



Short Article

An Analysis of Independence of Foreigners Tribunals with Special Reference to Assam

Raj Krishna¹, Rishika² & Sagarika Swapnil³

¹National Law Institute University, Bhopal ²Trilegal, Mumbai ³High Court of Judicature at Patna, Patna

Published on: September 28, 2021

Page No.: 114 – 119

Manuscript No.: 2021/LNLR/28114

Editors: Adnan Athar Quraishi, Mohd Rameez Raza

Cite as: Raj Krishna, Rishika, & Sagarika Swapnil, An Analysis of Independence of Foreigners Tribunals with Special Reference to Assam (2021) 1(2) LKO. L. REV. 114

Find here: <https://www.lucknowlawreview.org/raj-rishika-sagarika>

Abstract: *On 24th March, 2021 the Supreme Court of India in the case of Md. Misher Ali v. Union of India directed “the release of a man from the detention center in Assam.” The Apex Court ordered the same because Foreigners Tribunal in an ex-parte order declared the petitioner as an illegal migrant. As a result, the Court sent the matter back to the Foreigners tribunal and directed “the tribunal to decide the matter afresh and in accordance to the principles of natural justice.” While doing so the Court also rejected the arguments of the Assam Government which contended before the Court that the plea of the petitioner should not be entertained because the petitioner has exhausted the limitation period of filing an appeal against the order of Foreigners Tribunal. It is pertinent to note that this is not the first case wherein a Foreigners Tribunal has passed an ex-parte order. There have been many instances in the past wherein the Foreigners Tribunal has passed an ex-parte order and the same has been altered by the Constitutional Courts. The Tribunals are supposed to follow the principle of natural justice. However, the Foreigners Tribunals in Assam have passed multiple orders which are in violation of principle of natural justice. This is a matter of grave concern. As a result, a study upon the independence of Foreigners Tribunals becomes important.*

Keywords: *Tribunals, Natural Justice, Foreigner.*

Copyright © 2021, Lucknow Law Review.

This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<https://creativecommons.org/licenses/by/4.0/>).

1. Introduction

Articles 5 to 11 of the Indian Constitution deals with the concept of Citizenship. Furthermore, the Citizenship Act, 1955 provides for 6 ways by which one can acquire citizenship of India. However even prior to the enactment of our Constitution, the Foreigners Act, 1946 provided for who is not a citizen of our country. Section 2 of the Foreigners Act defines foreigner “*as a person who is not a citizen of India*”¹. Furthermore Section 3 of the Foreigners Act, “*empowers the Central Government to regulate the entry, exit or stay, of any foreigner in India.*”² The Foreigners Tribunals in India has been constituted under the Foreigners Act, 1946. Under Section 3 of the Act, the Central Government issued The Foreigners (Tribunals) Order in the year 1964. The said Order provided “*for the constitution of tribunals with the jurisdiction to rule upon cases of any individual whether he or she is a foreigner or not.*” Till the year 1979 there were only 10 Foreigners Tribunals in India. However, in the year 2015 the number increased to 64. Currently we have close to 100 Foreigners Tribunals and it is expected that the Union Government will create 200 more Foreigners Tribunals in our country.³

2. Functions and Working of Foreigners Tribunals

2.1. Appointment Procedure

Initially only retired or serving district and additional district judges were appointed as members of Foreigners Tribunals. However, post 2015 any advocate aged above 45 years and with 10 years of experience can be appointed as the members of the Foreigners Tribunals. On certain occasions even civil servants has been appointed as the members of the Foreigners Tribunals. The major criterion for appointment is that the applicant should have knowledge in regard to the foreigner’s issue.⁴

2.2. Jurisdiction of Foreigners Tribunals

The Foreigners (Tribunals) Order, 1964 deals with the powers and functions of the Foreigners Tribunals. Though this order of the Union Government had a country-wide jurisdiction, but it has been applied only in the state of Assam.⁵

¹ Foreigners Act 1946, sec 2

² Foreigners Act 1946, sec 3

³ Faizan Mustafa, ‘Kangaroo tribunals: Foreigners’ Tribunals almost another arm of BJP government in Assam,’ (*The Indian Express*, 8 October 2019) <<https://indianexpress.com/article/opinion/columns/supreme-court-foreigners-tribunals-assam-nrc-6058158/>> accessed on 1 August 2021.

⁴ *Ibid*

⁵ *Ibid*

Sections 2 of the Foreigners (Tribunals) Order, 1964 empower the Union Government to constitute Foreigners Tribunals in our country.⁶ However post 2019 amendment the state government, union territory administration, district collector, and district magistrate can create a Foreigners Tribunal.

Apart from that mostly 2 types of cases are referred to Foreigners Tribunals –

- i) Against whom a reference has been made by the Border police.
- ii) Individuals whose names in the electoral rolls have a D (Doubtful) against them.

Section 3 of the Foreigners (Tribunals) Order, 1964 states that –

“Every Tribunal shall serve on the person, to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his case and after considering such evidence as may produce and after hearing such persons as may desire to be heard, the Tribunal shall submit its opinion to the officer or authority specified in this behalf in the order of reference.”⁷

Section 3A of Foreigners (Tribunal) Order, 1964, states that –

“If an appellant goes to the tribunal within 30 days of an ex-parte order and gives a reasonable explanation for not showing up earlier, the tribunal can set aside the order declaring him a foreigner. This is to give people a chance to contest the case in the tribunal itself without having to approach a higher court.”⁸

Section 4 of the Foreigners (Tribunals) Order, 1964 empowers the Foreigners Tribunal with certain powers of the Civil Court. Just like Civil Court the Foreigners tribunals can summon and enforce the attendance of the person. The Foreigners Tribunals are empowered to examine documents and witnesses. Furthermore, the Tribunals are empowered to frame their own rules and procedure.⁹

3. Loopholes in the Working of Foreigners Tribunals

In recent times the Constitutional Courts of our country have overturned a large number of decisions of the Foreigners Tribunals for being antithetical to rule of law. As a result, it becomes quite important to study about the loopholes in the current working of Foreigners Tribunals.

⁶ Foreigners (Tribunals) Order 1964, sec 2

⁷ Foreigners (Tribunals) Order 1964, sec 3

⁸ Foreigners (Tribunals) Order 1964, sec 3A

⁹ Foreigners (Tribunals) Order 1964, sec 4

The problem starts with the appointment procedure itself. Initially the retired judicial officers of the rank of District Judge or Assistant District Judge were appointed as the members of these Foreigners Tribunals. However currently even civil servants are being appointed as the members of these Foreigners Tribunals. It is pertinent to note that the civil servants are not legally trained minds and they have been asked to decide upon the most complex issue of law and *i.e.*, the citizenship rights of an individual. As Professor Mustafa points out that in the name of training these officials undergo a two-day orientation course which is preposterous.¹⁰

Furthermore, the Executive has compromised the independence of the Foreigners Tribunals. It is because most of the members of the Foreigners Tribunal are hired for a temporary period of one or two years. Most of the members are removed after they complete one year itself. The most shocking aspect is that they are removed by the Union Government without providing any proper justification. This indeed compromises the independence of the working of the members of Foreigners Tribunals.¹¹

It has also been observed that the officials involved in the process of National Register of Citizens (NRC) often declare a person as a doubtful voter even without proper investigation. The individuals who are declared as doubtful voters are supposed to appear before the Foreigners Tribunals to prove their citizenship claim. However, the summon is served at such a short notice that most of the people fail to appear in time before the tribunals.¹²

Furthermore Section 3 (1) of Foreigners' Tribunal Order of 1964¹³ states that "*notices shall mention the main grounds why an individual has been summoned.*" However, in practice the Foreigners Tribunals act quite contrary to the said directive which is problematic. The poor individuals lack knowledge of law. Furthermore, if the charges are not known it will become quite impossible for a layman to defend himself.¹⁴

The Illegal Migrants (Determination by Tribunals Act), 1983 placed onus upon the prosecution to prove that the individual involved is a foreigner. However, in the Sarbananda Sonowal case¹⁵ the Supreme Court struck down the IMDT Act for being violating the provisions of the Constitution.

¹⁰ Faizan Mustafa (n 3)

¹¹ Prashant Bhushan, 'Conduct of Foreigners Tribunals in Assam is Questionable,' (*The Indian Express*, 20 September 2019) <<https://indianexpress.com/article/opinion/columns/assam-nrc-final-list-foreigners-tribunals-6011356/>> accessed on 31 July 2021

¹² Faizan Mustafa (n 3)

¹³ Foreigners' Tribunal Order 1964, sec 3(1)

¹⁴ Faizan Mustafa (n 3)

¹⁵ *Sarbananda Sonowal v Union of India*, Writ Petition (Civil) 131 of 2000

Furthermore, in *Sarbananda Sonowal (II) v Union of India*,¹⁶ the Supreme Court “struck down the Foreigners (Tribunals) Amendment Order, 2006 for being unnecessary and unreasonable.” This order stated that “*the Foreigners Tribunal has to first consider whether there were sufficient grounds for proceeding against a person suspected of being an illegal migrant and only on the Tribunal being satisfied that the basic facts were prima facie established could a notice be issued to the person concerned.*”¹⁷

However, the Supreme Court in *Sonowal (II)*¹⁸ held that “there was a lack of will in ensuring that illegal immigrants were sent out of the country. The 2006 Amendment Act, which sought to make the Foreigners (Tribunals) Order, 1964, inapplicable to Assam, is discriminatory and violative of Article 14 of the Constitution.” Thus, the Apex Court through its series of judgment has shifted the burden of proving the citizenship from the prosecution to the common man.

4. Conclusion and Suggestions

“Impartiality is the soul of the judiciary; independence is the life blood of the judiciary”

- Union of India v. R. Gandhi¹⁹

The Executive has compromised the independence of the Foreigners Tribunals. Not only the Executive has compromised the appointment process, but has also compromised the independent functioning of the officers by not fixing their tenure. If the independence of the Tribunal is compromised then one cannot expect impartial decisions from the members of these tribunals.

Therefore, the researcher believes that the matter of citizenship should be decided by judicial bodies and not quasi-judicial bodies. It is because citizenship is a gateway to fundamental rights. By virtue of being an Indian citizen we enjoy certain fundamental rights which cannot be taken away by the governments on its whims and fancies. As a result, the researchers believes that a body which is deciding the citizenship of an individual should be a judicial body headed by a retired or serving judicial officer. In certain circumstances lawyers with minimum seven years’ experience should be allowed to head the Tribunal.²⁰

¹⁶ *Sarbananda Sonowal v Union of India*, Writ Petition (Civil) 117 of 2006

¹⁷ V. Venkatesan., ‘The NRC case: The Supreme Court’s Role’, (*The Hindu*, 11 October 2019) <<https://frontline.thehindu.com/cover-story/article29498707.ece>> accessed on 30 July 2021

¹⁸ *Sarbananda Sonowal* (n 16)

¹⁹ *Union of India v R. Gandhi*, (2010) 11 SCC 1

²⁰ Special Correspondent, ‘Foreigners’ Tribunals must be Judicial Bodies’, (*The Hindu*, 15 June 2019) <<https://www.thehindu.com/news/national/foreigners-tribunals-must-be-judicial-bodies/article27951624.ece>> accessed on 31 July 2021.

When Foreigners Tribunals will become a judicial body then the chances of biasness will decrease and transparency and trustworthiness will increase. Furthermore, there needs to be a procedural code which every tribunal should follow to avoid biasness and arbitrariness. In the absence of a proper procedure code these Foreigners Tribunals have acted in a very arbitrary manner. Therefore, it is important that on the lines of CPC/CrPC, the Government comes out with a proper procedural code for the Foreigners Tribunals.²¹

It is pertinent to note that most of the people whose names have been omitted from the NRC list are the individuals who are poor and illiterate. As Prof Mustafa in his article²² pointed out that most of them whose name are not in the NRC list are those who are the victims of annual floods of the Brahmaputra River.

As a result, it is necessary that those people whose names are not there in the NRC list should be provided with proper legal aid so that they are not deprived of justice. Currently few of the National Law Universities have come in to the rescue of these people whose names are not there in the NRC list. It is expected that more members from the legal fraternity will support their cause.

²¹ Special Correspondent (n 20)

²² Faizan Mustafa (n 3)