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

\+ LPA 168/2019 & CM No. 11617/2019

Reserved on: 13th May, 2019
Date of decision: 28th May, 2019

MOHD JAVED & ANR. ..... Appellants

Through: Mr. Colin Gonsalves, Sr. Adv. With Bilal Anwar Khan, Mr. Mohd. Sajid and Mr. Suroosh Anwar, Advocates.

versus

UNION OF INDIA & ANR ..... Respondents

Through: Mrs. Maninder Acharya, ASG with Mr. Anurag Ahluwalia, CGSC and Mr. Kartikeya Rastogi, Advocate for R-1/UOI.
Mr. Abhishek K. Singh, Adv. for R-2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

JUDGMENT

ANUP JAIRAM BHAMBHANI, J.

By the present appeal filed under Clause 10 of the Letters Patent of the Delhi High Court, the appellants Mohd. Javed (appellant No.1) and Nausheen Naz (appellant No.2) impugn order dated 28.02.2019 made by the learned single Judge of this Court in W.P.(C) No.1835/2019, whereby the

single Judge has been pleased to dismiss the writ petition, thereby upholding the 'Leave India Notice' dated 07.02.2019 issued by respondent No.2 through the Deputy Commissioner of Police, Special Branch, New Delhi ('Notice', for short) directing appellant No.2 to leave India within 15 days of receipt of the Notice, that is by 22.02.2019.

2. Mohd. Javed, an Indian citizen, married Nausheen Naz, a Pakistani national on 26.08.2005 as per Islamic *Sharia* norms and conventions and a *nikahnama* was issued in evidence of the marriage. The couple have two sons, one about 11 years and the second about 6 years of age. Having been born in India, both children are Indian citizens.

3. As per a tabulated summary of Nausheen's dates of arrival in and departure from India handed-up by the Ministry of Home Affairs ('Ministry', for short), Nausheen came to India first in August 2005 on a 'visitor visa' and returned to Pakistan in September 2005. Thereafter she returned to India in June 2007, again on a 'visitor visa'; and subsequently applied for and was granted a Long Term Visa ('LTV', for short) valid until 28.09.2010 on the ground that she was desirous of living with her husband, an Indian citizen. The tabulated summary further shows that Nausheen's LTV was extended from time-to- time, the last extension being valid until 08.06.2020. As per a notation on the tabulated summary, the last extension granted was by way of an on-line application. Over the period of her stay in India, Nausheen has visited Pakistan on multiple occasions; and has been permitted to return to India on the basis of what is called a 'No Objection to Return to India' ("NORI") under the Ministry's policy for grant of LTV to Pakistani nationals as detailed hereinafter. The tabulated summary also

shows that lately Nausheen departed for Pakistan on 10.04.2017, 27.11.2017 and 03.07.2018, and on each occasion she returned to India without objection or demur by the authorities.

4. At present therefore Nausheen holds a valid and subsisting LTV, with a tenure from 09.06.2015 upto 08.06.2020.

5. That notwithstanding, *vidé* Notice dated 07.02.2019 captioned 'LEAVE INDIA NOTICE', the Ministry directed Nausheen to leave India within fifteen days of receipt of the Notice in the following words:

> *"You, Pak National Smt. Nausheen Naz, P.P. No. AZ9895772 r/o Gali Shahtara, H.No. 4481, Ajmeri Gate, Delhi-6, are hereby directed to 'leave India' within fifteen days from the date of receipt of this Notice in compliance of letter of Ministry of Home Affairs/GOI, F.No. 28020/03/2019-F.III dated 24.1.2019. If you fail to leave India within stipulated time, action will be taken against you as per law and your entry in India will be barred in future."*
>
> (Emphasis supplied)

It may be noted that letter dated 24.01.2019 referred to in the Notice was neither enclosed therewith nor is it available on the record of the present proceedings.

6. Notice dated 07.02.2019 was challenged by Mohd. Javed and Nausheen before the single Judge by way of Writ Petition (Civil) No.1835/2019 which culminated in passing of impugned order dated 28.02.2019 dismissing the writ petition.

7. Prior to issuance of the Notice however, there was no communication between the Ministry and Nausheen in relation to any proposed or possible curtailment of Nausheen's entitlement to remain in India on the basis of her LTV ; nor any communication seeking from Nausheen a response to any alleged breach of the terms and conditions of the LTV.

8. The record in fact shows that on 13.07.2016 Nausheen was granted a NORI for a period of 90 days with the following noting:

> File No.F.17/5171/2007/PPF
>
> Nausheen Naz is granted No objection to Return to India (NORI) for 90 days to visit Pakistan by Bus in view of Govt. of India, Min. of Home Affairs order No.28020/58/2014 -F.III dt. 15.12.2014
>
> Sd/-
> 13/7/16
> For Deputy Secretary
> Home (Passport)
> Govt. of NCT of Delhi

Although the wording of the notation above is somewhat ambiguous, the meaning is clear, namely that the *no-objection is valid for 90 days*, that is to say that the Ministry has no-objection if Nausheen returns to India within 90 days of leaving India. The notation does not purport to curtail the term of Nausheen's LTV.

9. The record further shows that Nausheen travelled freely between India and Pakistan even after 13.07.2016 (the date of the NORI notation)

upto 07.08.2018, when she last arrived from Pakistan as evidenced by the departure/arrival stamps appearing on her passport,a photocopy of the relevant page whereof has been filed by Nausheen on the record. The tabulated summary of Nausheen's travels handed-up by the Ministry mentions 06.08.2018, instead of 07.08.2018 as stamped on Nausheen's passport, as the date on which she last returned from Pakistan to India. This minor discrepancy of dates is irrelevant.

10. Inspite of the foregoing position of Nausheen's stay on an LTV in India however, the Ministry opposed her continued stay in the country before the single Judge for the following reasons, as recorded in the impugned order:

> *"2. ..., learned ASG appearing for the respondents states that the impugned notice had been passed on certain inputs, which were considered by the concerned authorities.*
>
> *3. This Court is unable to accept that petitioner no.2 has any right to reside in India, since the matter of granting visa is at the discretion of the Government of India. This Court has also perused inputs available with the respondents and is unable to accept that the impugned order is wholly arbitrary or without any basis. As noticed above, petitioner no.2 is unable to establish any right to reside in India. In this view, this Court is unable to grant the relief as sought for."*

(Emphasis supplied)

11. For the record, it may be noted that although Nausheen has been staying in India on the LTV as extended from time-to-time, she has never

applied for Indian citizenship. During the course of the proceedings before us however, *vidé* application dated 07/09.05.2019, Nausheen has made an application for registration as a citizen of India under Section 5(1)(c) of the Citizenship Act, 1955 as a person who has been married to an Indian citizen. Being a recent application, the same is yet to be considered by the authorities.

12. The appellants have urged before us that the issuance of the Notice to Nausheen, without any communication or information preceding the same in the context of the directive to leave the country, peremptorily asking Nausheen to leave India within fifteen days, is an act that is arbitrary, baseless and opposed to all notions of natural justice, equity and fair-play. It is contended that since Nausheen still holds an LTV valid until 08.06.2020, there is no reason why she should be directed, all of a sudden, to leave India abandoning her family here.

13. The contentions of Mohd. Javed and Nausheen notwithstanding, it is crucial for us to consider very carefully the contentions raised by the Ministry by way of short affidavit dated 10.04.2019, in which the Ministry states the following:

> *"9. That a Pakistani national, intending to meet relatives or friends or any legitimate purpose, is granted "Visit Visa" with "Single Entry" and with stipulated conditions related to restrictions of place(s) of visit and duration of the visa. Further, a Pakistani women (sic) married to Indian national and staying in India is eligible for grant of Long Term Visa (hereinafter referred to as "LTV") for five years with restriction of stay at specified place on the basis of marriage proof and an indemnity bond from*

the Indian guarantor. Under no circumstances, a Pakistani national belonging to majority community of Pakistani is allowed to carry (sic) business activities on LTV.

10. That if the Central Govt. has arrived at a decision to serve a "Leave India Notice" to a foreign national, then there is no vested right with the foreigner to claim to stay in India for the remaining period of his visa validity as "Leave India Notice" itself is cancellation of further validity of visa period.

11. That there is no statutory obligation on the part of Central Government to serve a Show Cause Notice to the foreigner.

12. It is submitted that the Foreigners Act, 1946, vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion, an unrestricted right to expel remains.

13. That the answering Respondent is privy to adverse inputs from agency about the Appellant No.2 and shall produce the same before this Hon'ble Court in sealed cover. Based on these inputs, the Central Govt. has arrived at a conclusion that the Appellant No.2 has to be served with a "Leave India Notice" in the interest of the security of the nation."

(Emphasis supplied)

14. As stated in its short affidavit, the Ministry has placed before the court two separate reports in sealed cover containing 'inputs' received from the Intelligence Bureau, which according to the Ministry, are the basis and reason for it to direct Nausheen to leave the country immediately.

15. Considering the classified nature of the 'inputs' shared by the Ministry with the court, we obviously do not wish to either quote or refer to the contents of such 'inputs', except to say that we have perused and analysed these carefully, objectively and with due circumspection ; but are unable to discern any information contained in the 'inputs' that would warrant precipitate action of requiring Nausheen to leave the country. We say so for two principal reasons: firstly, the 'inputs' do not disclose any conduct on Nausheen's part that may be perceived as egregious enough to warrant such action; and secondly, the 'inputs' refer to matters that are not proximate to the issuance of the Notice so as to inspire any confidence that there is a connection or causal link between the matters referred to in the 'inputs' and the issuance of the Notice. We may add that in the course of submissions before us counsel appearing for Mohd. Javed and Nausheen has indicated that the issuance of the Notice is really actuated by family disputes, whereby certain members of Mohd. Javed's family are pushing to get Nausheen out of Mohd. Javed's life. In any case, our decision in the present matter does not turn upon an adjudication either of the 'inputs' shared by the Ministry or of the contentions relating to family disputes canvassed by counsel for Mohd. Javed and Nausheen.

16. What we wish to test in this appeal is whether the impugned order, whereby the single Judge has declined relief against the Notice, has proceeded on adequate consideration and appreciation of the legal position applicable to the case.

17. The principal statutory provision that is relevant for our purposes is Section 3 of the Foreigners Act, 1946, which reads as under:

*"**3. Power to make orders -***

(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or, their departure there from or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner -

(a) shall not enter India or shall enter India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) shall not depart from India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in India, or in any prescribed areas therein;

(cc) shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;

(d) shall remove himself to, and remain in such area in India as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified-

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such

manner and at such time and place as may be prescribed or specified;

(iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified;

(v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified;

(vi) prohibiting him from association with persons of a prescribed or specified description;

(vii) prohibiting him from engaging in activities of a prescribed or specified description;

(viii) prohibiting him from using or possessing prescribed or specified articles;

(ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) 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;

(g) shall be arrested and detained or confined;

and may make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

(3)Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (c) or clause (f) of sub-section (2)."

18. At this point, we may therefore set-out the extant instructions issued by the Ministry on the basis of which LTVs are granted to Pakistani

nationals by our country. Notification dated 15.12.2014 referred to in the endorsement appearing on Nausheen's passport contains the following relevant portions:

> *"No.28020/58/2014-F.III*
> *Government of India*
> *Ministry of Home Affairs*
> *New Delhi, the 15th December, 2014*
>
> *To,*
>
> *1. The Principal Secretary (Home) Of all State Governments/UTs*
>
> *2. DGPs of all State Governments/UTs concerned*
>
> *Subject: Grant of Long Term Visa (LTV) to the Pakistani nationals*
>
> *Sir,*
>
> *As per the extant instructions, Pakistani nationals in the following categories, seeking permanent settlement in India with a view to become a citizen of India are being granted Long Terms Visa (LTV):-*
>
> *(i) Member of minority communities in Pakistan (Hindus, Sikhs, Christians and Buddhists);*
>
> *(ii) Pak women married to Indian nationals and staying in India;*
>
> *(iii) Indian women married to Pak nationals and returning due to widowhood/divorce and having no male member to support them in Pakistan; and*
>
> *(iv) Cases involving extreme compassion.*
>
> *2. Government have received a number of representations regarding restrictions/problems faced by these Pakistani nationals living in India on LTV.*

3. The matter has been examined in this Ministry and it has been decided, with the approval of competent authority, to make the following amendments to the extant procedure to facilitate the Pakistani nationals who are eligible for grant of LTV:-

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"(2) Presently, State Governments/UT Administrations are empowered to grant extensions on Long Term Visas on two-year basis at a time to the eligible Pakistani nationals under categories (i) to (iii) in para 1 above, after the first year long term visa has been granted by MHA. In the case of persons falling in category (iv) in para 1 above, extensions of LTV on two year basis are granted only with the prior approval of Ministry of Home Affairs.

It has been decided that long term visa for five years at a time may be granted by Ministry of Home Affairs to Pakistani nationals eligible under category (i) to (iii) in para 1 above, on receiving a proposal from the State Government/UT concerned, with their recommendations.

Grant of 5 years LTV in the above mentioned categories will be subject to Police Reporting every year at the place where the Pakistani national has been allowed to stay on LTV. Further DCP/FRO/FRRO concerned should keep a discreet watch on the activities of the Pakistani national and if anything adverse is found, immediate appropriate action should be taken alongwith bringing the same to the notice of the Home Department of the State Government/ UT Administration and to the Foreigners Division, Ministry of Home Affairs immediately.

XXXXX

"(6) The State Govt./UT Adm. concerned may grant No Objection to Return to India (NORI) facility for a maximum period of 90 days to Pakistani nationals living in India on LTV approved by this Ministry or whose request for LTV is under consideration in the State Government/UT Administration/ Ministry of Home Affairs, as follows:-

(a) Once in a calendar year to go to Pakistan

(b) Once in a calendar year to go to a third country

However, in deserving cases on extreme compassionate grounds, the State Government/UT Administration concerned may grant NORI endorsement more than once in a year on merits provided the person concerned has not come to any adverse notice. ..."

(Emphasis supplied)

19. In Nausheen's case, which is covered squarely by the extant instructions quoted above, NORI was granted without demur for the maximum period of 90 days as permissible; and even till date no specific adverse act or omission of sufficient gravity has been alleged against her. We say so, not on the basis of our own subject assessment of what is or is not a serious act or omission, but for the reason that prior to issuance of the Notice requiring Nausheen to leave the country, no other action by any law enforcement agency, Ministry or other authority has *ever* been initiated against Nausheen, much less *immediately*, as contemplated by the instructions quoted above. The very fact that Nausheen was permitted to freely depart from and enter the country, including by granting her NORI up until 07.08.2018 shows that there was no information, let alone material, against Nausheen to restrict her movement or to direct her to leave the country.

20. It is also important to note the view taken by the Supreme Court in a similar matter in the case titled ***Hasan Ali Raihany vs. Union of India & Ors.*** reported as (2006) 3 SCC 705 where, dealing with an order cancelling the 'residence visa permit' of a person of Iranian descent, the Supreme Court has held as under :

"4. We may observe that earlier, a residential permit was issued to the petitioner which has been extended from time to time

and which stood extended till 3-12-2007. However, while deporting him, the authorities cancelled the residential permit.

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"6. The question that arises for consideration is whether the authorities intend to deport him again and if so, whether they are obliged to disclose to the petitioner the reasons for his proposed deportation.

"7. Learned Counsel for the petitioner has relied upon a decision of this Court in National Human Rights Commission v. State of Arunachal Pradesh and particularly to the principles laid down in para 19 thereof and submitted that the petitioner cannot be thrown out of this country having regard to the fact that he was born in this country and lived here for many years and his application for grant of Indian citizenship is still pending. It is not as if he has entered the territory of India stealthily with any ulterior objective and, therefore, it is only proper, even though he is not an Indian citizen, that he should at least be informed of the reasons why he is sought to be deported, and his representation if any in this regard considered. The learned Additional Solicitor General has fairly brought to our notice the principles laid down by this Court in Sarbananda Sonowal v. Union of India. This Court in para 75 of the report has observed as follows: (SCC p. 720)

> *"Like the power to refuse admission this is regarded as an incident of the State's territorial sovereignty. International law does not prohibit the expulsion en masse of aliens, (p.351). Reference has also been made to Article 13 of the International Covenant of 1966 on Civil and Political Rights which provides that an alien* lawfully *in the territory of a State party to the Covenant may be expelled only pursuant to a decision reached by law, and except where compelling*

reasons of national security otherwise require, is to be allowed to submit the reasons against his expulsion and to have his case reviewed by and to be represented for the purpose before the competent authority. It is important to note that this Covenant of 1966 would apply provided an alien is lawfully in India, *namely, with valid passport, visa, etc. and not to those who have entered illegally or unlawfully."*

"8. Having regard to the facts and circumstances of the case, particularly, having regard to the fact that the petitioner has entered this country legally upon the single entry permit issued to him, it is only fair that the competent authority must inform him the reasons for his deportation. If such a decision is taken, the petitioner must be given an opportunity to submit his representation against his proposed expulsion. The competent authority may thereafter consider his representation and pass appropriate order. As observed by this Court, this procedure may be departed from for compelling reasons of national security, etc. In the instant case, we have not so far noticed any fact which may provide a compelling reason for the State not to observe this procedure.

"9. We, therefore, dispose of this writ petition with the directions to the competent authority, who we are told is the Deputy Commissioner of Police and FRRO, Mumbai, to communicate to the petitioner the reasons why he is sought to be deported from this country. The reasons disclosed must be sufficient to enable the petitioner to make an effective representation, if he wishes to do so. The petitioner shall be given two weeks' time to make a representation which shall be considered by the competent

authority as soon as possible. Any order passed shall be communicated to the petitioner forthwith."

(Emphasis supplied)

21. While taking the aforesaid view, the Supreme Court also put the petitioner in that case to the following terms:

> *"10. We further direct that the petitioner shall continue to report at Kurla police station every day. It is stated by learned counsel appearing on his behalf that the present residential address of the petitioner is the following:*
>
> *XXXXX*
>
> *If there is any change of address, the petitioner will inform Kurla police station of the said change. He shall continue to report to the police station till such time as the competent authority passes appropriate order as directed.*
>
> *"11. In case an adverse order is passed against the petitioner, it shall not be given effect to for a period of seven days from the date of service of that order on the petitioner so that he may seek appropriate legal remedy, if so advised."*

(Emphasis supplied)

22. Certain other aspects of the case strike us as we go through the record. We notice that the last extension of the LTV was granted to Nausheen 'online', which suggests that hers was a case of an ordinary, routine renewal and Nausheen was not under 'watch' by the authorities for any wrongdoing. We also find that the Notice cautions Nausheen that *if she were to fail* to leave India within the time stipulated in the Notice : " .... *your entry in India will be barred in future* .... "; meaning thereby that even though Nausheen was being directed to leave India for the time being, if she complied with

that direction, her entry back into the country would not be barred forever. Furthermore, for the reasons and on the grounds suggested in the intelligence 'inputs' Nausheen was never questioned or detained; nor were her movements curtailed in any manner except the restrictions already contained in the LTV itself, all of which is suggestive of a person who is *not* perceived as unwelcome in the country. Nausheen was given time to leave India at her convenience, though within the period stipulated in the Notice; and there was no effort to peremptorily deport her from the country. A close reading of short affidavit dated 10.04.2019 filed by the Ministry also shows that the grant of LTV to Nausheen was accompanied by an 'Indian guarantor', most likely her husband Mohd. Javed, furnishing an indemnity bond to the authorities. There is nothing to show that by reason of the so-called wrongful acts of Nausheen the indemnity bond furnished by her Indian guarantor was ever sought to be invoked or enforced.

23. Much as the Ministry states in short affidavit dated 10.04.2019 that:

> *" ... Based on these inputs, the Central Govt. has arrived at a conclusion that the Appellant No. 2 has to be served with a "Leave India Notice" in the interest of the security of the nation."*

we find no reasoning or basis for the Central Government to have arrived at the conclusion as the Ministry says above, nor any basis for perceiving a threat to national security.

24. We have recorded the above only to say that the overall facts and circumstances of the case, including in particular, the conduct of the Ministry and the authorities, do not inspire confidence or persuade us to believe that Nausheen is a *persona non grata.*

25. From the juristic standpoint, what requires elucidation is the exact nature of the 'right' that is under consideration. Confusion appears to have arisen from the perception that the 'right' being considered is Nausheen's 'right to live in India', which it is contended, she has none since she is an alien or foreigner. That is indeed true. What we are losing sight of though, is the fact that Nausheen is not an *illegal immigrant* and has not entered India clandestinely or unlawfully but has been continually residing in India for the last thirteen years on a valid visa, which has been renewed by the authorities from time-to-time. What is under the lens here is not Nausheen's right to reside in the country *but* the *Ministry's authority* to revoke a valid and subsisting LTV without following any process or procedure whatsoever and without arriving at a reasoned decision based on a factual matrix. It is not Nausheen's *substantive right* but her *procedural right* to 'due process' or *right to procedural due process*, as it is sometimes called, that is required to be considered.

26. In this context, while we are clear that most of the Part III rights under the Constitution, namely fundamental rights, are available only to citizens and not to foreigners, however, as has been consistently held, on a bare perusal of the constitutional provisions the rights enshrined in Articles 20, 21 and 22 of the Constitution are available even to non-citizens or foreigners. While invocation of rights under Articles 20 and 22 does not arise in the present case, the right under Article 21, namely the right of a person not to be *"deprived of his life or personal liberty except according to procedure established by law"* does. Here also, we hasten to add, it is not that Nausheen has been deprived of her life or personal liberty, in the narrow

and restricted sense, by being asked to leave India but what is impacted is Nausheen's 'right to life' in its expanded interpretation as given by the courts, with several aspects of 'life' having been read into Article 21 of the Constitution.

27. We are fortified in our view by a judgment of a Division Bench of this Court in the case titled ***Mohammad Sediq vs. Union of India & Ors.*** reported as 1998 (47) DRJ 74 : MANU/DE/1165/1998 where, dealing with the abrupt cancellation of the residence permit of an Afghan national who was married to an Indian citizen and had had three children, the Court ruled as under :

> *"In so far as rights of persons other than citizens are concerned, there is no manner of doubt that we are a country governed by the rule of law. Our constitution confers certain rights on every human being and certain other rights on the citizens alone. Every person, whether he is a citizen or not, is entitled to equality before the law and equal protection of the laws. As such, no person can be deprived of his life or personal liberty except according to the procedure established by law. In Hans Muller's case (supra) it was held that Article 21 guarantees the protection of personal liberty to citizen and foreigner's alike that no person can be deprived of his personal liberty except according to the procedure established by law.*
>
> *As a matter of fact the concept of liberty stood widened when the Supreme Court in Maneka Gandhi v. Union of India and another, AIR 1978 S.C. 597, while construing Article Article 21 of the Constitution of India added new dimensions to various features and concepts of liberty, as enshrined in Article 21. The principle of reasonableness was held to be an essential element of equality emphasizing that the procedure contemplated by Article 21 must answer to the test of reasonableness, in order to be in confirmity with Article 14.*

In Menaka Gandhi's case (Supra), the expression "procedure" established by law, in the context of deprivation of life and liberty in Article 21 was explained and interpreted. The interpretation so put, has been treated as enlargement of the right conferred by Article 21 of the Constitution of India. Limited to the procedure, the Court observed that the procedure must be reasonable and fair. It must not be arbitrary or capricious. In case, procedure was arbitrary, it would violate Article 14 since Article 14 is not consistent with any arbitrary power. This position in law was reasserted in Nand Lal Bajaj Vs. State of Punjab, AIR 1981 SC 2041.

The question, as such, would be that whether or not the action of the respondent in passing the impugned order is arbitrary. Sub section (1) of Section 3 of the Foreigners Act authorises the Central Government to make provision, either generally or with respect to all the foreigners, for prohibiting or regulating or restricting their entry into India or their departure therefrom or their presence or continued presence therein. Clause (c) of sub-section (2) of Section 2 says that in particular and without prejudice to the generality, such an order may provide that the foreigner shall not remain in India or in any prescribed area therein. A foreigner has no right to stay in India without an express permission. In Hans Mullers' case (supra) the Supreme Court held that the Act confers the power to expel Foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains. In Louis De Raedt Vs. Union of India & Others, AIR 1991 S.C. 1886, it was held that the Fundamental rights of a foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country. The Constitution Bench in Hans Muller's case(supra) had also turned down right of Foreigners' to move freely in India saying:—

> *"Article 19 of the Constitution confers certain fundamental rights of freedom on the citizens of India, among them, the right "to move freely throughout the territory of India" and "to reside and settle in any part of India" subject only to laws that impose reasonable restrictions on the exercise of*

those rights in the interests of the general public or for the protection of the interests of any Scheduled Tribe. No corresponding rights are given to foreigners. All that is guaranteed to them is protection to life and liberty in accordance with the laws of the land. This is conferred by Art. 21 which is in the following terms:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

In Anwar v. The State of J & K., AIR 1971 S.C. 337, this position was reasserted. Permission in the case of the petitioner to stay was granted on the basis of refugee certificate issued by the United Nations High Commissioner for Refugees, which was renewed from time to time. On expiry of the permit, obviously there will be no authorisation and thereafter the petitioner will have no right to stay and cannot make any grievance whatsoever. It is only when such a period of authorisation is sought to be curtailed by asking the petitioner to leave the country that the question for following a reasonable procedure might arise and not in those cases where there is no authorisation in operation.

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The rule of audi alteram partem is not cast in a rigid mould. There are numerous judicial decisions, which lay down that this rule may suffer situational modifications. The core of rule is that the person affected must have a reasonable opportunity of being heard and the hearing must be genuine one. What opportunity may be regarded as reasonable would necessarily depend upon the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing, which is very brief and minimal. The rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myraid kinds of situations, which may arise [See Maneka Gandhi's case (supra)].

In Louis De Raedt's case (supra) on the question of the extent of the right of hearing in such like cases to Foreigners who have the fundamental right confined to Article 21 of the Constitution of India for life and liberty and not to reside and settle in this

country it was held that there cannot be any hard and fast rule about the manner in which a person concerned has to be given an opportunity to place his case."

(pp. 77-79 of the DRJ report)

(Emphasis supplied)

Since in ***Mohammad Sediq's*** case the court was satisfied from the material on record, that in the facts and circumstances obtaining in that case, a *due and fair opportunity had already been afforded* to the petitioner as was reasonable, the court ruled that it was not a fit case for granting the relief prayed for. However, on point of law, it was held that a reasonable procedure is required to be followed in a case involving *curtailment of the period of authorization* granted by a residence permit.

28. In our jurisprudence the *right to a reasonable opportunity of hearing* has been read into the process of taking administrative decisions that involve 'civil consequences', *even if not expressly provided for*, as held by the Supreme Court *inter-alia* in the case of ***Sahara India (Firm), Lucknow vs. Commissioner of Income Tax & Ors.*** reported as (2008) 14 SCC 151 in the following words :

"17. Initially, it was the general view that the rules of natural justice would apply only to judicial or quasi-judicial proceedings and not to an administrative action. However, in State of Orissa v. Dr. Binapani Dei the distinction between quasi-judicial and administrative decisions was perceptively mitigated and it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistent with the

rules of natural justice. Since then the concept of natural justice has made great strides and is invariably read into administrative actions involving civil consequences, unless the statute, conferring power, excludes its application by express language.

18. Recently, in Canara Bank v. V.K. Awasthy the concept, scope, history of development and significance of principles of natural justice have been discussed in extenso, with reference to earlier cases on the subject. Inter alia, observing that the principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights, the Court said: (SCC pp. 331-32, para 14)

> *"14. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."*

19. Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.

20. We may, however, hasten to add that no general rule of universal application can be laid down as to the applicability of the principle audi alteram partem, in addition to the language of the provision. Undoubtedly, there can be exceptions to the said doctrine. Therefore, we refrain from giving an exhaustive catalogue of the cases where the said principle should be applied. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of all these matters that the question of application of the said principle can be properly determined. (See Union of India v. Col. J.N. Sinha [(1970) 2 SCC 458] .)

21. In Mohinder Singh Gill v. Chief Election Commr. explaining as to what is meant by expression "civil consequence", Krishna Iyer, J., speaking for the majority said: (SCC p. 440, para 66)

> *"66. ... 'Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary*

damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence."

(emphasis supplied)

22. The question in regard to the requirement of opportunity of being heard in a particular case, even in the absence of provision for such hearing, has been considered by this Court on a number of occasions. In Olga Tellis v. Bombay Municipal Corpn. while dealing with the provisions of Section 314 of the Bombay Municipal Corporation Act, 1888, which confers discretion on the Commissioner to get any encroachment removed with or without notice, a Constitution Bench of this Court observed as follows: (SCC p. 581, para 45)

"45. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule (hear the other side) could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exemption and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the legislature only in circumstances which warrant it. Such

circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."

(Emphasis supplied)

29. It is also a basic tenet of the rule of law, that no power conferred upon any authority must be unguided, uncanalized, untrammelled or absolute. Courts will invariably frown upon unguided power, wherever it be found ; and the test would be *vis-a-vis* the *authority* upon which power is conferred, *regardless of the subject* upon which the power is exercised. That is to say, in the present context, the Ministry cannot have absolute, unguided power, regardless of whether the power be exercised over a citizen or a foreigner. The question to ask therefore is, whether there is any guidance or restraint on the power of the Ministry to direct a foreigner to leave the country *or* is the discretion unguided and absolute? The fact that the power is exercised *upon or against a foreigner* is not the point. It is the existence of unguided power in the hands of an authority that is in issue. Providing a procedure for its exercise is the *basic minimum restraint* on exercise of any power. What, may we ask, is the procedure for exercise of the Ministry's power to direct a foreigner on a valid and subsisting visa, to leave the country. If no procedure is discernible in the statute, a basic procedure must be read into it. What was the procedure followed by the Ministry in the present case before issuing the Notice to Nausheen ? Here we are *not* holding the Ministry to the standard of a *just, fair or reasonable procedure* prescribed by law as per the principles laid down *inter alia* in the case of ***Maneka Gandhi vs. Union of India & Anr.*** (1978) 1 SCC 248 which may not be applicable to a case under the Foreigners Act or to regulations or orders made thereunder ; but

did the Ministry follow *any procedure at all*? We are afraid we are unable to discern any procedure whatsoever having been followed before the issuance of the Notice. The abrupt and peremptory issuance of the Notice *itself* cannot, on any parameters, be construed to be a procedure. A legal procedure must be a set of steps prescribed by law or read into the law, involving and displaying assessment of a fact situation, application of mind, leading to inferential action by the authorities, that *precedes* such action; which, in case of civil consequences, must also include due consideration of the version or representation of the person who will be visited with such consequences. The absence of any steps cannot itself pass-off as procedure.

30. If authorities are permitted to direct valid visa-holders to leave the country without basis or without need for any consideration or reasoning, it would amount to anarchic and arbitrary action, which the law will never countenance.

31. We must also remind ourselves that our country is party to the International Covenant on Civil and Political Rights ('ICCPR', for short) adopted by the General Assembly of the United Nations on 19.12.1966, Articles 13, 17, 23 and 24 whereof read as under :

> *"Article 13. An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

XXXXX

"Article 17.

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

XXXXX

"Article 23.

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. xxxxx

3. xxxxx

4. xxxxx

Article 24.

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality"

32. As held in ***Vishaka and Ors. vs. State of Rajasthan and Ors.*** reported as (1997) 6 SCC 241, the Supreme Court has said that it is permissible to

use and rely upon international conventions and norms for construing fundamental rights expressly guaranteed in the Constitution. The said principle laid down in ***Vishaka*** (supra) has been followed in the recent judgment of the Supreme Court in ***National Legal Services Authority vs. Union of India and Ors.*** (2014) 5 SCC 438 with the court observing that :

> *"59. ... Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions e.g. Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee."*

33. In the present case, the mandate of Articles 13, 17 and 23 have been thrown to the winds. The record does not reveal that Nausheen has indulged in any unlawful conduct, unfriendly activity or offensive act. Even upon perusal of the 'inputs' received from the Intelligence Bureau, as shared by the Ministry with the court, no such act or omission is discernible as would warrant unilateral, peremptory action by the Ministry.

34. This court is acutely conscious of the importance of 'national security'. We are also conscious that we must not substitute our view or opinion for the view taken by the Ministry and must respect decisions made by other branches of the State on the basis of special knowledge and resources that are available to such branches, which we do not have. Our concern however is limited, on a jurisprudential basis, to affording *procedural due-process protection* to a person, even if a non-citizen, against arbitrary State action. It deserves to be flagged that Nausheen has contracted marriage with Mohd. Javed legitimately and in accordance with law in

India. Religious nuances apart, in our country, marriage is considered a sacred institution. The institution of marriage entails the right of spouses to live together and to raise a family, which right must receive support of the community as also of the State since it is central to human life as we understand it.

35. At this point it would be useful to set-out the view taken by the United Nations Human Rights Committee at its Seventy-Second Session on 26.07.2001 in the case of ***Hendrick Winata & Ors. vs. Australia*** reported as 2001 SCC OnLine HRC 31, concerning the interpretation of Articles 17, 23 and 24 of the ICCPR, which view though not binding on us, certainly deserves respect, being the majority view of 13 eminent jurists of the Committee comprising 18 members (of which 1 rescued and 4 dissented) in a matter with very similar factual contours. The case relates to denial of 'protection visa' and 'parent visa' to two Indonesian nationals, who, having arrived in Australia on a visitor visa and student visa, remained back in Australia unlawfully after expiration of their visas. Having got into a relationship akin to marriage, the couple had a son who was thirteen years of age at the time when they were sought to be removed from Australia in compliance with the immigration laws of that country. By reason of his birth in Australia, the minor son had acquired Australian citizenship. Initially, the couple sought 'protection visa', claiming that they faced persecution in Indonesia owing to their Chinese ethnicity and Catholic religion, which however, was declined by the authorities. Subsequently, the couple sought to migrate to Australia on 'parent visa' on the basis that their minor son was an Australian national. While other details of the matter are of no relevance

for the present consideration, the following extracts of the view taken by a majority of the Human Rights Committee give an insight into and perspective on the concept of 'interference with family life', which we think ought to be duly appreciated:

> *"**6.3** As to the State party's contention that the claims are in essence claims to residence by unlawfully present aliens and accordingly incompatible with the Covenant[1], the Committee notes that the authors[2] do not claim merely that they have a right of residence in Australia, but that by forcing them to leave the State party would be arbitrarily interfering with their family life. While aliens may not, as such, have the right to reside in the territory of a State party, States parties are obliged to respect and ensure all their rights under the Covenant. The claim that the State party's actions would interfere arbitrarily with the authors' family life relates to an alleged violation of a right which is guaranteed under the Covenant to all persons. The authors have substantiated this claim sufficiently for the purposes of admissibility and it should be examined on the merits.*
>
> *XXXXX*
>
> *"**7.3** It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require*

[1] "Covenant" refers to the International Covenant on Civil and Political Rights
[2] "authors" refers to the visa applicants

departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen years. The authors' son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the authors would constitute, if implemented, arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the alleged victims, and, additionally, a violation of article 24, paragraph 1, in relation to Barry Winata due to a failure to provide him with the necessary measures of protection as a minor.

XXXXX

*"**9.** In accordance with article 2, paragraph 3(a), of the Covenant, the State Party is under an obligation to provide the authors with an effective remedy, including refraining from removing the authors from Australia before they have had an opportunity to have their application for parent visas examined with due consideration given to the protection required by Barry Winata's status as a minor. The State party is under an obligation to ensure that violations of the Covenant in similar situations do not occur in the future."*

(Emphasis supplied)

36. In our opinion it is in the fitness of things that due weightage be given to the family life of the parties concerned in this case, not just Nausheen but also her husband Mohd. Javed and the two minor children, who are citizens of India and who are entitled to consortium, love and affection of Nausheen and have the right to live as a family. We feel tempted to borrow the words of Justice Stephen Breyer of the US Federal Supreme Court in the case titled ***John F. Kerry, Secretary of State vs. Fauzia Din*** reported as 135 S.Ct. 2128 (2015) decided on 15.06.2015 which, though an observation made as part of the dissenting opinion in that case, rings true in the context of Article 21 of our Constitution, where Justice Breyer says :

> *" ... How could a Constitution that protects individuals against the arbitrary deprivation of so diverse a set of interests not also offer some form of procedural protection to a citizen threatened with governmental deprivation of her freedom to live together with her spouse in America? ..."*
>
> *(p. 2143 of the Supreme Court Reporter)*

We are only too familiar with the vast scope and expanse of rights protected under the overarching principles of Article 21 of the Constitution as developed over the past decades by court pronouncements. How then can the rights of a family against arbitrary and capricious interference by the State not be protected as part of the ever-growing bundle of rights under Article 21? Drawing upon the covenants contained in the ICCPR, we hold that the 'family', being the natural and fundamental unit of society, is entitled to protection of its integrity against arbitrary interference by the State.

37. In the backdrop of the above administrative and legal contours, the position that emerges is the following:

(a) Nausheen's LTV is valid until 08.06.2020. As of date, she has also applied for citizenship in India, which application is pending with the authorities;

(b) No notice, order or communication has ever been issued to Nausheen by the Ministry or by any other authority calling upon her to show cause against any alleged breach or violation of any terms or conditions of her LTV;

(c) Nausheen's LTV has never been cancelled;

(d) The Ministry's decision, as also the decision of the single Judge, against Nausheen's continued residence in India are based upon intelligence 'inputs' which, in our view, do not disclose matters that are egregious enough nor do they disclose a proximate or causal link between what is stated in the 'inputs' and the issuance of the Notice;

(e) While the single Judge proceeds on the essential basis of Nausheen being an alien who has no 'right' to continue to reside in India, that view omits to note that being the mother of two children who are Indian citizens and the wife of an Indian citizen, directing Nausheen to leave the country would break-up the family and would thereby be a serious infraction of the rights of at least three Indian citizens, namely the husband and the two sons aged 6 and 11 years, to

live as a family. It bears mention that appellant/petitioner No.1 in these proceedings is Mohd. Javed, an Indian citizen;

(f) In our view, the right to life under Article 21 of the Constitution of India would include the right of young children to live with their mother and the right of a husband to consortium with his wife; and State entities cannot be permitted to deprive Nausheen's sons and husband of these rights, merely by a stroke of the pen, in a manner that smacks of authoritarianism, without authority of law and without complying with basic tenets of natural justice and without affording her an opportunity of hearing to answer any matter alleged against her;

(g) While grant of a visa in the first instance may be a matter of pure discretion with the authorities, curtailing the liberty of residing in the country during the validity of an LTV cannot be permitted *except* by a reasoned decision, as has been held by the Supreme Court in ***Hasan Ali Raihany*** (supra) and by a Division Bench of this court in ***Mohammad Sediq*** (supra) ;

(h) If, as contended by the Ministry in affidavit dated 10.04.2019, it derives the power to regulate the entry, stay and exit of a foreign national from India *inter-alia* from Section 3 of the Foreigners Act 1946, then *a fortiori* such power can never be untrammelled or unregulated since law abhors absolutism and arbitrariness;

(i) What is under consideration here is *not* Nausheen's 'right' to stay in the country so much as the entitlement of the Ministry to act

with manifest arbitrariness in directing Nausheen to leave the country in spite of a valid and subsisting visa that she holds.

38. The above considerations lead us to the inevitable conclusion that Notice dated 07.02.2019, styled as a 'LEAVE INDIA NOTICE' issued by the Ministry to Nausheen does not stand the scrutiny of law and therefore requires to be quashed and set aside, which we hereby do. Accordingly, we also disagree with the conclusion of the single Judge and set-aside impugned order dated 28.02.2019.

39. We however leave it to the Ministry and to other concerned authorities to consider and decide application dated 07/09.05.2019 made by Nausheen Naz (appellant No.2) seeking citizenship, in accordance with law; giving liberty to Nausheen Naz to take recourse to such remedies, if any and if required, as may be available in law against any decision on her citizenship application that may be taken by the Ministry/authorities.

40. The appeal is disposed of in the above terms. Pending applications, if any, also stand disposed of. No costs.

ANUP JAIRAM BHAMBHANI
(JUDGE)

CHIEF JUSTICE

MAY 28, 2019/sr/*uj*