

Paper Title: Violation of trafficked victims' rights under the Foreigners Act 1946

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Abstract

Bangladesh and India share a long history of common resource sharing after the partition of 1947 and the Independence of Bangladesh, a new diaspora of population management and resource management is outflow in Bangladesh. Irregularity of increased population, poverty, migration and unemployment is causing a mass human rights violation in Bangladesh and impacting India. From time to time, both countries showed their commitment to preventing human trafficking, but unfortunately, both countries are still in the dilemma of legalising or criminalising prostitution. The definition of prostitution changes from government to court and court to government, due to which metropolitan cities of India and organised syndicates have a high demand for Traffickers. Economic instability of many migrants leads to migrating irregularly from Bangladesh to India without knowing the consequences of detention, investigation and trial. Offenders of human trafficking were hard to detect and detain due to transboundary crimes, and due to the absence of documentation and irregular migration, victims were detained. In this article, the author tries to examine the role of the Foreigners Act, 1946, in trafficking victims of India and Bangladesh and the memorandum of understanding between the countries. Efficiency of existing laws in Bangladesh on human trafficking, available data on trafficked persons and procedural inconsistency of laws to prevent human trafficking and victimisation of trafficked victims.

Keywords: *Transborder Trafficking, MoU 2015, Rescue and Repartition, Prevention and Suppression of Human Trafficking Act 2012 and Foreigners Act 1946.*

1. Introduction

Human trafficking is one of the severe offences, and it is a grave violation of human rights. Annually, a large number of women and children are trafficked across the globe. Both the source as well as the destination country is impacted by the trafficking cases. Each country has several laws and legal provisions that deal with human trafficking offences. Human trafficking can be within the nation or beyond the nation. In cross-border trafficking cases the laws that regulate the foreigner's entry or stay in the destination country becomes essential because there is a chance that trafficking victim when they are transferred or transited by the trafficker across the borders without proper documents or visa or from different route, port or place or may be with forged documents often gets falsely prosecuted under this law when they are caught. In India, the law which deals with foreigners' entry, stay and departure is the Foreigners Act of 1946¹. This act was enacted during the British colonial period, before independence, to check and control the foreigners' entry and departure from India. The Foreigners Act was originally created to control migration. After the partition in 1947 and after the liberation war of Bangladesh in 1971, irregular migrants became a persistent issue. Since then, this act has become an essential piece of legislation in India and Bangladesh to deal with the entry of foreigners. India and Bangladesh use this act to detain illegal migrants. In India, most of the Bangladeshi enter through West Bengal, out of which a huge number are trafficking victims. According to the NCRB data, the total number of foreigners registered under the Foreigners Act 1946 is 1022, out of which West Bengal has the highest number, 716. This shows that a large number of people booked under this act can be trafficked victims because the traffickers from Bangladesh transfer the victim mainly through Jessore road in West Bengal, and also Kolkata has Asia's largest brothel in Sonagachi. The Foreigner's Act does not particularly address the victims of human trafficking. Section 2 (a)² of the act defines foreigners as a "person who is not a citizen of India". Section 3³ empowers the central government to make an order relating to foreigners entering, departing or remaining in India. This section states that

¹ The Foreigners Act, 1946 (1046 Act No. 31).

² Ibid., S.2 (a).

³ Ibid., S.3.

no foreigner can enter or depart from India or they can do it only with the valid documents at specific time and place and from such route, port or place as prescribed by the law. If any foreigner stays in India after his/her visa has expired or if there is any contravention of the rules made under thereunder, they shall be punished under section 14 of the act. This section punishes the foreigner with five years' imprisonment and a fine. When this act is used against the cross-border trafficking victims, firstly, they are deprived of their human rights, and secondly, they are doubly victimised. However, there is no provision under this act which states how to identify or detect a foreigner or how to detect a trafficking victim or an illegal migrant. Furthermore, whereas on one side this act is protecting India from illegal immigrants and refugees, on the other side, it is depriving a victim of their rights and making the situation more traumatic for them, who have already been victimised by the traffickers.

2. Trafficking victims under section 14 of the Act.

A foreigner is punished under Section 14 if he overstays in India after his visa has expired. In such a case, the person will be punished with five years and also with a fine. Section 14A punishes any foreigners who enter India without valid documentation or stay in any restricted area; in such a case, the punishment is not less than two years but may extend up to 8 years, and the fine is not less than ten thousand but may extend up to fifty thousand. Section 14B punishes for using forged documents not less than 2 years, but may extend 8 years⁴. In *Sk. Rezaul alias Dalal Rezaul v. State of West Bengal*⁵ Calcutta High Court held that a person is punishable under section 14 of the Act if he enters India without a valid passport or remains after the visa has expired. In *kamil siedczynski v. union of India*⁶ The Supreme Court held that the central government has unfettered power under Section 14 of the Foreigners Act. If any foreigner's entry or stay is illegal, that person should be punished under this section. The perpetrators, when found, are also booked under Section 14. In one of the recent cases in 2024, the Delhi High Court in *Chande Sahani alias Raju v. the State*⁷ In this case, the accused were arrested for selling foreign girls for sexual exploitation. They were charged under Section 370

⁴ The Foreigners Act, 1946 (1046 Act No. 31). S.14.

⁵ *Sk.Rezaul Alias Dalal Rezaul v. State of West Bengal* [LAWS (CAL)-2007-9-8].

⁶ *Kamil Siedczynski v. Union of India* W.P. No. 4432 (W) of 2020.

⁷ *Chande sahani Alias Raju v. state, high court of Delhi*.

of the IPC and also under Section 14 of the Foreigners Act because they failed to provide a visa and a passport for their stay in India.

The working group on arbitrary detention submitted a report in 2018⁸ regarding the arbitrary arrest and detention of women and children from Bangladesh in West Bengal. There were four Bangladeshi women, namely Reena Akhtar, Taslima Begum, Beuti Begum, and Masuma Begum and her 8-year-old child. They were all arrested by the Swarupnagar police station, West Bengal, and charged under Section 14 of the Foreigners Act 1946. They were all brought to the ADJ of the Basirhat court, and they were sent to the correctional home for under-trial prisoners. The 8-year-old child was separated from her mother and was sent to a juvenile home. Section 14 of the foreigners act states that “any person who contravenes the provisions of this act or of any direction given in pursuance of this act or such order, shall be punished with imprisonment for term which may extend to five years and also liable to fine” this section punishes for illegal entry but this section should be read in connection to a advisory by ministry of home affaire in 2012 which states that “if any women or children is found to be a victim of human trafficking after an investigation, then she should not be prosecuted under foreigner’s act 1946. In case it is determined that the victim has not come to India voluntarily or participated in an illegal act, the state government may refrain from filing a charge against her. If the victim has already been charged under the Foreigners Act, necessary steps should be taken to withdraw the case against the victim. Details of such victims should be promptly provided to the Ministry of External Affairs to facilitate their repatriation to the origin state through diplomatic channels”. Despite the advisory from the central government, the trafficking victims, when found, are booked under section 14 of the Foreigners Act and sent to jail because of their lack of documents. This four women who were arrested no appropriate investigation was carried out to check whether they are really an illegal migrants or entered India due to force, coercion, fraud and deception out of their own free will. The trafficking bill of 2021 mentions many places that victims must be protected from re-traumatized. Under chapter VIII of offences and penalties section 36 mentions that public servant will be liable if they by any of their act cause trauma, hardship or secondary victimization to victims, but nowhere mentioned about the arbitrary arrest of the victims under foreigners act. Also Article 37⁹ of UN Convention of the right of the child and even section 16 of the juvenile justice (care

⁸ Palais Des Nation. 1211 Geneva 10, Switzerland, Reference: AL IND 5/2018.

⁹ The convention on the Rights of the child, Article 37.

and protection of children) Act 2015 states that no juvenile under 16 shall be detained. Even section 83 of IPC states that no child shall be held liable for any act committed under above 7 years and below 12 years of immature understanding. Despite all these provisions and the 2012 central government advisory not to charge children under this act, they continue to face injustice.

3. Principle of non-punishment.

The 2015 ASEAN Convention against trafficking in Persons, especially Women and Children (ACTIP) upholds the idea that victims of trafficking shall not be punished. States parties are obliged under Article 14(7)¹⁰ to “consider not holding victims of trafficking criminally or administratively liable”. Article 5¹¹ of the ASEAN human rights declaration ADRH outlines the rights of the victims to “an effective and enforceable remedy” for any infringement of their rights, as well as their entitlement to a fair trial, presumption of innocence and right to legal representation under section 20 (1). These clauses reaffirm that the non-punishment principle must be put into practice in order to provide victims of human trafficking with legal protection to which they are entitled, while additionally stopping their re-trafficking and assisting in the prosecution of traffickers.

The criminalisation of the victims not only limits and violates the victims’ rights, but it also makes it more difficult to successfully combat human trafficking. As per Article 7¹² of the trafficking protocol, member states are required to enact laws or take necessary measures to permit victims of human trafficking to reside in their territory for a suitable period of time, either temporarily or permanently. Article 9¹³ of the SAARC convention tacitly suggest that it is not acceptable for member states to prosecute victims of human trafficking by requiring them to receive sufficient care and support while they await repatriation.

Furthermore, there are non-binding recommendations that support actions to shield victims of human trafficking from prosecution for unlawful entrance, such as those made clear by the UN High Commissioner for Human Rights. As part of its recommended principles and guidelines on human rights and human trafficking, the Office of the High Commissioner for Human

¹⁰ ASEAN convention against trafficking in person, especially Women and Children, 2015.

¹¹ ASEAN human rights Declaration, Article 5.

¹² Trafficking Protocol, Article 7.

¹³ SAARC convention, Article 9.

Rights (OHCHR) declared that "Trafficking persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as a trafficked person." ¹⁴

In 2004, the UN general assembly passed a resolution emphasizing that victims of trafficking should not be treated as offenders but rather of exploitation and that the government must shield them from prosecution for entering or staying in the country illegally¹⁵. Similar to them from prosecution for entering or staying in the country illegally. Similar to this, in the 2014 resolution, they pleaded with the government to make sure that victims of human trafficking are not held accountable for the crimes they were forced to commit as a result of their trafficking. It places a strong emphasis on shielding victims from being victimised again by law enforcement. It demands that the states protect them from prosecution or punishment for entering or remaining in the destination country unlawfully. The government of India has signed an MOU in 2015¹⁶ Bangladesh states that the government must treat trafficking victims with dignity and must make sure that they are not discriminated against throughout the judicial process and repatriation.

4. Impact on trafficked victims when charged under section 14.

When a trafficked victim is charged under section 14A, 14B of the Foreigners Act 1946, it impacts them in several ways, such as:

- **Re-Victimised:** Charging trafficked victims for their illegal entry can re-victimise them, as firstly, they have already been victimised by the traffickers who have trafficked them and may force them for several exploitations, and secondly, they are victimised by the law enforcement agencies. Section 3(e)¹⁷ of the Foreigners Act, which gives the government to

¹⁴ UNGA, "Recommended Principles and Guidelines on Human Rights and Human Trafficking" (2002) UN Doc E/2002/68/Add 1. *available at:*

https://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf last visited on 12 April, 2024.

¹⁵ United Nations General Assembly, "Trafficking in Women and Girls" (2004) A/59/166, *available at:*

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_59_166.pdf last visited 13, last visited at 13 April 2024.

¹⁶ Memorandum of Understanding between India and Bangladesh 2015.

¹⁷ The Foreigners Act, 1946 (1046 Act No. 31). S.3(e).

regulate orders regarding foreigners, imposes certain conditions on them as restrictions on their movement, requiring them to give a finger impression, photograph, medical examination, restricting them from engaging in certain activities or associating with people all this can double victimise the victim who is already traumatized by the traffickers.

- **Denial of the victim's right to justice, protection and compensation:** When a victim is charged under the Foreigners Act, they are prevented from receiving the justice and assistance that a trafficked victim has the right to get under national and international instruments. Article 6 of the trafficking protocol states that trafficked victims must receive assistance and protection, they must receive medical, psychological, as well as material assistance, they must be given proper education, housing and care. They need to be protected and their human dignity must be respected, as mentioned by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which states that "victims are entitled to receive the mechanisms of justice and prompt redress for the harm they have suffered". Section 23 of ITPA¹⁸ states that a trafficked victim must be kept in a protective home where she must receive all kinds of protection, care, treatment, training, and maintenance. They are also deprived of the right to justice of getting the perpetrator punished as per sections 370 and 370A of the IPC¹⁹. Moreover, when booked as an illegal migrant under foreigners as they are identified as an illegal migrant rather than a victim of the organised crime, so they lose their right to compensation as a victim of crime; instead, they are liable to pay a fine of ten to fifty thousand if booked under section 14A, or 14B of the Foreigners Act 1946. *In Rudul Shah v. State of Bihar*²⁰ and *Nilabati Behara v. State of Orissa*²¹ The court held that victims have the right to receive compensation if there is a violation of their human rights. The Calcutta High Court recently, in 2023, in *X v. The State of West Bengal*²² "ordered state to pay 7 lakh compensation to a minor trafficked girl as she was deprived of the full amount due contradiction between the NALSA scheme and that it is a right of the victims to receive compensation"

¹⁸ The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956).

¹⁹ The Indian Penal Code, 1860 (Act 45 of 1860) ss.370 &370A.

²⁰ Rudul shah v. state of Bihar, (1983) 4 SCC 141.

²¹ Nilabati behera v. state of Orissa, AIR 1993, SC 1960.

²² X V. State of West Bengal (WPA 5441 of 2023).

- **Delay in repatriation:** The legal procedure of a victim under the Foreigners Act includes identification of the victim, burden of proof, and nationality verification. These procedures are time-consuming, and thus, they result in a delay of the victim's repatriation. Trafficking victims need immediate repatriation, Article 8²³ The trafficking protocol states that the state where the destination country must take all necessary steps to repatriate the victim to its country of residence without any unnecessary delay. Calcutta high court in *Iti pandit v. union of India*²⁴ trafficked victims should be immediately repatriated. In 2015, a MoU²⁵ was signed between India and Bangladesh for the repatriation of the victim.
- **Difficult in getting bail:** Once the trafficked victim is prosecuted under section 3 and 14(a) and (b) of the foreigner Act 1946 for entering into India without valid documents and visa or with forged documents, it becomes difficult for them to get bail as the Tamil Nadu High Court in *Janarajan alias Krishnamurali v. State of Tamil Nadu*²⁶ held that "as the person is entering into India without a valid passport, visa and proper documentation, that person shall be identified, detained and deported. And since the person has no legal right to stay without a proper visa and passport, he shall not be enlarged on bail". It becomes obvious that once a person is booked under the foreigners without a passport or visa, that person cannot be allowed to move freely so the same goes for trafficked victim though they did not come in India though their own will but once they are booked they are also treated in the same way as illegal migrants and thus they are also deprived of bail. They are detained along with the perpetrator and the other accused, and their rights as trafficked victims are violated.

5. Conclusion

In conclusion, trafficked victims' rights are seriously infringed when the Foreign Act of 1946 is used to prosecute them for entering or remaining in India illegally. These victims, who have already experienced exploitation and abuse in the past, become victims again as a result of strict legal action that neglects their situation. This act not only denies their rights to justice, assistance, protection and compensation but also delays their repatriation and gives them the status of illegal migrants rather than a victim of crime, hence enhancing

²³ The Trafficking protocol, Article 8.

²⁴ *Iti pandit v. the union of India*, WPA 19332 of 2021.

²⁵ Memorandum of Understanding between India and Bangladesh, 2015.

²⁶ *Janarajan alias krishnamurali v. State of Tamil Nadu*, 1994 (1) LW 21.

their suffering. Further, there is a concern for law reform and enforcement strategies that can emphasise the protection of their rights and prevent them from getting re-traumatised or re-victimised. Victim recognition and identification become very important in order to protect the victim. Unless they are identified it really becomes difficult to provide protection or support to the victims and repatriate them and save them from being prosecuted as an illegal migrant and provide them their right to stay in the destination country.