



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 20<sup>th</sup> April, 2023

Pronounced on: 26<sup>th</sup> May, 2023

+ W.P.(CRL) 550/2022

(46) EMECHERE MADUABUCHKWU ..... Petitioner

Through: Mr. Kanhaiya Singhal, Mr. Prasanna  
& Mr. Ujwal Ghai, Advs.

versus

STATE NCT OF DELHI & ANR. .... Respondents

Through: Ms. Rupali Bandopadhyia, ASC  
(Crl.) with Mr. Akshya & Mr.  
Abhijeet Kumar, Advs. for the State.  
Ms. Manisha Agrawal Narain and  
Mr. Sandeep Singh, Advs. for R2.  
SI Virender Singh, Central Distt.

+ W.P.(CRL) 827/2022

(47) EMECHERE MADUABUCHKWU ..... Petitioner

Through: Mr. Chetan Bhardwaj, Adv.

versus

FOREIGNERS REGIONAL REGISTRATION OFFICE DELHI

..... Respondent

Through: Ms. Rupali Bandopadhyia, ASC  
(Crl.) with Mr. Akshya & Mr.  
Abhijeet Kumar, Advs. for the State  
with SI Virender Singh, Central  
Distt.



Ms. Manisha Agrawal Narain and  
Mr. Sandeep Singh, Advs. for R2.

**CORAM:**  
**HON'BLE MR. JUSTICE ANISH DAYAL**

### **JUDGMENT**

1. These petitions have been filed by the petitioner who is a Nigerian national seeking setting aside order dated 14<sup>th</sup> July, 2021 passed by the Foreigners Regional Registration Officer (FRRO) (respondent herein) by which petitioner was restricted to move out of Sewa Sadan, Lampur, Narela, Delhi until his travel arrangements were made. The issue under consideration is essentially the grant of bail to a foreign national but with conditions of being sent to a detention centre, considering that the visa of stay in India of such a national had expired. The factual background relating to this matter is as under.

#### **Factual background**

2. The petitioner came to India in November, 2014 and got married to Ms. Rinkoo Tripathi in the month of December, 2015 and started residing with his wife in Delhi. Petitioner was running an African kitchen at H. No. 102 B, 50 Foota, Vijay Laxmi Park, Nilothi Extn., New Delhi-110041 to earn his livelihood. As per the case of the prosecution, a police team in April, 2021 while patrolling received secret information that the petitioner is running an African Kitchen in that area where some suspicious people come, drink liquor and create nuisance. After receiving this information, the police team went to the kitchen and noticed an African man coming



outside from the kitchen, carrying a white *katta* (bag) in his hand, got on a scooty and started going on it, then as he reached near the police, they stopped the vehicle and restrained him. On checking the bag, 24 sealed beer bottles were found and when search was made at the kitchen, 42 more sealed beer bottles were found.

3. An FIR No. 249/2021 was registered on 06<sup>th</sup> April, 2021 under Sections 33/38/58 of the Delhi Excise Act, 2009 and Section 14 of the Foreigners Act, 1946 at PS Nihal Vihar. The petitioner was also arrested and moved an application under Section 437 Cr.P.C. seeking regular bail before the Court of Ld. MM, West District, Tis Hazari Courts. By order dated 24<sup>th</sup> April, 2021, the Ld. MM allowed the bail application of the petitioner, however, directed that the petitioner would be transferred from the jail to the Detention Centre by the IO/SHO where he will be kept till the conclusion of the trial of the present case and will be produced before the Court as and when required.

4. The petitioner moved an application under Section 439 Cr.P.C. before Ld. ASJ, West District, Tis Hazari Courts. Ld. ASJ by order dated 25<sup>th</sup> June, 2021 allowed the application and admitted him on bail by releasing him from Detention Centre subject to furnishing a personal bond and surety bond of Rs. 1 Lac. The petitioner did furnish the surety of the respective amounts but has still not been released from the said detention centre.

5. When the petitioner's wife approached the detention centre with the order of the Ld. ASJ, the centre was not convinced to release the petitioner. A visit was made on 23<sup>rd</sup> November, 2021 by an advocate at the FRRO



Detention Centre *in lieu* of directions passed by this Court in order dated 07<sup>th</sup> October, 2016 in W.P.(C) No.4663/2008. The petitioner communicated the difficulty being faced by him for release and wrote a letter dated 23<sup>rd</sup> November, 2021 in order to seek assistance in Visa Extension and released from the detention centre and handed over the copy to the visiting counsel.

6. The petitioner's visa has been declined multiple times without assigning any reasons, and a simple message is received on the mobile stating that the visa extension application has been closed. The petitioner filed W.P. (CRL)No.550/2022 (one of the two petitions adjudicated herein). Reply dated 24<sup>th</sup> March, 2022 was filed by the FRRO where the order dated 14<sup>th</sup> July, 2021 impugned in Writ Petition 827/2022 (the other petition being adjudicated herein) was filed.

7. As per the said order passed by the FRRO, it was directed that the petitioner would not move out of Sewa Sadan, Lampur till the travel arrangements are made and such restrictions were imposed under Section 3(2)(e) of the Foreigners Act, 1946 and para 11(2) of the Foreigners Order, 1948.

8. It is contended that it has been close to two years since the order has been passed by the Ld. ASJ granting release of the petitioner from the FRRO detention centre, but he is still facing incarceration, and, therefore, pleads for setting aside of the impugned order of the FRRO restricting him to the detention centre.

### **Submissions by the Petitioner's Counsel**



9. The learned counsel for the petitioner submitted *inter alia* that: **firstly**, the impugned order dated 14<sup>th</sup> July, 2021 was without application of mind, unreasonable, non-speaking, and in violation of principles of natural justice. The said order was never communicated to the petitioner and only when the first W. P. 550/2020 was filed. The said impugned order was appended as part of the counter affidavit. The petitioner had never been notified of the said order and a decision had been taken *ex parte*. No show-cause notice was issued to him and despite the order's stating that "*reasonable time has been provided for the same*", there was no opportunity given;

**secondly**, the invocation of provisions of Section 3(2) of the Foreigners Act was also untenable, since while Section 3(1) of the Foreigners Act empowers the Central Government to make provisions generally with respect to foreigners or any class of foreigners for prohibiting, regulating or restricting the entry or departure into India or from India, Section 3(2) of the Foreigners Act provided specific illustrations or possibilities of the kinds of orders which could be made. In particular, Section 3(2)(d) of the Foreigners Act provided that such an order may prescribe that the foreigner "*shall remove himself to, and remain in, such area in India as may be prescribed*". Further, Section 3(2)(e) of the Foreigners Act provided that orders against such foreigners could also require him to "*reside in a particular place*" or "*impose any restrictions on his movements*". Section 3(2)(f) of the Foreigners Act provided the possibility of an order prescribing that the foreigner "*shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions*". It was,



therefore, submitted that the authorities had power to pass such orders under the Foreigners Act that were not adverted to or taken into account while passing directions restricting such foreigners to detention centre. Even though, Section 3(2)(e) of the Foreigners Act was being applied by the impugned order, it did not state why in particular that provision was being invoked instead of others which also provided for a bond or a surety or being located of the foreigner in a particular place;

*thirdly*, it is contended by the learned counsel for the petitioner that restrictions cannot be interpreted with detention and the same logic will not apply to both these concepts. Even in cases of bail, some restrictions are made as part of bail conditions but they do not come close to detention. This forms part of the grain of Article 21 of the Constitution of India and to move freely within the country as provided in Article 19(1)(d) of the Constitution of India;

*fourthly*, the petitioner was no longer a prisoner and he had been granted the benefit of regular bail and any detention would be exaggerating the powers conferred by law. The legislative purpose of Section 3 of the Foreigners Act was merely to curb movements of the foreigner and keep a vigil in order that some unlawful activity may not be committed but not of a mandatory detention;

*fifthly*, para 11 of Foreigners Order, 1948 was also adverted to which prescribed the power to impose restrictions on movements and the foreigner could be asked to comply with such conditions in respect of his place of residence, his movements, his association with any person or class



of persons as specified and his possession of such articles as may be specified in the order;

*sixthly*, reliance was placed on the decisions of the Karnataka High Court in ***Babul Khan and Another v. State of Karnataka***, 2020 SCC OnLine Kar 3438, where certain guidelines were passed *inter alia* that if a Court grants bail or anticipatory bail to an offender who is a foreign national and the visa is cancelled or lapsed or they have no passport or they are illegal immigrants then the Court can order to keep them in a detention centre “*unless the competent authority has passed any order under Section 3(2)(a) to (f) of the Foreigners Act, 1946*”. As per the learned counsel for the petitioner, there is a possibility of such orders being passed for restrictions as opposed to simpliciter sending the foreigner to the detention centre.

### **Submissions by the FRRO’s Counsel**

10. The learned counsel for the FRRO refuting the allegations of the petitioner submitted that the petitioner had arrived in India in November, 2014 on a Nigerian Passport No. A02377740 valid from 24<sup>th</sup> September, 2010 till 23<sup>rd</sup> September, 2015 and an Indian Medical Visa No. VJ2039458 issued on 15<sup>th</sup> October, 2014 and valid till 14<sup>th</sup> January, 2015. As per record, he did not approach any hospital for treatment and after expiry of the visa on 15<sup>th</sup> January, 2015 he did not approach the FRRO for registration or further visa extension till 15<sup>th</sup> May, 2021 and he had already overstayed for about six years as an illegal migrant. Pursuant to the order by the Ld. MM of 24<sup>th</sup> April, 2021, FRRO issued communication dated 05<sup>th</sup> May, 2021 noting the bail condition of being in the detention centre.



Thereafter, pursuant to the order of the Ld. ASJ dated 25<sup>th</sup> June, 2021, the impugned order was passed according to the FRRO this was necessitated since the Ld. ASJ has noted that detaining a person through an order of grant of bail was not in consonance with law and restriction. Further detention of a foreign national aside from the bail order has to be by a decision of the Competent Authority.

11. It was stated further that in the absence of a valid visa, the petitioner was an illegal immigrant and his visa applications dated 15<sup>th</sup> May, 2021, 17<sup>th</sup> July, 2021 and 30<sup>th</sup> July, 2021 were rejected and closed after application of mind. The reasons stated in the counter affidavit was that he was being tried for the violation of the provisions of the Foreigners Act and visa norms and contravention of Excise Act and that his passport expired as well, and not renewed.

12. On 12<sup>th</sup> July, 2021, his passport was revalidated by the High Commission of Nigeria till 11<sup>th</sup> July, 2026 purportedly for the purposes of deportation. FRRO, therefore, stated that to allow a foreign national to move around freely in the country even after committing the offence would make a mockery of the provisions of the Foreigners Act.

13. Releasing him from the detention centre cannot ensure that he would not get involved in illegal activities again. Reliance was placed on a decision of this Court in *Pascal v. Union of India, FRRO Delhi & Anr.* W.P.(CRL) 2276/2021, where it was held that since the petitioner did not have a valid visa which is required to get him deported, his movements were required to be restricted by keeping him in a detention centre.





14. Learned counsel for the petitioner, however, refuted this since it did not decide the question of law under Section 3(2) of the Foreigners Act. Moreover, the petitioner was not being deported but was an under trial and, therefore, Section 3(2) of the Foreigners Act would apply. It was further stated that the issue of overstay of foreign nationals facing criminal charges and their subsequent restriction and deportation was pending before a larger Bench of this Court in CRL. REF. No.02/2021.

### Analysis

15. To place it in perspective, the petitioner was arrested under the FIR under Sections 33/38/58 of the Delhi Excise Act, 2009. It may be noted that Section 33 relates to penalty for unlawful import, export, transport, manufacture, possession, sale etc. of intoxicant and it is punishable by imprisonment of the period not less than 6 months but may extend to three years plus fine not less than Rs.50,000/-, but which may extend to Rs.1,00,000/-. Section 38 imposes penalty for possession of spurious liquor unlawfully imported and duty not paid, punishable with imprisonment for a term which may extend to six months and fine which may extend to Rs.1,00,000/-. Section 58 provides for confiscation of any intoxicant which is unlawfully imported, transported, sold etc. Violation of Section 14 of the Foreigners Act, 1946, if convicted, triggers an imprisonment which may extend to five years plus fine.

16. These facts can be better assessed by appreciating them in the following silos. *First*, there is the allegation of an offence being committed by the foreign national; *second* is the release of the foreign national on bail as an undertrial (as in this case) or otherwise on a suspension of sentence/



parole as a convict; *third*, is the inability to have a valid visa due to the period of incarceration; *fourth* is the process and possibility of getting a visa considering the trial/conviction; and *fifth* is the options which are possible in order to monitor the movement of such a foreign national.

17. Since, no view can be expressed on the offence itself, at this stage, till a trial has resulted in a conclusive order, it would be worthwhile to examine the situation of foreign national released on bail as an undertrial. The fact that the Trial Court grants bail to a foreign national in the context of a pending proceeding, inures to the advantage of the foreign national since a competent court has legitimately allowed him to be free from custody. If such being the case, then the question arises whether the foreign national is to be then sent to a detention centre if he does not have a valid visa or travel documents. Or alternatively be subject to a procedure which specifically deals with such cases and consider grant of some permit/visa/travel documents which would ensure that the petitioner is not in a detention centre and will be able to enjoy his liberty but at the same time has to continue to be in India to face the trial.

18. These possibilities are provided by enabling provision Section 3(1) (in general terms) and Section 3(2) (in specific terms) of the Foreigners Act, 1946. Section 3(1) enables the Central Government to make a provision generally with respect to all foreigners, or with respect to a particular foreigner, or a prescribed class of a foreigner in order to: (i) prohibit; (ii) regulate; or (iii) restrict entry/departure/presence/continuing presence, in or from India. The scope and purview of this provision is expansive in its breath and purposeful in spirit.



19. The Central Government has, therefore, an option to not just prohibit but possibly regulate or restrict the presence or continued presence of such an undertrial in India. In a situation that is being dealt with as regards the petitioner, where the continued presence is necessary for the completion of the trial, various options can be exercised under provisions of Section 3(2) of the Foreigners Act *inter alia* to remain in such area as may be prescribed in Section 3(2)(d); to reside in a particular place as in Section 3(2)(e)(i); imposing a restriction on the movements as per Section 3(2)(e)(ii) or entering into a bond with or without sureties for the observance of such prescribed conditions as in Section 3(2)(f). These options are aside from the simpliciter option of detention. The question that would be presented before the Central Government is whether in such cases of foreigners being undertrials, the only blanket option to be exercised was detention or other options could also be considered. This would be relevant keeping in mind the specific facts and circumstances, since Section 3(1) of the Foreigners Act empowers the Central Government to deal with specific cases of an individual or a category of persons and not just generally with respect to all foreigners.

20. Merely pointing towards all such foreign nationals who are undertrials or suspended post conviction and are a security concern, would not be inconsonance with the letter and spirit of these provisions. Granting such persons, a special permit/visa/travel document would not legitimize their earlier offence of having overstayed in violation of the provisions of the Foreigners Act, but would in fact ensure that they are not confined in a detention centre at state expense, but instead are restricted to a place on conditions as may be prescribed and furnish bond/sureties to ensure



compliance of such conditions. Further, restrictions could be made for restricting the possibility of travelling out of India without permission. This would ensure a judicious balance between recognizing liberty, and a human right, and ensuring the presence of the foreign nationals for the purpose of trial and being subject to restrictions/regulations/conditions.

21. To further unravel this conundrum, it would be useful to have a snapshot view of some relevant decisions of the Hon'ble Supreme Court, this Court and other High Courts, to be usefully aware of the nature of directions passed in analogous situations.

### **Judicial precedents**

22. In *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India*, (1994) 6 SCC 731, the Hon'ble Supreme Court in dealing with cases of undertrials passed certain directions regarding release of such undertrials whose trials were still to get completed applying the principle of the constitutional right of speedy trial under Article 21. One of the directives related to undertrials who were foreigners, the Hon'ble Supreme Court directed that in such cases "*the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner/accused belongs, that the said accused shall not leave the country and shall appear before the Special Court, as and when required*". Reference to this direction is being made for the purposes that there are methods and modalities which are available to the State to ensure



that an undertrial who is a foreigner can be released on bail subject to these special conditions of impounding of passport and a certificate of assurance.

23. The Karnataka High Court in *Christian Chidieere Chukwu v. The State of Karnataka by K.R. Puram Police Station, Bangalore and Anr.*, (2016) SCC OnLine Kar 439 dated 18<sup>th</sup> February, 2016, in a petition for bail of a foreign national who had overstayed and had been accused of a crime under Sections 376/506 IPC and in addition for overstay in India, Section 14 of the Foreigners Act had been invoked. The Court noted that in these situations, if bail is granted to persons who have violated the provisions of the Foreigners Act, such persons cannot stay in India even for a day without valid passport and visa, therefore, and an undertrial has to await the result of the trial in respect of the case registered against him and after the conclusion of the criminal case, steps have to be taken to deport such foreign national for staying beyond the expiry of the visa. If there is a delay in conducting the trial, it would be as good as allowing such foreign national to be in India even after the expiry of the visa period.

24. In *Bathlomew Lkechukwu @ Charles v. Union of India & Ors.*, W.P. (CRL) 2146/2019 order dated 30<sup>th</sup> January, 2020, this Court in dealing with a petitioner who was a foreign national and had been acquitted of an offence against which an appeal had been filed by the NCB, observed that the petitioner could not be detained indefinitely in a deportation camp. The said foreign national was either required to be issued a visa or is required to be deported. Even if the person's presence was required in India on account of the appeal filed by the NCB, an appropriate visa was required to be issued to him. Directions were, therefore, issued to either



deport the petitioner or release him after providing proper visa within a period of three months.

25. In *Efrance Namatende v. State*, BAIL APPLN. 2214/2022 by order dated 09<sup>th</sup> January, 2023, this Court noted that for violation of Section 14 of the Foreigners Act there was no requirement that the person is to be confined in an observation home. The bail condition that he would remain in an observation home till he is granted a visa was deleted. A similar order was passed in *Frank Boadu v. State of Govt. of NCT of Delhi*, BAIL APPLN. 1897/2022 order dated 03<sup>rd</sup> March, 2023.

26. In *Rajesh Datta @ Raj v. The State & Anr.*, W.P.(C) 1565/2023 order dated 07<sup>th</sup> February, 2023, this Court in dealing with a petition for issue of directions to the FRRO to grant an extension of stay visa till pendency of the trial, directed that the petitioner would continue to apply to the FRRO for an extension of the visa on a periodic basis, and such extension applications after being duly verified shall be granted till the final adjudication of the case. In this case, the order noted that the visa had already been extended, but the Court gave the above directions for subsequent possibilities for extension.

27. In *Izuchukwu Joseph v. Foreigners Regional Registration Officer, Delhi & Anr.*, W.P.(C) 2106/2023 order dated 15<sup>th</sup> March, 2023, this Court had noted the submission of the FRRO through a status report, that due to misuse of visas by foreign nationals by involving themselves in criminal activity, visas were not being granted. As also grant of visa to a foreign national who is already in violation of the Foreigner's Act may be not be appropriate. Visas can be granted to foreign nationals when an appeal has



been preferred by the State against an acquittal order of a Lower Court or if the Court itself orders for grant of such a visa on an appeal filed by the foreign national against order of the Lower Court or of the FRRO. Besides a concept of entry visa (X-Misc. category) is also available which is granted to an accused foreign national facing criminal charge/trial proceedings in order to facilitate the foreign national to face such proceedings before the Ld. Trial Court or appear before the investigating agency pending investigation. Such a visa is usually co-terminus with the date of hearing in the case or as per directions which may be issued by the Courts.

28. In *Bailly Gui Landry v. The State of Telangana*, CRL. P. No.4396 & 4400/2021 of the High Court of the State of Telangana at Hyderabad, it was held that the Magistrate after conducting a full-fledged trial, acquitting the petitioner does not have the power to order deportation of any foreign citizen even in case of violation of the provisions of the Act. The Magistrate has to confine his findings with the regard to either acquittal or conviction, and not directing any deportation of foreign citizen.

29. In *James Pascal v. Narcotic Control Bureau*, CRL.A. 548/2020 order dated 21<sup>st</sup> September, 2022, this Court on 21<sup>st</sup> September, 2022 for suspension of sentence of a foreign national in an NDPS case had directed as part of the condition that the petitioner could apply for visa within a week from the date of his release and his application would be considered in accordance with law and relevant procedure.

30. Finally, and most importantly, in *Ana Parveen & Anr. v. Union of India & Ors.*, W.P.(CRL) No. 43/2022, the Hon'ble Supreme Court was



dealing with a foreign national detained and lodged at the detention centre in Delhi pending deportation after having been convicted and completed his sentence under Section 14 of the Foreigners Act. The person in question was a Pakistani national who came to India married an Indian citizen in 1989 had five children who were born in India. A representation had been submitted by him to the Ministry of Home Affairs for release from detention centre and to be allowed to stay at his home on long term visa or any other permit. Seven years had elapsed since he had served out his sentence following the conviction under the Foreigners Act. The Hon'ble Supreme Court directed that it would be appropriate if the Foreigner's Division of the Union Ministry of Home Affairs takes a decision on the representation for grant of a visa/long term visa having regard to all facts and circumstances of the case. Further, in light of mandate of Article 21 of the Constitution, it was directed that since there was no security threat or adverse impact on national security, he should be released on furnishing a personal bond of Rs.5,000/- with two sureties of Indian citizens in the like amount. The detenu would furnish the place address of permanent residence where he proposed to reside and would report to the local police station on the seventh day of every month.

### **Conclusions**

31. In this context, and in the background of all these decisions of various courts and the Hon'ble Supreme Court, the submission of the FRRO that by allowing permission to be released would legitimize their past offence is too simplistic a view in the matter. In the considered opinion of this Court, these situations do present themselves before courts on multiple occasions, require more calibrated treatment.





32. In any event what must be clarified is that a Court or Magistrates or a Sessions Court cannot as part of enlarging foreign national on bail can also direct the said person to be sent to a detention centre. The Court is not competent to pass such a direction when granting bail as has been conclusively held in various decisions. Detention centres are not for judicial custody but a place where a foreign national is detained on an executive order and is the prerogative of the competent authority under the Foreigners Act.

33. Therefore, what the Ld. ASJ directed by order dated 25<sup>th</sup> June, 2021 was apposite, by allowing the bail application and admitting him on bail by releasing him from Detention Centre subject to furnishing a personal bond and surety bond of Rs. 01 Lac. Despite that the petitioner was not released on account of the intransigent stand taken by the FRRO in not granting him a visa or permit and issuing the impugned order. This denial was in the teeth of a judicial order of Ld. ASJ, which is not merited considering there was no challenge to the said order by the State. The petitioner once being enlarged on bail cannot be detained without due process of law. The fact that he is facing trial for offences under the Excise Act and the Foreigners Act cannot be held against him, considering he still is to be proved guilty post trial. Right now, is the issue of his freedom.

34. The impugned order was therefore untenable on two counts – one, is that no opportunity was ever given to the petitioner to show cause or even a possibility of a hearing/or representation; and two, that other provisions of the Foreigners Act were not considered i.e. order could have been passed under any provision of section 3(2) of the Foreigners Act. Even *Babul Khan* (*supra*) holds that such foreigners without visa may be kept in



detention centres “*unless the competent authority has passed any order under Section 3(2)(a) to (f) of the Foreigners Act, 1946*”. There is no reason why the FRRO cannot consider other possibilities under these provisions i.e. requiring him to be at a particular place (not necessarily a detention centre), imposing restrictions on his movements (like restricting him to an area), regulating his conduct and association with persons; reporting requirements to an authority. There is a vast menu of options available for the FRRO to apply, which may be more in consonance with rights under Article 21, than a summary, plain vanilla order of continuing in the detention centre. Also, there is no reason, as has been observed by the Hon’ble Supreme Court, to not consider grant of a special visa/stay permit to the petitioner, which recognizes that he is an undertrial of an overstay offence and has to continue in this country for the purpose of trial or otherwise, in case that is not required, choose to deport him.

35. The petitioner has already spent 2 years in confinement in detention centre when the offences that he is charged with under the Excise Act trigger sentence of about 6 months and maximum may extend to 3 years. Even as regards the Foreigners Act offence, he may at the maximum be sentenced for 5 years, of which he has now already been in *de facto* custody for 2 years.

36. Considering that the petitioner now has a valid passport (having been extended by the Nigerian Embassy), the FRRO/any other competent authority of the UOI is directed to consider his application for visa and /or representation for an appropriate order under the Foreigners Act, in light of what has been stated above by this Court. The said decision may be taken



within a period of 8 weeks, with due compliance of principles of natural justice, providing him an opportunity to represent.

### **Criminal Reference**

37. It has been brought to the attention of this Court that a Crl. Ref. No.2/2021 is pending adjudication before the Hon'ble Division Bench of this Court since September, 2021. The said Crl.Ref. was received from Ld. MM-04, Saket Courts, and Mr. Harsh Prabhakar, Advocate was appointed as *Amicus Curie* to assist the Court by order dated 21<sup>st</sup> September, 2021. Thereafter, the matter has been listed before the Hon'ble Division Bench on 30<sup>th</sup> September, 2021 and subsequent dates, and is now listed for 6<sup>th</sup> September, 2023.

38. The order of reference by the Ld. MM dated 13<sup>th</sup> September, 2021, was passed while haring an application seeking bail moved by a Nigerian national who has overstayed his visa and proceedings have been initiated against him under the Foreigners' Act. The contentions before the Ld. MM on behalf of the accused as well as the State related to similar issues of whether bail can be granted to a foreign national who did not have any valid visa and what conditions ought to be imposed. In this regard the Ld. MM framed three questions for reference :

- a. *Would releasing the accused/foreign national by granting unconditional bail to such a foreign national not tantamount to legalizing his future stay in India without valid visa, which is otherwise an offence under section 14 of Foreigners Act, 1946?*



- b. *Should the matters of foreign nationals, who are accused of offence u/s 14 of Foreigners Act, 1946, and particularly where accused himself concedes expiry of his visa before date of his apprehension, be not treated differently than other criminal cases?*
- c. *Whether any condition can be imposed upon a foreign national while bail being granted to him so as to ensure that he does not flee away from the course of justice and can be kept in detention till completion of the trial?*

### **Directions**

39. Considering that the reference is still to be decided by the Hon'ble Division Bench of this Court, at this stage it would be improper to retain a foreign national in detention centre despite a clear judicial order of bail being granted by the Ld. ASJ, subject to conditions. On being enlarged on bail, the petitioner would still be in constructive custody of the Court. These directions are being passed taking guidance from the Hon'ble Supreme Court's decision adverted to in para 30 (supra). As regards the impugned order passed by the FRRO, on the basis of which the petitioner is being retained in the detention centre, it is set aside, and as directed above to be reconsidered in light of the observations made in this order, in particular in paras 18 to 20 (supra).

40. In the interest of justice, therefore, the directions passed by the Ld. ASJ are reiterated and endorsed, and the petitioner be released from the detention centre on satisfaction that he has furnished personal bond and surety bond in the sum of Rs. 1 lac each to the satisfaction of the Ld.



MM/Duty MM (West), who subject to furnishing and acceptance of the bail bonds, issue release warrants from the detention centre where he is detained. Further, to this condition the petitioner shall furnish a permanent residence address that he proposes to reside at and would report to the local police station every Saturday at 4:00 p.m. Further, he would surrender his passport with the Ld. Trial Court and would not leave the NCT of Delhi during the said period. Considering that the petitioner is married to an Indian national, Ms. Rinkoo Tripathi, he would also provide the mobile number of his wife and her identity details to the Ld. Trial Court.

41. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

42. A copy order be also sent to the FRRO Detention Centre, Sewa Sadan, Lampur, Narela, Delhi and the petitioner be intimated of this order

43. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.

44. Order be uploaded on the website of this Court.

(ANISH DAYAL)  
JUDGE

**MAY 26, 2023/MK**