IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. _____ OF 2018

(PUBLIC INTEREST LITIGATION)

IN THE MATTER OF:

HARSH MANDER
FOUNDING MEMBER
AMAN BIRADARI
C 6 6233 VASANT KUNJ
NEW DELHI - 110070
PH: 9810523018
Email: manderharsh@gmail.com … PETITIONER

VERSUS

1. UNION OF INDIA,
THROUGH ITS SECRETARY
MINISTRY OF HOME AFFAIRS
NORTH BLOCK, CENTRAL SECRETARIAT
NEW DELHI-110001 ….RESPONDENT NO.1

2. PRINCIPAL SECRETARY
HOME AND POLITICAL DEPARTMENT
CM BLOCK, 3RD FLOOR, ASSAM SECRETARIAT
GOVERNMENT OF ASSAM
PH: 9435080055
EMAIL: LS.CHANSAN@GOV.IN ….RESPONDENT NO. 2

WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA CHALLENGING THE INFRINGEMENT OF ARTICLE 14 AND ARTICLE 21 RIGHTS OF THOSE PERSONS DECLARED AS FOREIGNERS BY FOREIGNERS TRIBUNALS IN ASSAM AND HELD IN DETENTION CENTRES INDEFINITELY PENDING THEIR DEPORTATION

To,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUDGES OF THE HON'BLE SUPREME COURT OF INDIA

The Humble Petition of the Petitioners above-named

MOST RESPECTFULLY SHOWETH:-

1. The Petitioner is filing the instant writ petition in public interest under Article 32 of the Constitution of India for the enforcement of fundamental rights under Articles 14 and 21 of the Constitution of India, of those persons who are being held in detention centres in the State of Assam. The petitioner through the instant writ petition

seeks redress for violations of fundamental rights and internationally recognised human rights of detainees held presently in 6 detention centres/prisons in Assam, either because they have been declared as foreigners by one of the one-hundred Foreigners Tribunals in Assam or after serving out their sentence for illegally entering India, detained pending deportation. The petition is primarily based on the findings of the deplorable conditions in Assam detention centres, prepared as a report for the National Human Rights Commission (NHRC) by Mr. Harsh Mander, as Minorities Monitor at NHRC. The petition focuses on the appalling conditions in detention of such persons, that deprive them of their Constitutional right to life, guaranteed to all persons living in India. These persons were not served any notices by the Foreigners Tribunal and subsequent to ex-parte orders passed by the tribunals, have been arrested and detained in one of the 6 jails/detention centres. The petition points out the predicament of those who claim to be foreigners and are yet detained indefinitely in the absence of any clear procedure or time-line for their deportation. The authorities routinely detain people on the pretext of completing repatriation formalities by relying on certain provisions in the Foreigners Act, 1946, which for instance, enable the government to compel foreigners to 'reside at a particular place', with no specified time limit. Combined with the government's inaction, this has meant that the majority of illegal immigrants who have served their sentences remain indefinitely imprisoned instead of being deported. A third category of persons detained as those who are Stateless i.e. neither India or Bangladesh recognize them as citizens. The violations of the fundamental rights of such persons in indefinite detention, pending a judicial and political determination of their status and process of deportation is what the petitioner seeks immediate redress for.

1 A. The petitioner is Mr. Harsh Mander, human rights and peace worker, author, columnist, researcher and teacher. He works with survivors of mass violence, hunger, homeless persons and street children. He is the Director, Centre for Equity Studies, and founder of the campaigns Aman Biradari, for secularism, peace and justice;

Nyayagrah, for legal justice and reconciliation for the survivors of communal violence; Dil Se, for street children, and 'Hausla' for urban homeless people, for homeless shelters, recovery shelters and street medicine. He was Special Commissioner to the Supreme Court of India in the Right to Food case for twelve years from 2005-17. He is Special Monitor of the statutory National Human Rights Commission for Minority Rights. He convenes and edits the annual India Exclusion Report. He worked formerly in the Indian Administrative Service in Madhya Pradesh and Chhatisgarh for almost two decades. Among his awards are the Rajiv Gandhi National Sadbhavana Award for peace work, the M.A. Thomas National Human Rights Award 2002, the South Asian Minority Lawyers Harmony Award 2012 and the Chisthi Harmony Award 2012.The petitioners bank account number is 007101031452, pan number is AAWPH4686H and aadhar number is 356777866512.

The petitioner has no personal interest, or private/oblique motive in filing the instant petition. There is no civil, criminal, revenue or any litigation involving the petitioner, which has or could have a legal nexus with the issues involved in the PIL.

The petitioner has not made any representations to the respondent in this regard because of the extreme urgency of the matter in issue.

That the instant writ petition is based on the information/documents which are in public domain.

FACTS OF THE CASE

2. The State of Assam has a checkered history of grappling with the influx of migrants from other parts of India and neighboring countries especially erstwhile East Pakistan and now Bangladesh. Confronted with the problem of alleged "illegal" immigrants, the process of updating the National Register of Citizens in accordance with the Assam Accord (August 1985) has been undertaken. This process is being carried out as per the directions of this Hon'ble Court which is monitoring its process. However the process of identification of alleged illegal immigrants in Assam has become a contentious issue. The provisions of the Immigrants (Expulsion from Assam) Act 1950 together with the Foreigners Act, 1946 and the

Foreigners Tribunal Order of 1964 and the Citizenship Act, 1955 are the tools in the hands of the government to detect illegal immigrants who are then to be deported or detained pending deportation. A process that runs simultaneously with the current NRC process is the setting up of about hundred foreigners tribunals in Assam to determine whether a person is a citizen or illegal immigrant by determining those who allegedly illegally crossed over the border and live in India.

DETENTION CENTRES IN ASSAM

3. That there are presently no independent detention centres meant exclusively for the detention of foreigners in Assam and jails are being used for the detention of such persons. At present there are six centres in Assam for the detention of foreigners pending their deportation to their countries of origin. Each of these centres is located in the district jail of Goalpara, Kokrajhar, Silchar, Dibrugarh, Jorhat and Tezpur. Until 2014 there were only two. In case of women and small children below the age of 6, the alleged foreigner is separated from spouse (in cases where both are detained) and is sent to Kokrajhar detention centre. Kokrajhar still remains the only woman's detention centre.

4. The detainees in Assam's six detention centres may fall within either of the following two categories: "Declared foreigners" and "Convicted foreigners". Declared foreigners are people who have been declared as foreigners by Foreigners Tribunals due to the lack of documentation to prove their nationality as Indians. Convicted foreigners are those have been arrested for the lack of travel documents or for crimes. Such people are detained after their incarceration period is over, and are kept in the detention centres pending deportation. Their legal status is same as that of declared foreigners as soon as their incarceration period ends. Accordingto The Wire, there are 800-900 declared foreigners and 1,100-1,200 convicted foreigners who have been kept in detention centres. (as of February 2018). The purpose of detaining declared foreigners in a facility without any possibility of them of being deported to their

home country is not prescribed in law or highlighted in Government policy.

(A copy of The Wire reported, Detained until deported: Thousands declared Foreigners in Assam wait in Limbo, dated 10.02.2018, is annexed as **Annexure P - 1 (Pages _____to _____)**

NHRC NOTICE TO THE GOVERNMENT OF ASSAM

5. On 15.11.2017, the NHRC has issued notice to the Chief Secretary, Government of Assam, after taking suo motu cognizance of the allegations reported in the media about the harassment being meted out to the people by the police in the name of verification of their nationality in the State. The notice referred to media reports about the alleged harassment and discrimination faced by the persons who are lodged in detention centres. The notice states:

> *"According to the media report, there are detention centres in the State of Assam, where the people, under the scanner, are lodged in two categories. Bangaldeshis and D-voters. In many cases, once a person is declared an Indian citizen is again served notice by the police. It is further mentioned that at the time of hearing, the subjects are not allowed to wear their shoes and they have to enter barefoot, inside the Court, while the government officers and advocates are exempted…*

As mentioned in the report, there are 89,395 people estimated as illegal immingrants in Assam till August 2017 and currently there are more than 2000 people languishing in the detention centres, across the State, who are allegedly, being subjected to discrimination."

(A copy of the NHRC notice to the government of Assam dated 15.11.2017 is annexed as **Annexure P – 2 (Pages _____to _____)**

LEGAL PROVISIONS FOR DETENTION

6. That the legal basis for such detention stems from Section 2 and 3(2)(e) of the Foreigners Act, 1946 and Para 11(2) of the Foreigners Order, 1948, under which the Government of India has authorized the Government of Assam to set up such detention centres.

Provisions of the National Security Act and the Foreigners Tribunal Order 1964 have also been reproduced below.

The Foreigners Act, 1946

2. Definitions – In this Act -
(a) "foreigner" means a person who is not a citizen of India;
3."Power to make orders-
3(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 therefrom 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—
...
(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 identify 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;"

…

g) shall be arrested and detained or confined;

4. Internees: Any foreigner (hereinafter referred to as an internee) in respect of whom there is in force any order made under Clause (g) of sub-section (2) of Section 3, directing that he be detained are confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time by order determine.

Foreigners Order, 1948

In exercise of the powers conferred by Section 3 of the Foreigners Act, 1946, the Central government made the Foreigners Order, 1948. This order came into force on 14th February, 1948 and lays down regulations concerning foreigners entry into, movement in, and departure from, India.

"*11. Power to impose restrictions on movements, etc .-*

The civil authority may, by order in writing, direct that any foreigner shall comply with such conditions as may be specified in the order in respect of--

(1) his place of residence;

(2) his movements;

(3) his association with any person or class of persons specified in the order; and

(4) his possession of such articles as may be specified in the order."

The National Security Act, 1980

Section 3:Power to make orders detaining certain persons.—

(1) The Central Government or the State Government may,—

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

Section 5: Power to regulate place and conditions of detention.— Every person in respect of whom a detention order has been made shall be liable—

(a) *to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and*

(b) to be removed from one place of detention to another place of detention, whether within the same State or in another State, by order of the appropriate Government

Provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State to another State except with the consent of the Government of that other State.

The Foreigners (Tribunals) Orders, 1964

Under the provisions of this order, the matter whether a person is or is not a foreigner is referred to the Foreigners Tribunals within the meaning of the Foreigners Act, 1946 for opinion.

Section 2: Constitution of Tribunals

(1) The Central Government may by order, refer the question as to whether a person is or is not a foreigner within the meaning of the Foreigners Act, 1946 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion.

(1-A) The registering authority appointed under sub-rule (1) of rule 16F of the Citizenship Rules, 1956 may also refer to the Tribunal the question whether a person of Indian Origin, complies with any of the requirements under sub-section (3) of Section 6A of the Citizenship Act, 1955 (57 of 1955).

Section 3: Procedure for disposal of questions-

(1) The 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 be produced 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.
(1-A) The Tribunal shall, before giving its opinion on the question referred to in subparagraph (1A) of paragraph 2, give the person in respect of whom the opinion is sought, a reasonable opportunity to represent his case.

DETENTION IN THE ABSENCE OF POSSIBILITY FOR DEPORTATION

7. That the Government of Assam has been engaged in detaining individuals who are declared as foreigners by Foreigners Tribunals within detention centres, pending their deportation. The Home and Political Department of the Government of Assam, in the document titled "White Paper on Foreigners' Issue" dated October 20, 2012 has justified the detention of individuals declared by the tribunals as foreigners by stating that it serves the purpose of ensuring that they *"do not perform the act of vanishing".*

A copy of the White Paper on Foreigners' Issue, published by the Home and Political Department, Government of Assam, dated 20th October 2012, is annexed as **AnnexureP 3 (Pages _____ to _____)**

8. As per the Government of Assam White Paper on Foreigners,
"Once a person is declared a foreigner he or she is taken into custody and kept in detention centre till he or she is pushed back to his country of origin. The foreigners who are kept in detention are pushed back through the BSF deployed on the border.

There is a difference between 'pushback' and 'deportation'. In case of push back there is no need for acceptance of the person concerned by the BGB. In case of deportation, on the other hand, there is a proper flag meeting between BSF and BGB and deportation takes place only when BGB accepts the foreigners. If BGB refuses to accept the foreigner, BSF is left with no further option and such persons become 'stateless'

9. On the one hand the government has wide powers of deportation under the law, and on the other, there are no clear procedures in place for ascertaining nationality of suspected 'illegal immigrants' and their subsequent deportation to the country of confirmed nationality. The absence of a proper laid down procedure for deportation of illegal migrants between the government of India and the Government of Bangladesh, compounds the problem of pushbacks of alleged illegal immigrants which is in itself a violation of International law commitments. This Hon'ble Court had issued clear directions in *Assam Sanmilita Mahasangha & Others v. Union of India &Ors***(2015) 3 SCC 1,**regarding the need to streamline the procedure for deportation.

"46.3 While taking note of the existing mechanism/procedure for deportation keeping in view the requirements of international protocol, we direct the Union of India to enter into necessary discussions with the Government of Bangladesh to streamline the procedure of deportation"

10. Thus in the absence of such prescribed procedures for dealing with those whom the tribunals have determined to be foreigners, on such determination, persons are sent to the six detention centres that have been set up by the State. In pursuance of the instructions of the Election Commission of India, during intensive revision of electoral rolls in Assam in 1997, the letter 'D' was marked against the names of those electors who could not prove their Indian citizenship status at the time of verification through officers. Such doubtful voters cases have also be referred to the Tribunals for determination of their citizenship and many such cases have also been referred to detention centres.

11. That according a Press release by the Ministry of Home Affairs, dated 20th March 2018, the number of foreigners who have been deported to Bangladesh has been consistently low, with only 1770 Bangladeshi Nationals repatriated during the last three years.

(A copy of the Press Information Bureau, Government of India, Ministry of Home Affairs, on Illegal Immigrants, dated 20th March 2018, is annexed as **Annexure P4 (Pages _____to _____)**

12. That the White Paper on Foreigners' Issue explains the procedure to deport foreigners as follows:

"2.5.1. For deportation of declared foreigners he/she is handed over to the BSF who takes up the matter of such deportation with their counter part - the Border Guards of Bangladesh (BGB) – as well as with the Ministry of External Affairs, Government of India. Often, it is found that the BGB refers to the local police authorities in Bangladesh for verifying the address as also the character and antecedents of these persons. It is only after complete and satisfactory verification that they accept such persons – a process which delays the return of the illegal immigrant to his home country."

13. That the White Paper on Foreigners' Issue further states as follows:

"2.5.4. In the absence of a proper laid down procedure for deportation of illegal migrants between the Government of India and the Government of Bangladesh, it has become difficult to carry out deportations."

DETENTION OF STATELESS PERSONS

14. That regarding those declared foreigners who the Bangladesh Border Guard refuses to accept, the White Paper on Foreigners' Issue states that in such circumstances, *"BSF is left with no further option and such persons become 'stateless'."* There are currently such stateless persons who are being held in detention centres in Assam and the petitioner submits that such persons must be treated as refugees and granted all such rights that are granted to refugees in India, such as refugee identity cards, short term or long term visas and work permits.

15. The United Nations High Commission for Refugees (UNHCR) has recommended that Statelessness determination procedures be put in

place to identify and protect stateless persons. The UNHCR has stated that it is important to identify stateless people in a nations territory so that they can enjoy basic human rights, allowing them to live in dignity until their situation can be resolved through acquisition of a nationality. A stateless person is someone who is not considered a national by any State under the operation of its law. Identification of statelessness reduces the risk that stateless persons will be arbitrarily detained or spend prolonged periods in detention.

(A copy of the UN High Commissioner for Refugees (UNHCR), *Statelessness determination procedures, Identifying and protecting stateless persons*, August 2014, is annexed as **Annexure P5 (Pages _____to _____)**

PURPOSE OF DETENTION AFTER DETECTION

16. According to the Government of Assam White Paper on Foreigners, the purpose of detaining foreigners in detention centres immediately after detection is to ensure that they "do not perform the act of vanishing' since many go untraced. Foreigners are to be kept in such detention centres until deportation to their country of origin. The paper states as follows:

4.4.1. In most cases it was found that illegal migrants detected as foreigners by the foreigners Tribunal under the provision of the Foreigners Act, 1946, go untraced after they are so detected. This has created hurdles in deportation of the foreigners detected by the Foreigners Tribunals. To impose restrictions in the movement of the detected foreigners and requiring them to reside in a particular place immediately after they are so detected and to ensure that such persons do not 'perform the act of vanishing', it was decided to set up detention centres to keep such foreigners till they are deported to their country of origin. The Government of India has authorised the State Government under the provisions of S. 3(2) (e) of the Foreigners Act, 1946 and Para 11(2) of the Foreigners Order, 1948, to set up detention centres. Accordingly detention centres have been set up at Goalpara, Kokrajhar and Silchar for keeping persons declared as foreigners...Their finger prints and photographs are also being kept

and the photographs of absconding foreigner are being published in News."

17. Indian authorities routinely detain people on the pretext of completing repatriation formalities by relying on certain provisions in the Foreigners Act which, for instance, enable the government to compel foreigners to 'reside at a particular place', or be "detained or confined", with no specified time limit. Combined with the government's inaction, this has meant that the majority of illegal immigrants who have served their sentences remain indefinitely imprisoned instead of being deported. In some cases, foreigners have been languishing in Indian prisons for up to four decades.

18. A news report published by *The Indian Express* on August 05, 2018, after the publication of the draft NRC which excluded over four million people from the citizens register, highlights the near impossible task for the poor who are excluded to prove their nationality through valid documents or even verbally. The report states:

"The 33-year-old, who claims to have been a lawyer in 400 cases in various FTs in Barpeta over the past eight years, says, "Any mistake, however slight, regarding names and spellings, discrepancies in age between one document and another, or an answer to a question that does not match some submitted document, might lead to a person being declared a foreigner."

Several lawyers who have cases at the 11 FTs in Barpeta agree with Choudhury. "Cross-examination of those who are illiterate is problematic, many are unable to correctly remember their date of birth or the date of birth of their father. Then, if a question like their grandfather's place of birth is asked, it can yield an answer not exactly as in the records," points out a senior Barpeta lawyer.

A lawyer gives the example of a brother who came as a witness for his sister and was unable to say correctly the year she was married. She was declared a foreigner."

(A copy of this Indian Express report *"The uncounted Part 4: Their Next Stop"*, dated 5th August 2018 is annexed as **Annexure P6 (Pages _____to _____)**

19. The Foreigners Act, 1946 takes the legally permissible but practically onerous step of reversing the burden of proof, thereby compelling suspects – not the State – to prove their nationality. That reversal can be justified in instances where the accused can be shown to possess the best information to prove the contested fact, but it follows that where that is true there should be procedural safeguards to ensure due process and fairness. Yet the Foreigners Act has very few checks and balances against the authorities' power to ascribe nationality. Suspected foreigners are asked to prove their claims of Indian citizenship with official documentation such as passports or electoral registration cards. The reality, however, is that the overwhelming majority of people likely to be affected by this law are poor and do not possess such documents. These people are acutely vulnerable to harassment by police accusing them of being illegal immigrants. The law as it stands today adversely and disproportionately impacts poor and marginalised persons, who are unlikely to possess the necessary documentation prescribed by the Act.

VIOLATION OF FUNDAMENTAL RIGHTS AND INTERNATIONAL HUMAN RIGHTS OF DETAINEES HELD IN PRISONS IN ASSAM BASED ON THE NHRC MISSION REPORT ON ASSAM DETENTION CENTRES

20. The petition relies upon the report of Mr. Harsh Mander, the only non official who has been allowed entry into the Detention Centers in Assam, as Special Monitor for Minorities with the National Human Rights Commission. The mission on behalf of NHRC, on the detention centres for suspected illegal immigrants in Assam, was undertaken from 22nd to 24th January 2018. The Mission was initiated as a response to very disturbing reports about the situation of Bengali Muslim residents in Assam, as well as small number of Bengali Hindus, both relating to the process of

determining the legality of their citizenship, as well as the legality and conditions of the detention centres where persons deemed to be foreigners are held. During the mission, the team visited two detention centres and met the detainees. The Mission held meetings with jail and police authorities, district magistrates and senior officials in the state secretariat. The team also had a series of meetings with civil society groups in Goalpara, Kokrajhar and Guwahati. The report brings to light the fact that the state does not have the capacity to hold so many persons in detention. Some might be in indefinite detention and others may be subjected to continued discrimination and harassment as the processes continue. Many others may be forced to disappear and live in exploitative conditions without proper documentation in the absence of proper identification and deportation mechanisms in place.

A copy of Harsh Mander's report on "NHRC Mission to Assam's Detention Centres from 22 to 24 January 2018" is annexed as **Annexure P7 (Page _____to _____)**

21. **Main findings of the report on deplorable and illegal conditions of detainees in the detention centres/jails:**

1. The mission found a situation of grave and extensive human distress and suffering in the detention centres.

2. Legality of Detention Centres: The State does not make any distinction, for all practical purposes, between detention centres and jails; and thus between detainees and ordinary inmates. There is no clear legal regime governing the rights and entitlements of detainees. Consequently, the jail authorities appear to apply the Assam Jail Manual to them, but deny them even the benefits, like parole, etc., that the inmates get under the jail rules. Detainees are in fact treated as convicted prisoners but denied rights available to prisoners.

3. Indefinite incarceration: Since there is no formal agreement between India and Bangladesh governments for India to deport persons they deem to be foreigners, not only are the persons who the Foreigners' Tribunal judge to be foreigners detained for many years, there is no prospect of their eventual freedom from this incarceration. At present, it appears that they may actually be detained for the rest of their lives.

4. Separation of Families in detention: The Mission found that men, women and boys above six years were separated from the members of their families. Many had not met their spouse for several years, several never once since their detention, since women and men were housed in different jails, and they never were given parole or permission to meet. Kokrajhar detention centre remains the only woman's detention centre. Families are not allowed legally to communicate with their family members.

5. Lack of recreation: The detainees are not given any facilities for recreation. They spend their entire time in painful idleness.

6. Absence of Parole: Parole is not allowed to detainees even in the event of sickness and death of family members. In their understanding, parole is a right only of convicted prisoners, because they are Indian citizens.

7. Special Vulnerabilities of separated children outside the Detention Centres: A particularly vulnerable situation was created for children of parents who were detained. A child below 6 years would stay with the mother within the detention centre. But after 6 years, there are situations in which the child is declared Indian and both parents are declared foreigners. In these cases, the state takes no responsibility for the child, and the child is left to be taken care of by distant family members or the community. The legal handling of children above 6 who are declared foreigners is even more unclear and shaky.

8. Special Vulnerabilities of detainees with mental health issues: Many detainees seemed affected by depression and some displayed signs of severe mental health problems. But there are very few specialised facilities and services available with them.

9. Predicament of detainees who admit to be foreigners: There are other individuals in the detention centres who have not gone

through the Foreigners Tribunal but accept that they are foreigners. They do not contest their nationality. The Mission found these foreigners who are in detention for as long as nine years, from countries like Bangladesh, Pakistan, Nigeria and Afghanistan. Their repatriation has not been possible for long years despite their jail term ending, because of bureaucratic tangles and delays between India and their respective countries. The Mission found a total of 62 convicted foreign nationals detained in the Goalpara detention centre. Out of these 54 are from Bangladesh. All the 54 Bangladeshi nationals including 4 four Hindus have completed their term of punishment and all of them are willing to go back to their country. Unlike the declared 'foreigners' who are resident in Assam, these detainees have no visitors. For years, they have had no contact or information about their family members back in Bangladesh. Most of their families do not even know that they are detained in Indian detention centres.

10. Process flaws and lack of legal defence: The fate of an overwhelming majority of persons who were deemed to be foreigners and were detained in detention camps was on the basis of ex-parte orders by the Tribunals and without being sent a notices by the Tribunals. Moreover most lacked any kind of legal representation.

Key Recommendations from the report:

11. Establish a clear legal regime in conformity with Article 21 and International Law: Procedural due process under Article 21 is directly applicable to the treatment of declared foreigners since the provision is agnostic to the citizenship status of the detainees. Consequently, the whole plethora of rights both explicit and implicit in the provision is relevant. The state under Article 21 must provide a transparent procedure and respect the right to life and liberty of detainees. Their right of dignity, even in detention, cannot be compromised. Prisons cannot be used as detention centres.

12. Do not separate families: Humanitarian considerations and international law obligations require that families should not be separated under any circumstances. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, for instance, lays down that 'If members of the same

family are detained under aliens legislation, every effort should be made to avoid splitting up the family.

13. Ensure Due process: People actually need to be served their notices, and given legal advice and support, with much higher transparency.

14. Ensure policies for early deportation/repatriation of foreigners who don't contest: Clear polices should be adopted for those detainees who agree with the state that they are foreigners. Their applications for deportation should be expedited.

15. Apply juvenile Justice Law: The Indian juvenile justice laws are applicable to detainees, and to all children of foreigners and those deemed to be foreigners, whether or not they are deemed to foreigners. These are all children in care of need and protection (CNCPs) under the JJ Act. All of these children must be taken cognisance of by the CWCs, including both the children who are detained and those who are free while their parents are detained.

16. Special Care of Patients with Mental Health issues and Older patients: Detainees who suffer from any mental disability must be given due support under the Indian mental disability laws. The obligations of the Indian state in relation to mental disability also flow from Article 21, which is applicable irrespective of nationality. Detainees above a certain age should be allowed to not be in detention.

17. Detention should be the last resort and cannot be indefinite: Indefinite detention violates Article 21 of the Constitution, which also applies to foreigners. Indefinite detention of detainees clearly amounts to a violation of international human rights standards.

18. Provide legal aid to the detainees within detention centres: Detainees are entitled 'to be informed of the right to legal counsel. Free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights.

19. Detainees must be housed in the same district as their families and have rights to meet and communicate with them

20. Facilities for recreation, parole etc to detainees must be provided

21. Ensure due process and rights during investigation and trial rights

Case studies from the NHRC mission report on detention centres

22. The mission recorded the testimony of many detainees. Their stories relate to how they were picked up by the police, declared in an exparte decree by the Foreigners Tribunal as Bangaleshi nationals who illegally entered india after 25th March 1971. They claim that no notice was served on them by the police or by the Tribunal. That despite having sufficient proof of their Indian nationality they could not defend themselves in the Tribunal due to abject poverty and lack of access to proper legal service. Most of the declared foreigners have not met their family members since their detention. Further cases of convicted foreign nationals detail how they are languishing in the detention centres years after their sentence has been completed. Detailed case studies from the NHRC mission report are annexed.

THE CONDITIONS IN DETENTION CENTRES ARE VIOLATIVE OF ARTICLE 14 AND 21 OF THE CONSTITUTION OF INDIA

23. The Indian Constitution accords foreigners constitutional protection while in India. Article 14 guarantees the right to equality before law and the equal treatment under the law. Article 21 protects the life and liberty of every person in India irrespective of nationality. The following constitutional provisions offer a framework for protecting the rights of foreigners in detention.

Article 14 Right to equality states:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Article 21 Right to life and liberty

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

*Article 51 (c)*Directive Principle of State Policy, requires fostering of respect for international law and treaty obligations in the dealings of organised peoples with one another.

24. That in *NHRC v. State of Arunchal Pradesh,***1996 (1) SCC 742**, the case was regarding the deportation of Chakmas, who migrated from East-Pakistan (now Bangladesh) in 1964, first settled down in the State of Assam and then shifted to areas which now fall within the State of Arunachal Pradesh. The court reiteratedthat the fundamental right under article 21 was indeed available to all persons, not just citizens and directed the State government to provide adequate protection to the refugees and to ensure that they are not forcibly evicted. The court held:

> *"20. We are a country governed by the Rule of Law. Our Constitution confers contains rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Governmentworth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics"*

25. Article 21 guarantees human dignity, which in turn guarantees further rights. The article 21 rights of persons in detention would include the right to health, education, legal aid and family unity.

These rights have been held to be ingrained in the right to life and liberty in Article 21. All of the above-mentioned rights flow from Article 21 and protect 'all persons' - including immigrants in immigration detention.

26. InFrancis Coralie Mullin v Union Territory of Delhi**(1981) 1 SCC 608** Hon'ble Bhagwati J (as he then was) opined for a two Judge Bench of this Hon'ble Court:

6. *"The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person...*

7. "...the right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival...Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling. Now deprivation which is inhibited by Article 21 may be total or partial, neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. It is therefore clear that any act which damages or injures or interferes with the use of, any limb or faculty of a person, either permanently or even temporarily, would be within the inhibition of Article 21.

8. "...We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings...Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just

procedure established by law which stands the test of other fundamental rights..."

27. In*M Nagraj v Union of India***(2006) 8 SCC 212**a Constitution Bench of this Hon'ble Court affirmed the inalienability of human dignity to all humans, its axiomatic importance to all human life, and the responsibilities of the State to facilitate it:

26. *"The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it... It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give. It simply is. Every human being has dignity by virtue of his existence...*

28.Article 21 applies to all persons in India, including real or alleged immigrants in immigration detention. The denial of any of these rights to those in immigration detention is unconstitutional. In fact, all of these rights are denied to those in immigration detention. The current conditions in detention centres are therefore unconstitutional. Despite being placed in equal circumstances, detainees are subjected to unfavourable conditions as opposed to prisoners. While the latter have a right to work and earn a wage, the former do not enjoy the same.

Article 21 includes the rights to health of detainees

29. The conditions in the overcrowded jails which are used as detention centres, adversely affect the health and well being of detainees and is violation of the right to health which has been held as a part of the right to life and liberty under Article 21. The NHRC Mission reports that in the prison they visited, it has a capacity of 370 persons. However with the detainees, the number of persons in this prison is 439. Two detainees had even died in the detention centre. The jailer informed the mission that both the cases have

been intimated to the National Human Rights Commission. Detainees showed severe signs of mental health problems that were not being cared for.

30. This Hon'ble Court in *Bandhua Mukti Morcha* v. *Union of India(1984) 3 SCC 161*held that the right to live with human dignity, enshrined under Article 21 must include protection of health, and that:

"10. *Neither the Central Government nor the State Government has the right to take any action which will deprive a personof the enjoyment of these basic essentials."*

31. In *Parmanand Katara v Union of India* ***(1989) 4 SCC 286*** a two Judge Bench of this Hon'ble Court held medical professionals had an obligation to treat emergency cases without delay. In doing so they emphasised that preservation of life is of paramount importance under Article 21, and must be guaranteed to all people including those incarcerated – the obvious corollary being that health services must be provided:

"7. There can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or be a criminal liable to punishment under the laws of the society, it is the obligation of those who are in-charge of the health of the community to preserve life so that the innocent may be protected land the guilty may be punished. Social laws do not contemplate death by negligence to tantamount to legal punishment."

32. In *CESC Ltd. V. Subhash Chandra Bose (1992) 1 SCC 441* this Hon'ble Court elaborated the meaning of the word 'health', and so indicated it included mental health:

32. *"The term health implies more than an absence of sickness… Health is thus a state of complete physical, mental and social well being and not merely the absence of disease or infirmity."*

33. This was affirmed by a Constitution Bench of this Hon'ble Court in *Common Cause v Union of India (2018) 5 SCC 1*

238. *"We may, however, point out that in CESC Ltd. V. Subhash Chandra Bose, K. Ramaswamy, J. observed that physical and mental health have to be treated as integral part of the right to life, because without good health the civil and political rights assured by our Constitution cannot be enjoyed. Though Ramaswamy J. rendered minority opinion in that case, on the aforesaid aspect, majority opinion was not contrary to the views expressed by Ramaswamy, J. Thus Article 21 recognises the right to live with human dignity."*

34. In *Paschim Banga Khet Mazdoor Samity & Ors. v. State of W.B. & Anr. (1996) 4 SCC 37* this Hon'ble Court further held that the State cannot plead financial constraints to vitiate any of its obligations in relation to health:

"16. *In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. [See : Khatri (II) v. State of Bihar, 1981 (1) SCC 627 at p. 631]. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life."*

Article 21 includes the right to education of detainees

35. The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A into the Constitution of India, by which:

"The State shall provide free and compulsory education to all children of the age group of six to fourteen years in such a manner as the State may, by law, determine."

36. In Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. Sate of M.P. (2013) 15 SCC 677 the Supreme Court referred to the provisions of the Universal Declaration of Human Rights and the U.N. Convention on Rights of the Child, to understand the scope of the right to education under Article 21A and noted the following:

28. "The role of international organizations regarding the implementation of the right to education is just not limited to the preparation of documents and conducting conferences and conventions, but it also undertakes the operational programmes assuring access to education of refugees, migrants, minorities, indigenous people, women and the handicaps. India participated in the drafting of the Declaration and has ratified the covenant. Hence, India is under an obligation to implement such provisions. As a corollary from the Human Rights perspective, constitutional rights in regard to education are to be automatically ensured."

37. In addition to all of the above rights, certain additional Article 21 rights specifically protect persons who are imprisoned. The NHRC report highlights how the rights to work and recreation, right to family unity and right to free legal services form part of Article 21 rights that are available to persons in prisons, have been denied to those living in the detention centres in Assam. These additional rights applicable to prisoners must also, as a minimum, be applicable to immigrants incarcerated in detention centres. The logic is supported by the precise legal reasoning of this Hon'ble Supreme Court in a number of Constitution Bench cases. In *Sunil Batra (I) v Delhi Administration (1978) 4 SCC 494* Hon'ble Krishna Iyer, J.'s comments on the qualitative distinction between 'imprisonment' and 'safe-keeping' becomes all the more powerful when applied to those in immigration detention, who are not criminals. At the most, they are being 'safe-kept' before expulsion. The rights corollary to safe-keeping must therefore be afforded.

Right to work, recreation and family unity of detainees

38. In the Constitution Bench case of *Sunil Batra (I) v Delhi Administration (1978) 4 SCC 494* Hon'ble Krishna Iyer, J. stated:

101. *"This 'safe keeping' in jail custody is the limited jurisdiction of the jailor. The convict is not sentenced to imprisonment. He is not sentenced to solitary confinement. He is a guest in custody, in the safe keeping of the host- jailor until the terminal hour of terrestrial farewell whisks him away to the halter. This is trusteeship in the*

hands of the Superintendent not imprisonment in the true sense. Section 366(2) Criminal procedure Code (Jail Custody) and Form 4 (safely to keep) underscore this concept, reinforced by the absence of a sentence of imprisonment under section 53, read with section 73, Indian Penal Code. The inference is inevitable that if the 'condemned' men were harmed by physical or mental torture the law would not tolerate the doing since injury and safety are obvious enemies. And once this qualitative distinction between imprisonment and safe keeping within the prison is grasped, the power of the jailor becomes benign. Batra, and others of his ilk, are entitled to every creature comfort and cultural facility that compassionate safe-keeping implies. Bed and pillow, opportunity to commerce with human kind, worship in shrines, if any, games books, newspapers, writing material, meeting family members, and all the good things of life, so long as lie lasts and prison facilities exist. To distort safe-keeping into a hidden opportunity to cage the ward and to traumatize him is to betray the custody of the law. Safe custody does not mean deprivation, isolation, banishment from the lenten banquet of prison life and infliction of travails as if guardianship were best fulfilled by making the ward suffer near-insanity. May be, the Prison Superintendent has the alibi of prison usage, and may be, he is innocent of the inviolable values of our Constitution. May be there is something wrong in the professional training and the prison culture. May be, he misconceives his mission unwittingly to help God 'Whom God wishes to destroy, He first makes mad'. For long segregation lashes the senses until the spirit lapses into the neighbourhood of lunacy. Safe-keeping means keeping his body and mind in fair condition. To torture his mind is unsafe keeping. Injury to his personality is not safe keeping. So, section 366, Cr.P.C. forbids any act which disrupts the man in his body and mind. To preserve his flesh and crush his spirit is not safe keeping. whatever else it be."

...

201. Positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals, sramdan and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration.

Social justice, in the prison context, has a functional versatility hardly explored.

Right to avail free legal services

39. The NHRC mission report states that there are many detainees whose cases were either decided ex parte or didn't get a fair chance to prove their Indian nationality. The mission observed that "as a country we provide legal aid even to the people accused of heinous crimes like rape and murder, but in this case without even committing any crime these people are languishing in detention centres as they can't afford legal services." The mission recommended that legal aid which is being completely denied to detainees, should be provided in the detention centres, also at the tribunals level and in moving writ petitions in the High Court. The denial of free legal aid to detainees is a violation of their Article 21 rights.

40. In the Constitution Bench case of *Sunil Batra (I) v Delhi Administration* ***(1978) 4 SCC 494*** Hon'ble Krishna Iyer, J. further stated:

179 – B
(10). Legal aid shall be given to prisoners to seek justice from prison authorities, and, if need be, to challenge the decision in court-in cases where they are too poor to secure on their own. If lawyer's services. are not given, the decisional process becomes unfair and unreasonable, especially because the rule of law perishes for a disabled prisoner if counsel is unapproachable and beyond purchase. By and large, prisoners are poor, lacking legal literacy, under the trembling control of the jailor, at his mercy as it were, and unable to meet relations or friends to take legal action. Where a remedy is all but dead the right lives; only in print. Art. 39 A is relevant in the context. Art. 19 will be violated in such a case as the process will be unreasonable. Art. 21 will be infringed since the procedure is unfair and is arbitrary. In Maneka Gandhi the rule has been stated beyond mistake.

41. In *Francis Corallie Mullin v. Administrator, Union Territory of Delhi* ***(1981) 1 SCC 608*** a two Judge Bench of this Hon'ble Court expressly stated that the right to consult a legal adviser is not merely limited to defence in criminal proceedings:

11. "The right of a detenu to consult a legal adviser of his choice for any purpose not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention of filing a writ petition or prosecuting any claim or proceeding, civil or criminal, is obviously included in the right to live with human dignity and is also part of personal liberty and the detenu cannot be deprived of this right nor can this right of the detenu be interfered with except in accordance with reasonable, fair and just procedure established by a valid law.

42. In *Suk Das v Union Territory of Arunachal Pradesh* **(1986) 2 SCC 401** this Hon'ble Court held:

5. *"It is now well established as a result of the decision of this Court in Hussainara Khatoon's case that "the right to free legal service is ...clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer". This Court pointed out that it is an essential ingredient of reasonable, fair and just procedure to prisoner who is to seek his liberation through the court's process that he should have legal service available to him. The same view was taken by a Bench of this Court earlier in M.H. Hoskot v. State of Maharashtra. It may therefore now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involved jeopardy to his life or personal liberty and this fundamental right is implicit in the*

requirement of reasonable, fair and just procedure prescribed by Article 21…"

Conditions in detention centres violate the Article 21 rights of immigrant detainees in every possible manner

43. The restriction of Article 21 requires substantive due process – that the restriction of the Article 21 right be fair, just and reasonable. Post-*Puttaswamy* this requires that restrictions must satisfy the proportionality test, as set out in that case. The evidenced rights violations (of health, education – for children in detention-, family unity, work and recreation, and access to legal services) do not satisfy the proportionality test.

44. First, the absence of these rights for detainees is not validly based on any law, given the absence of any clear legal framework for immigration detainees. Second, there is no rational nexus between the legitimate aim (identifying and deporting 'illegal immigrants') and the violation of the aforementioned Article 21 rights. Violating the human dignity of immigration detainees through conditions-of-animal-existence has no reasonable link to detaining them in the first place. Third, even if there were a rational nexus between the legitimate aim and the impugned Article 21 rights violations, there is a less intrusive way to achieve the legitimate aim: to detain immigrants in detention centres with conditions befitting humans, and acceptable to human dignity. This includes by extending the rights afforded to prisoners to immigrant detainees – e.g. work and recreation, so they are not stuck in 'perpetual idleness'; permitting family meetings or enabling families to be kept together; not separating children from parents. Fourth, the issue of balancing does not properly arise given the aim pursued can be achieved through a less intrusive means. Still, assuming the issue did, the violated Article 21 rights would outweigh any countervailing interests. The above-cited case law repeatedly emphasizes the axiomatic and inalienable importance of giving all humans conditions that ensure dignity beyond mere animal-existence.

The capacity for indefinite detention is arbitrary and violative of Article 14 and 21 of the Constitution of India

45. The High Court of Gauhati, Assam in case of *State of Assam* v. *Moslem Mondal 2013 (1) GLT 809 and Anowar Ali* v. *State of Assam AIR 2014 Gau 134,*ordered the Central Government and the Government of Assam to ensure that declared foreigners who are detained must be deported within the expiry of two months from the date of detention. The aforementioned orders were given by the court in 2013 and 2014 respectively. The situation in Assam clearly indicates that there has been no compliance with this order by the State Government as many declared foreigners continue to remain in detention for prolonged periods. However, there has been no order by either the High Court of Gauhati or the Supreme Court of India, regarding what the Government must do about those who are in detention centres for prolonged periods and are uncertain about their future.

46. According to the Assam government White Paper, declared foreigners are kept in detention centres pending pushback or deportation. Given that the Indian Government and the Government of Bangladesh have no formal arrangement regarding the repatriation of "declared foreigners" who are identified by the Foreigners Tribunals as Bangladeshis, the Border Security Forces of India co-ordinate with the Border Guards of Bangladesh ('BGB') and the Indian Ministry of External Affairs regarding the deportation of such individuals on a case-by-case basis. The deportation takes place only after the BGB accepts the same after verifying (through the local police forces in Bangladesh), on the basis of the character, antecedents and address of the declared foreigner that Bangladesh is actually their home country. The number of foreigners who have been deported to Bangladesh has been consistently low as quoted above. The number of foreigners who are in Assam's detention centres significantly exceeds the number of deported foreigners (according to the Wire, there are more than 2,000 foreigners in Assam's six detention centres as of February 2018).

47. Deportation of declared foreigners is uncertain and going by the number of foreigners whom Bangladesh has accepted to repatriate

so far, unlikely to happen for most of them. Apart from this, as most of the declared foreigners claim to be Indian citizens, and because the process of their determination as foreigners does not involve Bangladesh at any stage, Bangladesh seems to be unwilling to accept them into its territory as their nationals. The *White Paper* blatantly acknowledges that declared foreigners who are not accepted by Bangladesh would be rendered "stateless". Neither the Central Government, nor the State Government of Assam has a policy codifying the limitations to the detention of declared foreigners, particularly, the detainees who are stateless persons. The detainees who are currently in Assam's detention centres do not know what the future holds for them. Keeping them in such circumstances, is in contravention to India's obligations under International human rights law as explained later in the petition.

48. The capacity for indefinite incarceration is arbitrary, unreasonable and hence unconstitutional. Indefinite detention for immigration purposes is violative of Article 14 and international human rights law.

49. In *Ahmed Noormohmed Bhatti v State of Gujarat (2005) 3 SCC 647* the constitutionality of Section 151, CrPC, was examined by this Hon'ble Court. This provision empowers a police officer to arrest a person without a warrant and without an order of the Magistrate to prevent the commission of a cognizable offence – though a person cannot be detained for longer than 24 hours. This power was found to be constitutional because the powers conferred had limitations built into them specifying detention could only be for a limited period. There are no such inbuilt safeguards when a person is detained in the detention centre on reference by the tribunal.

10. *"As we have noticed earlier, Section 151 of the Code of Criminal Procedure itself makes provision for the circumstances in which an arrest can be made under that section and also places a limitation on the period for which a person so arrested may be detained. The guidelines are inbuilt in the provision itself. Those statutory guidelines read with the requirements laid down by this Court in Joginder Kumar [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172] and D.K. Basu*

[(1997) 1 SCC 416 : 1997 SCC (Cri) 92] provide an assurance that the power shall not be abused and in case of abuse, the authority concerned shall be adequately punished."

50. In *Hussainara Khatoon v Home Secretary, Bihar* ***1979 SCR (3) 169*** this Hon'ble Court noted that 'a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as 'reasonable, just or fair'.' And so 'the law… must radically change its approach.' What this Hon'ble Court said there with regards to pre-trial detention can equally be said here with regards to immigration detention:

2. *"Some of the undertrial prisoners whose names are given in the newspaper cuttings have been in jail for as many as 5, 7 or 9 years and a few of them, even more than 10 years, without their trial having begun. What faith can these lost souls have in the judicial system which denies them a bare trial for so many years and keeps them behind bars, not because they are guilty, but because they are too poor to afford bail and the courts have no time to try them. It is a travesty of justice that many poor accused, "little Indians, are forced into long cellular servitude for little offences" because the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude. There can be little doubt, after the dynamic interpretation placed by this Court on Art. 21 in Maneka Gandhi v. Union of India that a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as 'reasonable, just or fair' so as to be in conformity with the requirement of that Article. It is necessary, therefore, that the law as enacted by the Legislature and as administered by the courts must radically change its approach to pretrial detention and ensure 'reasonable, just and fair' procedure which has creative connotation after Maneka Gandhi's case."*

…

13. *"It is indisputable that an unnecessarily prolonged detention in prison of undertrials before being brought to trial is an affront to all civilized norms of human liberty. Any meaningful concept of individual liberty which forms the bedrock of a civilized legal system must view with distress patently long periods of imprisonment before persons*

awaiting trial can receive the attention of the administration of justice."

51. In *Puttaswamy* a majority of the Constitution Bench of this Hon'ble Court found that infringements of Article 21 must satisfy the proportionality standard. Indefinite incarceration cannot satisfy this standard, and so the above stated principle from *Hussainara Khatoon* is affirmed. In *Puttaswamy* Chandarchud J stated for the plurality:

180. *"While it intervenes to protect legitimate state interests, the state must nevertheless put into place a robust regime that ensures the fulfilment of a three-fold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate state aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary state action. The pursuit of a legitimate state aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not re-appreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary state action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the three-fold requirement for a valid law arises out of the mutual inter-dependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The*

right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms."

Justice Kaul also stated a proportionality standard, though in slightly different words:

***71**. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:*

"(i) The action must be sanctioned by law;

(ii) The proposed action must be necessary in a democratic society for a legitimate aim;

(iii) The extent of such interference must be proportionate to the need for such interference;

(iv) There must be procedural guarantees against abuse of such interference."

52. Indefinite incarceration fails the proportionality test because:

There is little rational nexus between the legitimate aim (identifying and deporting 'illegal' immigrants) and the means which is indefinitely incarcerating immigrants. Many of those who end up in indefinite incarceration are stateless, and so not capable of being deported; or stuck in limbo because they are unable to prove their status as Indian citizens. Indefinitely keeping them in detention centres neither facilitates effective identification, nor the act of deportation. A less intrusive way exists to achieve the same legitimate aim – allowing immigrants to stay outside detention centres on bail (perhaps furnished with a bond as is the practice in the United States of America). Particularly if they are seeking to prove their status as Indian citizens and need access to the outside world to enable this, and particularly after certain time limits detained. The blanket nature of indefinite incarceration, for all those who find themselves stuck in limbo, is also anathema to proportionality. There will always be less restrictive ways to achieve an aim than a 'blanket' policy – namely, through a policy that leaves scope for individual review.

53. The Hon'ble Supreme Court's findings to date have focused on identification and deportation – not on sanctioning indefinite detention. And when the Hon'ble High Courts have ordered illegal immigrants to be detained in order to deport them, they have stipulated this detention until deportation must be done within a stipulated time frame: generally around two months. Therefore no Courts have ever sanctioned indefinite detention – since indefinite detention is anathema to Articles 14 and 21. In *Anowar Ali v State of Assam 2014 SCC Online Gau 115: 2014 4 Gau LR 839*the Hon'ble Gauhati High Court held:

134. "*(viii) Deport the persons from India within two months from the date of their detection as foreigners, within the meaning of 1946 Act.*
(ix) The persons detected to be foreigners shall be taken into custody immediately and kept in detention camp(s) till they are deported from India within the aforesaid time-frame."

54. In the Hon'ble Courts' findings, detention should only be brief, as a mere precursor to deportation. But the reality is that deportation does not occur swiftly, and so detention becomes indefinite. It is submitted that this Hon'ble Court must recognise that this arbitrary, barren and hopeless reality violates Articles 14 and 21.

Deportation of those who do not contest to being foreigners

55. That according to the report prepared by Mr. Harsh Mander, most of the detainees declared by Foreigners Tribunals as foreigners contest the opinion of the tribunals and maintain that they are Indian citizens. While the report further acknowledges that some detainees admit that they are foreigners, their repatriation has not been possible for long years because of bureaucratic tangles and delays between India and their respective countries. For instance, the report states that in the Goalpara detention centre, out of 62 convicted foreigners, there are 54 Bangladeshi nationals who are yet to be deported to Bangladesh despite the fact that their term of

punishment has elapsed. The report further states that there are foreigners who have been in detention for even nine years. There are such detainees from Bangladesh, Pakistan, Nigeria and Afghanistan in Goalpara detention centres. The report further states that in some cases of declared foreigners, they haven't been examined by the Deputy High Commissioner. Many of them are languishing in the detention centre since 2009/10.

56. Many persons who admit to being foreigners and seek to return to their home countries are languishing in detention – though they could be deported as per their wishes. Such persons who admit to being foreigners and wish to return to their home countries should be expeditiously returned, in accordance with what this Hon'ble Court has held and ordered. Notably, in *Assam Sanmilita Mahasangha & Ors v. Union of India*:

42. "In the light of the above, we have considered the necessity of issuing appropriate directions to the Union of India and the State of Assam to ensure that effective steps are taken to prevent illegal access to the country from Bangladesh; to detect foreigners belonging to the stream of 1.1.1966 to 24.3.1971 so as to give effect to the provisions of Section 6(3) & (4) of the Citizenship Act and to detect and deport all illegal migrants who have come to the State of Assam after 25.3.1971."

…

46 (III). Existing Mechanism of Deportation of Declared Illegal Migrants While taking note of the existing mechanism/procedure for deportation keeping in view the requirements of international protocol, we direct the Union of India to enter into necessary discussions with the Government of Bangladesh to streamline the procedure of deportation. The result of the said exercise be laid before the Court on the next date fixed.

The procedural flaws that lead to persons being put into detention centres are unconstitutional and must be rectified

57. In situations where persons have been sent to immigration detention through *inter alia* violation of a right to a reasonable

opportunity to be heard (at first instance or appeal), Articles 14 and 21 are violated for arbitrariness and lack of procedural due process. Detention is consequently tainted and vitiated.

58. When detainees are convicted *ex-parte,* the impugned detentions are wrong for violation of procedural rights per Article 14 and 21. Given the seriousness of deprivation of liberty and the right to a reasonable opportunity for a hearing, given the concerned parties are marginalized and often illiterate, given they act earnestly and in good faith in seeking legal representation to help them manoeuvre complex procedures, it is respectfully submitted that the generalized and widespread use of ex-parte judgments by which persons are sent into detention, violates Articles 14 and 21. Not receiving notice or being arbitrarily sent a notice (because they were the relative of a person who was meant to be given notice). This is clearly established a violation of Articles 14 and 21 per the cited case law above.

Having the documents available to appeal but not being given an opportunity to appeal or present those documents to any available authority is again a violation of fundamental rights of detainees. A fair, just and reasonable procedure requires feasible and accessible possibilities of appeal (and not merely through the often inaccessible channel of judicial review in the courts). A systematized appeals procedure for those in detention is therefore necessary, but lacking.

59. As far back as *A.K. Gopalan v. State of Madras 1950 SCR 88* this Hon'ble Court accepted that:
189. "*The detention of a man even as a precautionary measure certainly deprives him of his personal liberty, and as article 21 guarantees to every man, be he a citizen or a foreigner, that he shall not be deprived of his life and personal liberty, except in accordance with the procedure established by law, the requirements of article 21 would certainly have to be complied with, to make preventive detention valid in law…*"

60. It is therefore respectfully submitted that the requirements of Article 21 must be complied with in the procedure of identifying and deporting foreigners – because this procedure deprives foreigners of

personal liberty by resulting in their incarceration. The procedure must therefore satisfy the requirements of procedural and substantive due process.

61. In *D.K. Yadav v J.M.A. Industries Ltd. (1993) 3 SCC 259* this Hon'ble Court affirmed that all decisions of "civil consequence" must also abide by the rules of natural justice per Articles 14 and 21:

9. *"It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and be given him/ her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. In Mohinder Singh Gill & Anr. v. The Chief Election Commissioner & Ors. [1978] 2 SCR 272 at 308F the Constitution Bench held that 'civil consequence' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non- pecuniary damages. In its comprehensive connotion every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th Edition, page 1487 defined civil rights are such as belong to every citizen of the state or country they include rights capable of being enforced or redressed in a civil action. In State of Orissa v. Dr. (Miss) Binapani Dei & Ors, this court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice."*

...

11. "*The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Art. 14 and such law would be liable to be tested on the anvil of Art. 14 and the procedure prescribed by a statute or statutory rule or rules or orders effecting the civil rights or result in civil consequences would have to answer the requirement of Art. 14. So it must be right,just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial*

function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-.judicial enquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial enquiry and not to administrative enquiry. It must logically apply to both."

62. The Hon'ble Calcutta High Court was therefore right in *Mansur Molla v Union of India* ***2000(1) CLJ 216*** to affirm the rights to a reasonable opportunity of hearing the case, and also a right to appeal:

36. "*The provisions of such enquiry and giving reasonable opportunity of hearing to the person concerned have to be read as implied in the Act although the Act is silent in respect thereof. As held by the Supreme Court in its decision reported in AIR 1978 SC 597 and (1993)3 SCC 259, natural justice is now a facet of Article 14 of the Constitution, the provisions of which are available not only to the citizens of India but to all persons residing in India. The principle of natural justice is also a part and parcel of rule of law. Even assuming Article 14 of the Constitution is not available insuch a case, the right to life and liberty as guaranteed under Article 21 of the Constitution is available to all persons residing in India whether citizens or foreigners and therefore the procedure to take away such right has to be fair and proper, but no such procedure can be fair or proper unless reasonable opportunity is given to person concerned to prove that he is not a foreigner, but Indian."*

39. "The very fact that the legislature in its wisdom in aforesaid Section 9 of the Act places the onus of proving the same upon the person concerned implies that the affected person can question the order passed under Section 3 of the Act treating him as a foreigner, although it is for him to prove that he is the citizen of India. But how the affected person would prove that he is not a foreigner but he is a citizen of India unless he gets a reasonable opportunity in respect thereof."

And that the lack of clarity and explanation in notices issued toalleged illegal immigrants violated these above-mentioned rights:

55. *"In the said letter after giving reference to the arrest of each of the petitioners under Sections 3(a), 6(a) of the Passport (Entry into India) Rules, 1950 read with Section 14 of the Foreigners Act, the petitioners were requested to furnish within 7 days (sic) 10.7.1998 the birth certificate in original, father's birth certificate, the petitioners and their father's domicile certificate, ration card in original, passport and any other document to prove his national status and his photograph. It is not stated, however, clearly in the said notice what will be the consequences if the petitioners fail to produce the documents asked for and what specific action is proposed to be taken against the petitioners. It is nowhere stated that in case of failure to produce such documents, the petitioners will be deported as Bangladeshi Nationals. It has merely been stated that in case of failure to produce the documents actions as deemed fit will be taken under the Foreigners Act, although under the Foreigners Act, various actions can be taken against the foreigners including steps for prosecution. It is not even clearly stated in the said notice that on receipt of some information, the appropriate authority has come to know that the petitioners are Bangladeshi Nationals and illegally staying in Bombay and therefore they are required to produce such documents to show that they are Indian citizens and not foreigners. Reference has no doubt been made in the said notice as to the arrest of the petitioners under Sections 3(a), 6(a) of the Passport (Entry into India) Rules, 1950 and Section 14 of the Foreigners Act, 1946. but it is not disputed that all the petitioners belong to the weaker sections of the community and most of them are absolutely illiterate. If the notice is judged in the aforesaid context, it wilt not be clear to such a person who is so arrested as to why such documents have been asked for and for what purpose and what will be the consequences of non-production of the same. That apart, reference to Section 14 of the Foreigners Act, 1946, creates more confusion than clarification as Section 14 of the Foreigners Act provides for penalties when a person contravenes the provision of the Act either by way of imprisonment for a term to the extent of 5 years*

and fine and forfeiture of bond. There is nothing to show also that the contents of the said notices were explained to the petitioners, most of whom are illiterate, either in their mother tongue or otherwise."

56. *"It has been rightly contended by learned Amicus Curiae that even if the said notice can be termed as show-cause notice the opportunity given therein does not appear to be real opportunity at all. It is true that the order passed under Section 3 of the Foreigners Act by the appropriate authority is an administrative order and not a judicial order or quasi judicial order. But it is also now settled beyond any doubt by the pronouncement of the Apex Court that an administrative order cannot also be passed arbitrarily but only fairly and reasonably and in consonance with principles of natural justice specially when the same visits a person with civil and adverse consequences.De Smith Woolf and Jowell in their celebrated Treatise on Judicial Review of Administrative Action 5th Edition opined (Pg. 432 para 9-004) procedural fairness generally requires that persons liable to be directly affected by proposed administrative acts. decisions or proceedings be given adequate notice of what is proposed so that they may be in a position to make representation on their own behalf or to appear at a hearing or enquiry and effectively to prepare their own case and the answer of the case they have to meet. At page 434 paragraph 9-007 it has been further observed that as the reasons for imposing an obligation to give proper notice is usually to afford those who will be affected an opportunity to make representations, the notice must be served in sufficient time to enable representations to be made effectively, if charges are to be brought they should be specified with particularity. In the instant case, as stated hereinbefore, neither the charges against the petitioner was specified with particularity nor the consequences of failure to produce documents were mentioned nor sufficient time was given to produce the documents asked for."*

Juvenile justice laws must be applied to juveniles whose parents are in detention and the failure to do this is unconstitutional

63. As has been established above, all persons in immigration detention are deprived of liberty and the benefit from the protections

Articles 14 and 21 give to those deprived of liberty. Juveniles in immigration detention centres benefit from the protection afforded to juvenile detainees generally. This includes Articles 14 and 21 rights; but also the Juvenile Justice Act that applies to all children – not merely citizens. Besides, children whose parents are in detention are children in need of care and protection under the Juvenile Justice Act. Such children may be affected in 3 ways. They may a) be with mothers inside the detention centres; b)all living parents maybe in detention and the child outside; and c) the child maybe declared a 'foreigner'. In all cases, these children must be recognized to be children in care of need and protection under the Juvenile Justice Act. This means that they should be taken into care by the Child Welfare Committees, who should develop plans in the best interest of the children, preferably ensuring that the children are not separated from their parents, and if they are, they are taken full care of by alternate arrangements.

64. In the writ petition Re-Inhuman conditions in 1382 Prisons, a bench led by Hon'ble Justice M.B. Lokr, on the 2nd of August 2018, took serious note of the issue of women prisoners and their children, directing that a committee be set up to look into the matter in great depth. The order states as follows:

"The issue of women prisoners is an extremely serious issue. It has been pointed out by learned amicus curie that he has visited a prison in Faridabad, Haryana where he learnt that children of women prisoners, who are below six years of age are not allowed to leave the prisons. This is hardly conducive to their well-being and health.

There is another category of such children who have crossed the age of six years and they are released from prison, but there is nothing to indicate how such children are looked after. Surely, these children cannot be left to fend for themselves just because they are six years of age when their mother is in prison.

The third category of children are minors above six years of age and whose mother is in custody. Such children also need to be looked after since their father or any next of kin, etc. may not be there to look after them.

In view of this, we have suggested to the learned amicus curiae that it might be appropriate if a Committee is appointed to look into this

issue in great depth with the assistance of psychologists, social scientist and experts in different fields so that some pragmatic policy is framed for looking after such children."

(A copy of the order dated, 2.08.2018, in Writ Petiton, Re-Inhuman Conditions in 1382 prisons, is annexed as **Annexure P8** (**Pages _____to _____)**

Jails as detention centres

65. That according to the NHRC mission report, the detainees are kept in the jails along with prisoners, and the issue of overcrowding was found to exist in the Goalpara Jail which was visited by the Mission. The State under Article 21 must provide a transparent procedure and respect the right to life and liberty of detainees. Their right of dignity, even in detention, cannot be compromised. Thus it can be argued that the detention of detainees as common criminals, within jail compounds, without due facilities like free legal representation or communication with their families is a violation of their right to live with dignity and the right to procedural due process.

66. That there are no laws that have been enacted either by the Government of Assam or by the Government of India which exclusively address the terms and conditions of such detention and the rights of such detainees who are held in detention centres. The detention centres are running according to the Assam Jail Manual, the publication of all laws that govern conditions of prisons and the prisoners in Assam. However, the detainees are not entitled to parole and other basic rights, available to the other prisoners.

67. International law, as shown below, explicitly lays down that detention of immigrants cannot be done in jails. The status of immigrants is not that of criminals.

International instruments and standards on the protection of rights of persons in detention

68. International human rights law protects the rights of all persons against arbitrary arrest and indefinite detention. Many international conventions which have been ratified by India or to which India is a signatory have recognised these rights of detainees. Hence India is under an obligation to interpret domestic law in the light of the obligations under these conventions. The Hon'ble Supreme Court has in many cases directed that action of the States must be in conformity with international law and conventions.

69. In *Gramophone Company Of India Ltd vs Birendra Bahadur Pandey & Ors*, **(1984 SCC (2) 534)**, the Apex Court had held that the comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. The relevant paragraph of the judgement is produced below for perusal.

> *'5. There can be no question that nations must march with the international community and the Municipal law must respect rules of International law even as nations respect international opinion. The comity of Nations requires that Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament...The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with Act of Parliament."*

70. In *Vishaka & Ors vs State Of Rajasthan***(1997) 6 SCC 241**, the Apex Court has held that international conventions and norms can be used for construing the fundamental rights expressly guaranteed in the Constitution of India. The relevant paragraphs of the judgement are produced below for perusal.

> *'6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial*

interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51 :

"51. Promotion of international peace and security - The State shall endeavour to -

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another;

Article 253 :

253. Legislation for giving effect to international agreements - Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

Seventh Schedule :

"List I - Union List:

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms

by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution.

14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to compass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs vs. Tech. 128 ALR 535, has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.

15. In Nilabati Behera vs. State of Orissa 1993(2) SCC 746, a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity."

71. That in the *People's Union for Civil Liberties v. Union of India* **(1997) 3 SCC 433**, the Supreme Court states:

"provisions of covenant, which elucidate and go to effectuate the fundamental rights guaranteed under our Constitution

can be relied upon by the Courts, as facets of those fundamental rights and hence, enforceable as such."

72. That the Supreme Court in its landmark judgement on the right to privacy dated 24th August 2017, in, *Justice K.S. Puttaswamy (Retd) and Anr. v. UOIand Ors* ***(2017) 10 SCC 1,*** has categorically stated,

"Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation."

International Instruments on Arbitrary and indefinite detention

73. Various international standards and instruments contain negative obligations not to subject any person to arbitrary arrest and detention. The instruments point out that deprivation of liberty of an individual is only permissible to the extent that it is in accordance with a just, fair and reasonable procedure established by law. Indefinite detention clearly amounts to a violation of international human rights standards. Alternatives to detention can take various forms: reporting at regular intervals to the authorities; release on bail; or stay in open centres or at a designated place. Such measures are already successfully applied in a number of countries.

74. The **International Covenant on Civil and Political Rights (1966**) has been ratified by India and India is thus bound by its international law obligations to respect and protect the civil and political rights of persons against the standards that have been set in this Covenant. The ICCPR establishes general prohibitions against incarceration in inhumane conditions as well as against arbitrary arrest and detention.

- Article 7: *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..."*
- Article 9: *1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No*

one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

- *Article 10(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

75. **Universal Declaration of Human Rights (1948)** which has been ratified by India further states:

- Article 5*: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*
- Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

UNHCR Detention Guidelines (2012)

76. These guidelines are provided for guidance on issues regarding detention and asylum seekers to governments, parliamentarians, legal practitioners, decision-makers, including the judiciary, as well as other international and national bodies working on detention and asylum matters. They focus on the rights of detainees and its varying aspects including the extent and time period of detention, conditions of detention centres, provision of certain facilities, dealing with families as well as children.

- **"Guideline 4.1: Detention is an exceptional measure and can only be justified for a legitimate purpose**

21. Detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary, even if entry was illegal. The purposes of detention ought to be clearly defined in legislation and/or regulations (see Guideline 3).In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely public order, public health or national security.

22. Factors to balance in an overall assessment of the necessity of such detention could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of their

claim, or whether the claim is considered manifestly unfounded or abusive.Appropriate screening and assessment methods need to be in place in order to ensure that persons who are bona de asylum-seekers are not wrongly detained in this way.

24. Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks.At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law (see below).

25. Mindful that asylum-seekers often have justifiable reasons for illegal entry or irregular movement,including travelling without identity documentation**,** it is important to ensure that their immigration provisions do not impose unrealistic demands regarding the quantity and quality of identification documents asylum-seekers can reasonably be expected to produce. Also in the absence of documentation, identity can be established through other information as well. The inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate, or lead to an adverse security assessment. Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason. Rather, what needs to be assessed is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation or the possession of false documentation, whether he or she had an intention to mislead the authorities, or whether he or she refuses to cooperate with the identity verification process.

28. It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection.However, such detention can only be justified where that information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the full merits of the claim. This exception to the general principle – that detention of asylum-seekers is a measure of

last resort – cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

- **Guideline 4.1.4: Purposes not justifying detention:**

31. Detention that is not pursued for a legitimate purpose would be arbitrary.

32. Illegal entry or stay of asylum-seekers does not give the State an automatic power to detain or to otherwise restrict freedom of movement. Detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms. Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country.

33. Detention of asylum-seekers on grounds of expulsion:

As a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on grounds of expulsion as they are not available for removal until a final decision on their claim has been made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected.However, where there are grounds for believing that the specific asylum-seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed.

- **Guideline 4.2: Detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose**

34. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case

- **Guideline 4.3: Alternatives to detention need to be considered**

38. Notably, alternatives to detention should not be used as

alternative forms of detention; nor should alternatives to detention become alternatives to release. Furthermore, they should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers

- **Guideline 6: Indefinite detention is arbitrary and maximum limits on detention should be established in law**

44.the test of proportionality applies in relation to both the initial order of detention as well as any extensions. The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary. Indefinite detention for immigration purposes is arbitrary as a matter of international human rights law.

45. Asylum-seekers should not be held in detention for any longer than necessary; and where the justification is no longer valid, the asylum-seeker should be released immediately.

(A copy of the UNHCR, Detention Guidelines, 2012 is annexed as **Annexure P9 (Pages _____to _____)**

Report of the UN Working Group on Arbitrary Detention (2008)

77. The UN Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. The report states:

> 52. Working Group feels inclined to remind Governments of the principles developed in its Deliberation No. 5,13 particularly principles 3, 6, 7, 8, and 9:
>
> *− On the right to be brought promptly before a judicial or other authority after having been taken into custody;*
>
> *− On the necessity of founding the decision on custody on criteria of legality established by the law by a duly empowered authority;*
>
> *− On the desirability to set a maximum period of detention by law which must in no case be unlimited or of excessive length;*

– On the requirement of notification of the custodial measure in a language understood by the immigrant or asylum-seeker, including the conditions for applying for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and be competent to order the release of the person concerned, if appropriate;

– On the obligation of States to place asylum-seekers or immigrants in premises separate from those persons imprisoned under criminal law.

In all cases detention must not be for a potentially indefinite period of time.

(A copy of the Human Rights Council, Seventh Session, 10th January 2008, Report of the Working Group on Arbitrary Detention, is annexed as **Annexure P10 (Page _____to _____)**

OHCHR, Advanced Edited Version, Working Group on Arbitrary Detentions

78. With 2018, marking the seventieth anniversary of the Universal Declaration of Human Rights (UDHR), the OHCHR, published a revised guideline on Arbitrary Detentions. The UDHR has been ratified by India, and hence obliges India to maintain its commitment under the instrument not to subject anyone to arbitrary arrest, detention or exile and the right of every person to seek and enjoy in other countries asylum. The guidelines provide as under:

I. The right to personal liberty and the right of migrants not to be detained arbitrarily

7. The right to personal liberty is fundamental and extends to all persons at all times and circumstances, including migrants and asylum seekers, irrespective of their citizenship, nationality or migratory status…

8. The prohibition of arbitrary detention is absolute, meaning that it is a non-derogable norm of customary

international law, or jus cogens. Arbitrary detention can never be justified, including for any reason related to national emergency, maintaining public security or the large movements of immigrants or asylum seekers. This extends both to the territorial jurisdiction and effective control of a State.

II. The right to seek and enjoy asylum and the non-criminalization of migration

10. The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows. Migrants must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health.

11. The deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited.

III. Exceptionality of detention in the course of migration proceedings

12. Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.

14. Detention in the course of migration proceedings must be justified as reasonable, necessary and proportionate in the light of the circumstances specific to the individual case. Such detention is permissible only for the shortest period of time, it must not be punitive in nature and must be periodically reviewed as it extends in time.

16. Alternatives to detention must be sought to ensure that the detention is resorted to as an exceptional measure.

17. Alternatives to detention should be realistic and must not depend upon the ability of the individual to pay for

these. Alternatives to detention may take various forms, including reporting at regular intervals to the authorities, community-based solutions, release on bail or other securities, or stay in open centres or at a designated place. The conditions in any such open centres and other facilities must be humane and respectful of the inherent dignity of all persons.

24. The element of proportionality requires that a balance be struck between the gravity of the measure taken, which is the deprivation of liberty of a person in an irregular situation, including the effect of the detention on the physical and mental health of the individual, and the situation concerned.To ensure that the principle of proportionality is satisfied, alternatives to detention must always be considered.

IV. Length of detention in the course of migration proceedings

26. Indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.

(A copy of the OHCHR, Advanced Edited Version of the Working Group on Arbitrary Detention, dated 7th February 2018 is annexed as **Annexure P – 11 (Page _____to _____)**

Alternatives to Detention suggested by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Malta Visit 2004)

79. These alternatives to Detention guidelines based on the Malta Visit in 2004 state:

"14.In this connection, the CPT would suggest that alternative (non-custodial) measures be developed and used wherever possible, in particular vis-à-vis asylum seekers. These measures may include various restrictions on movement, but falling short of detention. Supervised release to a non-governmental organisation providing support to asylum seekers (which would, in return, be required to ensure the asylum seeker's presence at various asylum proceedings), regular reporting to the police, to be assigned to a specific residence or to be accommodated in an open centre (where their presence could be monitored) are only a few examples of alternative measures to detention which could usefully be considered. Some other non-custodial measures, typical for criminal justice systems, such as release on bail, warranty, and electronic tagging, could be considered as well. If non-custodial measures are deemed suitable for criminal offenders, they may be applied *a fortiori* to persons who are neither convicted nor suspected of a criminal offence. Further, the above measures are usually less costly than detention.

Resort to alternative measures is of particular importance vis-à-vis asylum seekers, who might have been imprisoned and/or tortured or otherwise ill-treated in their country of origin. In addition, some particularly vulnerable categories, such as women with children (including pregnant women and nursing mothers), juveniles, elderly persons, mentally and physically handicapped persons, etc. should, as a rule, be exempted from detention. Unaccompanied minor asylum seekers should be offered placement in residential homes and/or foster care, or in the care of family members who already reside within the asylum country."

(A copy of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Malta Visit 2004), is annexed as **Annexure P12 (Pages _____to _____)**

International Instruments on detention in Jails as contrary to International human rights standards and humane conditions of detention

80. International law explicitly lays down that detention of immigrants cannot be done in jails. The status of immigrants is not that of criminals. Detention of detainees in Assam, as common criminals within the jail compounds, without due facilities like legal representation or communication with their families is a violation of their right to live with dignity and the right to procedural due process as is laid down in various international standards and instruments.

The conditions of detention as pointed out in the detention guidelines (2012) must be humane and dignified. This is important in the context of what the petitioner has highlighted in terms of the inhumane conditions of persons in immigration detention centres in Assam, in violation of their Article 21 rights under the Constitution. Besides this, international instruments indicate that detention of persons pending deportation must be in appropriate, sanitary and non-punitive facilities and should not take place in prisons. The reality in Assam is in contrast to the requirements under basic international human rights standards as all detention centres for foreigners are located in the district jails.

81. UNHRC Guidelines on Detention (2012)

- **Guideline 8**: **Conditions of detention must be humane and dignified**

48.If detained, asylum-seekers are entitled to the following minimum conditions of detention:

(i) Detention can only lawfully be in places officially recognised as places of detention. Detention in police cells is not appropriate.

(ii) Asylum-seekers should be treated with dignity and in accordance with international standards.

(iii) Detention of asylum-seekers for immigration-related reasons should not be punitive in nature. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population. Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate.

(iv) Detainees' names and the location of their detention, as well as the names of persons responsible for their detention, need to be kept in registers readily available and accessible to those concerned, including relatives and legal counsel. Access to this information, however, needs to be balanced with issues of confidentiality.

(v) In co-sex facilities, men and women should be segregatedunless they are within the same family unit. Children should also be separated from adults unless these are relatives.Where possible, accommodation for families ought to be provided. Family accommodation can also prevent some families (particularly fathers travelling alone with their children) from being put in solitary confinement in the absence of any alternative.

Asylum-seekers in detention should be able to make regular contact (including through telephone or internet, where possible) and receive visits from relatives, friends, as well as religious, international and/ or non-governmental organisations, if they so desire. Access to and by UNHCR must be assured. Facilities should be made available to enable such visits. Such visits should normally take place in private unless there are compelling reasons relevant to safety and security to warrant otherwise.

(xii) Asylum-seekers should have access to reading materials and timely information where possible (for example through newspapers, the internet, and television).

(xiii) Asylum-seekers should have access to education and/or vocational training, as appropriate to the length of their stay. Children, regardless of their status or length of stay, have a right to access at least primary education. Preferably children should be educated offsite in local schools.

82. Further the detention guidelines detail the provision of basic necessities for those in detention. Food of nutritional value, access to reading materials, recreations, family visits and calls, education and vocational trainings, etc

The European Committee for the Prevention of Torture (CPT), March 2017, factsheet

83. The CPT organises visits to places of detention, in order to assess how persons deprived of their liberty are treated. The CPT has stated that a prison is by definition not a suitable place in which to detain someone who is neither suspected nor convicted of a criminal offence (Ireland Visit 2014). Further it has recommended that persons detained under aliens legislation should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation. Care should be taken in the design and layout of such premises to avoid, as far as possible, any impression of a carceral environment. (Malta visit 2008)

'Purposeful activities, in an immigration detention context, can include, inter alia, language classes, IT/computer classes, gardening, arts and crafts, cookery skills and so-called "cultural kitchens".'

'Immigration detention centres should include access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis, sports), a library y and a prayer room. All multiple occupancy rooms should be equipped with tables and chairs commensurate with the number of persons detained'

(A copy of the European Committee for the Prevention of Torture and inhuman or Degrading Treatment or Punishment, Factsheet, March 2017, is annexed as **Annexure P – 13 (Page _____to _____).**

International Instruments on treatment of children in detention and Separation of families in detention

84. Humanitarian considerations and international law obligations require that families should not be separated under any circumstances. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, for instance, lays down that if members of the same family are detained under aliens legislation, every effort should be made to avoid splitting up the family. Further in the context of vulnerable children, the Committee states:

Specific screening procedures aimed at identifying victims of torture and other persons in situation of vulnerability should be put in place and appropriate care should be provided. In this context, the CPT considers that there should be meaningful alternatives to detention for certain vulnerable categories of person. These categories include inter alia victims of torture, victims of trafficking, pregnant women and nursing mothers, children, families with young children, elderly persons and persons with disabilities.

The CPT wishes to recall its position that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a child.

(Annexure European Committee for the Prevention of Torture and inhuman or Degrading Treatment or Punishment, Factsheet, March 2017)

85.International Convention on Civil and Political Rights, 1966

states:

Article 17

"[n]o 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."

Article 23

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

86. The UNHRC detention guidelines stipulate that children, regardless of their status or length of stay, have a right to access at least primary education. Besides this it is perferable for children to be educated in off site local schools. Children born in detention need to be registered immediately after birth in line with international standards and issued with birth certificates.

87. The United Nations Convention on the Rights of the Child, 1990 (CRC)which has been ratified by Indiaprovides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children. Children have the right to family unity (*inter alia*, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC). Article 20(1) of the CRC establishes that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

Article 5: *States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child,*

appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 8: (1). *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*

(2). *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child...

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 16:

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

(2).The child has the right to the protection of the law against such interference or attacks.

Article 20 (1): *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*

(2). States Parties shall, in accordance with their national laws, ensure alternative care for such a child.

(3) Such care could include, inter alia, foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 37: States Parties shall ensure that:

a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

88. The NHRC report recommends that Detainees must be housed in the same district as their families have rights to meet and communicate with them. The report details the practice of the United States of America as worthy of emulation where facilities for detainees to make local trips, telephone calls, legal aid,etc are granted.

89. That the petitioner has not filed any other petition seeking the same relief in any other court.

GROUNDS

A) Because the action of respondents in detaining those declared as foreigners by Foreigners Tribunals as well as convicted foreigners after they have served out their sentence, in six detention centres in Assam, indefinitely and in inhuman conditions, without access to adequate work, recreation, parole, family visits and in deprivation of their rights to health, education, legal aid and appeal, is a violation of Article 21 rights of such detainees. The Indian Constitution

accords the alleged foreigners constitutional protection while in India. Article 14 guarantees to detainees in prisons/detention centres in India, the right to equality before law and the equal treatment under the law. Article 21 protects the life and liberty of every person in India irrespective of nationality. That in *NHRC v. State of Arunchal Pradesh,* **1996 (1) SCC 742**, this Hon'ble Court reiterated, "*Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise...*"

B) Because in the absence of a formal agreement between the government of India and the government of Bangladesh on deportation and repatriation of declared foreigners who are identified by Foreigners Tribunals as Bangladeshis and kept in detention, their incarceration is indefinite, arbitrary and violative of Article 14 and 21 rights. The Hon'ble Supreme Court's findings to date have focused on identification and deportation – not on sanctioning indefinite detention. And when the Hon'ble High Courts have ordered illegal immigrants to be detained in order to deport them, they have stipulated this detention until deportation must be done within a stipulated time frame: generally around two months. Therefore no Courts have ever sanctioned indefinite detention – since indefinite detention is anathema to Articles 14 and 21. In *Ahmed Noormohmed Bhatti v State of Gujarat (2005) 3 SCC 647* , this Hon'ble Court emphasised the limitation on the period for which a person so arrested may be detained. Because what this Hon'ble Court said in *Hussainara Khatoon v Home Secretary, Bihar 1979 SCR (3) 169* with regard to pre-trial detention, can equally be said here with regards to immigration detention. This Hon'ble Court noted that *'a procedure which keeps such large numbers of people behind bars without trial so long cannot possibly be regarded as 'reasonable, just or fair'.'* The blanket nature of indefinite incarceration, for all those who find themselves stuck in limbo, is also anathema to proportionality.

C) Because the conditions of detentions are not in accordance with the substantive due process requirement of Article 21. The evidenced rights violations of detainees (of health, education, family unity, work and recreation and access to legal services, etc.) do not satisfy the proportionality test of Article 21. There is no rational nexus between the legitimate aim of identifying and deporting illegal immigrants and the violation of the abovementioned Article 21 rights.

D) Because according to the NHRC report prepared by Harsh Mander, the indefinite incarceration of those detainees who claim to be Foreigners and whose repatriation has not been possible for long years because of bureaucratic tangles and delays between India and their respective countries, is arbitrary and unreasonable and hence unconstitutional.

E) Because in situations where persons have been sent to immigration detention through *inter alia* violation of a right to a reasonable opportunity to be heard (at first instance or appeal), Articles 14 and 21 are violated for arbitrariness and lack of procedural due process. Detention is consequently tainted and vitiated. When detainee are convicted *ex-parte,* the impugned detentions are wrong for violation of procedural rights per Article 14 and 21. Given the seriousness of deprivation of liberty and the right to a reasonable opportunity for a hearing, given the concerned parties are marginalized and often illiterate, the generalised and widespread use of ex-parte judgments of Tribunals to send people to detention centres, violates Articles 14 and 21.

F) Because article 51 (c), a Directive Principle of State Policy, requires India to foster respect for international law and treaty obligations in the dealings of organised peoples with one another, hence India must respect the various Conventions and treaties that provide a legitimate framework for dealing with persons who are in immigration detention and adhere to international human rights standards in just, fair and humane treatment of detainees.

G) Because Juveniles in immigration detention centres benefit from the protection afforded to juvenile detainees generally. This includes

Articles 14 and 21 rights; but also the Juvenile Justice Act that applies to all children – not merely citizens. Besides, children whose parents are in detention are children in need of care and protection under the Juvenile Justice Act. The United Nations Convention on the Rights of the Child (CRC)which has been ratified by Indiaprovides specific international legal obligations in relation to children and sets out a number of guiding principles regarding the protection of children. Children have the right to family unity (*inter alia*, Articles 5, 8 and 16, CRC) and the right not to be separated from their parents against their will (Article 9, CRC). Article 20(1) of the CRC establishes that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

H) Because international law explicitly lays down that detention of immigrants cannot be done in jails. The status of immigrants is not that of criminals. Detention of detainees in Assam, as common criminals within the jail compounds, without due facilities like legal representation or communication with their families is a violation of their right to live witlh dignity and the right to procedural due process as is laid down in various international standards and instruments.

I) Because Humanitarian considerations and international law obligations require that families in detention should not be separated under any circumstances.

J) Because the United Nations High Commission for Refugees (UNHCR) has recommended that Statelessness determination procedures be put in place to identify and protect stateless persons. There are currently stateless persons who are being held in detention centres in Assam and the petitioner submits that such persons must be treated as refugees and granted all such rights that are granted to refugees in India, such as refugee identity cards, short term or long term visas and work permits. The UNHCR has stated that it is important to identify stateless people in a nations territory so that they can enjoy basic human rights, allowing them to

live in dignity until their situation can be resolved through acquisition of a nationality.

PRAYERS

In view of the above facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to:

a) Issue a writ of mandamus or any other appropriate writ or direction to respondents to ensure the fair, humane and lawful treatment of those persons kept in detention centres in Assam, in conformity with Article 21 of the Constitution of India and international law on treatment of immigration detainees

b) Issue a writ of mandamus or any other appropriate writ or direction to respondents to ensure that detention of declared foreigners should be the last resort, for a limited period with clear prospects for release; it should be non-punitive; it should be resorted to only after an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case

c) Issue an appropriate writ in the nature of mandamus or any other direction to the respondents to ensure that in the rare cases in which detention is resorted to as a last resort and for limited time, families should under no condition be separated during detention

d) Issue an appropriate writ in the nature of mandamus or any other direction to the respondents to ensure that use of prisons and facilities designed or operated as prisons, should be abjured in all cases of such limited detention of foreigners, in keeping with international law standards on immigrant detentions.

e) Issue an appropriate writ in the nature of mandamus or any other direction to the respondents to ensure that detainees may be provided free legal aid and proper opportunity to defend themselves in challenging the order of the Foreigners Tribunals in the High Court and this Hon'ble Court

f) Issue an appropriate writ, order or direction, to declare those who have been determined to be foreigners and held in detention pending their repatriation, be treated as refugees

g) Issue an appropriate writ in the nature of mandamus or any other direction to the respondents to ensure that clear polices are adopted for those detainees who agree with the state that they are foreigners; to expedite their applications for deportation;

h) Issue an appropriate writ, order or direction, that those who have been declared foreigners, but whom their country of origin does not accept as nationals of that country, be declared as Stateless persons and be granted long term visa and protections that are afforded to refugees.

i) Issue an appropriate writ in the nature of mandamus or any other direction to the respondents to ensure that the Indian juvenile justice laws are applied to all children of those deemed to be foreigners, including inter alia both the children who are detained and those who are free while their parents are detained, whereby they are all treated as children in need of care and protection (CNCPs) under the JJ Act; taken cognisance of by the Child Welfare Committees established at district or sub-district levels.

j) pass such other order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

Petitioner Through:

(PRASHANT BHUSHAN)
Counsel for the Petitioner

Drawn by: Cheryl D'souza, Advocate
Drawn & Filed On: 24th August, 2018
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