LEX/BDAD/0037/1994

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IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)

Civil Appeal No. 58 of 1993

Decided On: 22.06.1994

Bangladesh **Vs.** Professor Golam Azam and others

Hon'ble Judges/Coram:
M.H. Rahman, A.T.M. Afzal, Mustafa Kamal and Latifur Rahman, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Aminul Huq, Attorney-General, A.F. Hassan Ariff, Deputy Attorney-General, and B Hossain, Deputy Attorney-General with him instructed by Sharifuddin Chaklader, Advocate-on-Record

For Respondents/Defendant: AR Yusuf, Senior Advocate, instructed by Md. Nowab Ali, Advocate-on-Record - For the Respondent No. 1

JUDGMENT

M.H. Rahman, J.

1. This appeal by special leave at the instance of the Government is directed against the judgment and order dated April 22, 1993 of the High Court Division passed in Writ Petition No. 1316 of 1992. Profession Golam Azam, hereinafter referred to as the respondent, instituted that writ petition. The High Court Division upheld his contentions that Notification No. 403-Imn/III dated Dhaka April 18, 1973, so far as it related to him, and the show cause Notice No. HH : MA(Bhai-I)/134 dated March 23, 1992 of the Ministry of Home Affairs served on him were without lawful authority. The material portion of the notification reads as follows :

> Whereas it appears that the persons specified below have been staying abroad since before the liberation of Bangladesh and by their conduct cannot be deemed to be citizens of Bangladesh :
>
> And whereas the said persons have continued to be citizens of Pakistan :
>
> Now, therefore, the Government declares under Article 3 of the Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order 149 of 1972), that the persons specified below do not qualify themselves to be the citizens of Bangladesh.....
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> Thirty-nine persons were mentioned in the notification. The respondent's name was at serial No. 3 : "Professor Golam Azam, s/o. Golam Kabir of Birgaon, Police Station Nabinagar, District Comilla and of Elephant Road, Maghbazar, Dhaka."

2. The respondent claims that his father, grand-father and he himself were all born in this country. He became the Ameer, President, of the Jamaat-e-Islami of the then East

Pakistan in 1969. He was a permanent resident in Bangladesh on March 25, 1971 and he continued to be so resident on 22 November, 1971 when he went to Lahore for attending his party's Central Working Committee meeting. As the war broke out between India and Pakistan he wanted to come back home. On December 3, 1971 the plane in which he was returning to Dhaka was diverted at first to Colombo, and then to Jeddah. After a few days the respondent was sent back to Karachi along with other passengers. He had to remain in Pakistan against his will for some months as the Government of Pakistan did not allow any Bangladeshi citizen to leave Pakistan. For making contact with his family he tried to go to London in March, 1972, but he failed to obtain any travel document. He arranged a Pakistani passport for going to Saudi Arabia for performing Hajj in December, 1972. During Hajj he came to know from fellow-pilgrims from Bangladesh that a political mispropaganda was running high in Bangladesh against him because of his party's opposition to the Awami League, the party in power in Bangladesh, and if he went back home his life would be in danger. In the first week of April, 1973 he went to London. From a copy of the Bangladesh Observer he came to know about the Notification dated 18 April, 1973. No prior notice was served on him. On January 17, 1976 the Government invited applications from those persons whose citizenship had been cancelled by the previous Government for restoration of their citizenship. From 20 May, 1976 the respondent sent several applications to the Secretary, Ministry of Home Affairs, the Chief Martial Law Administrator and the President, but without any result. On 11 March, 1978 the Government turned down his mother's application to restore his citizenship, but he was allowed to come to Bangladesh on 11 July, 1978 to see his ailing mother with a visa for three months. His visa was extended twice. For avoiding a possible deportation, on 8 November, 1978 he filed an application for restoration of his citizenship to the Ministry of Home Affairs and surrendered his Pakistani passport. On 27 May, 1980 the Minister of Home Affairs informed Parliament that the respondent's application for restoration of citizenship was pending for decision of the Government. On being asked by the Immigration Section of the Ministry of Home Affairs the respondent submitted on 30 April, 1981 an affidavit with an oath of allegiance to Bangladesh. His name was included in the voters' list in 1983 and also in 1990. As late as 12 January, 1992 the Home Minister informed Parliament that on 9 November, 1978 the respondent sought permission to stay in the country till a decision was taken on his citizenship and that no such decision had yet been taken. Suddenly on 23 March, 1992 at 3:00 AM the respondent was served with a notice to show cause by 10:00 AM on the same day as to why be, being a foreigner and disqualified to be a citizen of Bangladesh by the Notification dated April 18, 1973, should not be deported from Bangladesh for becoming the Ameer of Jamaat-e-Islami of Bangladesh, violating Article 38 of the Constitution. In his reply the respondent asserted his right as a citizen of Bangladesh and requested for a personal hearing. He was, however, arrested and detained at the Dhaka Central Jail by an order of detention dated 24 March, 1992 under section 3 of the Foreigner's Act, 1946.

3. The case of the government, the appellant before us, is that the respondent had been staying abroad since before liberation of Bangladesh as a citizen of Pakistan; that for his anti-liberation role and active collaboration with the Pakistan Army in raising irregular forces like the Rajakers, Al-Badrs and Al-Shams and placing his party, the Jamaat-e-Islami, at the disposal of the Pakistani Army, and because of his conduct during and after the liberation war, and his voluntarily residing in Pakistan as a citizen of Pakistan he could not be deemed to be a citizen of Bangladesh. The Rajakars, the armed wing of the respondent's party, were engaged in arson, looting and rape and other genocidal activities. The respondent was himself associated with the Pakistani Army Officers. A photograph, published in Dainik Purba Desh on April 6, 1971 showed him sitting with General Tikka Khan. The respondent took advantage of the Hajj

congregation in Saudi Arabia to orchestrate his anti-Bangladeshi activities. He lobbied actively to dissuade the Muslim countries from giving recognition to Bangladesh. In 1972 he organised a campaign throughout Pakistan so that Bangladesh might not be recognised as an independent State. In the same year he attended an Islamic Youth Conference in Riyadh where he made an appeal for liberating and recapturing East Pakistan and organised a Committee for recapturing East Pakistan in London. In 1973 he went to Bengazi, Libya where the Conference of the Foreign Ministers of the Islamic World was held and made an appeal there not to recognise Bangladesh as an independent State. From 1973 to 1976 the respondent met the King of Saudi Arabia several times and prevailed upon him not to recognise Bangladesh or give any assistance to her. On 23 March, 1992 he was lawfully asked to show cause why he should not be externed from Bangladesh and why other legal actions should not be taken against him.

4. In his affidavit-in-reply the respondent reiterated his assertions made in his writ petition and gave a denial to all the material allegations made in the Government's affidavit-in-opposition. The Jamaat-e-Islami had nothing to do with the Razakars, Al-Badr or Al-Shams. The respondent did not make any campaign against Bangladesh nor did he try to dissuade other Muslim countries or the King of Saudi Arabia from giving recognition to Bangladesh. He did not organise any organisation like the East Pakistan Recovery Committee in Lahore or in London. He used the Pakistani passport as a travel document and at the earliest opportune time he surrendered that passport to the Government and also affirmed his allegiance to Bangladesh by an affidavit

5. In the High Court Division the matter was at first heard by a Division Bench comprising Mohammad Ismailuddin Sarkar and Badrul Islam Chowdhury, JJ. Because of difference of opinion the matter was referred by the learned Chief Justice to Anwarul Huq Chowdhury J. The latter agreed with the opinion of Badrul Islam Chowdhury J and declared the notification and the show cause notice to have been made without lawful authority. By the impugned judgment the High Court Division upheld the respondent's contentions that he was born in this country and that he was a permanent resident on the midnight of 25/26 March, 1971 and that for the period of his being stranded in Pakistan he was to be deemed to be a permanent resident under the proviso to Article 2; that the allegations that the respondent's indulged in anti-Bangladesh activities were irrelevant; that the notification was bad for violation of principle of natural justice; and that the respondent' writ petition was not bad for laches and delay.

6. The term "citizen", derived from the Latin word "civis" is no longer understood in the narrow sense of earlier times as an inhabitant of a city or a freeman having a family in a city or as the representative of a city in parliament. By citizen we mean a person who is a member of an independent political community having rights and obligations under the Constitution and law of the country. What sovereignty is to a State, citizenship is to a person. Sovereignty gives a State membership in the family of nations. Citizenship gives a person membership in the political community of his country. Further, it indicates a two-way relationship of allegiance and protection between an individual and his country. Citizenship, the status of being a citizen, is a term of municipal law. Nationality, the status of being a national, is a term of international law. The terms 'citizenship' and 'nationality' are often used interchangeably.

7. Our Constitution, although repeatedly using the term citizen, did not define Bangladesh citizenship. Citizenship, though not mentioned as a fundamental right in our Constitution, is to be considered as the right of all rights as on it depends one's right to fundamental rights expressly provided for a citizenship in Part III of the Constitution

and his right to seek Court's protection of those rights. As per Article 152 of the Constitution "citizen" means" a person who is a citizen of Bangladesh according to the law relating to citizenship (.)" Article 6 of the Constitution provides that the citizenship of Bangladesh shall be determined and regulated by law. Article 21(1) of our Constitution provides:" It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property."

8. Citizenship may be acquired by birth or by naturalisation. A person who is deemed to be a citizen of Bangladesh under Article 2 is not required to take any oath of allegiance unless he is elected or appointed to any office mentioned in the Third Schedule of the Constitution. A naturalised citizen is, however, required to take oath of allegiance to the Constitution of the People's Republic of Bangladesh. To meet the requirements of the new situation that emerged out of the independence of Bangladesh President's Order 149 of 1972 was brought into existence on 15 December, 1972; one day before the commencement of the Constitution so that it might get the constitutional protection of an existing law. That legislation bears marks of hurried drafting. It has undergone several amendments. At present, law of citizenship is governed by two legislations the Citizenship Act, 1951, continued as an existing law by President's Order No. 48 of 1972, but not yet revised for printing in the statute book, and the Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order 149 of 1972). The instant case is governed by President's Order 149 of 1972. That law came into force on 15 December, 1972 but it was given effect from 26 March, 1971. Relevant articles of President's Order No. 149 of 1972 read as follows:

> **2.** Notwithstanding anything contained in any other law, on the commencement of this Order, every person shall be deemed to be a citizen of Bangladesh.
>
> (i)who or whose father or grandfather was born in the territories now comprised in Bangladesh and who was permanent resident of such territories on the 25th day of March, 1971 and continues to be so resident; or
>
> (ii) who was a permanent resident of the territories now comprised in Bangladesh on the 25th day of March, 1971, and continues to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force;
>
> Provided that if any person is a permanent resident of the territories now comprised in Bangladesh or his dependent is, in the course of his employment or for the pursuit of his studies, residing in a country, which was at war with, or engaged in military operations against Bangladesh and is being prevented from returning to Bangladesh, such person, or his dependents, shall be deemed to continue to be resident in Bangladesh.
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> 2A. A person to whom Article 2 would have ordinarily applied but for his residence in the United Kingdom shall be deemed to continue to be permanent resident in Bangladesh.
>
> Provided that the Government may notify, in the Official Gazette, any person or categories of persons to whom this Article shall not apply.
>
> 2B. (1) Notwithstanding anything contained in Article 2 or in any other law for the time being in force, a person shall not, except as provided in clause (2), qualify himself to be a citizen of Bangladesh if he -

(i) owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state, or

(ii) is notified under the proviso to Article 2A;

Provided that citizen of Bangladesh shall not, merely by reason of being a citizen or acquiring citizenship of a state specified in or under clause (2), cease to be a citizen of Bangladesh.

(2) The Government may grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state which the Government may, by notification in the Official Gazette, specify in this behalf.

3. In case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order, the question shall be decided by the Government which decision shall be final.

9. In this case we need not enquire into the meaning of the term 'decision' or to the question what makes a decision judicial or quasi-judicial or whether a lis was to be decided by the notification. The judicial review available in our Constitution is quite wide and free from the ill-suited straight-jackets of English common law prerogative writs like certiorari. All actions or decisions, administrative or quasi-judicial are amenable to judicial review under Article 102 of the Constitution subject to the limitations provided in that Article. The respondent's writ petition was no doubt maintainable. Before the High Court Division the appellant submitted that the respondent's writ petition, filed long 20 years after the impugned notification ought to have been rejected in limine. Relying on Tilok Chand vs. HB Munshi 1969 SCR (2) 824, Ram Chandra Shankar Deodhar vs. State of Maharashtra 1974 SCC 317 and Shafiqur Rahman vs. Certificate Officer, Dhaka in 29 DLR (SC) 232 the High Court Division rejected that contention.

10. The remedy of judicial review under Article 102 of the Constitution is not governed by any law of limitation. This is an extraordinary remedy and should be sought with all possible expedition. The Court should not allow its docket to be choked with stale matters, otherwise the whole process of adjudication will adversely be affected. The Court is to balance the interests of the party or parties affected by a decision, and public interests. In considering the question of delay the court will consider whether the relief granted would be likely to cause substantial hardship or prejudice the rights of any other person or would cause real harm to or dislocation in the administration. The circumstances of each case, the context, the type of error and the reasons for delay like pursuing a legal remedy or taking necessary steps before coming to Court are to be considered. In the instant case no one will be prejudiced. The respondent contends that when he was enjoying all his rights as a citizen and the government was giving assurances that the question of his citizenship was under consideration he advisedly did not rush to the Court. The show cause notice dated 23 March, 1992 was the last straw and he immediately thereafter came to the Court. In the facts of the case the High Court Division correctly refused to dismiss the matter on the ground of delay.

11. The learned Attorney-General submits the High Court Division misinterpreted the provisions of Article 2, in determining the respondent's permanent residence on the commencement of President's Order 149 of 1972 and in applying proviso to Article 2 to the case of the respondent. Let me dispose of these two points first.

12. Commencement of an Act and its coming into effect are not the same thing. Sub-

section (3) of section 5 of the General Clauses Act, 1897 clearly indicates that there is a distinction between an Act coming into effect and the commencement of the Act. For commencement of an Act there can only be one date. An Act may come into effect as a whole or in part on the day of its commencement, or it may be given, as a whole or in part, a retrospective effect from a date earlier than the date of commencement. Even where the Act is given retrospective operation the significance of the date of commencement of that law will be relevant for several reasons. From the date of its commencement that an Act will find a place on the statute-book of the country. In the instant case provision of Article 2 clearly provides that the date of the commencement of the Order will be the terminus a quo for determination of citizenship. In Bishal Deo Tewari vs. State 27 DLR 623 and in Abdul Haque vs. Bangladesh 33 DLR 113 the date of coming into effect of President's Order 149 of 1972 was wrongly regarded as the relevant date for determination of the continuance of permanent residence. The High Court Division relying on these decisions wrongly held that 25/26 March of 1971 was the terminal point and as the respondent touched both the points he should be deemed to be a citizen of Bangladesh. The respondent was admittedly born in this country and a permanent resident on 25 March, 1971. For determining his citizenship under Article 2 the question will be whether he continued to be so resident on 15 December, 1972, the date of the commencement of President's Order 149 of 1972. The respondent's contention that for his residence in United Kingdom on 18 April, 1973 he should be deemed to continue a permanent resident in Bangladesh under Article 2A must be rejected because the deeming provision under Article 2 is to be examined with reference to 15 December, 1972, the date of commencement of President's Order No. 149 of 1972, when the respondent was not residing in the United Kingdom.

13. In upholding the respondent's contention that proviso to Article 2 is available to him the High Court Division relied on two observations of this court: (i) the one in para 4 of the People's Republic Of Bangladesh vs. Abdul Haque 1982 BLD (AD) 143, and (ii) the other in para 22 of the Government of Bangladesh vs. MS Ispahani 40 DLR (AD) 116. In the facts of both the cases there was no averment that the aggrieved person was staying in Pakistan in the course of his employment or for his studies. For attracting the proviso to Article 2 a permanent resident in Bangladesh or his dependent is required to fulfil two requirements (i) that he was residing in the other country in course of his employment or for the pursuit of his studies, and (ii) is prevented from returning to Bangladesh. The legal fiction as to continuance of residence in Bangladesh as provided in proviso to Article 2 must he limited to the purpose for which it is created and should be strictly construed and should not be extended in the name of beneficial construction beyond its context, I uphold the appellant's contention that the respondent's staying in Pakistan on and from November 1971 was neither for his studies nor for his employment and as such the proviso to Article 2 of President's Order 149 No. 1972 is not available to him.

14. Where the proviso to Article 2 is attracted a citizen will not be required to explain further his case for staying abroad. That provision of law will not, however, preclude a citizen from explaining his staying abroad on other good reasons. For example, from December 1971 to September 1973, due to snapping of all communications between Bangladesh and Pakistan and because of non-recognition of Bangladesh by Pakistan, hundreds of Bengali citizens were stranded in Pakistan. On 17 April, 1974 Bangladesh and India "jointly proposed that in the larger interests of reconciliation, peace and stability in the sub-continent the problem of the detained and stranded persons should be resolved on humanitarian considerations through simultaneous repatriation of all such persons except those Pakistani prisoners of war who might be required by the Government of Bangladesh for trial on certain charges". As per the Delhi Agreement

dated 28 August, 1973 between India and Pakistan and with the concurrence of Bangladesh a three way repatriation commenced on 19 September, 1973. With regard to the atrocities and destruction committed in Bangladesh in 1971, the Prime Minister of Bangladesh had already declared that he "wanted the people to forget the past and to make a fresh start.....(.)" The respondent's contention that he was stranded in Pakistan till he left for England cannot be brushed aside.

15. The appellant contends that as the notification did neither deprive nor take away any vested right of the respondent and only notified his inherent lack of eligibility to be deemed to be a citizen of Bangladesh there had been no procedural defect in issuance of the notification for not serving a prior show cause notice on the respondent, then not residing in Bangladesh.

16. In support of his contention that the impugned notification was bad for violation of the principle of audi alteram partem the respondent relied on a number of decisions before the High Court Division.....R. vs. University of Cambridge (1723)1 Str. 557; Ridge vs. Baldwin 1963 (2) All England Reports 66; Commissioner of Income-tax, East Pakistan vs. Fazlur Rahman 16 DLR (SC) 410; Shah Abdur Rahman vs. Collector and Deputy Commissioner Bahawal Nagar and others 16 DLR (SC) 470; University of Dhaka vs. Zakir Ahmed 16, DLR 722; Bangladesh Steamer Agent's Association vs. Bangladesh and others 31 DLR(AD) 272; and Mohammad Ali vs. Burmah Eastern 38 DLR (AD) 41.

17. The learned Attorney-General does not challenge the principles laid down in aforementioned cases, but he contends that notification published under clause (1) of Article 17 of President's Order No. 8 of 1972 shows that the respondent was absconding or concealing himself or remaining abroad and hence any further notice would have been an exercise in futility. That notification was for a different cause of action and for different purposes. The publication of the impugned notification in the Bangladesh Gazette on 22 June, 1973 cannot satisfy the requirement of a prior notice. The appellant's contention that such publication was a sufficient compliance of the requirement of notice must, therefore, fail. No notice was served on the respondent at either of the two addresses mentioned in the notification, nor any effort was made to effect a substituted service on his last known address.

18. The learned Counsel for the respondent has drawn our attention to the following observation of Professor HWR Wade in his Administrative Law (fifth edition) at page 465 : "For the purposes of natural justice the question which matters is not whether the claimant has some legal right but whether legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interest, but simply of the exercise of governmental power in a manner which is fair and considerate."

19. As the respondent was staying abroad and not present in Bangladesh on 15 December, 1972 there could be a doubt about his continuance or abandonment of his permanent residence on the date of commencement of President's Order 149 of 1972. The notification expressly does not say anything about abandonment of his permanent residence. Where a doubt arises in respect of a person's status, conduct or intention that person must be the first person to be heard and given the opportunity to dispel the doubt. Article 3 does not either specifically or by implication exclude the principle of 'hear the other side.' It is also silent as to duty to act judicially. From the nature of the subject matter, resolving a doubt, from the nature of wide powers with no provision for post-decisional appeal or revision and from the nature of the right to be affected by the decision I have got no doubt that in deciding any matter under Article 3 the principle of 'hear the other side' must be followed.

20. For non-observance of the principle of natural justice the Privy Council in Attorney-General. vs. Ryan [1980] AC 718 advised that the Minister's decision to refuse the respondent's application for registration as a citizen of the Bahamas should be declared to be null and void. It was observed that "It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in Spackman vs. Plumstead District Board of Works (1885) 10 App. Cas. 229, 240: "There would be no decision within the meaning of the statute if there were anything.....done contrary to the essence of justice." See also Ridge vs. Baldwin [1964] AC 240."

21. Had the Government's case been bad only for violation of the principle of 'hear the other side', and it acted promptly on the expiry of the respondent's visa, and had the respondent come to Court soon after his surrendering the passport then I would have followed the above decision and directed the Government to decide the matter afresh after hearing the respondent. The Government's contention that the matter is still pending appears to me as too technical, when the Government sat over the matters for so many years, and without deciding it passed the order for detaining the respondent as a foreigner.

22. In case where no prior notice could be served, if, subsequent to the order, an opportunity of being heard is given to the person aggrieved, then that may be considered in certain circumstances to be a sufficient compliance of principle of natural justice. Had the respondent been given a post-decisional hearing after his arrival in this country or after the show cause notice dated 23 March, 1992 served on him then perhaps the appellant's case could not have been assailed on the ground of violation of the principle of 'hear the other side' or fair hearing, After hearing the respondent the Government could have omitted his name from the notification as it was done in a number of cases. The respondent's case is that his case is not at all different from those persons whose names were omitted from the notification and that his case is totally dissimilar from those persons who did not come to challenge the notification.

23. Even if the service of prior notice is ignored as being impracticable in view of the respondent's staying abroad beyond the jurisdiction of the country and that there was some urgency for the publication of the notification, then it is not understood why the appellant did not act on the notification when the visa of the respondent for staying in this country expired. The appellant's inaction, whatever may be the compulsion, is not understood by me. The official amnesia was sometimes broken by naive queries, like the one made on 3 December, 1986 by the Home Ministry as to how the respondent after registering himself as a foreigner was staying in this country without extending the visa. The Government did not inform the respondent nor the Parliament where the matter was raised twice, why the respondent's application for citizenship was pending since 1978.

24. The learned Attorney-General contends that from March 26, 1971 the respondent clung to his citizenship of Pakistan till April 18, 1973 when the notification was published in the Official Gazette, and that he did not satisfy the prerequisites of Article 2(i) and that there was reasonable doubt as to whether he continued to be a permanent resident in Bangladesh, and as in the notification three clear reasons were given as to the doubt the notification was wrongly struck down by the High Court Division. The respondent's case is that the notification itself shows that the Government did not apply its mind and exercised its power dehors Article 2 and was guided by considerations irrelevant under Article 2.

25. Article 3 does not provide for a declaration or publication of such a declaration in the Official Gazette. It indicates that a decision is to be given with regard to a person. It is not clear why in the notification 39 persons were banded together and why it was issued when all the thirty-nine persons were stated to be staying abroad i.e. beyond the jurisdiction of the country. The notification in question appears to be the only one so far issued by the Government On December 5, 1973 it was challenged in Writ Petition 410 of 1973 by Molla Harunur Rashid, mentioned at serial No. 13 of the notification. Subsequently by a notification dated 13 May, 1974 the writ-petitioner's name was omitted from the notification and the Rule issued in the writ petition was discharged as infructuous. After a change in the Government and a new orientation in the politics of the country in 1976 names of several other persons, about fifteen in number, mentioned in the notification were omitted by the Government, the learned Attorney-General informs this Court.

26. The questions whether by his conduct the respondent disqualified himself to be a citizen of Bangladesh or whether he renounced his citizenship of Bangladesh or whether he continued to be a citizen of Pakistan, implying he had already been a citizen of Pakistan are totally irrelevant under Article 3. If the purpose was to deter the persons mentioned in the notification from making anti-Bangladesh propaganda then that was not covered by Article 3. The only question that can be decided under Article 3 whether a person is qualified to be deemed to be a citizen of Bangladesh. The notification indicates that the Government did not ask the right question, namely, whether the respondent was a permanent resident in Bangladesh on 15 December, 1972. It was not made in exercise of power under Article 3 and it therefore must be held to be ultra vires.

27. The appellant had relied on the respondent's Pakistani passport as the most important evidence of his Pakistani citizenship. As a Pakistani the respondent applied and obtained a Pakistani passport and in that capacity he went to Saudi Arabia to perform hajj. Then he went to London as a Pakistani and got his Pakistani passport renewed there. He entered Bangladesh as a Pakistani citizen, and registered himself as a foreigner. His visa was extended twice on his Pakistani passport. He continued to hold that passport and did not surrender it on his own.

28. The appellant relied on Joyce vs. Director of Public Prosecutions 1946 AC 347. In 1933 Joyce, an American citizen, got a British passport, describing himself as a British subject by birth. After the outbreak of war between Great Britain and Germany and before the expiration of his renewed passport, Joyce delivered from enemy territory broadcast talks in English hostile to Great Britain. The passport was not found in his possession when he was arrested in Germany. Joyce was forwarded to England for trial for high treason. By a majority decision the House of Lords upheld the order of his conviction and the death sentence.

29. Lord Jowitt LC referred to the following definition of passport given by Lord Alverstone CJ, in R vs. Brailsford (1) [1905] 2 KB 730, 745:

> It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." It was observed that" The possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not

> a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his sovereign.

30. The Lord Chancellor, however, acknowledged "that there is nothing to prevent an alien from withdrawing from his allegiance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport." It was however held :

> But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt step to withdraw from his allegiance, unless indeed reliance is placed on the act of treason itself as a withdrawal. That, in my opinion, he cannot do. For such an act is not inconsistent with his still availing himself of the passport in other countries than Germany and possibly even in Germany itself.

31. The passport was never found again. The accused might have used it only to gain admittance to Germany and might then have discarded it. As the jury was not asked to pronounce on the question that unless the accused continued to retain the passport for use as a potential protection, the duty of allegiance would cease, Lord Porter dissented and allowed the appeal.

32. In the instant case, the respondent surrendered his passport which act itself is an evidence to show that though he used the Pakistani passport to enter this country he did not want to belong to the political community of Pakistan. The decision of the House of Lords in Joyce has got little relevance in this case. A different question was raised in that case. Lord Jowett LC himself observed : "The question is not whether he obtained British citizenship by obtaining the passport, but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad."

33. The US Supreme Court observed long ago in Domingo Urtetiqui vs. John ND Arcy (1835) 9 L. ed. 276; 9 Pet, 692, 698 : "There is some diversity of opinion on the bench, with respect to the admissibility in evidence of this passport, arising, in some measure, from the circumstances under which the offer was made, and its connection with other matters which had been given in evidence. Upon the general and abstract question, whether the passport, per se, was legal and competent evidence of the fact of citizenship, we are of opinion that it was not."

34. In Corpus Juris Secundum Vol. 14 at page 18 it is noted that "The granting of a passport to a particular individual by the state department is not conclusive that such person is a citizen of the United States."

35. The learned Attorney-General has drawn our attention to the following observation made in that majority decision : Izhar Ahmed vs. Union of India AIR 1962 (SC) 1052 (1065) :

> Now, it is not disputed that according to the laws prevailing in Pakistan a person is not entitled to apply for or obtain a passport unless he is a citizen of Pakistan under its Citizenship Act. Besides, the prescribed form of the

application requires that the applicant should make a declaration to the effect that he is a citizen of Pakistan and the said declaration has to be accepted by the Pakistan authorities before a passport is issued. In the course of the enquiry as to the citizenship of the applicant, declaration by officials of Pakistan about the truth of the statement of the applicant are also required to be filed. Thus, the procedure prescribed by the relevant Pakistan laws makes it abundantly clear that the application for the passport has to be made by a citizen of Pakistan, it was to contain a declaration to that effect and the truth of the declaration has to be established to the satisfaction of the Pakistan officials before a passport is granted. When a passport is obtained under these circumstances, so far as the Pakistan Government is concerned, there can be no doubt that it would be entitled to claim the applicant as its own citizen. The citizen would be stopped from claiming against the Pakistan Government that the statement made by him about his status was untrue. In such a case, if the impugned rule prescribes that the obtaining of a passport from the Pakistan Government by an Indian national, (which normally would be the result of the prescribed application voluntarily made by him) conclusively proves the voluntary acquisition of Pakistani citizenship, it would be difficult to hold that the rule is not a rule of evidence.

36. The respondent has, on the other hand, relied on paragraph 9 in Md. Ayub Khan vs. Commissioner of Police AIR 1965 (SC) 1623 (1626) :

> Acquisition of citizenship of another country to determine Indian citizenship, must, however, be voluntary. Provision for prescribing rules of evidence, having regard to which the question of acquisition of citizenship of another country has to be determined, clearly indicates that the order is not to be made on the mere satisfaction of the authority without enquiry, that the citizen concerned has obtained a passport of another country. The question as to whether, when and how foreign citizenship has been acquired has to be determined having regard to the rules of evidence prescribed, and termination of Indian citizenship being the consequence of voluntary acquisition of foreign citizenship, the authority has also to determine that such latter citizenship has been voluntarily acquired. Determination of the question postulates an approach as in a quasi-judicial enquiry; the citizen concerned must be given due notice of the nature of the action which in the view of the authority involves termination of Indian citizenship, and reasonable opportunity must be afforded to the citizen to convince the authority that what is alleged against him is not true.

37. In India Article 10 of the Constitution provides that every person who is or is deemed to be a citizen of India under any provision of the Constitution shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen. By Article 11 Parliament is authorised to make provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. Rule 30 of the Citizenship Rules, 1965 under the Indian Citizenship Act, 1955 provides that the Central Government is to determine the question as to whether, when or how any person has acquired the citizenship of another country with due regard to the rules of evidence specified in schedule III. One of the rules of evidence reads as follows : "3. The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of that country." By majority decision in Izhar Ahmed vs. Union of India 1962 (SC) 1052 (1965) the India Supreme Court upheld the validity of that rule of evidence. In our law there is no such corresponding provision.

38. In Md. Ayub Khan vs. Commissioner of Police, Madras the Supreme Court refused to re-examine Izhar Ahmed's case as it had been followed in AP vs. Syed Mohd. Khan AIR 1962 (SC) 1778. The Court however gave a liberal interpretation to Rule 3. Shah J. observed that it was impossible to hold that the termination of Indian citizenship depended upon the action of the foreign country in issuing the passport. It was held that the mere receipt of a passport by a person did not attract the operation of Rule 3 unless it was shown that the passport was received voluntarily. The same view was reiterated in Gangadhar vs. Erasmo Jesus Jesus AIR 1975 (SC) 972.

39. Citizenship is neither conferred by giving a passport nor it is acquired by receiving a passport. As both the grantor and the grantee of a passport are bound by certain mutual legal obligations, similar to those between the State and its citizen, a passport is considered as prima facie evidence of citizenship or nationality of its holder. It was held as a good evidence in the Superintendent and Remembrancer of Legal Affairs, Govt. of East Pakistan vs. Sunil Kumar Das 14 DLR Dhaka 705 and Gour Chandra Saha vs. The Vice-Chairman, East Pakistan Enemy Property Dhaka and others 21 DLR, Dhaka 535. It was observed in 14 DLR, Dhaka 705 : " It will be presumed, in the absence of any evidence to the contrary, that the passport obtained by the respondent from the Pakistan Government was obtained in due course of law. The passport raises a very strong presumption of the citizenship of a person, and is undoubtedly a primary evidence of citizenship of the holder thereof of the State from whom the passport has been obtained." In Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan vs. Kiron Chandra Dutta PLR (Dhaka) 436 at page 441 it was, however, held that "a person may hold a passport of another country owing to a variety of reasons and it cannot be deemed to be a conclusive proof of the nationality of the country of which he holds the passport although a strong presumption arises to that effect". In that case it was found that the presumption arising out of the holding of Indian passport had been rebutted by the evidence adduced by the respondent that his parents, brothers and his wife and children were living in Pakistan and that he never intended to leave Pakistan permanently.

40. A passport is not regarded as conclusive evidence of the citizenship or the nationality of its holder. This is because practice of issuing passport to non-citizens is widely prevalent amongst nations. Article 15 of the Bangladesh Passport Order, 1973 (President's Order 9 of 1973) provides that the Government may issue a passport or travel document to a person who is not a citizen of Bangladesh if the Government is of the opinion that it is necessary to do so in the public interest. Similar provision is there in section 20 of the Passport Act, 1967 of India.

41. It is contended that the respondent ought to have discarded the Pakistani passport and sought political asylum in England and asked for Nansen passport as a stateless person. The respondent did not get any opportunity to meet this new contention, urged for the first time before this Court. We are to examine the respondent's case on the basis of what he did and not on the basis of what he could have done on supposedly better advice. From the Government's own paper, a copy of the telex dated 5 May, 1972 from the Bangladesh High Commissioner to the Home Secretary, it appears that 14,187 persons obtained Bangladeshi passports from the High Commission after surrendering their Pakistani passport. The Government's case is that like other Bangladeshis from Pakistan the respondent did not surrender his Pakistani passport and ask for Bangladeshi passport before the Bangladesh High Commission in London. A Bangladeshi citizen who surrendered his Pakistani passport obviously used that passport as a convenient travel document without which he could not leave Pakistan and enter England. The appellant's contention that the respondent ought to have surrendered his

Pakistani passport and asked for Bangladeshi passport is totally misconceived. The Bangladesh High Commission in London could not have issued a Bangladeshi passport to the respondent in the face of the notification dated 18 April, 1973. The respondent could not have surrendered or discarded his Pakistani passport in England and denuded himself of the only travel document for leaving England and coming to Bangladesh.

42. The learned Attorney-General has submitted that in the USA even for voting in a political election in a foreign country a US citizen may lose his citizenship. He has not cited the case. That was the decision in Perez vs. Brownell 356 US 44, 2 L ed 2d 603 S Ct. 568. The Constitution of the USA did not define US citizenship prior to the Civil War, probably to avoid fixing the status of slaves. The Supreme Court in Scott vs. Sandford 60 US (19 How.) 393 (1857) defined the scope of US citizenship negatively, holding that such citizenship could not extend to a freed slave. That decision was overruled by the fourteenth amendment which provides : "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

43. In case of Perez in his dissent, joined by Black and Douglas JJ, Chief Justice Warren, held :

"Citizenship is man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be."

44. In Trop vs. Dulles 356 US 86, 2 L ed 2nd 630, 78 S Ct. 590, decided on the same day as Perez, the plaintiffs application for a passport was denied on the ground that he had lost his citizenship by reason of his court-martial conviction and dishonorable discharge for wartime desertion. Warren, CJ, with the concurrence of Black, Douglas, and Whittaker, JJ. held that

> Citizenship is not a licence that expires upon misbehavior. The duties of citizenship are numerous.....and the discharge of many of these obligations is essential to the security and well-being of the nation.....failure to perform any of these obligations may cause the nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however, reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this petitioner has done neither, I believe his fundamental right of citizenship is secure.

45. The decision in Perez was overruled in A froyim vs. Rush 387 US 253, Supreme Court Report 18 L ed 757, 87 S Ct. 1660 (P. 760) In delivering the opinion of the Court Black J. held :

> To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of S 401(e) would be equivalent to holding that Congress has the power to "abridge," "affect," "restrict the effect of," and "take.....away" citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with the Chief Justice's dissent in the Perez case that the Government is without power to rob a citizen

> of his citizenship under S 401(e) [of the Nationality Act of 1940].....We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this nation against a congressional forcible destruction of this citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

46. In his dissent in Perez case Chief Justice Warren, however, indicated that "under some circumstances [a citizen] may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country." The 'rights' conception of US citizenship, entrenched in Fourteenth Amendment, is different from our law. I have referred to the above decisions to show how the US Supreme Court has come to lay emphasis on voluntariness in cases of derivative relinquishment of citizenship. What will constitute voluntary relinquishment of citizenship will depend on the facts of each case.

47. Banishment, expulsion or ostracism by customary laws prevailing in ancient societies have been replaced in modern times by laws regulating expatriation, denationalisation or deprivation of citizenship. The histories of national liberation movements and break-away wars are replete with tragic stories of divided allegiance, broken families and endless human miseries. In the USA during civil war years (1861-65) of emotional stress and hostility, bordering on delirium, Congress passed two Acts designed to deprive military deserters to the Southern side of the rights to citizenship. In Europe between 1919 to 1941 several countries.....Soviet Russia, Turkey, Italy, Germany, Romania, Poland and France.....passed decrees denationalising considerable number of subjects on the ground of uninterrupted residence abroad, disaffection, political or other reasons. Article 15 of the Universal Declaration of Human Rights, 1948, specifies that everyone has the right to a nationality, and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. According to the Convention on the Reduction of Statelessness, 1961, a contracting State shall grant its nationality to a person born in its territory who otherwise will be stateless and shall not deprive a person of his nationality if such deprivation would render him stateless. Bangladesh has not yet signed the Convention on Reduction of Statelessness, but thanks to judicial pronouncements quite a few salutary features of the growing international norms in this regard have stood embodied in our national jurisprudence. The Superior Courts in our country have always interpreted the law of citizenship liberally so that one's claim to citizenship is upheld rather than destroyed, discarded documents of distress, obtained in time of despair, as prima facie evidence of renunciation of citizenship, and emphasised on voluntariness of such renunciation.

48. In the Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan vs. Kiron Chandra Dutta 15 PLR Dhaka 436 (441) where the respondent, a citizen of Pakistan, had been to India for medical treatment before the introduction of the system of passport between East Pakistan and India, and returned home with an Indian passport and visa from the Pakistan High Commission it was held that the respondent did not lose his citizenship of Pakistan as the prosecution failed to prove that he left Pakistan for India with the intention to settle there permanently.

49. In the Advocate-General vs. Benoy Bhusan 25 DLR (SC) 9 (12), the Supreme Court relied more on oral evidence than on the documentary evidence of a migration certificate. In view of the oral evidence of the Chairman of the Local Union Council that the respondents were voters in Pakistan in 1964, that they went to India after the

disturbances in 1964, that before their departure they had told him that they would come back to Pakistan after the restoration of peace, that they did not sell any of their properties before their departure for India, that they returned home from India within one or one and a half months after their departure and that after the return they repaid the agricultural loan which they had earlier taken, it was held that "it cannot be said that the respondents left Pakistan for good after abandoning their domicile in Pakistan with the intention of permanently settling in India and to acquire Indian citizenship. The migration certificate, on the strength of which they crossed into the Indian territory, at the most, contained an admission of the respondents that they had intended to settle in India, but this admission was capable of being explained away. In the exigencies of circumstances created by the disturbances in East Pakistan in 1964, it was perhaps not unnatural on the part of the respondents to cross into India under a Migration Certificate for their personal safety. The normal travel documents, such as passport and visa, were not likely to be available to them in those circumstances and, therefore, they were circumstanced to avail of the Migration Certificate in order to facilitate their entry into India. The mere grant of the Migration Certificate did not confer Indian citizenship on the respondents under the Indian Citizenship Act 1955, nor was there any evidence to show if the respondents applied for securing Indian citizenship under the applicable provisions of the said Indian Act. On the contrary, the evidence was that they, in accordance with their promise to the Chairman of the Union Council, returned home in East Pakistan within 1 or 1 1/2 months of their departure."

50. In Mukhtar Ahmed vs. Government of BangladeshLEX/BDHC/0001/1979 : 34 DLR 29 in view of the petitioner's continuous permanent residence in this country as a naturalised citizen and his taking oath of allegiance to Bangladesh the Court ignored his application filed in time of distress to the International Committee of Red Cross for going to Pakistan which was however rejected for not being pursued. It was held that the petitioner having not acquired the citizenship of any other country, his citizenship of Bangladesh which he acquired long before could not evaporate and that he continued to be a citizen of Bangladesh.

51. Ordinarily the question of citizenship comes for a decision when the person concerned enters the country or makes a claim on the basis of citizenship or is denied a passport. On the respondent's citizenship the appellant's contentions are various, a little incoherent. The learned Attorney-General's contentions that from 26 March, 1971 till the publication of the notification on 18 April, 1973 the respondent clung to his citizenship of Pakistan and that, though the respondent was born within the territories that now comprise Bangladesh, in his contemplation his birth place was in Pakistan are totally flawed. Law cannot be interpreted according to the respondent's alleged contemplation or notion about Pakistan's sway over his mind. Even a diehard pro-Pakistani, born in this country, is entitled to be a citizen of Bangladesh if he fulfills the requirements under Article 2 and is not disqualified under clause (1) of Article 2B. In one breath it is urged that the respondent was not a citizen of Bangladesh, and in another breath it is asserted that for his conduct and pro-Pakistani activities he was disqualified to be a citizen of Bangladesh. It is again urged that the respondent was never a citizen of Bangladesh and that, as such, his citizenship was never cancelled. If the Government's case is that the respondent was never a citizen of Bangladesh or, as stated in the notification, that he continued to be a citizen of Pakistan, then it is not understood why his name was included in the notification. The learned Attorney-General contends that no question of cancellation of citizenship arises in this case as the respondent had never been a citizen of this country. The press handout dated 17 January, 1976 issued by a Deputy Secretary of the Home Ministry indicated that the Government decided to consider restoration of citizenship of those persons whose citizenship had been

cancelled after liberation by the then government and that they might directly apply for restoration of their citizenship to the Secretary of the Home Ministry. It is contended that this had no nexus with the notification in question and that there was also no sanction behind that press release. The Government can hardly disown its own press handout, when no such stand was taken in the Government's reply dated 23 April, 1977 to the respondent's application for restoration of citizenship.

52. The connotation of permanent residence of a citizen by birth as provided in Article 2, is akin to that of domicile of origin, an expression found in private international law. The domicile of origin is not a matter of choice or free will. It is received or communicated to a person at his birth by operation of law. The domicile of origin is not lost by mere abandonment nor it is extinguished by mere removal animo non revertendi. Overwhelming evidence is required to rebut the presumption in favour of its continuance. The onus of proving that a domicile had been chosen in substitution for the domicile of origin would lie upon those who assert that the domicile of origin had been lost. The learned counsel for the respondent cited a number of decisions in this regard.....Bell vs. Kennedy (1868), LR 1 Sc & Division 307; Udny vs. Udny (1869), LR 1 SC & Division 441; Winans V AG, [1904] AC 287; 290; Ramsay vs. Liverpool Royal Infirmary [1930] AC 588; Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan vs. Kiron Chandra Dutta 15 PLR Dacca 436; Gour Chandra Saha & others vs. The Vice-Chairman, East Pakistan Enemy Property Dacca & ors LEX/HEPK/0149/1969 : 21 DLR 535 and Shah Ghulam Nabi & others vs. Vice-Chairman East Pakistan Enemy Property Management Board Dacca & ors. 22 DLR 48. Any event or incident of a man's life, his health and humours, his expectations of financial gains or advancement, his religious belief or political conviction, his prejudices or preferences will be relevant and admissible as indicia of his intention to abandon his permanent residence with no intention to return.

53. Before the High Court Division the appellant's case was that as the respondent acted in a manner prejudicial to the interest of the liberation of Bangladesh on and from 26th March, 1971 and thereby expressly and by conduct owned, affirmed and acknowledged allegiance to a foreign state, he cannot qualify himself to be a citizen of Bangladesh. The Government placed before the High Court Division a number of books, written long after the date of notification, in support of its contention that the respondent collaborated with Pakistan and indulged in anti-Bangladesh propaganda and appealed to some Muslim countries not to recognise Bangladesh. The truth or otherwise of the authors' views or statements cannot be verified in this summary proceeding. Advisedly the learned Attorney-General did not place those books before this Court. Instead, reliance was placed on numerous reports, published in the Dainik Sangram, the mouthpiece of the respondent's political party, Jamaat-e-Islami. Even from a casual runover of the reports it will be clear that during the war of liberation the respondent's allegiance and sympathies were with Pakistan and that he actively collaborated with the Pakistani authorities. He organized peace committees, led mass-prayer for Pakistan and gave a clarion call to all patriotic citizens to comb every quarter, search out the enemies of Pakistan and liquidate them. The Dainik Sangram reported on 16 August, 1971 that the respondent said "but God forbid, if Pakistan does not exist then Bengali Muslims will have to face the death of dishonour." The respondent said in mid-October of 1971 that for the existence of the Bengali Muslims the solidarity of Pakistan must be preserved. He termed the pro-liberation forces as enemies of Pakistan and as miscreants. He travelled to the then West Pakistan and met the policy-makers. He also addressed the training camps of the Rajakars, the auxiliary force of the Pakistan Army. These matters would have been straight-away relevant and admissible had there been a case under Article 2B. They are equally relevant and admissible as indicia of the respondent's intention for

examining a question whether he abandoned his permanent residence in this country.

54. After publishing the notification in the Bangladesh Gazette on 30 November, 1972 about the respondent's abscondence, the Government did not follow up any investigation or enquiry under the Bangladesh Collaborators (Special Tribunals) Order 1972 (President's Order No. 8 of 1972) against the respondent. Even for his participation in the by-election to the Pakistan National Assembly, an act of collaboration under President's Order 8 of 1972, no case was started against him. On 30 November, 1973 the Government granted a general clemency to all persons who were convicted or accused of offences under President's Order 8 of 1972 except those who were convicted or accused for murder, rape or arson. A Home Ministry's spokesman, however, said that the clemency would not cover those who had lost their citizenship. President's Order No. 8 of 1972 was repealed and omitted from the First Schedule of the Constitution by the Second Proclamation Order No. III of 1975. The respondent asserts that his name was not included in the list of 195 persons prepared by the Government for alleged crime under the International Crimes (Tribunals) Act, 1973. No complaint was made against him till the filing of his writ-petition for commission of any offence or crime during the last 20 years. Generally, there is no repose, peace or law of limitation against a trial for crime, though.

55. All the three judges of the High Court Division held that Article 2B is not applicable in this case. On 23 May, 1973 Article 2B was inserted by Ordinance No. X of 1973. On 22 June, 1973 that Ordinance was repealed by Act V of 1973. Art 2B was then given retrospective effect from 26 March, 1971. It was substituted by new Article 2B, quoted in paragraph 9 above, by Ordinance No. VII of 1978. Leave was granted to consider whether the principle of ex-post facto validation can be invoked for upholding the appellant's contention that Article 2B, because of its retrospective operation from 26 March, 1971, will be available to uphold the notification under Article 3. At the hearing of the appeal the learned Attorney-General has frankly conceded that Article 2B was not attracted in this case. He has, however, repeatedly emphasised on allegiance as an important factor in the traditional concept of citizenship. He has referred to the maxim, Nemo Patriam in Qua Natus Est Exuere Neo Ligeantiae Debitum Ejurare Possit (A man cannot abjure his native country nor the allegiance which he owes to his sovereign). Allegiance is important in modern concept of citizenship as well. The question of allegiance is important in considering disqualification under Article 2B. In this case allegiance as such is irrelevant as the impugned notification is made under Article 3 with regard to Article 2 and not made under Article 2B. No question arises in this case whether the respondent's acts or utterances in derogation of undivided allegiance to this country should result in his expatriation. The Government did not invoke the provisions of Article 2B, nor did it ask the respondent any question in this regard after he submitted on 30 April, 1981 an affidavit with an oath of allegiance to this country.

56. For continuing a permanent residence a person need not be rooted to the place of his permanent residence. For various reasons he may move out. For staying abroad alone a citizen cannot be said to have discontinued his permanent residence. In Schneider vs. Rusk 377 US 163, 12 L ed 2n 218, 84 S Ct. 1187 Douglas, J in delivering the opinion of the Court said. "Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons."

57. In conjunction with other reasons under section 16(4) of the Citizenship Act, 1951 a citizen can only be deprived of his citizenship for staying abroad for a continuous

period of seven years. The respondent stayed for about thirteen months in Pakistan. Thereafter he went to England and did not, even for once, go back to Pakistan. He continued to stay in London till July, 1978 when he came back to Bangladesh. There is nothing to show that while staying abroad he had taken any steps like renting or buying a house or even having a fixed address in Pakistan indicating that he had no animus revertendi so far his permanent residence in Bangladesh is concerned. In Re Coxen, Mac Callum vs. Coxen [1948] Ch. 747; [1948] LJR 1590; [1948] 2 All ER 492. the expression "shall have ceased permanently to reside therein," was interpreted to imply that there must be no animus revertendi :

58. The respondent asserted in his writ petition that on the same day the war broke out between India and Pakistan i.e. on 3 December, 1971, he started for Dhaka by plane but the plane after reaching Dhaka could not land at Dhaka airport and it had to go back and land in Colombo. As there was bombing at Karachi airport, the plane had to go to Jeddah where the respondent had to remain as a distressed passenger along with other passengers. After the ceasefire he was sent back to Karachi along with other passengers. Similar assertions were made, in brief, as early as on 12 January, 1977 when the respondent wrote to the Chief Martial Law Administrator for restoration of his citizenship. The assertions made in the writ-petition were not controverted by the Government nor the respondent was put to strict proof as to his averments. Now for the first time, in appeal, the appellant wants that this Court should take judicial notice of the impossibility of the plane journey on 3 December, 1971 when the war had already begun. The respondent's assertions were not denied by the Government after getting the full opportunity to do so. The Court cannot now take judicial notice of a controversial fact whether Karachi airport was at all operational on 3 December, 1971 or not for a take-off.

59. Wherever may be the doubt about the respondent's intention as to his continuing permanent residence in Bangladesh at the time of the notification, there can be no doubt now after he surrendered his Pakistani passport in November 1978, and thereafter, stayed on in this country and enjoyed, nearly unhindered, civic rights of a citizen. He even held a press conference on 30 May, 1988 to assert that he is a citizen of Bangladesh by birth. After his party's recent gains in the general election held in 1991 the respondent was wooed by the present Prime Minister who sought his party's support in Parliament. Both the Presidential hopefuls in the election held in 1991 called on him and solicited his and his party's support. It was only when the respondent accepted the office of the Ameer of his party the Government served him with a show cause notice and finally arrested him under the Foreigner's Act.

60. The Government did not make out any case in the notification about the respondent's abandonment of permanent residence and hence no effort was made in that regard in the Government's affidavit-in-opposition. The learned Attorney-General has, however, valiantly made a last-ditch argument that the case of abandonment of permanent residence was impliedly made in the facts asserted by the Government. I have considered the Government's new case that the respondent's pro-Pakistani acts and utterances and anti-Bangladesh propaganda and his obtaining a Pakistani passport unequivocally indicate that on 22 November, 1971 when he left for Pakistan he intended to leave his permanent residence in this country with no intention to return. I have examined the appellant's case in juxtaposition with the respondent's that on 3 December, 1971 he tried to come back to Bangladesh, his home for fifty years from his birth; that he surrendered his Pakistani passport; that he made amends and took an oath of allegiance to Bangladesh against whose independence he worked although the liberation war in 1971; and that he has been residing in the country for more than

fourteen years, never visiting Pakistan or any other country. It is a case of the return of the native, back to the roots, the land of his ancestors. The respondent had good reasons to surrender his Pakistani passport and ask for restoration of his citizenship in this country as he had equally good reason for taking the Pakistani passport for going out from Pakistan and trying to come back home. His wife and seven children are Bangladeshi citizens by birth. He has got properties in this country and he has been paying taxes for his residential house in Maghbazar where members of his extended family are residing. The appellant's case that the respondent intended to abandon his permanent residence on 22 November, 1971 when he left for Pakistan does not inspire any confidence.

61. The learned Attorney-General preambled as well as concluded his submission and, in between, repeated several times that the facts of the case are unique and they have no relevance with other cases of abandonment of domicile of origin and they are to be examined from a completely new angle in the context of bundle of facts out of which Bangladesh emerged. After referring to the maxim salus populi est suprema lex (public welfare is the highest law) he has submitted that if the inclusion of the respondent's name is declared as illegal it will, in his words, "tantamount to rehabilitation of the respondent in political community of this country and this will be a national catastrophe in Bangladesh in as much as the entire political process will be disturbed."

62. A part of the learned Attorney-General's submission seems to have been inspired by Lord Bacon's dicta, as noted by Herbert Broom in his 'A Selection of Legal Maxims (Tenth Edition)' at page, 7 that "the Law will permit a departure from the legal technicalities which he describes as the "placita juris," "rather than crimes and wrongs would be unpunished, quia salus populi suprema lex." and "salus populi is contained in the repressing offences by punishment," and, therefore, receditur a placitis juris poitius quam injurioe et delicto maneant impunita". The maxim salus populi est suprema lex can hardly be invoked in a case like this where the citizenship of an individual is only involved. Names of about fifteen persons have already been omitted from the notification.

63. The learned counsel for the respondent has submitted that many a person, known for their alleged collaboration with Pakistan, have been rehabilitated within less than seven years after the war of liberation. He has referred to the oft-quoted aphorism of Lord Atkin in Liversidge vs. Anderson [1941] 3 All ER 338, 361 "In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace."

A reference has also been made to the following observations of Munir, CJ in Federation of Pakistan vs. Tamizuddin Khan 7 DLR (FC) 1955 291(330):

> It has been suggested by the learned Judges of the Sind Chief Court and has also been vehemently urged before us that if the view that I take on the question of assent be correct, the result would be disastrous because the entire legislation passed by the Constituent Assembly, and the acts done and order passed under it, will in that case have to be held to be void.....I do not wish to say anything more than that the sole question before us is whether the Governor-General's assent was obtained to the Government of India (Amendment) Act of 1954, which inserted section 223A to the Government of India Act.....I am quite clear in my mind that we are not concerned with the consequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legislation by the Legislature of the

> Dominion under sub-section (3) of section 8 needed the assent of the Governor-General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an irremovable legislature to what straits it has brought the country. Unless any rule of estoppel require us to pronounce merely purported legislation as complete and valid legislation, we have no option but to pronounce it to be void and to leave it to the relevant authorities under the Constitution or to the country to set right the position in any way it may be open to them. The question raised involves the rights of every citizen in Pakistan, and neither any rule of construction nor any rule of estoppel stands in the way of a clear pronouncement.

64. In considering a matter before it the Court will only consider whether the aggrieved person has got the legal entitlement to the relief claimed. Any consideration of his political antecedents having no bearing on the questions of law involved in the matter will be irrelevant. Equally, it will be irrelevant to consider to what probable political consequences will follow if the relief is granted. Political antecedents to an aggrieved person, otherwise notorious for his anti-people role, were rejected by the Supreme Court of Zimbabwe in Smith vs. Mutasa No & Another [1990] LRC (Const) 87. Ian Douglas Smith, a former Prime Minister of Rhodesia, now Zimbabwe, while in power, detained a large number of African leaders, believed and practised apartheid and publicly declared that there could be no majority rule in "thousand years". After independence he was elected to the House of Assembly. For his derogatory remarks made in an interview in London about the black people of Zimbabwe and by inference their representatives in Parliament he was reprimanded and admonished. The House of Assembly suspended him from service for twelve months and denied him his salary and allowances. The High Court refused to grant him any relief. The Supreme Court upheld his right to his property.....the salary and allowances he had earned as a member of the House of Assembly. (see "Developing Human Rights Jurisprudence," Volume 3 pages 81-82 and volume 5, pages 56-57, Commonwealth Secretariat, Interights, London.)

65. A Court's decision may have or may be viewed to have momentous consequences. One may say that the twelve-to-two decision in the Hampden's case (1637) in favour of the King's prerogative right to issue shipmoney led to the struggle between the King and his Parliament or that the decision in Godden vs. Hales (1686), a test case in which eleven of the twelve judges found that the King was entitled to dispense with law, led to the Glorious Revolution of 1688 in England. The decision of the US Supreme Court in Scott vs. Sanford, known as the Dred Scott case, is said to have provoked the civil war in the USA. One can refer to many other decisions, releasing different kinds of momentous consequences. Diverse consequences may follow from a decision. A Court may not have the prescience to foresee the imponderabilities of the future. While acting under the law a Court's anxiety in decision-making must be limited to the questions of facts and law and the interest of justice in the circumstances of a particular case. It should not brook any doubt while making a decision. And it should not also have any conceit that its is the perfect decision.

The appeal is dismissed. No costs.

ATM Afzal J : Having gone through the judgments prepared by my learned brothers, I find that the entire field of controversy raised on the basis of the impugned judgment has been well-covered and there is very little or practically nothing left for me to add. All that I can say now, as it is said at the end of every story, is that the King (or the

Queen?) and his/her subject started living happily ever after despite the dark prophesy of national catastrophe (if the appeal is dismissed) made by the learned Attorney-General during the dying moments of the hearing.

66. I have always felt for one thing, that the main issue in the writ petition, saying with respect to the learned Judges of the High Court Division, had not been put in the right focus; had it been so done, much of their judgments dealing with acquisition/loss of citizenship by the respondent and theories relating thereto would not have been necessary.

67. Professor Golam Azam did not move the writ petition seeking a declaration of his citizenship; indeed a writ petition for such purpose would not lie. The writ petition was filed precisely for a declaration that the impugned notification dated 18.4.1973 issued by the Government in purported exercise of power under Article 3 of the Bangladesh Citizenship (Temporary Provisions) Order, 1972 (President's Order No. 149 of 1972), was ultra vires. The only question at issue therefore is : Did the Government exercise its power legally and in terms of Article 3 as would make the notification immune from the doctrine of ultra vires?

68. It is a truism that the exercise of a statutory power must not be ultra vires. What then is required to make it infra-vires?

69. Lord Macnaghten said in Westminster Corporation vs. London and North Western Railway, 1905 AC 426:

> It is well settled that a public body invested with statutory powers such as those conferred upon the Corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably.

70. Professor, de Smith in his treatise, 'Judicial Review of Administrative Action' (4th Edn) at pages 285-86 summarized the principles formulated by the Courts thus :

> The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it : it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what has not been authorised to do. It must act in good faith must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, is it possible to differentiate with precision the grounds of invalidity contained within each category.

(emphasis added).

71. In the context of the facts of the present case, I find it very apt what the Supreme Court of India said in Smt. Shalini Soni vs. Union of India, (1981) 1 SCR 962 : AIR 1981 (SC) 431 :

> It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entruste to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote.

There is yet another principle about which the Privy Council has said that 'it has long been settled law' that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority (AG vs. Ryan (1980) AC 718). Violation of natural Justice, says HWR Wade in his 'Administrative Law' (5th Ed.) 415, is then to be classified as one of the varieties of wrong procedure, or abuse of power, which transgress the implied conditions which Parliament is presumed to have intended.

72. Nobody would dispute today the Courts' power of judicial review of an administrative action or decision which is not within the perimeter set out above. This is precisely the function of the High Court Division under Article 102 of the Constitution when an aggrieved person seeks for a declaration that the act complained of has been done without lawful authority and is of no legal effect. Article 3, relevant portion of Article 2 of President's Order 149 of 1972 and the impugned notification (as far as the respondent is concerned) are reproduced below for ready reference.

> **2.** Notwithstanding anything contained in any other law, on the commencement of this Order, every person shall be deemed to be a citizen of Bangladesh,
>
> (i) who or whose father or grandfather was born in the territories now comprised in Bangladesh and who was permanent resident of such territories on the 25th day of March 1971 and continues to be so resident; or.....
>
> **3.** In case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order, the question shall be decided by the Government which decision shall be final.....
>
> "The impugned notification dated 18.4.73 (Annexure-B) is to the following effect:-
>
> "Whereas it appears that the persons specified below have been staying abroad since before the liberation of Bangladesh and by their conduct cannot be deemed to be citizen of Bangladesh:
>
> And whereas the said persons have continued to be citizen of Pakistan :
>
> Now, therefore, the Government declares under Article 3 of the Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order 149 of 1972), that the persons specified below do not qualify themselves to be the citizens of Bangladesh :
>
> **1.**.....

2......

3. Prof. Golam Azam, son of Golam Kabir of Birgaon, Police Station Nabinagar, District Comilla and of Elephant Road, Magbazar, Dhaka.

4......

39......

By Order of the Government

Sd/-S. Ahmed,

Secretary."

(Underlined by me).

73. It has not been disputed by the Government appellant that the respondent's citizenship is liable to be determined by the aforesaid provision of Article 2(i) subject to Article 3. It has also not been disputed that of the three conditions in Article 2(i) the respondent definitely satisfied two of them, namely, (1) that he/his father/grandfather was born in the territories now comprised in Bangladesh, (2) that he was permanent resident of such territories on the 25th day of March, 1971; the third condition is, whether he continued to be so resident "On the commencement of this Order" on 15.12.1972. Respondent claims that he continued to be a permanent resident on that day also although he was not physically present for reasons beyond his control.

74. Article 3 authorizes the Government to decide the question whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 "in case of doubt". It is not a conferment of a plenary power but a power hedged with a condition. It is not a power for disqualifying a person from citizenship if he otherwise qualified under the law. For example, if the respondent was present in Bangladesh on 15.12.1972, the Government could not claim to take any decision about him under Article 3. The Government's doubt to enable it to take a decision in the present case, in a narrow sense of the phraseology 'permanent resident', must only be due and with regard to the respondent's absence from Bangladesh on 15.12.1972. The absence before or after that date is not at all relevant for exercising power under Article 3.

75. The respondent went to Lahore on 22.11.1971. Had his plane been able to land at the Dhaka airport on 3.12.1971 on return journey, whatever other lot might have befallen him in Bangladesh, the Government probably would not have any occasion to exercise power under Article 3 although he was not always present in Bangladesh after 25th March, 1971. Similarly, if the respondent had left Bangladesh after 15.12.1972 then also, the Government could not invoke Article 3.

76. Now it is a historical fact that like the respondent several hundred thousand persons who had permanent hearth and home in Bangladesh were stranded in Pakistan upto August, 1973 and the process of repatriation officially began on 19 September, 1973 and nearly 300,000 persons were repatriated by 9 April, 1974. Vide Bangladesh-India-Pakistan Agreement signed in New Delhi on April 9, 1974. Can it be said with any amount of reasonableness that those persons had lost their permanent residence merely because of absence from Bangladesh on 15.12.1972 and were thus not qualified to be deemed to be a citizen of Bangladesh under Article 2(1)? Can there be any doubt about their citizenship? True, by adding a proviso to Article 2 those persons who were in

Pakistan in course of employment or for the pursuit of studies during that period were deemed to continue to be resident in Bangladesh. But the fact remains that this deeming provision was made because they were prevented from returning to Bangladesh. On principle, therefore, there is no difference between their case and that of the respondent or persons like Abdul Hoque, 1982 BLD (AD) 143. Before the official repatriation began in September, 1973, the Government could not in fairness and honestly allow itself a doubt to invoke its power under Article 3 on 18.4.1973 in respect of any person including the respondent who was stranded in Pakistan on 15.12.1972. It is clear that the impugned notification does not at all satisfy the test of fairness and reasonableness.

77. By majority judgment in the High Court Division, it has been held that the impugned notification (dated 18.4.1973) having offended the principle of audi alteram partem, it is bad in law. This view has been upheld by us. For reasons see the judgments of MH Rahman and Mustafa Kamal, JJ. The impugned notification was ultra vires on this ground alone.

78. If one were to express in one sentence the substance of the long petition, the longer affidavits and still longer submissions and citations made by the respective parties in the High Court Division, the long and short of all that is that whereas Professor Ghulam Azam submits that the impugned Government order is bad in law, the Government says in reply - 'but your political conduct was equally bad'. That is no answer to the objection of the respondent. A point of law cannot be matched by alleging political mis-demeanour. That is sheer perversity. The entire affidavit-in-opposition filed by the Government is a repetition of the political conduct of the respondent, during and after the war for national independence, which was alleged to be anti-independence and anti-Bangladesh. The Government's views about the impugned order is reflected in its affidavits, a typical part of which may be quoted here which gives an insight of the authority's mind :

> Professor Golam Azam had never been a citizen of Bangladesh by his anti-Bangladesh role both before and after the War of Liberation of Bangladesh and his whole conduct, effect and attempt was against the sovereign concept of Bangladesh and he had there acted along with Pakistan elements to restore the original structure of Pakistan and he had never reconciled with the independent and sovereign Bangladesh and Government of Bangladesh had never treated him as a citizen of Bangladesh. It is stated that the petitioner was at no point of time on and from 26th March, 1971 a citizen of Bangladesh, inasmuch as the petitioner continued to be a citizen of Pakistan by his acts, deeds and conduct overtly and covertly.

79. The impugned order, inter alia, refers to conduct and, as noticed above, the Government's affidavit is mainly based on the respondent's political conduct during the liberation struggle and after. There is complete unanimity on all hands that the political conduct of the respondent was wholly irrelevant for deciding the question under Article 3 of President's Order No. 149 of 1972. There is no power under Article 3 for denuding a person of his citizenship for the offence of collaboration with the Pakistan Occupation Army. Indeed there is nothing in President's Order No. 149 of 1972 which authorised the Government on the date of the impugned notification to disqualify a citizen on the ground of collaboration with the Pakistan Occupation Army. President's Order No. 149 of 1972 was never intended to punish an alleged collaborator of the said Army by stripping him of his citizenship. Even Mohammad Ismailuddin Sarkar, J who upheld the notification very fairly and rightly observed :

> .....there is nothing to directly implicate the petitioner in any of the atrocities alleged to have been perpetrated by the Pakistani Army or their associates - the Rajakars, Al-Badrs or the Al-Shams. Except that the petitioner was hobnobbing with the Military Junta during the war of liberation, we do not find anything that the petitioner was in any way directly involved in perpetuating the alleged atrocities during the war of independence. In my view, none of these reports is of any help for solving the legal question raised before us in this matter and, as such, I will refrain from mentioning any such reports or events in course of my discussion of the points raised in this matter.

80. The learned Attorney-General also fairly conceded that the alleged conduct of the respondent was not relevant for deciding the question under Article 3 but he made an almost, what may be called, last-ditch metaphysical submission that from the respondent's conduct, action, deeds it was quite plain that he had, infact, abandoned his permanent residence in Bangladesh and if he at all contemplated any home either in Brahmanbaria or in Maghbazar that home was within the geo-political boundary of Pakistan. This argument has the charm of novelty but has little appeal to reason. However, the view that the conduct referred to in the notification and the affidavit-in-opposition was totally irrelevant is unanimous.

81. The other consideration in the impugned notification reads : "Whereas the said persons have continued to be citizen of Pakistan."

82. Before 26th March, 1971, the persons who are now citizens of Bangladesh were all citizens of Pakistan. The law of citizenship in Bangladesh (President's Order 149 of 1972) has brought about the conversion if one fulfilled the conditions. One cannot continue to be a citizen of Pakistan merely by his choice or stay in Pakistan unless the State of Pakistan accepted him as such. In the case of Superintendent and Remembrancer of Legal Affairs, Govt. of East Pakistan vs. Amalendu Paul, PLD 1960 Dhaka 329, Rahman, J (as his Lordship then was) observed :

> There is no principle recognized in international law which would enable a person by his own volition and by his own act regardless of the will of a State to acquire or terminate a nationality merely by his own choice. A nationality can neither be acquired nor retained except with the will of the State.

82. To say that the Government entertained doubt about permanent residence of the respondent on 15.12.1972 because he continued to be a citizen of Pakistan is to misconceive the whole issue. The right matter to look for was whether there was any material to doubt that the respondent ceased to continue as a permanent resident on 15.12.1972. The allegation that the respondent continued to be a citizen of Pakistan, to my mind, is entirely extraneous for the purpose. The learned Attorney-General in course of his submission repeatedly said that the respondent clung to his Pakistani citizenship. I have failed to appreciate this submission. Citizenship, learned Attorney-General himself submitted, is governed by the respective law of each country. Therefore it is not a matter for clinging to. Rather citizenship clings to a person unless lost otherwise by or under any law.

83. The authority of the Government under Article 3 is exercisable only "in case of doubt". As in many statutes, for example, The Special Powers Act, 1974 (section 3), the Government is authorised to make an order "if satisfied", the Court insists on such satisfaction in the order itself to show application of the mind of the authority concerned. Likewise, there ought to have been mentioned in the notification itself that

the Government entertained doubt as mentioned in Article 3. Not only there is omission in the notification but in the Affidavit-in-Opposition also there is no clear mention as to Government's entertaining any doubt about the respondent's qualification to be deemed to be a citizen of Bangladesh under Article 2. Indeed the Government's clear case is that it has never treated the respondent as a citizen of Bangladesh and disqualified him from being a citizen of Bangladesh for his anti-liberation activities. This shows how utterly the Government failed to comprehend its powers under Article 3. It has already been noticed that Article 3 does not give the Government a power to disqualify a person from being a citizen. If the Government never treated the respondent as a citizen of Bangladesh, it means that it never had any doubt about his citizenship even though he was a citizen under the law and in that case there was no question of giving any decision under Article 3. The impugned notification, upon the Government's own case, therefore, was not one falling under Article 3.

84. Thus, looking at the notification from any point of view, I am clear in my mind that it cannot survive the test of being intra-vires.

85. The learned Attorney-General has made an impassioned appeal in the name of public welfare not to interfere with the impugned notification because it will amount to rehabilitation of Professor Ghulam Azam in the political community of Bangladesh which will be a national catastrophe inasmuch as the entire political process will be disturbed thereby. Frankly speaking, I do not find any basis for this submission because the Government have not made out any case on facts in that behalf in its Affidavit-in-Opposition. Rather the Government have chosen to make "no comments" on the assertion of the respondent that before formation of Government Begum Khaleda Zia personally met the respondent for the support of his party in forming the Government and that at the time of election of President both the candidates for the office of President of the country came to the respondent's residence and requested his support and his party's support which was published as news items in national dailies. In other words, there is already a tacit recognition by the Government of the respondent's being a member of the political community of the country. However, the Court's concern is not politics but law and only law. It is for the people of this country either to accept or reject the politics of the respondent. They are the best judge of their own welfare. The Court cannot shirk its responsibility from doing justice according to law on an unfounded assumption of alleged national catastrophe. As I was pondering over the submission of the learned Attorney-General, a news item published in The New Nation of 25 June, 1994 attracted my notice. It was a statement by the leader of the opposition in Parliament reading which I felt assured in my conviction that the Court need not take notice of the argument as to alleged political rehabilitation of the respondent and that political question should be debated politically outside the Court. The news item was :

> Referring to restoration of citizenship of Jamaat Leader Prof. Golam Azam, Sheikh Hasina said late President Ziaur Rahman by bringing amendment to country's constitution politically rehabilitated anti-independence axis including the Jamaat Leader and Begum Zia made arrangement for restoration of his citizenship.

I agree that the appeal should be dismissed.

Mustafa Kamal J : I concur fully with the exhaustive judgment and order of my learned brother MH Rahman, J.. Without re-stating the facts of this case I wish however to deal with the arguments advanced in the light of my own understanding.

86. It is quite permissible for the Court to trace legislative history (".....a page of history is worth a volume of logic", said Justice Frankfurter) to find out the intent or purpose behind a legislation, in this case the (Pakistan) Citizenship Act, 1951 and President's Order No. 149 of 1972, the two existing laws on citizenship in our country.

87. During the British period, the collective United Kingdom legislation known as the British Nationality and Status of Aliens Act, 1914 to 1943 determined the citizenship of British citizens as well as the sub-continental inhabitants who were known as "British subjects". It was a concept "of a common British nationality of all subjects of the Crown throughout the Commonwealth and Empire, which had grown out of, and perpetuated, the Common Law doctrine of allegiance to the King". (Halsbury's Laws of England, 3rd Edition, Volume I, paragraph 1023 page 528). When this common law doctrine became unworkable, the UK Parliament enacted the British Nationality Act, 1948 following a general agreement between the UK Government and Commonwealth countries including India and Pakistan. Thereafter separate citizenship laws were passed by the different Commonwealth countries including India and Pakistan on similar lines.

88. During the period from 1948 to 1951, Pakistani citizens were only potentially so. They enjoyed Commonwealth Citizenship which was synonymous with British subjects without citizenship. This Commonwealth Citizenship was to continue under section 1 of the British Nationality Act, 1948 until Pakistan enacted its own citizenship laws.

89. A citizenship law was enacted in Pakistan for the first time on the 13th April, 1951 when the Pakistan Citizenship Act, 1951, shortly, the said Act, came into effect. It provided for seven different classes of citizens, namely, (i) a person who shall be deemed to be a citizen of Pakistan, (ii) citizen by birth, (iii) citizen by descent, (iv) citizen by migration, (v) citizen by naturalisation, (vi) citizen by registration and (vii) citizen by incorporation of territory.

90. Our concern in this case is (i) above and also remotely with (ii). There were four categories of persons in (i) above who "at the commencement of this Act" "shall be deemed to be a citizen of Pakistan" under section 3(a) to 3(d) of the said Act. In the appeal before us only the first category is relevant. The first category under section 3(a) comprises a person "who or any of whose parents or grandparents was born in the territory now including in Pakistan and who after the fourteenth day of August, 1947, has not been permanently resident in any country outside Pakistan". In the absence of a better terminology, I shall call them "deemed citizens" of Pakistan.

91. Section 4 of the said Act provided that "every person born in Pakistan after the commencement of this Act (i.e. 13th April, 1951) shall be a citizen of Pakistan by birth".

92. Respondent Professor Golam Azam was born in British India on the 22nd November, 1922. To begin with, he was a "British subject" by birth. After the said Act, he became a "deemed citizen" of Pakistan. He was never a citizen of Pakistan by birth, nor a citizen of Bangladesh by birth.

93. The Central Government of Pakistan framed The Pakistan Citizenship Rules, 1952 under section 23 of the said Act on the 6th February, 1952, which were published in the Gazette of Pakistan, Ext., pp. 57-90, and were amended from time to time. Rule 3 thereof provided that any person claiming citizenship of Pakistan at the commencement of the said Act under section 3(a) may be granted a certificate by (the then) Provincial Government in the manner provided in the Rules. Application was to be made before a Magistrate of the First Class in Form A supported by some documents. The Magistrate shall in attestation of the truth of the statements made by the applicant, administer an

oath or affirmation to the applicant and shall examine the evidence, oral or documentary, adduced by the applicant in support of his claim. He may, if he thinks it necessary, summon and examine any witnesses likely to know the fact of the application and may call for any records relevant to it. If the Magistrate is satisfied that the applicant is entitled to citizenship under clause (a) of section 3, he shall recommend to (the then) Provincial Government that a certificate of citizenship in Form-'A-I' be granted. (The then) Provincial Government shall pass such orders on the recommendation as it deems fit.

94. President's Order No. 149 of 1972, enacted on 15.12.72 and from now on referred to as the said President's Order, did not completely replace or repeal the said Act. It replaced, inter alia, the first category of "deemed citizens" of Pakistan in clause (i) of Article 2, following an identical yardstick and closely resembling section 3(a) of the said Act.

Clause (i) of Article 2 provides as follows :

> **2.** Notwithstanding anything contained in any other law, on the commencement of this Order, every person shall be deemed to be citizen of Bangladesh -
>
> (i) who or whose father or grand father was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25th day of March, 1971, and continues to be so resident; or

95. Again, in the absence of a better terminology, I shall call them "deemed citizens" of Bangladesh.

96. Plainly stated there are three conditions for fulfilment of clause (i) of Article 2, namely, on the commencement of the said President's Order (1) the deemed citizen himself or his father or grandfather must be born in the territories now comprised in Bangladesh and (2) the deemed citizen must be a permanent resident of such territories on the 25th day of March; 1971 and (3) the deemed citizen must continue to be a permanent resident of such territories. All the three conditions must be present on the commencement of the said President's Order.

97. The issue in this appeal is not whether the respondent Professor Golam Azam is a citizen of Bangladesh by birth, but whether he is a "deemed citizen" of Bangladesh under Article 2(i).

98. President's Order No. 149 of 1972, enacted on 15.12.72, was given a retrospective operation by Article 1(2) which is as follows :

> (2) It shall come into force at once and shall be deemed to have taken effect on the 26th day of March, 1971.

99. There has been an all-round misconception about the nature and scope of retrospectivity of the said President's Order. Mr. AR Yusuf, learned Counsel for the respondent, contended and the learned Attorney-General readily conceded before the High Court Division, that the words "on the commencement of this Order" in Article 2 (quoted earlier) is referable to the 26th March, 1971, because the said President's Order has been given a retrospective effect in Article 1(2). The learned Judges in the majority in the High Court Division accepted this interpretation. Before us as well the learned Attorney-General steadily maintained this argument in his opening submissions.

100. The plain implication of this interpretation is that if a person fulfilling the first condition of clause (i) of Article 2 fulfils the second condition as well by being a permanent resident in the territories now comprised, in Bangladesh on the 25th day of March, 1971 and if upon the passing of the midnight of the 25th day of March, 1971, he is found to be a permanent resident of such territories then he also fulfils the third condition of clause (i) of Article 2. If that interpretation is correct, then what is all this appeal about? Professor Golam Azam was admittedly in the territory now comprised in Bangladesh on the 26th March, 1971. So how can there be a doubt about his citizenship? He fulfils all the three conditions of clause (i) of Article 2. On this interpretation alone, the impugned Notification can be thrown out in limine.

101. The fallacy of this interpretation, to which the learned Judges in the majority in the High Court Division subscribed, is that there is a difference between the commencement of a statute and its retrospective operation, which has not been understood. The word "commencement" occurring in Article 2 has a legal meaning and it has been defined in section 3(12) of the General Clauses Act, 1897 as follows :

> (12) "Commencement", used with reference to an Act or Regulation, shall mean the day on which the Act or Regulation comes into force.

102. The commencement of a statute is rarely retrospective and if it is so, it must be made expressly so. Commencement is usually at once or prospective or contingent upon some happening, either in full or in part. Article 1(2) provides that the said President's Order "shall come into force at once". This means that the said President's Order shall commence on the date of its promulgation, namely, the 15th December, 1972. This date of commencement has not been given a retrospective operation in Article 1(2). It is the said President's Order itself which has been given a retrospective effect. Article 2(i), read with Article 1(2) means, therefore, that all the three conditions of clause (i) of Article 2 must be fulfilled "on the commencement of this Order" i.e. on the 15th December, 1972. The third condition specifically means that a person who fulfils the first two conditions must also be a permanent resident of Bangladesh between the 26th day of March, 1971 and the 15th day of December, 1972, both days inclusive. The terminus ad quem of the third condition will be the 26th March, 1971 and the terminus a quo will be the 15th December, 1972. If a person fulfils or does not fulfil the aforesaid three conditions in Article 2(i) on the 15th December, 1972 then that fulfilment or non-fulfilment "shall be deemed to have taken effect on the 26th day of March, 1971". That is, the meaning of the retrospectivity of Article 2(i) and it cannot have any other meaning. It is only during reply that the learned Attorney-General veered round this interpretation articulated from the Court and revised his submission, and I think, rightly. Mr. AR Yusuf did not ultimately register any strong opposition to this interpretation.

103. I come now to consider the proviso to Article 2. Clause (ii) and the proviso to Article 2 dealing with "deemed citizens" is as follows :

> (ii) who was a permanent resident of the territories now comprised in Bangladesh on the 25th day of March, 1971, and continues to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force :
>
> Provided that if any person is a permanent resident of the territories now comprised in Bangladesh or his dependent is, in the course of his employment or for the pursuit of his studies, residing in a country, which was at war with,

> or engaged in military operations against Bangladesh and is being prevented from returning to Bangladesh, such person or his dependents, shall be deemed to continue to be resident in Bangladesh.

104. Mohammad Ismail Uddin Sarker J held that the above proviso did not apply to the respondent and his reason was that the respondent did not stay in Pakistan for employment or studies. This view appears to me to be the correct one, but nonetheless an incomplete one. The learned Judges in the majority gave an extended meaning to "employment" or "studies" and held that the proviso is applicable to Professor Golam Azam. In my view, an extended meaning of the proviso was unwarranted.

105. The proviso means in effect that if a person can explain his stay in a hostile country answering the description in the proviso in terms of the proviso itself then by a legal fiction his residence in that country on the commencement of the said President's Order will be treated to be a continuation of residence in Bangladesh. The proviso does not say or it does not mean that if there are other purposes or manners of stay such as a tourist, a sick person undergoing treatment, a political traveller, a visitor of relations, a pilgrim, a fugitive offender or debtor, a stranded person, a person in transit, etc. then such kinds of stay will automatically mean abandonment of permanent residence in Bangladesh. The proviso only implies that no aid of legal fiction will be extended to such other kinds of stay, Persons who stayed in such a hostile country for purposes other than employment or studies can still claim continuation of residence in Bangladesh, but they will not get the benefit of a legal fiction extended to persons staying for employment or studies. It will be a matter for determination in each case as to whether such other manners of stay have resulted in an abandonment of permanent residence in Bangladesh or whether the residence in such country was temporary. If no abandonment has taken place, residence in Bangladesh will continue. The proviso does not apply to the respondent, but his failure to avail of the proviso will not be fatal to him. He can still claim that his stay in Pakistan did not mean an abandonment of his permanent residence in Bangladesh, but his stay in Pakistan will not attract any legal fiction of continuation of residence in Bangladesh in terms of the proviso.

106. Then comes Article 2A and 2B which were first introduced by Ordinance No. X of 1973 on the 15th May, 1973, later made into an Act of Parliament, Act No. V of 1973 on the 22nd June, 1973. The amendment was given a retrospective effect from the 26th March, 1971.

Article 2A provides as follows :

> 2A. A person to whom Article 2 would have ordinarily applied but for his residence in the United Kingdom shall be deemed to continue to be permanent resident in Bangladesh :
>
> Provided that the Government may notify, in the official Gazette, any person or categories of persons to whom this Article shall not apply.

107. In the High Court Division, BI Chowdhury, J held that on the date of issuance of the impugned Notification (18.4.73) Professor Golam Azam was not residing in Pakistan but in the United Kingdom and therefore his case can be said to be covered by Article 2A of the said Order. That view is also not correct. As I said before, the terminus ad quem of the third condition of Article 2(i) is the 26th March, 1971 and the terminus a quo is the 15th December, 1972. Between these two terminal dates Professor Golam Azam was not in UK and therefore Article 2A is not applicable to him. Mr. AR Yusuf has also not pressed this branch of his submission.

108. Article 2B as originally inserted by Ordinance No. X of 1973 and Act V of 1973 was substituted by Ordinance No. VII of 1978, promulgated on the 11th February, 1978. The substituted Article 2B stands as follows :

> 2B(1). Notwithstanding anything contained in Article 2 or in any other law for the time being in force, a person shall not, except as provided in clause (2), qualify himself to be a citizen of Bangladesh if he.....
>
> (i) owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state, or
>
> (ii) is notified under the proviso to Article 2A :
>
> Provided that a citizen of Bangladesh shall not, merely by reason of being a citizen or acquiring citizenship of a state specified in or under clause (2), cease to be a citizen of Bangladesh.
>
> (2) The Government may grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state which the Government may, by notification in the official Gazette, specify in this behalf.

109. While Article 2 prescribes for initial citizenship, clause (1) of Article 2B prescribes a disqualification for becoming a citizen of Bangladesh.

110. Article 2 conferred citizenship on a body of persons by a legal fiction, not by the Government or any other executive authority, but by the legislature. Clause (1) of Article 2B is a separate and independent power to determine whether a person qualifies himself to be a citizen of Bangladesh. When the authority, yet undetermined both by the said President's Order or any Rules, exercises its power under clause (1) of Article 2B, the legal fiction created by the legislature under Article 2 gives way to the authority's determination. Clause (1) of Article 2B prevails over Article 2.

111. All the three learned Judges of the High Court Division uniformly and correctly held that clause (1) of Article 2B is not applicable in the present case. Their common reasoning is that the impugned Notification dated 18.4.73 was issued prior to the insertion of clause (1) of Article 2B in the said President's Order and therefore the respondent's conduct thereunder was not available to the Government when the impugned Notification was issued. I think this approach was also not correct, although the common conclusion of the learned Judges is unexceptionable.

112. The plain legal position which eluded the notice of the three learned Judges is that Article 3 is not concerned at all with clause (1) of Article 2B, whether it was inserted before the impugned Notification or not.

113. Article 3 is as follows :

> 3. In case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order, the question shall be decided by the Government, which decision shall be final.

The power of the Government to issue a Notification under Article 3 is attracted" in case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order". Article 3 is not referable to clause (1) of Article 2B in any way, because, as already observed, the latter is a separate and independent power. Article 3 was not amended when Article 2B was subsequently inserted in the said

President's Order. Therefore Article 3 will only concern itself with doubts arising out of Article 2. It is a doubt-resolving mechanism in respect of matters falling under Article 2 only. It is for this reason that Article 3 has no manner of application to clause (1) of Article 2B.

114. Yet the learned Attorney-General made the conduct of the respondent under clause (1) of Article 2B the main plank of his unsuccessful submissions in defence of the impugned Notification before the High Court Division. Before us, he was constrained to concede that as Article 3 has no manner of application to clause (1) of Article 2B he forgoes his arguments on the respondent's alleged conduct thereunder. It was an apt concession, wisely made.

115. What, then, is the scope of Article 3? It is not a power in the hands of the Government to 'cancel' a person's citizenship or to make a 'declaration' of any sort or to 'disqualify' any person from his citizenship or to 'review' one's citizenship under Article 2. In Article 2, citizenship is conferred on a body of persons by the legislature itself by a legal fiction. It is an act of the legislature, not of the executive. The occasion to exercise power under Article 3 arises only when a 'doubt' arises as to whether a person fulfils all or any of the conditions of "deeming citizenship" under Article 2. The doubt may be infused into the mind of the Government by some information supplied by a third party or by the person concerned himself or by the Government itself by means of some information obtained through its own agencies. The Government, to start with, must disclose in the ultimate order passed by it as to what the doubt was. That particular "doubt" will be the "question" before the Government. Then the Government must give a "decision" on the "question". That is the purport and meaning of Article 3.

116. Contrast Article 3 of the said President's Order with section 19 of the Pakistan Citizenship Act, 1951 which is as follows :

> **19.** Cases of doubt as to citizenship.....(l) Where a person with respect to whose citizenship a doubt exists, whether on a question of law or fact, makes an application in this behalf to the Central Government, the Central Government may grant him a certificate that at the date of the certificate he is a citizen of Pakistan.
>
> (2) The Certificate, unless it is proved to have been obtained by fraud, false representation or concealment of any material fact, shall be conclusive evidence of the fact recorded in it.

117. Rule 24 of the Pakistan Citizenship Rules, 1952 provided the procedure, Form of application and Form of Certificate to be granted for one year in the first instance, extendable from time to time and withdrawable too.

118. Neither the learned Attorney-General nor Mr. AR Yusuf cared to notice and submit to the Court that in exercise of powers conferred by Article 5 of the said President's Order the Government framed the Bangladesh Citizenship (Temporary Provisions) Rules, 1978 by Notification No. SRO 214-L/78 dated 27.7.78, published in the Bangladesh Gazette Extra on 27.7.78. These Rules will henceforth be called the said Rules, which were amended, rather enlarged, by Notification No. SRO 213-L/81 published in the Bangladesh Gazette Extra on 12.7.81 (34 DLR Statutes 21) and further enlarged by Notification No. SRO 164-L/85, published in the Bangladesh Gazette Extra on 9.4.85 (37 DLR Statutes 247). The said Rules are detailed in nature, but no Rule seems to have been framed for disposal of matters under clause (1) of Article 2B or Article 3. Unlike Rule 3 of the Pakistan Citizenship Rules, 1952, the said Rules do not provide for grant

of a certificate of citizenship to any person claiming citizenship of Bangladesh on the commencement of the said President's Order under Article 2. The absence of such a Rule reinforces the conclusion that the legislative conferment of citizenship is not verifiable by any Magistrate or executive and that the conferment need not be reinforced by an issuance of a certificate.

119. In the light of the law and the rules expounded above, the submissions of the learned Attorney-General may now be considered.

120. He submits, first, that Professor Golam Azam was born in the territories now comprised in Bangladesh and he was a permanent resident of such territories on the 25th March, 1971 and therefore he satisfies the first two conditions of clause (1) of Article 2; but he does not satisfy the third condition of clause (i), because he did not continue to be a permanent resident of Bangladesh on the commencement of the Order, i.e. on the 15th December, 1972. He left this country for good on the 22nd November, 1971 when he left for Lahore on a politico-military mission. The learned Attorney-General read out extensively from the clippings of the Daily Sangram, the mouthpiece of the respondent's political party, Jamaat-i-Islami from the 7th April, 1971 to the 30th November, 1971 and from the Dainik Pakistan from the 5th April, 1971 to the 4th December, 1971 and interpreted the news and views contained therein as suggesting that the respondent was not only orchestrating a virulent anti-Bangladesh campaign during the liberation war, calling the freedom fighters miscreants, but also was maintaining close liaison with the leading lights of the Pakistan Occupation Army and had even pressed the armed Jamaat cadre into service as Razakars who killed freedom fighters, murdered, looted, raped, set fire to houses and helped the Pakistan Occupation Army in carrying out a genocide in this country. The respondent was so irresolutely opposed to the creation of Bangladesh that he could not conceive himself to be within any political community other than that of Pakistan. So when he left for Lahore on the 22nd November, 1971 his intention was never to return to the political community of Bangladesh. He never contemplated his permanent home at Brahmanbaria or at Maghbazar at Dhaka to be within the political community of Bangladesh. These permanent homes were for him an eternal part of Pakistan. His case therefore, is one of abandonment of permanent residence of Bangladesh with effect from the 22nd November, 1971, more than a year before the said President's Order came into effect.

121. The argument of the learned Attorney-General is long on emotion and short on law. First, his commentaries on the criminal aspects of the political antecedents of the respondent were never tested in a court of law. Secondly, even if the allegations are correct, our citizenship law does not deny citizenship to those who opposed the creation of Bangladesh and even killed freedom fighters and were engaged in murder, rape, etc. Our law has followed the Pakistan law in this respect. There were many Muslims (and Hindus as well) who opposed the creation of Pakistan and even voted against joining Pakistan in the plebiscites held in the North Western Frontier Province and in Sylhet. Yet the Pakistan Citizenship Law did not deny them citizenship. They were deemed to be citizens of Pakistan if they had permanent residence in the territory of Pakistan and did not leave the same. Bangladesh also followed the same principle. The history of citizenship legislation, detailed earlier, bears ample testimony to that. In Bangladesh, collaborators and Razakars were prosecuted under the Collaborators Order, President's Order No. 8 of 1972, but they were not denied the citizenship of Bangladesh.

122. Our citizenship law also does not require that in order to be a permanent resident "in the territories now comprised in Bangladesh" from the 26th March, 1971 to the 15th December, 1972, a person must mentally regard that territory to be a territory of

Bangladesh. There is no political connotation attached to the word "territories". Article 2 of our Constitution defines the territory of Bangladesh as follows :

> **2.** The territory of the Republic shall comprise.....
>
> (a) the territories which immediately before the proclamation of independence on the 26th day of March, 1971 constituted East Pakistan and the territories referred to as included territories in the Constitution (Third Amendment) Act, 1974, but excluding the territories referred to as excluded territories in that Act; and
>
> (b) such other territories as may become included in Bangladesh.

123. Thus the word "territories" in the Constitution has no reference to the mental state with which a person views the political nomenclature of that territory. "Territory" is only a geographical concept and not a political concept, as far as citizenship law is concerned. But if, remaining within the territory of Bangladesh or outside of it, a citizen of Bangladesh owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state, then that person can be dealt with under clause (1) of Article 2B of the said President's Order but that is not the article under which the respondent has been dealt with.

124. It must be clearly understood that our citizenship law in Article 2 is not in terms governed by the law of domicile in private international law, except for those who seek citizenship of Bangladesh under Article 4 of the said President's Order, because the proviso to Rule 4 of the said Rules says that an application under rule 4 will not be entertained unless the applicant on affidavit renounces his status as a citizen of another country and has abandoned his domicile of origin. Our citizenship law in Article 2 is governed by the concept of "permanent residence" which has not been defined in the said President's Order. In the absence of any definition, the law of domicile may be resorted to by way of parity of reasoning for the reason that the notion which lies at the root of the concept of domicile is that of "permanent home". But the parity of reasoning should not be drawn too far. Dicey and Morris have pointed out in the book "The Conflict of Laws" (11th Edition, 1987, Vol. (1), that the notion of permanent home can be explained largely in the light of common sense principles, but domicile is an "idea of law" which is different from the notion of permanent home in two important respects. First, the elements required for the acquisition of a domicile go beyond those required for the acquisition of a permanent home. To acquire a domicile of choice a person must intend to reside in it permanently or indefinitely. Secondly, a person may be domiciled in a country whether or not he has his permanent home in it. (P. 117).

125. For the purpose of the third condition of clause (i) of Article 2, it is therefore not necessary in our law that the person concerned should go so far as to abandon his domicile of origin and acquire a domicile of choice. It is enough if he "abandons" his "permanent residence" in Bangladesh from 26.3.71 to 15.12.72. What is "permanent residence" and what is "abandonment" can, only for purposes of understanding, be referable to the concepts of "permanent home" and "abandonment of a domicile of origin" in the law of domicile, but there the analogy will end, because the law of citizenship is a municipal law of Bangladesh and we are not concerned here with marriage, divorce, majority or minority, right of succession, etc. so as to involve the entire gamut of private international law in this case.

126. What is a "permanent home" in the law of domicile? Definitions are elusive and as early as in 1858 Lord Cranworth said in Whicker vs. Hume, (1858), 7 HL Cas. 124

(160),

> By domicile, we mean home, the permanent home, and if you do not understand your permanent home I'm afraid that no illustrations from foreign writers will very much help you to it.

126. In 1863, Lord Cranworth was more specific in Moorhouse vs. Lord (1863), 10 HL Cas. 272 (285, 286),

> The present intention of making a place a person's permanent home can exist only where he had no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this event a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent.

Lord Chelmsford made this point clearer in the same case :

> The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence.

127. By analogy, the last two quotations will be the meaning of "permanent residence" in our citizenship law.

128. With regard to "abandonment" it is the law of domicile that a domicile once existing cannot be lost by abandonment even when coupled with the intent to acquire a new one but continues until a new one is, infact, gained. (See 25 Am Jur 2d. Chapter on Domicile. Para 18). By parity of reasoning, one can say that a permanent residence once existing cannot be lost by abandonment even when coupled with the intent to acquire a new one, but continues until a new permanent home is, in fact, gained. That is what is meant by an "abandonment" of permanent residence in our law.

129. "There is a presumption", writes Cheshire, "in favour of the continuance of an existing domicile. Therefore the burden of proving a change lies in all cases upon those who alleged that a change has occurred. "Private International Law, 7th Edition 1965 P 151). By parity of reasoning, the onus will be on the Government to show that the respondent abandoned his permanent residence.

130. The respondent, it is admitted, has his permanent residence in the territories now comprised in Bangladesh.

131. There is absolutely no evidence to show that the motive for which the respondent had stayed in Pakistan for thirteen months was for a permanent or indefinite settlement in that country, with an intention never to return to Bangladesh. On the contrary, the respondent has asserted, which the appellant has not specifically denied in its affidavit-in-opposition, that he boarded a plane from Karachi to come back to Bangladesh on the 3rd December, 1971 but as a shooting war broke out between India and Pakistan the plane could not land at Tejgaon Airport. It landed in Colombo and could not also land in Karachi. It was diverted to Jeddah. The respondent returned to Pakistan from Jeddah as a stranded passenger, but in March, 1972 he made an attempt to leave Pakistan, but failed. In December, 1972 he obtained a Pakistani passport, performed Hajj in Saudi

Arabia, went to the United Kingdom, and never returned to Pakistan at any subsequent time. True it is that he did not come back to Bangladesh from Saudi Arabia after performing Hajj, but he has explained this failure by stating, without contradiction, that a political vilification campaign was being waged against him at that time in Bangladesh and he had a reasonable apprehension that he might be done to death if he returned home then. While in United Kingdom he submitted abortive applications for restoration of his citizenship in response to a Government Press Note and came back to Bangladesh with a Pakistani passport and Bangladesh visa to see his ailing mother in 1978 and he has been living in his permanent residence and never set his feet on a foreign soil ever since. From these uncontroverted facts it is absolutely unfair and unreasonable to conclude that the respondent look up residence in Pakistan from November, 1971 to December, 1972 for the purpose of acquiring a permanent or indefinite residence in Pakistan. He has asserted, again without contradiction, that his wife, 7 children and parents were all along residing at his permanent residence in Bangladesh and that he had never taken any one of them to Pakistan or UK during his stay there. There is also no evidence that the respondent look up any profession, vocation or calling while in Pakistan and no evidence either that he purchased a home or made some arrangements for an indefinite stay in Pakistan. On the contrary it appears from his conduct that he made repeated efforts to make good his escape from Pakistan as early as possible. Therefore his residence in Pakistan for more than a year was not freely chosen and his temporary residence in Pakistan was also onerous. From the paper clippings of the Daily Sangram read out by the learned Attorney-General in the Court it was clear that during the liberation war the respondent picked up political enmity with Mr. Zulfikar Ali Bhutto and as soon as Mr. Bhutto assumed power in Pakistan in December, 1972 the respondent's stay in Pakistan became even more onerous and he lost no opportunity to come out of that country before Mr. Bhutto's wrath fell on him. Besides, it is admitted by the appellant that during the liberation war and before the 22nd November, 1971 the respondent had made several political visits to the then West Pakistan and each time returned to his permanent residence in Bangladesh. Mr. AR Yusuf has rightly argued that if no war had broken out in December, 1971 the respondent would have normally returned to his permanent residence as he did before. The learned Attorney-General conceded that if the respondent was found in Bangladesh on the 16th December, 1971, he would have been deemed to be a citizen of Bangladesh and would have been proceeded against as a collaborator under the law. On no account therefore, can it be said that the appellant has discharged its onus to establish that the respondent abandoned his permanent residence in Bangladesh on the 22nd November, 1971.

132. It has been further argued by the learned Attorney-General that the acquisition of a Pakistani passport by the respondent in December, 1972 for purposes of going to Hajj and to the United Kingdom and his return to Bangladesh in 1978 with a Pakistani passport is a conclusive evidence that he was clinging to the citizenship of Pakistan.

133. The questions therefore, are, is acquisition of passport of a foreign country a conclusive evidence of citizenship of that country and was the respondent clinging to his Pakistani citizenship?

134. Before the questions are answered, it will be profitable to notice some forms of passports issued by various countries.

135. The passport issued by "European Community, United Kingdom of Great Britain and Northern Ireland" contains the following :

Her Britannic Majesty's Secretary of State requests and requires in the name of

> Her Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford the bearer such assistance and protection as may be necessary.

Note 2 of the Passport says,

> British citizens have the right of abode in the United Kingdom. No right of abode in the United Kingdom derives from the status, as British nationals, of British dependent Territories citizens, British Nationals (Overseas), British Overseas Citizens, British Protected persons and British subjects

136. It is clear, therefore, that passports are issued by United Kingdom not only to British citizens, but also to other categories of persons who have no right of abode in the United Kingdom.

A USA passport contains the following :

> The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection.

137. As such a US passport is issued not only to US citizens but also to US nationals and the distinction between a citizen and a national has been highlighted by my learned brother MH Rahman, J which I need not repeat.

138. Both the British and US passport make it quite clear that the passport is the respective property of the respective governments and must be surrendered upon demand.

A passport of Bangladesh contains the following :

> These are to request and require in the name of the President of the People's Republic of Bangladesh all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him/her every assistance and protection of which he/she may stand in need.

139. The Government of Bangladesh reserves the right to cancel or demand back a Bangladesh passport. A passport may be issued to a non-citizen of Bangladesh (Article 15 of President's Order No. 9 of 1973).

140. A Pakistan passport is no different in form.

141. What, then, is a passport? The classic definition given by Lord Alverstone, CJ in the King vs. Brailsford, (1905) 2 KB 730 (745) is still a legend :

> It will be well to consider what a passport is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Government of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named.
>
> Passports have been known and recognised as official documents for more than three centuries.....

142. This definition has been adopted in Wharton's Law Lexicon, XIV Edition, P. 741 and has also been affirmed by the House of Lords in Joyce vs. DPP, 1946 AC 347. In Halsbury's Laws of England (4th Edition) Volume 6 at page 519, the present law on passport is summarised as follows :

> Passports may be granted by the Crown at any time to enable British subjects to travel with safety in foreign countries, but such passports would clearly not be available so as to permit travel in an enemy's country during war.

Then a footnote adds the following :

> The possession of a passport is now almost always required by the authorities to enable a person to enter a country.

143. In the USA the position is not different. The law started evolving from the earliest case on the subject (1835) in Domingo Urtetiqui vs. John N D'arey and another, 9 L Ed 276. A passport granted by the US Secretary of State was given in evidence by the defendant, stating the defendant to be a citizen of the USA. The US Supreme Court held that the passport was not legal evidence to establish the fact of the citizenship of the person in whose favour it was given. The Court said,

> Upon the general and abstract question, whether the passport, inter se, was legal and competent evidence of the fact of citizenship, we are of opinion that it was not.
>
> There is no law in any manner regulating the issuing of passports, or directing upon what evidence it may be done or declaring their legal effect.....It is a document which from its nature and object, is addressed to foreign powers, purporting only to be a request that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognised in foreign countries as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.

The Court proceeds to say,

> But this is a very different light from that in which it is to be viewed in a court of justice, where the inquiry is as to the fact of citizenship. It is mere ex parte certificate; and if founded upon any evidence produced to the Secretary of State establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial, as higher and better evidence of the fact.....(p. 279).

144. Ballentine's Law Dictionary, 3rd Edition at p. 922, Hackworth's Digest of International Law, Vol. III, at p. 435 and American Jurisprudence (1942) Vol 40 at p. 523 describe a "passport" almost the same way as it has been described in Urtetiqui's case.

145. In Rockwell Kent vs. John Foster Dulles (decided on June 16, 1958), 1958-2 L.Ed. 2nd 1204, Mr. Justice Douglas of US Supreme Court delivering the Judgment, extended the scope of passport by saying:

> A passport is not only of great value.....indeed necessary.....abroad; it is also an aid in establishing citizenship for purposes of re-entry into the United States, (pp. 1207-1208).

At P. 1212, however, Justice Douglas proceeds further :

> In part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection, though it does no more than "request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection" to this citizen of the United States. But that function of the passport is subordinate. Its crucial function today is control over exit.

145. Observing the law of passport in United Kingdom and USA and noticing some other authorities like Weiss on Nationality and Statelessness in International Law P. 226, Harry Street on Freedom, the Individual and the Law P. 271, the Grotius Society Vol. 32 (1946)...Passports and Protection in International Law by Kenneth Diplock and the forms of passport obtaining in different countries Subba Rao, CJ of the Indian Supreme Court says in the majority judgment in Satwant Singh vs. APO New Delhi, AIR 1987 (SC) 1836 (1841) :

> So a passport, whether in England or in the United States of America, serves diverse purposes; it is a "request for protection", it is a document of identity, it is a prima facie evidence of nationality, in modern times it not only controls exits from the State to which one belongs, but with it, with a few exceptions, it is not possible to enter another state. It has become a condition for free travel.

Hidayetullah, J., writing the minority judgment, also says,

> Whatever the form of the passport, it is clear that it is a political document and the ownership of it, strictly speaking, remains in the Government which grants it although a fee may be charged on it. In England a passport is considered to be a document of the Crown and can be recalled.

146. Passport is now treated as a conclusive evidence of citizenship in India, by law and rules. In India section 9(2) of the Citizenship Act, 1955 provides that "if any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such Rules of evidence, as may be prescribed in this behalf". The Citizenship Rules, 1956, framed thereunder, provided in Rule 30(2) that "the Central Government shall, in determining any such question, have due regard to the Rules of Evidence specified in Schedule III". Clause (3) of Schedule III provides as follows:

> 3. The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship for that country before that date.

147. The Indian Act and the Rules have no application in our country. But it is interesting to note that even after the framing of such a formidable Rule of Evidence the Indian Supreme Court held in the case of Md. Ayub Khan vs. Commissioner of Police, Madras, AIR 1965 (SC) 1623, that obtaining a foreign passport cannot be regarded as conclusive proof of voluntary acquisition of foreign citizenship in all cases. It must be decided in an enquiry and the person concerned must be given due notice of the action so that he can convince the authority that what is alleged against him is not true. The decision goes so far as to say that mere issue of a foreign passport is not decisive as to the voluntary acquisition of passport and that the voluntariness of acquisition of passport cannot be decided by a foreign country. In the case under our consideration the act of a foreign Government, namely, the government of Pakistan, in issuing a

Pakistani passport to the respondent and the Form which the respondent filled up while applying for passport will not determine the voluntariness of the acquisition of passport or even his Pakistani citizenship after the emergence of Bangladesh.

148. In our country there is no Rule of Evidence either in the citizenship and passport law or in the said Rules that the acquisition of a foreign passport is a conclusive evidence of the acquisition of citizenship of that country. The decided cases in our jurisdiction resolved each case on its own facts, but never laying down any proposition of law that acquisition of a foreign passport is a conclusive evidence of acquisition of citizenship of that country. In each case it will be a question of determination in our country as to whether a foreign passport was obtained voluntarily or under duress, whether it was obtained only for the sake of obtaining a travel document or for the purpose of acquiring foreign citizenship of the issuing country or whether it is a primary evidence of citizenship or whether it is an excepted case under clause (2) of Article 2B of the said President's Order.

149. In the present case the respondent obtained a Pakistani passport in December, 1972 at a time when Bangladesh was not recognised by Pakistan (the recognition came on 22.2.74) and at a time when the respondent had no means or opportunity to obtain a Bangladeshi passport in Saudi Arabia either (which recognised Bangladesh in August, 1975). In United Kingdom too he could not have surrendered his Pakistani passport and obtained a Bangladeshi passport because the impugned Notification had already deprived him of his Bangladeshi citizenship. The learned Attorney-General submitted that the respondent could have obtained what he called a "Nansen" passport from United Kingdom, but in the next breath he admitted that he himself never heard of the "Nansen" passport at any time before. The Government did not raise this question in its affidavit-in-opposition either. In any case "Nansen" passport was meant for some refugees and not for the respondent.

My answer therefore to the two questions involved in this branch of the learned Attorney-General's submission is that passport is not a conclusive evidence of citizenship of the issuing country. It may be a primary evidence of citizenship but in the backdrop of the facts of this case the respondent has no choice but to acquire a Pakistani passport and the circumstances do not at all establish that he was "clinging" to Pakistani citizenship.

150. The learned Attorney-General next submitted that the traditional concept of citizenship presumes allegiance to the State. The activities of the respondent during the war of liberation, he said, was highly revolting, repulsive and an affront to human conscience as his political party provided material and political support to the occupation Pakistan Army. He never expressed his allegiance to Bangladesh until he was called upon to furnish an oath of allegiance in connection with his application for citizenship. The learned Attorney-General quoted from Broom's Maxims, namely, Nemo Patriam In Qua Natus Est Exuere Nec Ligeanntiae Debitum Ejurare Possit (a man cannot abjure his native country nor the allegiance which he owes to his sovereign). He also cites the House of Lords case of Joyce vs. DPP, 1946 AC 347, and also a passage from Landmarks in Law by Lord Denning at page 23 in support of his submission.

151. It is true that citizenship is the status of being a citizen and that a citizen is one who, under the constitution and laws of a particular State, is a member of the political community, owing allegiance (underlines are mine) and being entitled to the enjoyment of full civil rights. Collectively, citizens are members of a political community, who, in their associated capacity, have established or submitted themselves to the dominion of

a government for the protection of their general welfare and the protection of their individual as well as collective rights. This has been so held in United States vs. William J Cruikshank, (1875) 23 L. Ed. 588, 590 and adopted in Black's Law Dictionary, 5th Ed., 221, 222.

152. But for purposes of being a "deemed citizen" of Bangladesh under Article 2, no person is required to express an allegiance to Bangladesh either by law or by the said Rules. He becomes a "deemed citizen" of Bangladesh by operation of law. Expression of allegiance is required only in the case of those who apply for a certificate of Naturalization under the Naturalization Act, 1926 (Act No. VII of 1926) and also in cases provided for in the said Rules. It is also required in our Constitution by the holder of some high Constitutional offices to make an oath (or affirmation) that they "will bear true faith and allegiance to Bangladesh". Hence this contention of the learned Attorney-General has no substance.

153. The learned Attorney-General next contends that he does not dispute the soundness of the decisions cited by the learned Counsel for the respondent before the High Court Division and before this Court as to the application of the principle of natural justice, but his contention is that this principle has no manner of application in the present case as - (a) it was not practicable to serve a notice to show cause as the respondent was admittedly residing beyond the jurisdiction of Bangladesh; (b) the Court should take judicial notice of the fact that the situation of the country in 1973 was not normal; (c) Article 2 does not provide for service of notice and no useful purpose would have been served in doing so; (d) the respondent was never qualified to be a citizen of Bangladesh and therefore having acquired no vested right, he was not entitled to a show cause notice; and (e) the requirement of show cause notice has been substantially complied with when he was earlier served with a notice under President's Order No. 8 of 1972, directing him to appear before a Court for enquiry, which he failed to do.

154. As for (a), the practicality of service of notice, the respondent has alleged and it has not been denied either that his wife, seven children and parents were all along residing at his Maghbazar residence at Dhaka, which address was known to the appellant. Even though the respondent was at the time of Notification staying outside the jurisdiction of Bangladesh, it was not impractical to serve a notice in his aforesaid permanent residence which could have been forwarded to him by the inmates of his residence. It could have then been legitimately argued that it was not practicable to effect a personal service upon him. As for (b) above, it has nowhere been contended by the appellant either in the affidavit-in-opposition or in the impugned Notification that the allegedly abnormal situation in 1973 prevented it from serving a show cause notice. The question of taking judicial notice does not arise. As for (c) above, Article 3 bestows a power on the Government to resolve a doubt and to give a decision on it which has a finality attached to it and it will be totally inappropriate to say that as there is no provision for service of notice in Article 3 itself, the said President's Order excludes the principle of natural justice. On the contrary, it is well-settled that in the absence of express words in an enactment excluding the principle of natural justice, the said principle will be imported into all legislations of this kind. As for (d) above, if the Government had already taken the view before issuing the impugned Notification that the respondent had never been qualified to be a citizen of Bangladesh and had not acquired a vested right, the very use of power under Article 3 will be a gross abuse of power. The proceedings under Article 3 start with a doubt and until the doubt is resolved against the respondent, he enjoys the benefit of doubt. The Government cannot pre-judge the issue and deny him a show cause notice. As for (e) above, the

service of notice for a different purpose and for a different proceeding under President's Order No. 8 of 1972 is no compliance with a notice to show cause under Article 3 of the said President's Order. The intents and purposes of the two legislations are different.

155. The learned Attorney-General's submissions on the principle of natural justice are thoroughly misconceived, because Article 3 requires the Government to "decide" a "question", "which decision shall be final"

156. As to what is a "decision" Fazal Ali, J in Province of Bombay vs. Khusbaldass, S Advani, AIR 1950 (SC) 222 (229) observed :

> The word 'decision' in common parlance is more or less a neutral expression and it can be used with reference to purely executive acts as well as judicial orders. The mere fact that an executive authority has to decide something, does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is : (1) Is there any duty to decide judicially?

157. The same view has been taken by the Indian Supreme Court in PL Lakhan Lal Pall vs. Union of India, AIR 1967 (SC) 908. I respectfully agree with the same.

158. The decision that the Government has to take under Article 3 affects the civil and political status of a person and it determines his legal relationship between himself and the State. The legal relationship involves rights and corresponding duties upon both.....on the part of the citizen no less than on the part of the State. The doubt-resolving power of the Government may involve determination of both facts and law and it cannot be said that this is a purely executive decision and can be given by a mere ipse dixit of the executive. Though not a judicial decision it is certainly a quasi-judicial decision of a far-reaching legal consequence and therefore it is impossible to whittle down the importance of the principle of natural justice in such a case.

159. The learned Attorney-General has next submitted that the writ petition was a belated one, since it was filed after a lapse of 19 years. The respondent could have filed a writ petition from UK through someone with a power of attorney. His petition for restoration of citizenship had been denied twice, even then he did not file any writ petition. The Proclamation of Emergency under Article 141B and the suspension of fundamental rights contained in Articles 36-40 and 42 did not put any bar in filing a writ petition challenging the validity of the impugned Notification. He submits therefore that the respondent is guilty of laches and the learned Judges in the majority in the High Court Division erred in law in not dismissing the application on that score.

160. It is the case of the respondent that after his two successive petitions for restoration of citizenship submitted from UK were turned down, one on 23.4.77 and the other on 29.9.77, he came to Bangladesh to visit his ailing mother on 11.7.78 with a Pakistani passport and Bangladesh visa which was valid for 3 months. He obtained extension of visa twice and applied for registration as a citizen of Bangladesh on 8.11.78 and formally surrendered his Pakistani passport to the authority on that date. On 27.5.80 the then Home Minister informed Parliament that the matter (restoration of the respondent's citizenship) was under consideration of the Government. The statement was to this effect :

> Those who come to Bangladesh from abroad and ask for citizenship of this country surrender their passport and apply for citizenship. As long as a decision is not taken on his application he is granted visa and is allowed to stay in this

country. If he is granted citizenship then he is so informed. If not granted, then he is forced out of the country.

161. It was also admitted by the then Home Minister on 27.5.80 that the respondent had surrendered his Pakistani passport to the Government. On 28.4.81 the Home Ministry asked the respondent to submit an Affidavit of Oath of Allegiance to Bangladesh which he did on 30.4.81. After more than 8 years the Home Ministry by a Memo. dated 3.12.86 wanted to know from the respondent how he was residing in Bangladesh after expiry of his visa. The respondent sent a reply and also in a Press Conference held on 30.5.88 asserted that he was a citizen of Bangladesh by birth. Then on 12.1.92 the Home Minister stated in Parliament that the Government had not yet taken any decision regarding the restoration of citizenship of the respondent. Finally on 23.3.92 the Home Ministry served a notice (also impugned in the writ petition) on him asking him to show-cause why an action should not be taken against him under the Foreigners Act. He gave a reply but he was arrested and detained in Dhaka Central Jail by issuing an order of detention. Then the writ petition was filed.

162. These facts are not contradicted materially and it appears that even though the writ petition was filed long 19 years after the impugned notification the laches are equally shared by both the appellant and the respondent. The respondent has given his explanation as to why he was delayed in filing the writ petition by contending that the Government having taken time upto 29.9.77 to reject his application for restoration of citizenship and having suffered his stay in Bangladesh for long 14 years keeping his application for registration of citizenship pending he felt no urgent imperative to move against the impugned Notification. The appellant, on the other hand, has not given any explanation as to why it kept the respondent's application hanging for more than a decade without taking any decision in this regard. If the respondent has to explain his laches, which it has not, the appellant too has a duty to explain its own contributory laches. I am therefore unable to take a unilateral view of the laches of the respondent and ignore the unexplained laches of the Government itself.

163. Besides, delay in filing writ petition is not condoned on several well-known principles. First, if the claim becomes stale with lapse of time. It is quite evident that the respondent's claim of citizenship has not become stale with the passage of time, he having stuck to his claim for long 19 years. Moreover, as Mr. AR Yusuf argued in the facts of this case, denial of citizenship was a continuing wrong done to the respondent and his right to constitutional remedy never became stale with lapse of time. Secondly, if owing to the laches of the writ petitioner the rights of a third party are affected then delay will be fatal. I do not see how anybody else will be affected if a single citizen is restored to his citizenship. No case has been made out that the property rights, succession rights or any other rights of any other citizen will be adversely affected if the respondent obtains a relief at this state. The learned Attorney-General submits that the third party which will be affected by restoration of citizenship to the respondent will be the political process of Bangladesh. It will be tantamount, he submits, to a rehabilitation of Professor Golam Azam in the political process of Bangladesh which will be a national catastrophe. The learned Attorney-General invokes the maxim Salus Populi Est Suprema Lex (regard for the public welfare is the highest law) and urges that in the interest of public welfare the writ petition ought to be dismissed. No officer of the Government has risked his oath to swear an affidavit-in-opposition to say that a restoration of citizenship to the respondent will invite a national catastrophe. I place no credence to such arguments of despair. There is no stay of operation of the judgment of the High Court Division since 25.7.93. The learned Attorney-General, when challenged by Mr. AR Yusuf, has failed to point out what national catastrophe has befallen the

country, when the respondent in the meanwhile is engaged in open political activities in exercise of his right as a citizen. The political process of the country cannot at all be juxtaposed as a third party in a dispute between a private individual and the state on the former's citizenship. Along with the respondent 38 other persons were similarly divested of their citizenship by the same Notification. The majority received their citizenship back on return to Bangladesh and some of them later on came to occupy high offices of the State. One of them filed a writ petition as early as in 1973 and the Government withdrew the Notification in his case. Before the present writ petition was filed the respondent was already a reckonable political factor in the political process of the country. What aid and comfort the Court can bestow upon the respondent for his political rehabilitation? Political parties of all recognisable shades had already rehabilitated him politically by wooing him for political and parliamentary support, before he filed the present writ petition.

164. The learned Attorney-General next submits that the three learned Judges of the High Court Division have uniformly held that the respondent's petition for restoration of citizenship is still pending with the Government and therefore the cancellation of the impugned Notification is uncalled for. Earlier I have quoted the then Home Minister's statement made in Parliament on 27.5.80. He categorically stated that when an application for citizenship is not granted, the applicant is turned out of the country. By issuing a notice on 23.3.92 treating the respondent as a foreigner and by detaining him the Government has taken the first step to force him out of the country. Mr. AR Yusuf is correct in his submission that it is quite inappropriate under the circumstances to say that his application for citizenship is still pending with the Government.

165. The learned Attorney-General finally submitted that the case of the respondent cannot be decided on the basis of available cases on the law of domicile. Bangladesh has come out of a bloodbath and such a situation has no parallel. This case is therefore unique and cannot be compared with the run-of-the-mill cases on abandonment of domicile of origin. It has to be considered from a completely new angle in the context of the bundle of facts out of which Bangladesh emerged, he submits. I have failed to follow from his submissions what that new angle will be.

166. These exhortations of the learned Attorney-General in 1994 have been misdirected towards the Court and could properly be addressed at the right time to the law-makers of the day in 1972 who knowing full well that Bangladesh was born through a bloodbath had chosen to follow the Pakistani law of citizenship in Article 2(i). What prevented the law-makers of the day to chalk out a different course? As the law stands it will speak in one voice and the law will not be of one kind for the respondent Professor Golam Azam and a different one for the rest.

167. I come now to the basic objections to the impugned Notification taken by Mr. AR Yusuf. The Notification gives three reasons for the decision : (i) that the respondent has been staying abroad since before the liberation of Bangladesh; (ii) by his conduct he cannot be deemed to be a citizen of Bangladesh and (iii) he has continued to be a citizen of Pakistan. Thereafter there is a "declaration" by the Government that the respondent "does not qualify himself to be a citizen of Bangladesh".

168. I have discussed the implication of Article 3 earlier and it is quite obvious from the Notification itself that it does not have the merit of addressing the law. First of all, it does not say what is the doubt under Article 2 that cropped up in this case. Secondly, it does not say how the doubt has been resolved. Thirdly, the reasons given are nowhere near the three conditions in clause (i) of Article 2. They rather beg the question. And

lastly, instead of deciding a question the Government has made a "declaration" which is totally uncalled for. The impugned Notification therefore suffers from non-application of mind taking into account extraneous matters, and is a totally misconceived use of power by the Government.

169. For the sake of complete consideration of this case, I need to mention a point which has not been argued by the learned Attorney-General, perhaps because he was unaware that Rules were framed by the Government under Article 5 of the said President's Order Rule 8 is as follows :

> 8. Appeal.....Any person aggrieved by an order made under the Bangladesh Citizenship (Temporary Provisions) Order, 1972 may, within a period of 30 days from the date of receipt of order prefer an appeal to Government. Before making an order on such an appeal, the appellant shall be given an opportunity of being heard.

170. This Rule came into force on 27.7.78, 6 years after the President's Order was enacted and 5 years after the impugned Notification. Professor Golam Azam obtained visa and entered Bangladesh on 11.7.78. The impugned Notification dated 18.4.73 was never served on him. Before the said Rules were framed the Government decided (vide News Release of the Ministry of Home Affairs dated 17.1.76 Annexure-"C" to the Writ petition) to reconsider the cases of those Bangladeshi citizens whose citizenship had been "cancelled" and invited applications. From UK, the respondent applied for restoration on 20.5.76 and sent a reminder on 12.1.77. The request was not acceded to on 23.4.77 and 29.9.77 (Annexure-E and E(l) to the writ petition). A further appeal, as per Rule 8, under the circumstances, would have been an invitation to a foregone conclusion and also an idle formality and cannot at all be called an equally efficacious alternative remedy in view of the Government's indecision for long 14 years in taking a decision as to the respondent's application for citizenship.

Latifur Rahman J : Having agreed with the main judgment of my learned brother MH Rahman, J. I like to add a few words of my own. It is needless to re-state the facts after going through the main judgment in this case.

171. I have read the three judgments delivered separately by the three learned Judges of the High Court Division and have heard the elaborate arguments advanced by the learned Attorney-General and Mr. AR Yusuf in this case. Lot of decisions have been cited at the Bar, but for determination of respondent No. 1's citizenship I do not find that those are very relevant in the facts and circumstance of the case. The most important question for decision in this case is, whether due to the absence of the respondent from Bangladesh from 22.11.71 till 15.12.72, when President's Order No. 149 of 1972 was promulgated, he ceased to continue to be a permanent resident of Bangladesh under Clause (1) of Article 2 of The Bangladesh Citizenship (Temporary Provisions) Order, 1972, briefly, "The Order".

172. The preamble of our Constitution envisages that, "We, the people of Bangladesh, having proclaimed our Independence on the 26th day of March, 1971 and through a historic war for national independence, established the independent, sovereign People's Republic of Bangladesh." Since Bangladesh was established as an independent sovereign state, the question of acquisition of Bangladeshi citizenship at the very inception of creation of a new State was an essential pre-requisite for establishment of a political State. The territory of the Republic as per Article 2 of the Constitution comprises the territories which immediately before the proclamation of independence

constituted East Pakistan became the territory of the Republic of Bangladesh. The territory of Bangladesh must contain in it citizens of Bangladesh. It is with this object that under the creation of this new State, The Bangladesh Citizenship (Temporary Provisions) Order, 1972 was promulgated on 15.12.1972 to make temporary provisions regarding citizenship of Bangladesh. This Order was made effective retrospectively from the 26th day of March, 1971 and the declaration was confirmed and a sovereign State was constituted according to the Proclamation of Independence of Bangladesh' issued on April 10, 1971. The Provisional Constitution of Bangladesh Order, 1972, made in pursuance of the Proclamation of Independence Order invested the President with all executive and legislative authority. In pursuance of which, 'The Order' was promulgated and made effective from the day when Bangladesh came into being as a State.

173. I will refer herein below the original Order as it stood on 15.12.72, as because the question of determination of the citizenship of Prof. Golam Azam really rests on the interpretation of this Order alone.

> Whereas it is expedient to make temporary provisions regarding citizenship of Bangladesh;
>
> Now, Therefore, in pursuance of the Proclamation of Independence of Bangladesh, read with the Provisional Constitution of Bangladesh Order, 1972, and in exercise of all powers enabling him in that behalf, the President is pleased to make the following order :-
>
> **1 .** (I) This Order may be called the Bangladesh Citizenship (Temporary Provisions) Order, 1972.
>
> (2) It shall come into force at once and shall be deemed to have taken effect on the 26th day of March, 1971.
>
> **2.** Notwithstanding anything contained in any other law, on the commencement of this Order, every person shall be deemed to be a citizen of Bangladesh.
>
> (i) who or whose father or grandfather was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25th day of March, 1971, and continues to be so resident; or
>
> (ii) who was a permanent resident of the territories now comprised in Bangladesh on the 25th day of March, 1971, and continues to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force;
>
> Provided that if any person is a permanent resident of the territories now comprised in Bangladesh or his dependent is, in the course of his employment or for the pursuit of his studies, residing in a country which was at war with, or engaged in military operations against Bangladesh and is being prevented from returning to Bangladesh, such person, or his dependents, shall be deemed to continue to be resident in Bangladesh.
>
> **3.** In case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order, the question shall be decided by the Government, which decision shall be final.
>
> **4.** The Government may, upon an application made to it in this behalf in the

manner prescribed, grant citizenship to any person.

5. The Government may make rules for carrying but the purposes of the Order.

174. Article 2 of 'The Order' starts with the non-obstante clause and it says that Notwithstanding anything contained in any other law, on the commencement of this Order, the following persons shall be deemed to be citizens of Bangladesh. Instead of adopting the simple language, the use of non-obstante clause confers citizenship to the following persons by a legal fiction. Clause (1) of Article 2 of the Order shows that following categories of people shall be deemed to be citizens of Bangladesh, namely;

(i) who or whose father or grandfather was born in the territories now comprised in Bangladesh;

(ii) who was a permanent resident of such territories on the 25th day of March, 1971;

(iii) who continues to be so resident.

Clause (2) of Article 2 speaks of the following categories of people who will also be deemed to be citizens of Bangladesh :

(1) Who was a permanent resident of the territories now comprised in Bangladesh on the 25th day of March, 1971;

(2) who continues to be so resident;

(3) who is not otherwise disqualified for being a citizen by or under any law for the time being in force.

175. The proviso to Article 2 of the Order is not relevant for our purpose. Article 3 of this Order speaks that in case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order, the question shall be decided by the Government and this decision shall be final. In deciding the main question regarding the citizenship of Prof. Golam Azam we are really called upon to interpret Articles 2(1) and 3 of the Order and on interpretation of these articles we are to determine the citizenship of the respondent.

176. The learned Attorney-General mainly argued that Prof. Golam Azam by his acts, deeds and speeches as revealed in the daily newspaper "The Sangram" voluntarily abandoned his permanent residence in Bangladesh and by staying abroad since before the liberation of Bangladesh he actively participated in the anti-Bangladeshi campaign during the war of liberation and created armed cadre of Jamaati Islami such as Rajakar, Al-Badr and Al-Shams and placed these forces under the disposal of occupation army and he actively collaborated with Pakistani Army and by his conduct he made it clear that he ceased to qualify himself to be a citizen of Bangladesh under Article 3 of President's Order 149 of 1972. He next submits that the respondent was holding a Pakistani passport which fact also shows that he was clinging to the citizenship of Pakistan and he never intended to abandon Pakistan as his permanent home and as such the notification has been validly made by the Government by taking the conduct of respondent to disqualify him as a citizen of Bangladesh.

177. Mr. AR Yusuf, learned Advocate appearing for respondent No. 1 submits that under the law the respondent must be deemed to be a citizen of Bangladesh as he continues to be a permanent resident of Bangladesh on the commencement of

President's Order 149 of 1972, and the conduct as has been mentioned in the impugned notification as a measure for disqualifying the respondent as a citizen of Bangladesh under Article 3 is not referable to the guideline given in Article 2(1) of the Order. In this connection he also submits that the appellant could not place on record any material to show animus of the respondent to permanently settle in Pakistan and to renounce his citizenship of Bangladesh by abandoning his permanent home. Hence, the notification is based on irrelevant considerations not authorised by law and the same is liable to be declared to have been passed without any lawful authority. The learned Advocate next submits that possession of passport of Pakistan is by itself not a conclusive proof that the respondent is a citizen of Pakistan and he further argues that in view of the non-voluntary circumstances, possession of the Pakistani passport is wholly irrelevant for issuing the notification under Article 3 of the Order.

178. It is to be stated here that admittedly the respondent, his father and grandfather were born in Bangladesh and so far as his permanent residence is concerned it is also not disputed that he was a permanent resident of Bangladesh on the 25th day of March, 1971. The material question is whether the respondent continues to be so resident in Bangladesh i.e. the 3rd qualification in Clause (1) of Article 2 of the Order. "Continues to be so resident" must be meant as to whether he continues to be so permanently resident. We are primarily to investigate as to whether the respondent satisfies the last qualification as laid down in Clause (1) of Article 2 of the Order. It has been already mentioned hereinabove, that the respondent satisfies the first and second qualifications mentioned in this Clause. We are only to determine whether on the commencement of this Order one can legally hold the respondent to be a permanent resident of Bangladesh or whether the respondent can be deemed to be a permanent resident of Bangladesh under this Order. Reading Article 3 of the Order it is apparent that conferral of citizenship on a person by Article 2 of the Order is never absolute. It is always conditional and thus liable to be defeated if the conditions mentioned in Article 2 are not fulfilled. It will be worthwhile now to refer to the impugned notification dated 18.4.73 so far it relates to Prof. Golam Azam. The notification speaks that the respondent was staying abroad since before the liberation of Bangladesh and by his conduct he cannot be deemed to be a citizen of Bangladesh and the said person (Professor Golam Azam) has continued to be a citizen of Pakistan. It can be mentioned here that staying abroad since before the liberation of Bangladesh and the conduct have been considered as disqualifications under Article 3 of the Order and consequently, the Government declares under Article 3 that the respondent did not qualify himself to be a citizen of Bangladesh. This is the decision given by the Government under Article 3 of the Order whereby the respondent was not qualified to be deemed to be a citizen of Bangladesh. I may point out here that staying abroad since before the liberation of Bangladesh and the conduct by themselves are not at all material considerations, as clause (1) of Article 2 does not contemplate such considerations at all. Thus, it appears that in passing the impugned Notification under Article 3 some irrelevant facts were taken into consideration, not strictly relevant to resolve the doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order.

179. It is on record that the respondent was absent from Bangladesh from 22.11.71 and he returned to Bangladesh on 11.7.78. Admittedly during this period the respondent remained outside Bangladesh. So the vital question for consideration is, whether his continued stay outside Bangladesh from 22.11.71 upto the date of promulgation of President's Order No. 149 of 1972 renders him to be disqualified to be deemed to be a citizen of Bangladesh and whether he ceased to continue to be a permanent resident of Bangladesh. The question whether a person has ceased to be a permanent resident of

Bangladesh for his temporary absence from the country is a question of fact and this has to be determined on the facts and circumstances of each particular case. Further, this question is to be answered squarely within the context of this Order and not beyond Article 2(1) of the Order. The expression is used as permanent resident and this we are to interpret as to what is meant by permanent resident. Unless and until the term 'permanent resident' could be clearly understood with reference to its connotation as meant in determination of citizenship, the question of one's citizenship can never be lawfully and strictly determined. In 'the order' 'permanent resident' and also the word 'resident' in Bangladesh have been used. So these two expressions must be clearly understood and spelt out in determining the citizenship of a person in Bangladesh. In Black's Law Dictionary, 5th Edition, 'permanent abode' means -

> A domicile or fixed home, which the party may leave as his interest or whim may dictate, but which he has no present intention of abandoning.

In this Order, the expression used is 'permanent resident' which is akin to domicile. Domicile has been defined in Black's Law Dictionary like this -

> Domicile. "That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. The permanent residence of a person or the place to which he intends to return even though he may actually reside elsewhere. A person may have more than one residence but only one domicile. The legal domicile of a person is important since it, rather than the actual residence, often controls the jurisdiction of the taxing authorities and determines where a person may exercise the privilege of voting and other legal rights and privileges. The established, fixed, permanent, or ordinary dwelling place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from the temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him.

'Resident' has been defined in Black's Law Dictionary meaning thereby;

> Resident, Any person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an on going physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature. The word "resident" when used as a noun, means a dweller, habitant or occupant; one who resides or dwells in a place for a period of more, or less, duration; it signifies one having a residence, or one who resides or abides.

The citizens of a country are members of a political community to which they belong and they compose State and they establish the Government for the promotion of their general welfare and for the protection of their individual as well as their collective rights in the State. The citizen of a State enjoy full fundamental, civil and political rights. The term Citizenship refers to the relationship of an individual with State from the internal aspect and 'nationality' refers to similar relationship from international aspect. From the international standpoint, the nationality is the status and quality of belonging to particular nations or States. All nationals of a State are not citizens though citizens must be nationals. A national of a State may not possess full civil or political rights, but a citizen must possess full civil and political rights.

180. President's Order No. 149 of 1972, only declares certain categories of persons who shall be citizens of Bangladesh at the commencement of this Order i.e. on 15.12.72. Clauses (1) and (2) of Article 2 of the Order only give tentative qualifications for acquisition of Bangladeshi citizenship at the commencement of the Order. A little reflection would, however, show that the provisions of Article 2 deal with ad hoc situation, where rights of citizenship were conferred on persons at the commencement of the Order with certain qualifications and reservations.

181. It is to be kept in mind that the Pakistan Citizenship Act, 1951, briefly, called the 'Act', is very much in existence today in our country as a valid law by The Bangladesh (Adaptation of Existing Bangladesh Laws) Order, 1972, effective from the 26th day of March, 1971. This Act provides for the mode of acquisition and deprivation of citizenship in Bangladesh subsequent to the commencement of 'The Order'. It appears that from the 26th day of March, 1971, both 'The Order' and 'The Act' are governing the field of citizenship of Bangladesh. The Act of 1951, was promulgated on 13th April, 1951 and section 3 of the Act speaks of citizenship at the date of commencement of this Act. After the Division of British-India, Pakistan was created on the 14th day of August, 1947 and the necessity of promulgating this Act was felt to provide for Pakistan Citizenship. Like clauses (1) and (2) of President's Order 149 of 1972, this Act also provided for conferring citizenship to certain categories of persons at the commencement of this Act. Section 4 of the Act speaks of citizenship by birth and the same is referable to person born after the commencement of this Act. In this Act, section 16 speaks of deprivation of citizenship in case the citizenship has been obtained by a person by certificate of domicile or certificate of naturalization under the Naturalization Act, 1926 by means of fraud, false representations or the concealment of some material fact. The power of depriving citizenship to such a person is left entirely with the Government. This power of deprivation of citizenship as contemplated in section 16 of the Act has got nothing to do with depriving the citizenship of a person who is deemed to be a citizen by Article 2(1) of the Order. A reference to President's Order 149 of 1972 (with upto date amendments) shows that a person who is deemed to be a citizen of Bangladesh under Article 2(1) of the Order can be disqualified to be a citizen of Bangladesh either under Article 3 or under Article 2B, as the case may be. If the respondent does not possess the qualifications as mentioned in sub-article (1) of Article 2 of the Order he can be disqualified to be a citizen of Bangladesh with retrospective effect or its non-accrual at any point of time. But in the case of the respondent, the question of determination under the Act does not arise. Deprivation presumes that at some point of time a person was a citizen of Bangladesh, but the respondent's case is to be looked at as if he shall be deemed to be a citizen of Bangladesh under this Order or he never could claim to be a citizen under the Order at any point of time. Thus the provisions of the Order and the Act supplement each other and have to be read together to disqualify or deprive a citizen of Bangladesh either under Articles 3 and 2B of the Order or under section 16 of the Act as the case may be. The provisions of the Act and the Order are to be read together to get a complete picture of the law of Citizenship in Bangladesh.

I may refer in this connection that the citizenship of India is governed by Part-II of the Constitution of India (Article 5 to Article 11) and by the Citizenship Act, 1955. Unlike the Constitution of India, in our constitution there is no corresponding provision as contained in Part-II (Citizenship) of the Constitution of India. Citizenship is entirely left to be determined by legislation as contained in Article 6 (1) of our Constitution.

182. It must be stated here that the case made out by respondent No. 1 in his Writ Petition has not been controverted by specific denial by the Government-appellant. As a

matter of fact no material could be brought on record by the appellant to show that the respondent really intended to leave his permanent residence and voluntarily acquired citizenship of Pakistan by any positive act and thereby he ceased to be a permanent resident of Bangladesh. The intention must be an intention to reside permanently or for an indefinite period. If a person goes to a country for employment, business, or to stay there for some other purposes he will retain his permanent residence i.e. his domicile of origin. The domicile of origin is thus a concept of law and clings to a man till he abandons it but if, it can be shown that the person has permanently settled down in a country and has established his permanent home and residence with his family and children then, of course, the matter will be different. By mere place of residence itself without any animus to acquire a permanent home or residence the permanent residence or domicile is never lost. For example, if the respondent would have purchased a house in Pakistan or estate coupled with long residence therein and non-retention of any home in his birth place it might be sufficient to prove the intention to acquire a new permanent home. It is on record that the respondent's wife and children are continuously living in Bangladesh since before and after liberation of Bangladesh. Every person acquires his domicile of origin (permanent residence) at his birth, which continues until he has validly acquired domicile of choice. Thus even though a person leaves the country of his origin with intention of never returning to it, his domicile of origin in that country is never lost, until he has actually settled in another country with the intention of making that country his permanent home. In other words, the domicile of origin is not lost by mere temporary abandonment. Domicile of origin acquired subsists until it is replaced by a fresh domicile of choice. Hence, residence in foreign country, going to imprisonment as a political refugee, or as invalid for change of climate or for service or diplomatic missions, studies and/or for business is not sufficient for acquisition of permanent residence. The permanent residence continues until a person has voluntarily relinquished and acquired a permanent residence in any country. The appellant could not place any material whatsoever to show that the citizenship acquired by respondent No. 1 by birth and by operation of law has been voluntarily relinquished or abandoned at any point of time. There being nothing on record to show that respondent No. 1 voluntarily renounced or abandoned his permanent residence, and took up citizenship of Pakistan, he is deemed to be a citizen of Bangladesh as he continues to be permanent resident in Bangladesh under clause 2(1) of the Order. In this connection I will refer to two English decisions. In the case of Ramsay vs. Liverpool Royal Infirmary, 1930 (AC) 588, the fact relevant is that, one George Bowie was born in Glasgow in 1845 and therefore with a Scottish domicile of origin. From there he moved his residence to Liverpool (UK) in 1892, lived there and died there in 1927. George Bowie lived in England for the last 36 years of his life. During this time he occasionally went outside England. He was proud to be a Glasgow man and resolutely refused on several occasions to return to Scotland, even for the purpose of attending his mother's funeral. George Bowie left a will that was valid if his domicile at death was Scottish, but invalid if it was English. In that case the House of Lords unanimously held that George died domiciled in Scotland, though he lived for 36 years in Liverpool and died at Liverpool and was buried there. Their Lordships were of the view that prolonged residence did not disclose an intention to choose England as his permanent home. In that case Their Lordships answered the question in the following terms :

> The real question in the case is whether this prolonged residence in England was accompanied by an intention on the part of the deceased to choose England as his permanent home in preference to the country of his birth. The law requires evidence of volition to change. Prolonged actual residence is an important item of evidence of such volition, but it must be supplemented by

> other facts and circumstances indicative of intention. The residence must answer a qualitative as well as a quantitative test.

The case of Winans vs. AG, (1904) AC 287, relates to the domicile of one Winans who was born in 1823 in USA From 1850-59 he went to Russia and was in employment there. He married a British subject and came after two years in UK due to his ill health on the advice of his doctor. He took lease of two houses in UK at the time of his death. From 1860-70, he lived for four months of the winter at his residence in UK and remaining eight months in Russia. Subsequently before his death he lived from 1893 to 1897 entirely in England. Winans had two objects in life, first, to construct in Baltimore (USA) a large fleet of spindle-shaped vessels and, secondly, to develop a large property of 200 acres in Baltimore. The fact that he resided in England for 37 years of his life raised a strong presumption in favour of an English domicile, but Their Lordships held that the domicile of origin in New Jersey had not been lost. Lord Macnagthen held as follows :

> On the whole I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated.

183. Learned Attorney-General argued that the respondent's possessing the Passport of Pakistan is a positive proof that he is a citizen of Pakistan and he is a permanent resident of Pakistan and thereby he is not qualified to be a citizen of Bangladesh. In this regard he referred to section 9 of the Indian Citizenship Act, 1955 and Rule 30 framed thereunder. Section 9 speaks of termination of citizenship. According to section 9(2) if a person possesses a foreign passport, a determination by the Central Government under section 9(2) cannot be dispensed with. Rule 30(3) speaks that obtaining a passport from any other country shall be conclusive proof of voluntarily acquiring citizenship of that country. In our law there in no such provision like Indian Citizenship Act, 1955, and hence this argument is not relevant in this case. Further, the possession of a passport does not necessarily imply that he is a citizen of that country, but it may only mean that he is a national of that country. Under The Bangladesh Passport Order, 1973 (President's Order 9 of 1973), passport is primarily a travel document of a citizen of Bangladesh and other persons for the purpose of departure from Bangladesh. In the passport of Bangladesh, issued by the Government of Bangladesh, nowhere it is written as citizen of Bangladesh, but as national of Bangladesh.

184. From the judgment of the High Court Division it appears that the 26th day of March, 1971 was taken to be the commencing day of President's Order 149 of 1972. "Commencement" means the time at which the Act comes into operation. President's Order 149 of 1972 was promulgated on 15th December, 1972 and came into force on that date, though it was made effective from the 26th day of March, 1971. Hence, legally speaking the commencement day of this Order is the 15th December, 1972 and we are to see whether upto this date a person qualifies the tests as contained in clause (1) of Article 2 of the Order. Clause (1) of Article 2 of the Order only speaks of permanent residence on 25th day of March, 1971 and nowhere it has been mentioned that one is to be physically present at any point of time after 25th day of March, 1971. From the 26th day of March, 1971 upto 15.12.72 the investigation will be whether a person continues to be so permanently resident in Bangladesh upto the date of commencement of the Order. In other words, Article 2 of the Order does not provide any mode for acquisition of citizenship of Bangladesh subsequent to the commencement of the Order.

185. A discussion has been made with regard to proviso of Article 2 of the Order by the two learned Judges of the High Court Division. But to me it appears that the proviso has got no relevance in the facts of the present case. The present case is one of temporary absence from the permanent residence and this has got nothing to do with studies or employment in Pakistan as mentioned in the Proviso to Article 2 of the Order. In the case of People's Republic of Bangladesh vs. Abdul Haque, 1982, BLD (AD) 143, it appears that respondent Abdul Haque was born in Satkhira within the territory of Bangladesh. In November, 1971 he had gone to Pakistan in connection with his business. In 1975 he came to Bangladesh with a Pakistani passport. He surrendered his passport to the Government and applied for citizenship of Bangladesh. The Government did not grant him citizenship and asked him to leave the country under Foreigners Act, 1946. Before the High Court Division the respondent in his writ petition stated that he never abandoned his permanent residence in Bangladesh while his wife and children are continuously living in Bangladesh. In that decision it was held that the citizenship by birth is not lost by temporary absence from the country of origin. The learned Judges after considering Article 2 of President's Order 149 of 1972 held that in the eye of law, the respondent remains a resident of Bangladesh. The fact and law of this case apply with all force to the present case.

186. The appellant's case is that the respondent was never deemed to be a citizen of Bangladesh under President's Order No. 149 of 1972. Respondent's case is that he is a citizen of Bangladesh by birth, he was physically present in Bangladesh on 25th day of March, 1971 and even when he was temporarily absent from his permanent residence from 21.11.71 he continues to be a permanent resident of Bangladesh. The appellant alleges that the respondent was never a citizen of Bangladesh and that he is a citizen of Pakistan. In the present case the onus of proving that the respondent has lost his citizenship from the country of his permanent residence is on the appellant who seeks to deprive the respondent of his rights as a citizen and for discharging the onus the appellant could not place any objective material before us other than mentioning about the conduct and mental attitude of the respondent. The test of citizenship, so far it relates to the order as it originally stood, is to be determined by objective tests and not by conduct and subjective satisfactions. In the order, the concept of citizenship is that of permanent residence (domicile) and it does not evaporate with the passing of time and it clings to a person wherever he may go. I may unhesitatingly say that in Article 2 of the Order "permanent residence" is made one of the basic conditions for treating a person to be deemed to be a citizen of Bangladesh. The appellant has totally failed to show that the respondent has voluntarily renounced his original citizenship or is guilty of some conduct as not being qualified to be 'deemed citizen of Bangladesh' under the Order.

187. Lot of decisions have been cited by the learned Advocate for the respondent to show that the principle of natural justice has not been followed in this case before issuing the impugned notification under Article 3 of the Order. Without going into any decision, it can be safely said that citizenship involves a determination of a very vital issue concerning an individual by which his fundamental, political and civil rights are affected and consequently, the Government is called upon to dispose of the issue of citizenship in a quasi-judicial manner and the ends of justice demands a fair hearing in the matter. It has been argued by the learned Attorney-General that in the facts of the present case it was not possible to serve any notice on respondent No. 1. From the record it appears that there was no bonafide attempt on the part of the appellant to issue any show cause notice to the respondent when the respondent's permanent addresses at Brahmanbaria and Dhaka were known to the appellant before issuance of the impugned notification. Thus the two learned Judges were correct in holding that the

principle of natural justice has been violated in this case. From the two judgments of the High Court Division it appears that on a detailed discussion of the materials on record, the two learned Judges have observed that the delay has been sufficiently explained. Further, the appellant-State having also contributed to the delay the question of delay is of no prime importance in this case, when a very valuable right of the respondent is adversely affected.

Before parting with the case, I want to mention that in President's Order No. 149 of 1972. Article 28 was inserted on 22.6.73, by an amendment which speaks of oath of affirmation, allegiance and conduct. The exercise of power by the Government not being under Article 2B of the Order and the learned Attorney-General having accepted the position, I refrain from saying anything on this score.