these 37 Pakistani prisoners who have served out their sentence and are not required under Indian laws have been kept in jail because their nationality has not been confirmed. Whatever may be the reason for delay in confirmation of their nationality, we have not even slightest doubt that their continued imprisonment is uncalled for. In no way, these 37 Pakistani prisoners can be treated as prisoners once they have served out their sentence. It is true that unless their nationality is confirmed, they cannot be repatriated and have to be kept in India but until then, they cannot be confined to prison and deprived of basic human rights and human dignity.

WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

7

It is stated in the additional affidavit of Shri Payingattery Venkiteswaran Sivaraman that in respect of these 37 prisoners that the Ministry of Home Affairs has advised the State Governments/Union Territory Administrations concerned to set up detention centres for restricting their movements. A communication dated 15/16.02.2012 has been sent by the Ministry of Home Affairs advising the State Governments/Union Territory Administrations concerned to release such foreign nationals from jails and to restrict their movements in detention centers in terms of the powers delegated under Section 3(2) (e) of the Foreigners Act, 1946 and under paragraph 11 of the Foreigners Order, 1948 pending their deportation/repatriation. However, in the case of Jammu and Kashmir, it has been advised that the existing procedure, i.e., detention under Section 8 of the Public Security Act may continue. We are presently not concerned with the validity and legality of the detention of these prisoners

under the above referred provisions. However, suffice it to say that these 37 persons have to be formally released from jail immediately and be kept at appropriate place with restricted movements pending their deportation/repatriation. The places where they are to be kept - detention centers or by whatever name such places are called - must have basic facilities of electricity, water and hygiene. 21 persons out
WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

8

of these 37 persons who are mentally challenged, on release, have to be given proper medical help/assistance or treatment in suitable Government hospitals or the hospitals/clinics run by NGOs.

Mr. P.P. Malhotra, learned Additional Solicitor General, on instructions, stated that in Delhi there are two Detention Centres, namely, (1) Sewa Sadan, Lampur and (2) Mahila Sadan, Jail Road (for females), and one in Amritsar and these Centres have proper facilities for lodging and boarding. He submitted that according to the availability of accommodation at the Detention Centres, Delhi and Amritsar such of the 37 persons would be accommodated. We accept the statement of learned Additional Solicitor General.

As regards the confirmation of the nationality of these 37 persons by the Pakistan High Commission, we observe that the Government of India through the concerned Ministry shall take all necessary steps in ensuring that the exercise is completed expeditiously. We have no doubt that Pakistan High Commission will also act swiftly and complete this exercise as early as may be possible.

With regard to 11 Pakistani fishermen against whom no offence has been registered by the State of Gujarat, until exercise of confirmation of their nationality is complete, it is directed that they shall be kept at an appropriate place having all basic facilities by the State of Gujarat.

WRIT PETITION (CRL.) NO(s). 310 OF 2005 WITH W.P(CRL.) NO. 82 of 2010

9

The petitioners are at liberty to file additional affidavit in response to the additional affidavit filed by Shri Payingattery Venkiteswaran Sivaraman, Director (Foreigners) on February 24, 2012 which we have referred to above.

The respondent No. 1 shall file compliance report and further affidavit in support thereof before next date.

Let these Writ Petitions come up for further consideration on April 10, 2012.

(Rajesh Dham)
Court Master

(Renu Diwan)
Court Master