Unmaking Citizens: The Architecture of Rights Violations and Exclusion in India's Citizenship Trials

National Law School of India University & Queen Mary University of London

Unmaking Citizens

The Architecture of Rights Violations and Exclusion in India's Citizenship Trials


O Lhasa
Arunachal Pradesh
BHUTAN
West Bengal
ASSAM
Nagaland
Meghalaya
BANGLADESH
Manipur
O Dhaka
Tripura
Mizoram
MYANMAR

Endorsements

"In this meticulous study of the Foreign Tribunals operating in Assam, Mohsin Alam Bhat, Arushi Gupta and Shardul Gopujkar reveal how an exclusionary politics informed by India's colonial legacy has been mobilised to deny citizenship from hundreds of thousands of residents who were born and grew up in the state. Exposing the tribunal's fundamental disregard of basic legal procedures and the rulings of India's Supreme Court as well as the unapologetic support the tribunal has received over the years from the Gauhati High Court, *Unmaking Citizens* lays bare how those who have been appointed to guard the law have instead instrumentalised legal proceedings to systematically undermine forms of identity, belonging and protection, and to deny the residents of their own state 'the right to have rights'. *Unmaking Citizens* is a must read to anyone interested in how the state uses the law to deprive people of citizenship."

Neve Gordon, Professor of International Law and Human Rights, Queen Mary University of London, School of Law, and a Fellow of the British Academy of Social Sciences.

"One of the most populous states in the world's largest democracy has been undertaking a citizenship verification exercise of mind-boggling proportions. This report painstakingly documents how all residents of the state of Assam in Eastern India have effectively been deemed to be foreign nationals, saddled with the burden to prove their citizenship through documentary evidence of ancestral residence predating 1971. As of January 2025, 165,992 people have been declared foreigners, with over 85,000 cases still pending. A resident can be declared a foreigner if they fail to show up for a hearing, even if the notice of the hearing was sent to their previous address and they never received it. Or, if their official documents have minor discrepancies because of transliterating their names into English. Or if they changed their names, as Indian women often do after marriage. The un-appealable determination of their status is made by executive tribunals manned by inadequately trained 'judges' on fixed-term government contracts, which are often not renewed if they find insufficient 'foreigners'. The High Court exercises its discretion to review the tribunal's findings in a vanishingly small number of cases. A large number of those who fail to prove their Indian citizenship are poor or female Muslims. They can be detained for years or 'pushed back' over the border into Bangladesh, a country they may have never set foot upon previously. Future generations of Indians will be ashamed, appalled, and enraged by this systematic cruelty being perpetrated in the name of their security and safety."

Tarunabh Khaitan, Professor (Chair) of Public Law at the London School of Economics Law School, and an Honorary Professorial Fellow at Melbourne Law School

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This report draws deeply from the learnings shared by the courageous lawyers of Assam who have defended individuals before the Foreigners Tribunals and beyond, often under extraordinarily difficult conditions and with extremely limited resources. Their work—undertaken within a system that is structurally unsympathetic—has been a source of insight, strength, and ethical clarity for this project. Some of these learnings appear in the interviews cited in the report; much more is embedded throughout the analysis, which has been shaped by their lived experiences and critical perspectives. We have kept the identities of these lawyers anonymous, both to protect their security and as a matter of ethics, but we want to express our deepest admiration and gratitude for their work.

Over the years, numerous students and researchers have contributed to this project. Their names are listed in the authorship and contributor sections. Our deepest thanks go to them—for providing the oxygen and engine for this endeavour, for inspiring us to create a report that can make an impact, serve as a pedagogic tool in classrooms and beyond, and reflect serious, responsible academic and legal work.

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Glossary

Adverse Inference	A negative assumption or conclusion that a court or tribunal may draw against a party who fails to produce relevant evidence that is within their control or fails to testify when expected.
Affidavit	A written declaration or affirmation made to a court, which is legally binding on the party making it.
Article 226 of the Indian Constitution	This gives every high court the power to issue directions, orders or writs to enforce any of the fundamental rights, and for any other purpose.
Assam Police Border Organization (APBO)	An organisational branch of the Assam Police., with the mandate of detecting and deporting foreigners, as well as preventing entry of foreigners across the international borders. They are also mandated to identify 'suspected foreigners', and register a 'Reference Case' which is forwarded to Assam's Foreigner Tribunals.
Burden of Proof (Section 9, Foreigners Act 1946)	A provision that places the responsibility to prove citizenship on the individual accused of being a foreigner—contrary to ordinary criminal or civil standards.
Convicted Foreign National (CFN)	A non-citizen individual who has been convicted under provisions of the Foreigners Act, 1946 (typically Section 14), usually for unlawful entry or stay in India. CFNs are distinct from individuals "declared foreigners" by a Foreigners Tribunal, as their status arises from a criminal conviction rather than quasi-judicial proceedings.
Declared Foreign National (DFN)	Someone officially found by an FT to be a non-citizen, often losing legal rights.
Defendant or "Proceedee"	A person whose citizenship is in doubt and the Central Government has referred a case against them to the FT.
Doubtful voters (D-voter)	Individuals classified by the Election Commission of India as suspected foreigners. These names may be forwarded to the Superintendent of Police (Border), who then issues a reference to the Foreigners Tribunal.
***Ex parte* order**	A decision made without the defendant being present or heard.
Foreigners Tribunal (FT)	Quasi-judicial bodies set up in Assam to determine whether a person is a foreigner under the Foreigners Act, 1946.
Foreigners Tribunal Members (FT Members)	Individuals appointed to adjudicate cases in Foreigners Tribunals in Assam. They issue legally binding "opinions" on whether a person is a "foreigner."
Foreigners Tribunal Opinion (FT Opinion)	The formal decision issued by an FT, stating whether a person is a foreigner. This "opinion" has serious legal consequences and is subject to judicial review.

Glossary

Gauhati High Court	Assam's top constitutional court, which hears appeals against FT decisions.
Gaon Burah Certificate	A certificate issued by the local village headman (known colloquially as Burah) in parts of Assam and Northeast India. It certifies birth, residence, or family lineage, often used in Foreigners Tribunal cases to support claims of Indian citizenship.
Gaon Panchayat Certificate	A certificate issued by the Village Panchayat Secretary of the village that the defendant is residing or born in. It certifies birth, residence, or family lineage, often used in Foreigners Tribunal cases to support claims of Indian citizenship.
Inquiry Authority/ Investigating Authority	Inquiries are conducted by both Border Police officials (for Reference cases) and Election Commission of India officials (for D-voter cases). The Inquiring Authority is required to conduct a fair and thorough investigation when there is a reasonable suspicion regarding a person's citizenship status. This suspicion must be based on materials gathered from or relating to the individual.
Referral Authorities	Superintendent of Police (Border).
Remand	When higher courts (in this case the Gauhati High Court) send cases back to lower courts (in this case the FTs) for further action.
Reverse burden	A legal rule which places the responsibility of proving innocence on the accused in certain cases, as opposed to the norm where the State is required to prove guilt.
Sarbananda Sonowal v. Union of India (2005) and Sarbananda Sonowal (II) v. Union of India (2006) (Sonowal I/II)	Key Supreme Court cases that have shaped Assam's citizenship laws and FT powers.
Statelessness	A condition where a person is not recognised as a citizen by any country.
Writ Petition	A legal remedy filed under Articles 226 or 32 of the Indian Constitution, asking a higher court to intervene against actions that violate fundamental rights.
Written Statement	The written defence submitted by a defendant, addressing the claims or allegations brought by the plaintiff. It presents the defendant's version of events.

Part II

4 Violations of Natural Justice and the Right of Due Process

5 Embedding Violations: Role of Assam's High Court

6 Conclusion

1 Framing the Intervention

Introduction

In early 2022, Rahim Ali—a 58-year-old, poor agricultural labourer from Kashimpur village in Assam's Nalbari district—died destitute and legally erased. He had spent the last 18 years of his life struggling to defend his status as an Indian citizen, and the last ten years as a man stripped of legal identity—declared a "foreigner" by a Foreigners Tribunal (FT) on the ground that he had unlawfully entered India from Bangladesh. Rahim Ali had submitted school records, electoral rolls, and community testimonies to establish his Indian citizenship—but to no avail. He challenged the FT's decision before the Gauhati High Court, which upheld the tribunal's findings, maintaining his precarious legal status as a person the State had deemed foreign. As he sought further legal redress, his case languished. Denied ration cards, medical care, and other entitlements tied to citizenship, Rahim Ali fell into deeper poverty. **He died awaiting justice.**[1]

Two years later, the Indian Supreme Court overturned the FT's decision—tragically, posthumously.[2] Describing the FT's findings as "wholly unsustainable",[3] the Court found that the State had proceeded against Rahim Ali without any material basis, and that the evidence he submitted was rejected without adequate reason or attention to basic principles of fairness. The Court observed that his family had long resided in Assam, the FT had already declared his sibling an Indian citizen, and discrepancies in his documents were minor and did not diminish their authenticity. On the contrary, the Court found that such imperfections actually strengthened the credibility of his claim. In the Court's "considered opinion", minor inconsistencies

> "would further buttress the appellant's claim… that not being in the wrong, and being an ignorant person, he truthfully and faithfully produced the official records as they were in his possession… The conduct of an illegal migrant would not be so casual."[4]

Although the Supreme Court ordered the matter to be reconsidered by the FT, this decision arrived far too late. Rahim Ali's fate had already been sealed—not by due process, but by a system that denied him timely justice. "What is the point now?" his family asked. "The fear he lived under, of being taken away, died with him. If they still wanted to call him a foreigner, what would they do—pick him up from his grave?"[5]

Rahim Ali's story is both tragically common and uncommon. It typifies the experiences of thousands who pass through Assam's citizenship status determination—a regime that is among the most complex, far-reaching, and opaque in the world. Shaped by enduring anxieties over migration from what is now Bangladesh, this regime today includes 100 FTs, the National Register of Citizens (NRC), and associated border policing mechanisms. Assam's FTs have declared close to 166,000 persons as foreigners, and more than 85,000 cases are still pending (see §1.1). The fate of around 2 million persons classified as suspected foreigners under the NRC (see §1.3) is also linked to the FTs. While ostensibly intended to identify "illegal migrants", in practice it ensnares some of the most marginalised people in India—individuals who may lack extensive and error free documentary proof, but who often manage to produce significant records nonetheless, only to find them dismissed or insufficient.

Rahim Ali's case was also uncommon for having reached the Supreme Court's doorstep. For the vast majority, legal recourse ends at the FTs and then, for a small proportion, at the Gauhati High Court. The systemic hurdles—cost, distance, legal complexity—make it nearly impossible for impoverished litigants to contest adverse decisions effectively. In this landscape, the FT process has profound importance, and any redress, when needed, often arrives after irreparable harm.

This report critically examines the functioning of the FTs and the role of the Gauhati High Court within this adjudicatory machinery. It analyses the structure and operation of the FT system, scrutinises the judicial reasoning of the High Court, and assesses these practices against the benchmarks of constitutional law and international human rights standards. Drawing on empirical data, case law analysis, and interviews with legal practitioners, the report demonstrates how the system systematically fails to provide fair and reasoned adjudication—especially for those already facing social, economic, and legal precarity.

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[1] Rahim Ali's story was widely covered in Indian newspapers. See 'How the System Failed Rahim Ali, Indian' (The Indian Express, 19 July 2024) <https://indianexpress.com/article/opinion/editorials/how-the-system-failed-rahim-ali-indian-9462302/> accessed 29 June 2025.

[2] *Md. Rahim Ali @ Abdur Rahim v. State of Assam* 2024 SCC OnLine SC 1695.

[3] ibid [54].

[4] ibid [44].

[5] Sukrita Baruah, 'Last Week, SC Declared Rahim Ali a Citizen; What Nobody Knew: He Died over Two Years Ago Branded "Foreigner"' (The Indian Express, 18 July 2024) <https://indianexpress.com/article/long-reads/rahim-ali-citizenship-died-over-two-years-ago-branded-foreigner-9459966/> accessed 29 June 2025.

1.1 The Stakes

Citizenship status lies at the heart of the constitutional order. As India's Supreme Court has affirmed, citizenship is the gateway to all other fundamental rights.[6] Any process that risks its arbitrary denial must therefore meet the highest standards of procedural fairness, evidentiary integrity, and judicial oversight. Yet, as this report documents, the FT regime consistently falls short. The FTs operate without adequate judicial safeguards; their procedures vary dramatically; and the reasoning in many cases is either absent, contradictory, or disconnected from the lived realities of those trapped within the system. Meanwhile, the Gauhati High Court, rather than acting as a site of correction, has more often than not upheld or enabled these deficiencies. Its decisions have repeatedly refused to entertain challenges to defective inquiries, enabled people to be declared foreigners without a hearing, imposed unpredictable and cumbersome evidentiary thresholds, and failed to articulate consistent legal standards.

***Indian Supreme Court in Re : Section 6A of the Citizenship Act 1955* (2024)**

Para 5 "In the domestic context, citizenship was ascertained by a 9-Judge Bench of this Court in State Trading Corpn. of India Ltd. v. CTO, as the 'right to have rights'. It was held that citizenship is the prerequisite that leads to gaining legal status and other socio-political rights in a country."

Para 9 "Citizenship provides a sense of belongingness and esteem, apart from furthering the self-actualization needs of individuals. Collectively, citizenship provides an 'identity' to individuals, which has a significant impact on the quality of their lives and their individual psyche."

Para 11 "Though citizenship is one sub-set among many possible ways of being a member of a polity, it is the most significant one."

The consequences of this failure are profound. As of January 2025, Assam's FTs have declared 165,992 people as foreigners.[7] Citizenship decisions in Assam have led to mass detention. In January 2025, 266 people were reportedly being held in detention centres, with periodic numbers being as high as 826 in 2017, 428 in 2018 and 1043 in 2019.[8] Thousands more live in the fear of being summoned.

The Assam Government has reported that 452 persons have been repatriated from March 2013 to January 2025. As of January 2025, over 30,115 persons have been "push back deported". As of January 2025, 273 persons have been released on bail from the detention centre on completion of 3 years as per a Supreme Court order (Writ Petition (Civil) No. 1045/2018). 527 persons have been released on bail after completion of 2 years as per the Supreme Court order, and an order of the Gauhati High Court in Writ Petition (Civil) (Suo Moto) No. 1 of 2020.

Cases before the Foreigners Tribunals[9]

4,36,46

References made to the Foreigners Tribunals

85,162 Cases Pending

3,48,014 Cases Disposed

1,32,015 Persons declared as Indians

1,65,992 Persons declared as foreigners

[6] *In Re : Section 6A of the Citizenship Act 1955*, 2024 SCC OnLine SC 2880 [5], [9], [11].
[7] Assam Legislative Assembly, Departmentally Related Standing Committee on Development (D) Departments 2025-26, 'Report on Demands for the Grant No. 19 For the year 2025-26' (21 March 2025) First Report, 7 <https://assambidhansabha.org/assets/uploads/reports/report_1742723741_JZBEZ.pdf> accessed 23 June 2025.
[8] Response by Minister of State for Home Affairs, Starred Question No 45, Rajya Sabha (6 February 2019); Response by Minister of State for Home Affairs, Unstarred Question No 234, Lok Sabha (19 November 2019).
[9] Assam Legislative Assembly, 'Report on Demands for the Grant No. 19 For the year 2025-26' (n 7).

The implications are constitutional and urgent. The rule of law is undermined when fundamental rights turn on inconsistent adjudication. Equality is compromised when evidentiary rules shift arbitrarily. Dignity is denied when ordinary individuals are made to defend their belonging with no clear understanding of what the law requires.

For many, the consequences extend across generations, with children inheriting a legal limbo shaped by suspicion and exclusion. India's Citizenship Act of 1955 originally granted citizenship, as a principle, to everyone born in the country.[10] However, amendments in 1986 restricted this by requiring that at least one parent be an Indian citizen.[11] The 2003 amendment went further, denying citizenship by birth to a child if even one parent was classified as an "illegal migrant".[12] These changes have created cascading consequences: children born in India after 2004 to parents marked as "foreigners" face a heightened risk of statelessness because their Indian citizenship is tied to their parents' status. Thus, although it is often described as a mechanism to identify unauthorised immigrants, the structure of citizenship status determination has far broader implications.

The risks faced by these individuals are further exacerbated by systemic legal and institutional failures. Indian law provides no constitutional or statutory guarantee against arbitrary deprivation of nationality, despite India's obligations under international human rights law.[13] Many of those affected have lived in India for decades, have deep familial and social ties, and participate in its economic and civic life.[14] Even for those without documents, their genuine links with, and long-standing integration into Indian society challenge the assumption that they are unauthorised immigrants. Nonetheless, they remain vulnerable to indefinite detention, denial of rights, and deportation to countries with which they have no real connection.[15]

Article 15 of the 1948 Universal Declaration of Human Rights:

"Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

Article 7(1) of the Convention on the Rights of the Child:

"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."

Article 24(3) of the International Covenant on Civil and Political Rights:

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

Article 12(4) of the International Covenant on Civil and Political Rights:

"No one shall be arbitrarily deprived of the right to enter his own country."

Article 9(1) of the Convention on the Elimination of All Forms of Discrimination against Women:

"States Parties shall grant women equal rights with men to acquire, change or retain their nationality."

This vulnerability is compounded by deep definitional ambiguities in Indian law. The Foreigners Act, 1946 defines a "foreigner" merely as a person "who is not a citizen of India",[16] while the Citizenship Act defines an "illegal migrant" as a foreigner who enters without valid documentation or overstays a visa.[17] Crucially, Indian law does not distinguish between citizens without documentation, persons entering the country irregularly, and persons fleeing persecution. Consequently, administrative and quasi-judicial bodies such as the FTs exercise their broad discretion to determine the fate of a disparate range of persons without any meaningful sensitivity to the legal task at hand.

India's obligations under international law— the Universal Declaration of Human Rights (UDHR) as customary international law and the International Covenant on Civil and Political Rights (ICCPR)— require citizenship decisions to be transparent, proportionate, and grounded in fair procedure. As this report shows, the current regime fails to meet these standards. It risks making exclusion a routine bureaucratic practice, rather than treating it as an extraordinary measure to be used sparingly and with the utmost legal scrutiny.

This issue continues to escalate. Since May 2025, the Government of Assam has illegally "pushed-back" hundreds of persons—allegedly undocumented Bangladeshi migrants and Rohingya refugees—into Bangladesh.[18] In June 2025, the Assam Government claimed to have pushed back over 330 persons across the border into Bangladesh.[19] Several among those "pushed back" have their appeals pending before the Gauhati High Court and the Supreme Court of India.[20] These actions have created a spectre of constant danger, leaving the lives of declared foreigners at risk at all times.

The case of Rahim Ali serves as a haunting reminder of what is at stake. It is not merely about the correct interpretation of documents or the technicalities of jurisdiction. It is about the lives of people who, having always belonged, are forced to prove their belonging before a system that too often treats them with suspicion rather than fairness. The law must do better.

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[10] Citizenship Act 1955, s 3.
[11] Citizenship (Amendment) Act 1986, s 2.
[12] Citizenship (Amendment) Act 2003, s 3.
[13] Centre for Public Interest Law, 'Securing Citizenship: India's Legal Obligations towards Precarious Citizens and Stateless Persons' (Jindal Global Law School 2020) <https://jgu.s3.ap-south-1.amazonaws.com/jgls/SecuringCitizenship-Report_CPIL.pdf> accessed 29 June 2025. See also Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 15.
[14] Salah Punathil, 'Precarious Citizenship: Detection, Detention and "Deportability" in India' (2022) 26 Citizenship Studies 55; Urmitapa Dutta, Abdul Kalam Azad and Najifa Tanjeem, 'Examining Citizenship Regimes in Assam through a Structural and Cultural Violence Lens' (2024) 73 American Journal of Community Psychology 294.
[15] Citizens for Justice and Peace, '"Spent Last Few Days In Terror": Assam Women Allegedly Pushed Into Bangladesh Speak Up' (The Wire, 4 June 2025) <https://thewire.in/rights/assam-women-pushed-into-bangladesh-returned> accessed 29 June 2025; Arunoday Mukharji, 'Assam: "I Was Pushed across the Border into Bangladesh at Gunpoint"' (BBC News, 5 June 2025) <https://www.bbc.com/news/articles/cqj78v79z9do> accessed 29 June 2025.
[16] Foreigners Act 1946, s 2(a).
[17] Citizenship Act 1955, s 2(b).
[18] Rokibuz Zaman, 'How Rohingyas Were Expelled from Assam Detention Centre, despite Their Pleas Pending in Court' (Scroll.in, 22 May 2025) <https://scroll.in/article/1082630/how-rohingyas-were-expelled-from-assam-detention-centre-despite-their-pleas-pending-in-court> accessed 29 June 2025; 'Assam to Revive 1950 Law to Oust Illegal Migrants sans Court Order' (The Times of India, 8 June 2025) <https://timesofindia.indiatimes.com/city/guwahati/assam-to-use-75-yr-old-law-to-push-back-illegal-migrants/articleshow/121698594.cms> accessed 29 June 2025.
[19] Sukrita Baruah, '330 Deported to Bangladesh: Himanta Cites 1950 Law to Say District Collectors Can Push "Foreigners" Back' (The Indian Express, 10 June 2025) <https://indianexpress.com/article/india/330-deported-to-bangladesh-himanta-cites-1950-law-to-say-district-collectors-can-push-foreigners-back-10057454/> accessed 29 June 2025.
[20] Sushanta Talukdar, 'How Assam's Pushback Politics Is Weaponising Citizenship' (Frontline, 25 June 2025) <https://frontline.thehindu.com/the-nation/assam-pushback-policy-illegal-migrants-bangladesh-citizenship-crisis/article69699823.ece> accessed 29 June 2025; Zaman (n 18).

1.2 Argument and Contribution of the Report

A substantial body of scholarship, legal analysis, and investigative reporting has exposed the deep procedural and structural deficiencies of Assam's FT system.[21] Four core concerns have emerged.

First, the FTs operate without a codified procedural framework (see §1.4), leading to unregulated and discretionary adjudication. Individuals are often denied basic guarantees of natural justice—such as proper service of notice, a meaningful opportunity to be heard, or consistent evidentiary standards. Discretion, rather than principle, frequently drives outcomes.

Second, the FT regime imposes harsh and unrealistic evidentiary and procedural burdens, which disproportionately impacts women and Muslims, who are overrepresented among the poor, landless, and historically marginalised.[22] Lack of documentation is a structural barrier particularly for the Miya Muslim community living on the chars or riverine islands on the Brahmaputra and other low-lying areas. The community is prone to displacement from flooding, exclusion from formal education and land ownership, and lack of institutional birth or school records.[23] Women encounter additional burdens, such as customary name changes after marriage and exclusion from property ownership. Consequently, the communities most vulnerable to exclusion are saddled with the most onerous legal requirements. The concern has been that FTs are erratic in terms of giving adequate time and opportunity to defendants.[24] The result is a staggering 63,959 *ex parte* decisions between 1985 and 2019—almost half of the total number of orders during this period —many of which were issued without a hearing or defence.[25]

Third, there is a documented pattern of rigid, formalistic scrutiny of evidence.[26] Minor discrepancies—such as spelling errors, customary name changes (particularly among married women), or variations from transliteration—are often treated as fatal flaws. Oral testimony, even from family members with direct knowledge, is regularly dismissed. This obsession with documentary precision ignores the lived realities of marginalised communities.

Fourth, the reversed burden of proof under Section 9 of the Foreigners Act—the statute governing the FTs—presumes individuals to be foreigners unless they can prove otherwise. This is a burden that is especially insurmountable for those without access to legal aid or robust documentation. Rather than placing responsibility on the State to prove exclusion, the regime shifts the onus entirely onto the defendant .

Building on these foundational insights, this report contributes to the field in four significant and original ways.

First, it offers the most comprehensive legal analysis of the FT regime to date, integrating constitutional principles and international human rights standards into a unified normative framework. It shows how the system systematically violates the right to a fair trial, due process, equality before the law, and the principles of natural justice. A core contribution lies in demonstrating how domestic

and international legal obligations operate together to bind Indian authorities, offering a principled and enforceable standard against which the FT system must be assessed.

Second, the report provides an unprecedented empirical account of how the FT system functions in practice. It draws on a detailed review of 1,193 Gauhati High Court orders (2009–2019), Supreme Court jurisprudence (2017–2024), and interviews with lawyers including nine in-depth case studies of FT cases (see Annexure). In doing so, it offers a grounded, granular understanding of how injustice is produced and reproduced across the FT process—from police referral and tribunal trial to judicial review.

Third, in doing so, this report presents the first sustained analysis of the Gauhati High Court's jurisprudence in FT matters. It argues that the High Court has not merely failed to correct procedural and evidentiary flaws but has actively entrenched them. Through inconsistent rulings, selective legal reasoning, and an overly restrictive approach to its constitutional role, the Court has normalised practices that turn minor documentary inconsistencies into pivotal determinants of citizenship status, ignore structural disadvantage, and downplay the devastating consequences of citizenship loss. By failing to articulate coherent legal standards or offering meaningful guidance to tribunals, the Court has allowed arbitrariness to flourish under the guise of legal neutrality.

Fourth, the report shifts the analytical lens from isolated institutional error to the FT regime as a legally sanctioned and judicially sustained system of exclusion. It situates the FTs within a broader ecosystem—including the police, the Home Department, the judiciary, and the legal frameworks of the Foreigners Act and the Citizenship Act. By tracing how these institutions interact, it demonstrates that procedural injustice is not accidental but structural. The rules, far from being random, function in systematic disregard of the lived realities, documents, cultures, and constraints of affected communities—and in doing so, punish individuals for being who they are. What emerges is not an arbitrary or chaotic process, but an exclusionary structure that operates with internal coherence and a deeply unequal logic.

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[21] For a representative sample of important work on this question, see Amnesty International India, 'Designed to Exclude: How India's Courts Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (2019) <https://www.amnesty.be/IMG/pdf/rapport_inde.pdf> accessed 24 June 2025; Talha Abdul Rahman, 'Identifying the "Outsider": An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2 The Statelessness & Citizenship Review 112; Fariya Yesmin, 'Beyond Papers: Understanding the Making of Citizenship in the Foreigners' Tribunals of Assam' (2024) 32 Contemporary South Asia 475; Sital Kalantry and Agnidipto Tarafder, 'Death by Paperwork: Determination of Citizenship and Detention of Alleged Foreigners in Assam' (2021) Cornell Legal Studies Research Paper; Padmini Baruah, '"The Right to Have Rights": Assam and the Legal Politics of Citizenship' (2020) 16 Socio-Legal Review 17; Siddhartha Deb, '"They Are Manufacturing Foreigners": How India Disenfranchises Muslims' The New York Times Magazine (15 September 2021) <https://www.nytimes.com/2021/09/15/magazine/india-assam-muslims.html> accessed 29 June 2025; Makepeace Sitlhou, 'Strangers in Their Own Land: Assam's Bengali-Origin Muslims Face Disenfranchisement and Indignity' [2022] The Baffler 26; Mohsin Alam Bhat, '(Un)Credible Citizen: Citizenship Dispossession, Documents and the Politics of the Rule of Law' (2024) 50 Journal of Ethnic and Migration Studies 4867; Rohini Mohan, '"Worse Than a Death Sentence": Inside India's Sham Trials That Could Strip Millions of Citizenship' VICE (29 July 2019) <https://www.vice.com/en/article/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship/> accessed 29 June 2025; Sagar, 'How Assam's Foreigners Tribunals, Aided by the High Court, Function like Kangaroo Courts and Persecute Its Minorities' (The Caravan, 6 November 2019) <https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities> accessed 15 January 2025.

[22] Sitlhou (n 21); Trisha Sabhapandit and Padmini Baruah, '"Untrustworthy and Unbelievable": Women and the Quest for Citizenship in Assam' (2021) 3 The Statelessness & Citizenship Review 236; Nazimuddin Siddique and Sujata Ramachandran, 'The Punitive Gap: NRC, Due Process and Denationalisation Politics in India's Assam' (2024) 12 Comparative Migration Studies 34.

[23] Kalantry and Tarafder (n 21) 20-22; Baruah (n 21) 25.

[24] Nargis Choudhury, 'Access to Justice for Women under Foreigner's Tribunal Act, 1946 in Assam' (Mahanirban Calcutta Research Group 2023) Policies and Practices 148 <http://www.mcrg.ac.in/PP148.pdf> accessed 24 June 2025; Sabhapandit and Baruah (n 22).

[25] Response by Minister of State for Home Affairs, Unstarred Question No 1724, Lok Sabha (2 July 2019); Response by Minister of State for Home Affairs, Unstarred Question No 3558, Lok Sabha (10 December 2019).

[26] Sagar (n 21); Amnesty International India (n 21).

The report's central claim is therefore stark: the FT system is not merely flawed—it is irreconcilable with the principles of constitutional democracy and the rule of law. Its procedural and doctrinal pathologies are too entrenched to be addressed through incremental reform or case-by-case judicial intervention. Only a fundamental rethinking of the legal and institutional frameworks governing citizenship determination can restore fairness, legality, and justice to the process.

By diagnosing the core failures of the FT regime—through legal critique, empirical evidence, and institutional analysis—this report seeks to contribute to that necessary transformation. At stake is not only the fate of millions in Assam but the integrity of India's constitutional order itself.

1.3 Political and Legal Historical Background

This report does not take a position on the contested historical facts or political claims regarding migration in Assam. The region's migration history remains deeply debated, and questions of scale, cause, and pattern persist in academic and public discourse. What this report asserts is that irrespective of one's historical perspective, it is the law—not sentiment, suspicion, or narrative—that must govern citizenship determination. Mechanisms designed to distinguish citizens from so-called foreigners must meet the highest standards of legality, accuracy, and fairness. The stakes could not be higher: wrongful denationalisation brings the gravest harms—statelessness, detention, deportation, and exclusion from civic life. As the Supreme Court held in *Rahim Ali*, such "life-altering" consequences demand the strictest procedural safeguards.[27]

The longer arc of India's citizenship policy emerged out of the country's partition in 1947, leading to the creation of Pakistan on the eastern and western borders. The current legal architecture in Assam was influenced by subsequent developments, arguably most by the Assam agitation (1979–1985). This agitation, led by Assamese-speaking communities in the state, was catalysed by migration—initially flows of people fleeing the atrocities during Bangladesh's War of Independence—and long-standing anti-immigrant sentiment, especially against Bengali-speaking or Bengali-origin Hindus and Muslims. Although Assam is socially diverse, with indigenous communities (including Adivasi, Boro, Karbi, Mising, and other indigenous "Scheduled Tribes"), Assamese Hindus, Bengali speakers, and Muslims, the anti-immigrant discourse has often failed to distinguish between long standing residents and more recent arrivals. The 1985 Assam Accord responded to these anxieties by establishing 24 March 1971 (the date of the creation of Bangladesh) as the cut-off for citizenship for migrants, and enacting Section 6A of the Citizenship Act, 1955. This amendment created a special regime for Assam—supplementing the national framework (citizenship by birth under s. 3, descent under s. 4, registration under s. 5, and naturalisation under s. 6)—through a three-tier system: pre-1966 entrants are deemed citizens; those who entered between 1966 and March 1971 must register and wait ten years for full rights; post-1971 entrants are labelled foreigners.[28]

This evidentiary regime hinges on proving either one's own presence in Assam before 1971 or establishing ancestral presence through documentary linkage. Legacy documents—such as pre-1971 electoral rolls, and land records —have become central to citizenship claims. This burden has fallen disproportionately on Bengali-origin Muslims, many of whom are landless, displaced, and undereducated. In addition to legacy documents, individuals are also required to produce linkage documents—records that connect them to an ancestor with pre-1971 presence in India. These documents are often even more difficult to obtain, particularly when family names have changed through customary practice, or when records were never formally maintained by either the state or poor households. For individuals tracing their claims through ancestry, the evidentiary threshold becomes doubly demanding. These structural vulnerabilities have made it extraordinarily difficult for many to assemble the documentation required to prove citizenship.

Intermittent violence, stigma, and everyday exclusion has continued. The 2019 NRC exercise, involving applications from the 33 million residents of Assam, out of which 1.9 million—about 6% of the population—were eventually excluded.[29] Excluded persons had the right to challenge their exclusion before the FTs, further heightening the stakes in these bodies.[30] That same year, the Citizenship Amendment Act introduced a religious criterion for Indian citizenship by immunising non-Muslim immigrants from the "illegal migrant" label—a legislative change awaiting adjudication by the Supreme Court.[31]

Alongside the NRC, the Indian Election Commission's tagging of "Doubtful Voters" (D-voters) has exacerbated legal precarity. As of 2024, the Election Commission reportedly classified approximately 370,000 people as D-voters,[32] out of which over 51,500 have since been declared foreigners by the FTs, and cases involving 94,400 persons are pending before the FTs. D-voter status denies both the right to vote and legal security, and often leads to referrals to the FTs.

[27] *Rahim Ali* (n 2) [37].
[28] Citizenship Act 1955, s 6A.
[29] Helen Regan and Manveena Suri, '1.9 Million Excluded from Indian Citizenship List in Assam State' (CNN, 31 August 2019) <https://www.cnn.com/2019/08/30/asia/assam-national-register-india-intl-hnk> accessed 29 June 2025; Uma Menon, 'India's National Register of Citizens Threatens Mass Statelessness' (Princeton Journal of Public and International Affairs, 2 June 2023) <https://jpia.princeton.edu/news/indias-national-register-citizens-threatens-mass-statelessness> accessed 29 June 2025.
[30] Foreigners (Tribunals) Order 1964, para 2(1B).
[31] Citizenship (Amendment) Act 2019, s 2.
[32] Syeda Ambia Zahan, 'Assam: 22 Years on, RTI Finds Removes Doubts about 33 "D-Voters"' The Times of India (22 November 2019) <https://timesofindia.indiatimes.com/city/guwahati/22-years-on-rti-finds-removes-doubts-about-33-d-voters/articleshow/72174241.cms> accessed 29 June 2025.

D-Voter Reference Cases before the Foreigners Tribunals as of 31 December 2023

244,144	D-Voter Case References made to the Foreigners Tribunals
94,412	Pending D-Voter cases before the Foreigners Tribunals
149,732	D-voter cases Disposed by the Foreigners Tribunals
51,505	D-Voters Declared as Foreigners by the Foreigners Tribunals

These administrative measures are underpinned by profound uncertainty over numbers. In 2016, the Union Minister of State for Home Affairs claimed that there were approximately 20 million Bangladeshi migrants in India. However, a 2018 Right to Information (RTI) response from the Ministry of Home Affairs confirmed that no such estimate exists. The central justification for mechanisms like the NRC and the FT process rests on the assumption that such methods provide legal clarity and administrative fairness. But, as this report argues, those systems must themselves be transparent, consistent, and procedurally just. Otherwise, they risk transforming unverified claims into instruments of exclusion. This concern is particularly acute in light of what the Supreme Court observed in *Rahim Ali*: that deprivation of citizenship has "penal" consequences. Even if proceedings before the FTs are not formally classified as criminal, the severity of the outcomes demands that the standards of adjudication meet the highest threshold of fairness.

Therefore, this report proceeds from the conviction that any system capable of stripping citizenship, detaining individuals, or creating statelessness must meet the highest legal, constitutional, and human rights standards. Migration management and border control cannot be pursued through mechanisms that violate fundamental rights or due process. Assam's current regime—shaped by contested history, legal ambiguity, and administrative discretion—creates a machinery of exclusion that fails legal and constitutional tests.

1.4 The Foreigners Tribunals

The centrality of documentary evidence in Assam's citizenship regime stems from a broader legal architecture built on control. At the heart of this structure lies the Foreigners Act, 1946, a colonial-era statute that forms the legal foundation of the FT system. The escalation of global conflict saw the Foreigners Ordinance, 1939 enacted as a wartime emergency measure, which evolved into the Foreigners Act, 1940, and subsequently the Foreigners Act, 1946, post-World War II. The authoritarian logic embedded in that context continues to shape the Act's post-Independence form. It grants sweeping powers to the Central Government over individuals deemed "foreigners," without establishing clear procedural safeguards or offering substantive rights to the accused.

At its core, the Act confers upon the executive wide-ranging authority to regulate, restrict, detain, and deport any person who is not a citizen of India.[33] "Foreigner" itself is defined broadly and vaguely as anyone who is "not a citizen of India".[34] The statute delegates vast powers to the executive with minimal judicial oversight and no structured process or protections for those targeted. The result is a framework in which the legal status of individuals is determined through opaque administrative procedures—without a guaranteed right to be heard, without requirements of proportionality or reasoned justification, and without a right of appeal. The absence of codified standards places individuals at the mercy of executive discretion.

This legislative design raises serious constitutional concerns. Section 3(2)(g) of the Act, which authorises detention without a stated justification, was identified as incompatible with Articles 21 and 22 of the Constitution as early as the *Hans Muller of Nurenburg* case.[35] There, the then Attorney General, M.C. Setalvad, acknowledged that the provision became invalid after independence because of the Constitution's provisions on due process rights. Though Section 3(2)(g) was deleted in 1957,[36] it was reintroduced in 1962[37] under geopolitical pressures—revealing how national security imperatives have persistently overridden constitutional protections.

In Assam, this exclusionary framework was reinforced by the Immigrants (Expulsion from Assam) Act, 1950, which authorised the government to expel persons considered "detrimental to the interests of the general public of India."[38] With indemnity provisions shielding officials from accountability, the Act triggered a spike in deportations and drew diplomatic protest from Pakistan.[39]

To temper international criticism, the government introduced a judicial component in the form of the Foreigners (Tribunals) Order, 1964. Under this Order, the government could refer to the FT the question of whether a person is or is not a foreigner. The FT was required to serve on the person

[33] Foreigners Act 1946, s 3.
[34] ibid s 2(a).
[35] *Hans Muller of Nurenburg v. Superintendent, Presidency Jail* 1955 SCC OnLine SC 35.
[36] Foreigners Laws (Amendment) Act 1957, s 3.
[37] Foreigners Law (Application and Amendment) Act 1962, s 3.
[38] Immigrants (Expulsion from Assam) Act 1950, s 2.
[39] Dinesh Chandra Jha, 'Other Problems', *Indo-Pakistan Relations, 1960-1965* (Bharati Bhawan 1972) 274-279.

"the main grounds on which he is alleged to be a foreigner," and to offer "a reasonable opportunity of making a representation and producing evidence in support of his case." After hearing the person and considering the evidence, the FT would then "submit its opinion" to the government. Importantly, the Order stated that the FT may regulate its own procedure, and was not bound to observe the provisions of the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Being an executive order, the qualifications of FT members could be altered without legislative sanction. Moreover, the Foreigners Act, under Section 9, placed the burden of proof on the individual, reversing the ordinary presumption of citizenship. In effect, this gave the FT broad procedural latitude without binding legal standards—creating a quasi-judicial forum that exercised significant adjudicatory power, but without the institutional safeguards or accountability mechanisms of a court.

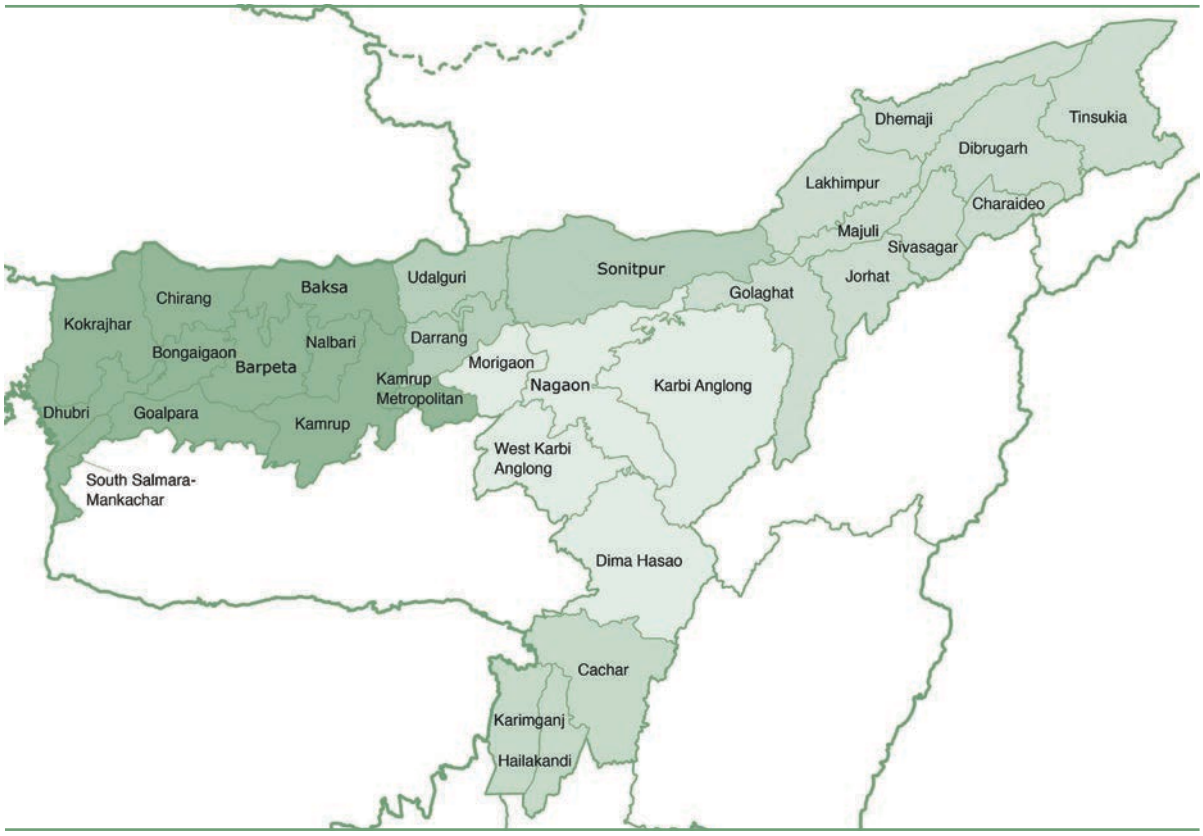
Concerns about the discriminatory use of these powers, particularly against minorities, led to the enactment of the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT Act), which sought to provide stronger procedural protections. Applicable only in Assam, the IMDT Act restored the burden of proof—requiring the complainant to establish a prima facie case—and permitted only residents within a 3-kilometre radius to lodge complaints. Complaints had to be vetted by a screening committee before reaching the Tribunal. In design, the IMDT Act attempted to prevent arbitrary accusations and to create a more rigorous basis for initiating citizenship challenges.

However, in *Sarbananda Sonowal v. Union of India*[40] (*"Sonowal I"*), the Supreme Court struck down the IMDT Act as unconstitutional. The Court held that its safeguards unduly favoured suspected "illegal migrants," impeding national security and violating the spirit of the Assam Accord. The Court described migration as an "unique type of bloodless aggression"[41] and endorsed the State's interest in identifying and removing illegal migrants over the rights of those accused. The effect of this decision was to transfer the task of citizenship determination to the FTs under the Foreigners Act, reinstating the reversed burden of proof and dissolving the procedural safeguards the IMDT had introduced. In *Sarbananda Sonowal v. Union of India*[42] ("*Sonowal II*"), the Court reaffirmed this orientation.[43]

[40] (2005) 5 SCC 665.
[41] ibid [56].
[42] (2007) 1 SCC 174.
[43] ibid [62].

There are currently 100 Foreigners Tribunals functioning in Assam.

After the repeal of the Illegal Migrants (Determination by Tribunals) Act, 1983 in 2005, the Government of Assam converted the existing **11 IMDT Tribunals into FTs**. **21 new FTs were established in the year 2005, followed by 4 FTs in 2009**. **In 2014, additional 64 FTs were set up to dispose of the pending cases in FTs.** Out of the 100 Tribunals, 36 are permanent Tribunals, and the remaining 64 FTs require periodic extension of terms from the Ministry of Home Affairs, Government of India.



The FTs in Assam are spread across 28 districts of Assam. The districts of Jorhat, Sivasagar, Golaghat, Charaideo, and Majuli share the jurisdiction of a common FT at Jorhat, while Barpeta district has 11 FTs, the most for any single district.

There are three parallel mechanisms by which a case may be referred to the Foreigners Tribunals (FTs):

1. Enquiry Report by the Assam Border Police: Under the Foreigners (Tribunals) Order, 1964, if the Enquiry Officer from the Assam Border Police Organisation suspects a person to be a foreigner, an enquiry report is forwarded to the Superintendent of Police (Border), who then submits it to the Tribunal.
2. Classification as a Doubtful Voter (D-Voter): The Election Commission of India may classify an individual as a "D-voter" (Doubtful Voter) based on reports from a Local Verification Officer and the Electoral Registration Officer. This classification is based on an enquiry of the Local Verification Officer, who acts as the enquiring authority for this process. This classification is subsequently forwarded to the Superintendent of Police (Border), who then issues a reference to the Tribunal.
3. Transfer of Cases from the Illegal Migrants (Determination by Tribunals) Act, 1983: Cases previously registered under the Illegal Migrants (Determination by Tribunals) Act, 1983, which was struck down by the Supreme Court of India in *Sarbananda Sonowal v. Union of India* (2005) 5 SCC 665, are also transferred to the FTs.

Under Notification 1/1/64-(I)-F.III, the Superintendents of Police (Border) and the Deputy Commissioners within their jurisdictions are empowered to carry out functions of the Central Government under the Foreigners (Tribunals) Order, 1964. Consequently, the Assam Border Police Organisation serves as the "Competent Authority" responsible for conducting enquiries and forwarding references to the FTs.

The jurisprudence of the Gauhati High Court has been central in operationalising and deepening this legal structure. In *Bahaluddin Sheikh v. Union of India*,[44] the High Court excluded ordinary civil court jurisdiction over citizenship determination, vesting exclusive authority in the FTs. The effect has been to elevate the importance of FTs— even though they are not courts and lack basic judicial safeguards. The High Court has also narrowed the scope of judicial review under Article 226 of the Indian Constitution, intervening only in limited procedural contexts and avoiding scrutiny of substantive questions. It has endorsed rigid evidentiary standards, dismissed oral testimony even from immediate kin, and deferred to executive and tribunal discretion. The result has been the consolidation of a jurisprudence that privileges form over substance and allows procedural irregularities to ossify into systemic norms.

Since then, both the Supreme Court and the High Court have attempted to introduce incremental reforms—some aimed at clarifying evidentiary burdens, others at reinforcing procedural fairness. This report engages with these reforms in detail. Perhaps, the optimistic view was that court-led reform would, over time, bring justice to the FT system and safeguard the constitutional and ethical gravity of citizenship. This report contends, however, that these reforms have neither succeeded nor are likely to succeed. Structural deficiencies—unbound discretion, reversed burdens, lack of binding procedures, and judicial inconsistency—remain deeply entrenched. They demand not patchwork correction but a fundamental rethinking of the legal and institutional framework.

[44] 2013 SCC OnLine Gau 108.

1.5 Structure of the Report

This report is organised into two main parts, each of which builds a cumulative argument about the fundamental legal, constitutional, and human rights deficiencies of the FT system in Assam, and the devastating consequences of these deficiencies for individuals and communities subjected to its processes. Part I, comprising Chapters 2 and 3, lays the normative, doctrinal, and legal foundation for the critique, while Part II, comprising Chapters 4 and 5, presents a granular empirical and procedural analysis of how these structural failures play out in practice, leading to profound injustice. Together, the chapters are tightly interlinked: the normative arguments of Part I not only frame the detailed empirical analysis of Part II, but also find confirmation in the evidence of systemic malfunction and harm documented therein.

Chapter 2 begins the analysis by demonstrating that the institutional design of the FT system violates both the Indian Constitution and India's international human rights obligations. It argues that the FTs are neither established by law nor structured to ensure the independence, impartiality, and competence that citizenship adjudication demands. Citizenship, as the report underscores, is the foundational political status upon which access to all other rights depends, and decisions affecting this status require the highest standards of legality, fairness, and integrity. Yet, the FTs lack a secure legislative foundation, operate under executive control, and are staffed by members who often do not have the requisite legal expertise or independence. This chapter shows that the FTs fail to meet the basic rule of law requirements under domestic and international law and that their operation represents a breach of the constitutional promise of equal protection, fair trial, and effective remedy. It further highlights that the post-*Sonowal* and *Bahaluddin* jurisprudence wrongly endorsed the FTs as exclusive forums for citizenship determination without addressing their structural illegitimacy, thereby enabling a legal architecture that facilitates arbitrary and discriminatory deprivation of citizenship.

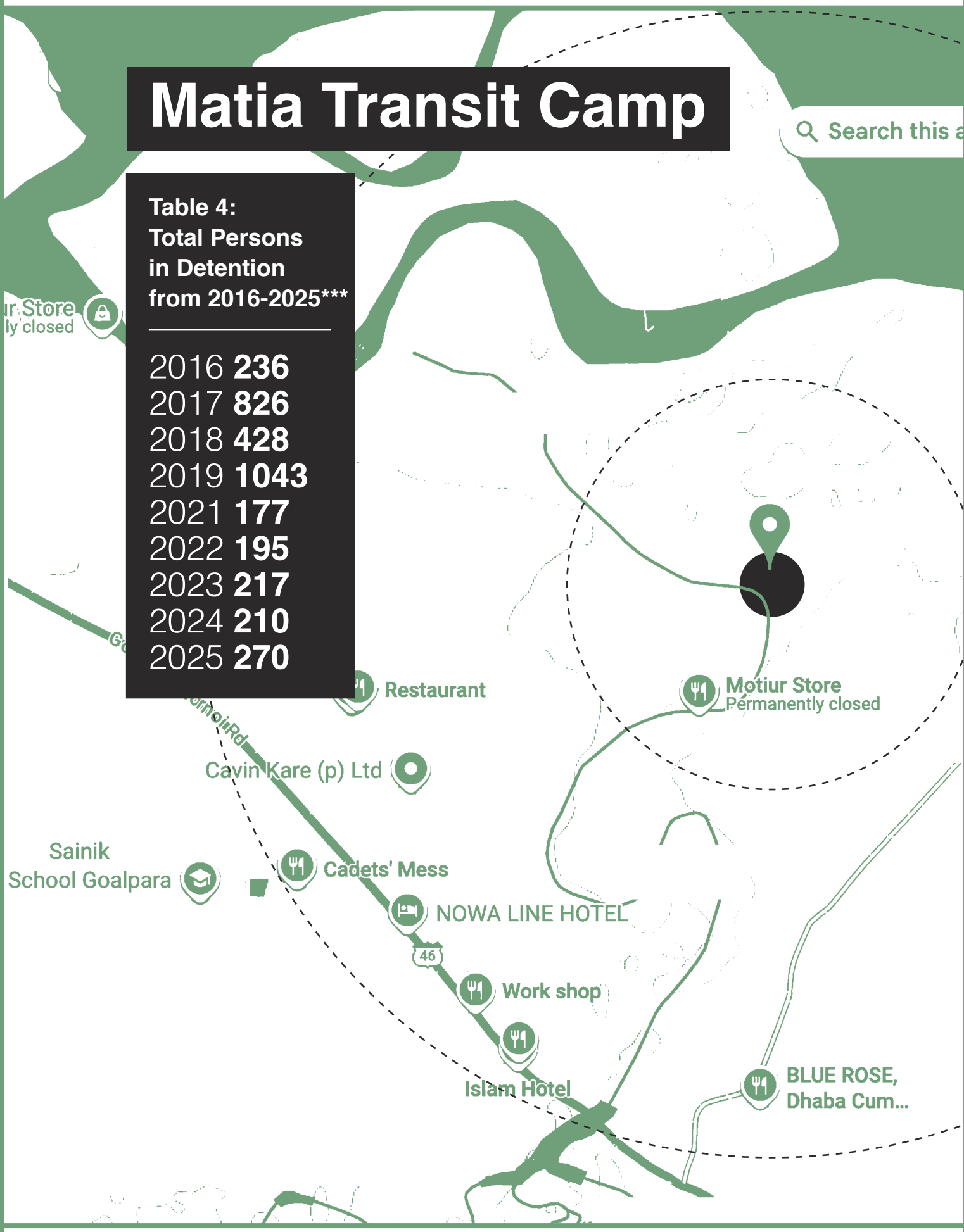
Chapter 3 extends this critique to the procedural domain. It argues that the FT system, in both its legal design and everyday practice, violates the right to a fair trial, particularly the principle of equality of arms. The chapter explains how the burden of proof, as misconstrued and implemented in the FT regime, places an almost insurmountable burden on defendants, while relieving the State of its responsibilities to establish a case or rebut evidence. It shows that the supposed safeguards envisioned by the judiciary—such as the phased burden shifting and meaningful State participation—have collapsed in practice, with the State often absent from proceedings, leaving FT members to assume improper roles as partisan inquisitors rather than neutral adjudicators. This chapter anchors its critique in both constitutional guarantees of fairness under Articles 14 and 21 and international fair trial standards, demonstrating that the procedural structure of the FTs is designed, and functions to the systemic disadvantage of those accused of being foreigners.

Part II turns to the detailed empirical and procedural examination of the FT system's operation, showing how the structural and normative failures identified in Part I manifest in the day-to-day working of the tribunals and their broader legal environment. Chapter 4 focuses on due process and natural justice at the granular level of the FT trial. It provides a systematic analysis of how procedural safeguards are flouted at every stage of the process—from pre-referral inquiry, to notice and hearing, to evidentiary assessment and decision writing. The chapter demonstrates that referral authorities often fail to conduct meaningful inquiries before making references; that FTs issue notices without adequate grounds or disclosure of materials; that defendants are routinely denied access to inquiry reports or the opportunity to cross-examine inquiry officers; and that decisions are made on the basis of arbitrary evidentiary standards and often in the absence of proper rebuttal from the State. This chapter powerfully shows how procedural violations are not isolated failings but are systemic, recurring across cases and undermining the integrity of the entire citizenship determination process.

Chapter 5 takes this analysis further by examining the role of the Gauhati High Court, which, in the absence of an appellate mechanism, is the primary forum for judicial review of FT decisions. The chapter argues that the High Court has failed to provide meaningful oversight or correction of the procedural and substantive deficiencies in the FT process. Instead, it has allowed vast areas of the law governing citizenship determination to remain undefined, has issued contradictory decisions, and has adopted an overly restrictive view of its own role under Article 226. By failing to develop coherent legal standards or enforce existing safeguards, the High Court has not only failed to check the excesses of the FTs, but has actively contributed to the creation of a legal vacuum where arbitrary and inconsistent adjudication flourishes. This chapter demonstrates that the FT system's failures cannot be ascribed solely to the tribunals themselves, but are a product of the broader legal and judicial architecture that has abdicated its responsibility to uphold constitutional values and protect fundamental rights.

Across both parts of the report, the argument is clear and consistent: the FT system is not merely flawed in its details, but is constitutionally and legally unsustainable in its design, operation, and supervision. The chapters work together to show that the structural illegitimacy of the FTs (Chapter 2) and the procedural unfairness of their processes (Chapter 3) find their empirical confirmation in the everyday realities of citizenship trials (Chapter 4) and the failure of judicial correction (Chapter 5). The report, as a whole, argues that unless these foundational defects are addressed—through statutory reform, institutional redesign, and a reinvigoration of judicial responsibility—the FT regime will continue to produce injustice on a massive scale, particularly against already marginalised and precarious communities. The stakes, as the report makes plain, are not merely technical or procedural, but are profoundly social and political: they concern the right to belong, the security of citizenship, and the integrity of India's constitutional democracy.


Lhasa
BHUTAN
Tezpur
Bongaigaon
Barpeta
Matia Camp
Guwahati
BANGLADESH
MYANMAR


Matia Transit Camp
Table 4:
Total Persons
in Detention
from 2016-2025***
2016 236
2017 826
2018 428
2019 1043
2021 177
2022 195
2023 217
2024 210
2025 270
Search this a
Restaurant
Motiur Store
Permanently closed
Cavin Kare (p) Ltd
Sainik
School Goalpara
Cadets' Mess
NOWA LINE HOTEL
46
Work shop
Islam Hotel
BLUE ROSE,
Dhaba Cum...

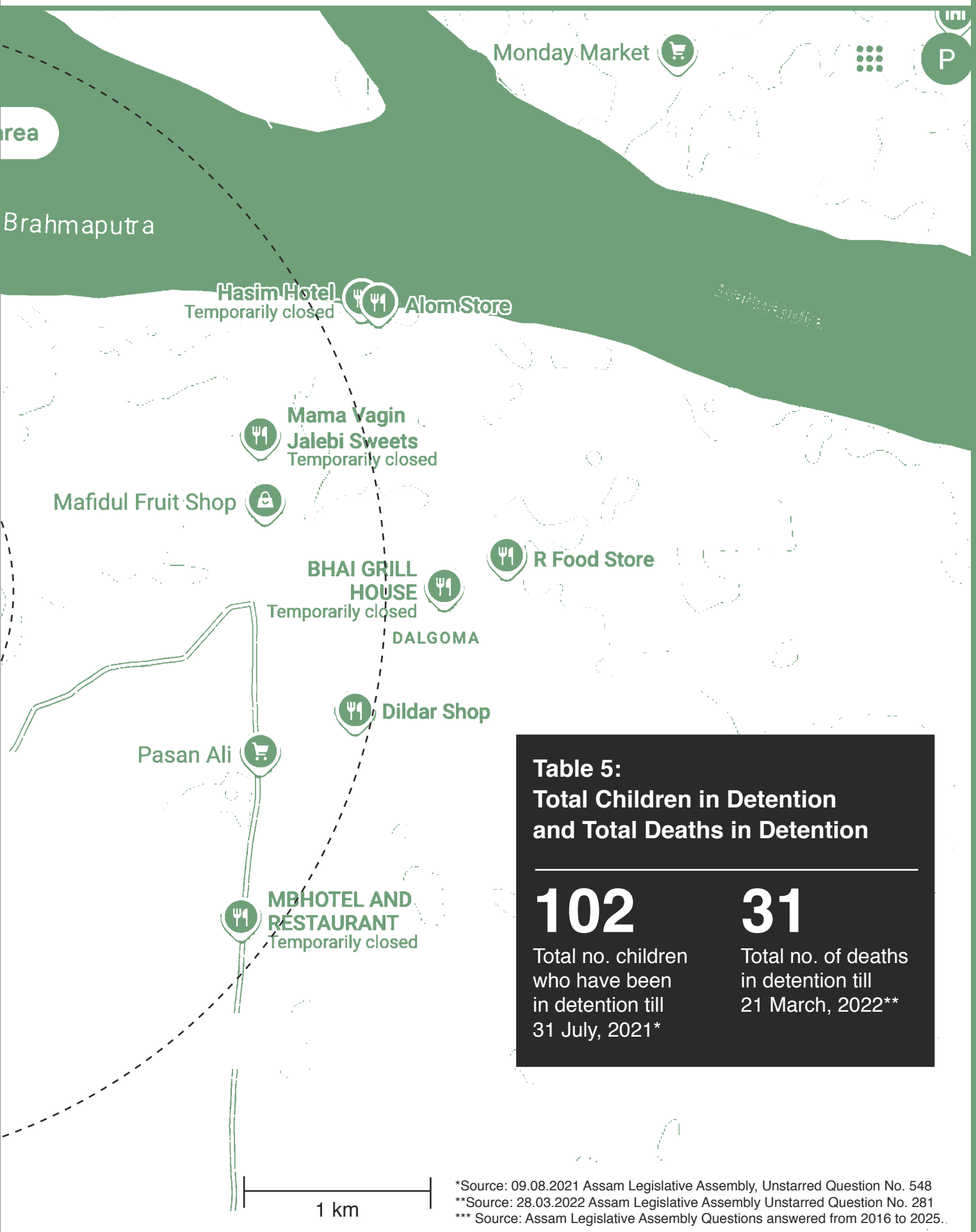


Table 5:
Total Children in Detention and Total Deaths in Detention

102	**31**
Total no. children who have been in detention till 31 July, 2021*	Total no. of deaths in detention till 21 March, 2022**

*Source: 09.08.2021 Assam Legislative Assembly, Unstarred Question No. 548
**Source: 28.03.2022 Assam Legislative Assembly Unstarred Question No. 281
*** Source: Assam Legislative Assembly Questions answered from 2016 to 2025.

2 Institutionalised Arbitrariness: Violating the Rule of Law and the Right to Effective Remedies

The institutional structure of the Foreigners Tribunals violates both the Indian Constitution and India's binding international human rights obligations. Citizenship adjudication engages constitutionally significant questions with profound consequences, including the risk of statelessness. Such determinations require bodies that are legally constituted, independent, impartial, and composed of competent legal officers. The FT system fails on all these counts: it lacks a secure legal foundation, is vulnerable to executive interference, and is staffed by inadequately qualified adjudicators. It thus stands in stark violation of the rule of law and the right to an effective remedy under both domestic and international law.

Introduction

Any serious legal evaluation of the structural (this chapter) and procedural operational (see Chapter 3) dimensions of the Foreigners Tribunals (FTs) must begin with a recognition of the constitutional and ethical gravity of the task these bodies are charged with.

In contemporary legal and political discourse, the status of citizenship holds a foundational place. Within India's constitutional scheme, citizenship is the central political status upon which access to many other rights depends. Its deprivation carries grave and far-reaching consequences. Unsurprisingly, the Supreme Court of India recently affirmed this in *Mohd. Rahim Ali v. State of Assam*,[45] observing that "[t]he consequences which would befall the person declared as a foreigner are no doubt penal and severe. The moment a person is declared to be a foreigner, he/she is liable to be detained and deported to the country of his/her origin."

This appreciation aligns with India's obligations under international human rights law. As a matter of customary international law, India is bound to uphold the right to nationality, which includes a corresponding duty not to arbitrarily deprive individuals of their nationality.[46] Embedded within this right is the requirement that citizenship adjudication be free from arbitrariness—procedurally, substantively, and institutionally. The processes and structures responsible for determining nationality must therefore conform to basic standards of fairness, legality, and institutional integrity.

[45] *Rahim Ali* (n 2) [45].
[46] Universal Declaration of Human Rights, art 15(2); Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 Refugee Survey Quarterly 93, 101.

2.1 The Principle of Legality

The foundational condition for the structural integrity of any institution adjudicating citizenship status is that it must be established by law. This principle is central to both constitutional and international human rights frameworks. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees that any person whose rights and obligations are being determined in a legal suit is entitled to a hearing by a court or tribunal established by law. General Comment No. 32 of the Human Rights Committee (HRC) clarifies that to qualify as a "tribunal" under Article 14, a body must not only be established by law but must also be independent of both the executive and legislative branches of government.[47]

This guarantee is not limited to the ICCPR. The right to be heard before a tribunal established by law is a fundamental, universally recognised principle reflected across major international human rights instruments. It serves as a crucial safeguard for judicial fairness, legal accountability, and the integrity of adjudicatory processes. This requirement is particularly vital where determinations involve fundamental rights—such as the right to nationality or citizenship—where errors or arbitrariness carry life-altering consequences, including detention, deportation, and the spectre of statelessness.

Although tribunals are typically embedded within the judiciary, exceptions exist. Specialised tribunals that lie outside the ordinary court system may nonetheless qualify as "tribunals" under Article 14 if they are legally constituted and exercise genuine judicial independence in deciding matters of a legal character.[48] What matters is not the label but the substance: the body must be created and empowered through law and must operate independently of executive direction.

Thus, the phrase "established by law" is not a mere formalistic or procedural requirement. It also embodies a substantive guarantee. It requires that the tribunal be grounded in a legal framework that meaningfully constrains executive interference and prevents arbitrary decision-making. A facade of legality will not suffice. Rather, there must be a clear and stable legal foundation that secures the tribunal's existence and functioning. In this sense, legal establishment implies insulation from discretion and arbitrary creation by the executive branch.[49] The judicial function—independent adjudication of rights—is what defines a body as a "tribunal" under international standards.

This understanding has been affirmed in various international fora. The International Criminal Tribunal for the former Yugoslavia (ICTY), in *Prosecutor v Tadić*, held that the requirement of being "established by law" exists precisely to "ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather, they should be regulated by law emanating from

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47 Human Rights Committee (HRC) 'General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial' (23 August 2007) UN Doc CCPR/C/GC/32, para 18.

48 HRC 'Rameka et al. v. New Zealand' (15 December 2003) UN Doc CCPR/C/79/D/1090/2002, para 7.4; HRC 'Torres v. Finland' (5 April 1990) UN Doc CCPR/C/38/D/291/1988, para 7.2.

49 Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University Press 2021) 133.

Parliament."[50] The European Commission of Human Rights (ECtHR) has affirmed a similar view, underscoring that the legislative origin of such bodies is essential for ensuring their legitimacy.[51]

Further elaborating this principle, the UN Human Rights Committee has identified three essential features a norm must possess to qualify as "law": it must be (i) publicly accessible, (ii) sufficiently precise to allow individuals to regulate their conduct and to guide those enforcing it, and (iii) not confer unfettered discretion on the state.[52] These attributes ensure that "law" is not deployed as an instrument of executive will but remains a check on arbitrary power.

Another core dimension of the "established by law" requirement is its function as a check against the creation of *ad hoc* or exceptional tribunals. States are generally discouraged from establishing parallel structures outside the ordinary judicial system, especially when existing courts are capable of hearing the matters in question. Where special tribunals are established, they must be justified by objective and reasonable grounds.[53] As Clooney and Webb note, citing the Human Rights Committee, such bodies must not serve to displace the jurisdiction of ordinary courts arbitrarily.[54] They cite the Inter-American Court of Human Rights to caution against the use of special tribunals that do not follow established legal procedures, underscoring the risk of politically motivated or selective justice.

The global consensus across international human rights instruments affirms that the requirement that tribunals be "established by law" is essential to safeguarding judicial integrity and the rule of law. Especially in citizenship determinations—where individual rights and state power collide—adjudicatory bodies must not be created at the whim of the executive. They must be firmly grounded in law, meaningfully independent, and institutionally capable of delivering impartial and procedurally fair decisions.

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50 *Prosecutor v. Dusko Tadic* aka "*Dule*" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) 35 ILM 32 (1996) [43].

51 *Zand v. Austria* (ECommHR App 7360/76) (1977) 8 DR 167 [80]; *Crociani, Palmiotti, Tanassai, Lefebvre D'Ovidio v. Italy* (ECommHR App 8603/79, 8722/79, 8723/79, 8729/79) (1980) 22 DR 192 [219].

52 HRC 'General Comment No. 34, Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34, para 25; HRC 'General comment No. 37 (2020) on the right of peaceful assembly (article 21)' (17 September 2020) UN Doc CCPR/C/GC/37, para 44; HRC 'General Comment No. 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)' (8 April 1988) UN Doc HRI/GEN/1/Rev.9 (Vol 1) 181, paras 3, 8; HRC 'Kirill Nepomnyashchiy v. Russian Federation' (23 August 2018) UN Doc CCPR/C/123/D/2318/2013, para 7.7.

53 HRC 'General Comment No. 32 (n 47); Clooney and Webb (n 49) 133.

54 *Apitz Barbera et al. (First Court of Administrative Disputes) v. Venezuela*, Inter-American Court of Human Rights Series C No 52 (30 May 1999) [129].

2.2 Missing Legal Foundations

The FTs in Assam lack the legal foundations required by the principle of legality outlined above. Their origins, institutional structure, and subsequent judicial validation fall short of the substantive and procedural guarantees expected under both constitutional and international human rights standards.

The FTs were established by executive order under Section 3 of the Foreigners Act, 1946—as an administrative framework[55] aimed at identifying and deporting so-called "infiltrators" from Pakistan.[56] Their creation was prompted in part by diplomatic objections from the Pakistani government regarding the existing process of identifying undocumented migrants,[57] which had previously allowed the police to determine an individual's citizenship status.[58] To mitigate the risk of error and potential harassment of genuine citizens, the FTs were introduced as a mechanism involving persons with judicial experience.[59] A Press Note issued by the Government of Assam on 27 July 1965 stated that the FTs were intended to include a basic form of due process to protect Indian citizens.[60] Soon after, the Foreigners' (Tribunals) Order, 1964 ("FT Order") was issued under the Foreigners Act, formally establishing the FT framework. Paragraph 2 of the FT Order provides that the Central Government may refer the question of whether a person is a foreigner or not to a tribunal for its opinion.[61]

From the outset, the FTs were conceived not as judicial bodies, but as administrative mechanisms designed to support executive decision-making. They were to render non-binding "opinions" on questions of nationality when referred to them by the Central Government. Importantly, the 1965 Press Note made clear that individuals dissatisfied with an FT's decision could seek relief before civil courts.[62] Indeed, during this period, civil suits for citizenship declarations continued to be entertained in ordinary courts,[63] confirming the FTs' ancillary and non-exclusive role.

The first effort to fully displace civil courts in adjudicating citizenship came with the Illegal Migrants (Determination by Tribunal) Act, 1983 ("IMDT Act"), which applied to persons alleged to have entered Assam illegally after 25 March 1971. The IMDT Act provided a statutory basis for the establishment of specialised tribunals, deemed judicial proceedings under Indian law.[64] These tribunals were procedurally robust, staffed by judicial officers, and supported by an appellate mechanism,[65] features that provided a degree of legal protection to individuals at risk of deportation.[66] In this period, IMDT

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[55] Jha (n 39) 279.
[56] Statement by the Minister of State for Home Affairs, Debate on Illegal Entry of Pakistanis, Lok Sabha (4 March 1964).
[57] Jha (n 39) 274-279; Statement by the Prime Minister, Debate on Pakistani Infiltration, Lok Sabha (16 December 1963) col 4789; Statement bythe Minister of State for Home Affairs, Debate on Pakistani Infiltration (23 September 1964) col 3224.
[58] Statement by the Prime Minister (n 57).
[59] Government of Assam, 'White Paper on Foreigners' Issue' (20 October 2012), paras 1.5.1, 1.5.2, 1.5.3; Statement by the Minister of Home Affairs, Debate on Indo-Pakistan Home Ministers' Conference, Lok Sabha (13 April 1964) col 10703, col 10747.
[60] Government of Assam, 'Press Note on infiltration and deportation of Pakistanis' (27 July 1965); Statement of Shri Harish Chandra Mathur, Debate on Demand No. 128 – Capital Outlay of the Ministry of Home Affairs, Lok Sabha (13 April 1964) col 10748.
[61] Foreigners (Tribunals) Order 1964, para 2.
[62] Government of Assam, 'Press Note on infiltration and deportation of Pakistanis (n 60); Statement by the Minister of Home Affairs, Debate on Demands for Grants, Lok Sabha (15 April 1964) col 11319.
[63] *Union of India v. Ghaus Mohd.* 1961 SCC OnLine SC 2; *Abdur Rahim v. Union of India* 1991 SCC OnLine Gau 106; *The Superintendent Of Police, Cachar v. Abdul Rashid* 1979 SCC OnLine Gau 23; *Bahaluddin Sheikh* (n 44).
[64] Illegal Migrants (Determination by Tribunals) Act 1983, s 19.
[65] ibid ss 5, 6, 7, 20.
[66] ibid ss 14, 15.

tribunals and the FTs coexisted.[67] IMDT tribunals functioned as the exclusive judicial forum for citizenship disputes in Assam, while the FTs remained administrative bodies supporting decision making when people were suspected of entering Assam between 1966 and 1971.[68]

This distinction was elided—but not resolved—by the Supreme Court's judgment in *Sonowal I*, which struck down the IMDT Act and transferred all pending cases to the FTs. The Court did not require any structural changes to the FTs, thereby vesting them with a jurisdiction formerly exercised by statutorily constituted judicial bodies, without modifying their administrative design or enhancing their procedural safeguards.

This elision was compounded by the Gauhati High Court's decision in *Bahaluddin Sheikh v. Union of India & Ors* (2013),[69] which held that following *Sonowal I*, the FTs enjoyed exclusive jurisdiction over citizenship determination in Assam.[70] The Court declared that civil courts were barred from entertaining suits on this matter, reasoning that the relevant statutes—namely the Foreigners Act and the Citizenship Act—contained "inbuilt" provisions delegating this authority to the FTs and the Central Government.[71]

This reasoning is flawed on multiple grounds.

First, it misrepresents the implications of *Sonowal I*. The controversy surrounding the IMDT Act arose not because civil courts enjoyed concurrent jurisdiction, but because the IMDT framework was seen as too protective of alleged migrants. By directing that pending IMDT cases be transferred to FTs, the Supreme Court did not endorse the FTs' structural legitimacy or judicial capacity. It simply filled the vacuum left by the Act's invalidation, without attending to the lack of statutory authority underpinning the FTs.

Second, the Gauhati High Court failed to apply the established test for ousting civil courts' jurisdiction under Section 9 of the Code of Civil Procedure (CPC).[72] As clarified by the Supreme Court,[73] civil courts' jurisdiction can only be excluded where there is a clear statutory provision to that effect or where an alternative remedy is so comprehensive that it implicitly bars recourse to ordinary courts. On this test, the FT Order fails. It does not explicitly exclude civil court jurisdiction, nor create a special statutory right or judicial remedies comparable to those offered by civil courts. The FTs were never intended to function as fully-fledged adjudicatory forums with binding authority and appeal

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[67] Government of Assam, 'White Paper on Foreigners' Issue' (n 59); Foreigner's Tribunals co-existed with IM(D)Ts with the signing of the Assam Accord. While IM(D)Ts took up cases of suspected foreigners of the post March 25th 1971 stream, the existing Foreigners Tribunals were entrusted with the responsibility of disposing of cases pertaining to pre-March 25th 1971 stream of suspected foreigners.

[68] The only set of cases in which the FT determinations were treated as legally binding were under Section 6A of the Citizenship Act. Section 6A(1)(b) defines "detected to be a foreigner" to mean detection by the Tribunals constituted under the Foreigners (Tribunals) Order, 1964. Section 6A(3) provides for registration of "persons of Indian Origin" under certain conditions: (a) if they came to Assam from the "specified territory" between 01.01.1966 and 25.03.1971, (b) if they have been ordinarily resident in Assam since the date of their entry, and (c) if they have been detected to be foreigners. As per the Explanation to Section 6A(3), the opinion of the FT is deemed to be sufficient proof of these requirements for the purpose of such registration only.

[69] 2013 SCC OnLine Gau 108.

[70] ibid [57-59].

[71] ibid [38].

[72] Section 9 of the CPC provides: "Courts to try all civil suits unless barred: The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

[73] *Dhulabhai v. The State of Madhya Pradesh* AIR 1969 SC 78 [9].

mechanisms. Their decisions are styled as "opinions," they lack statutory procedural codes, and their members do not enjoy independence and are under executive control. There is no legislative scheme that replicates the essential functions of civil courts, nor one that provides an adequate remedy for the rights at stake. As such, the claim that civil court jurisdiction has been ousted—explicitly or implicitly—is unsustainable under Indian law.

The missing legal foundations of the FTs are further established by the FT Order not meeting the domestic standards of legality. This is underscored by the Supreme Court's ruling in *A.P.D. Jain Pathshala v. Shivaji Bhagwat More*.[74] In that case, the Supreme Court struck down an attempt by the Maharashtra State Government to convert an advisory grievance redressal committee into a quasi-judicial tribunal through executive fiat. The committee, intended to handle disputes arising from the Shikshan Sevak Scheme, was declared *ultra vires* because it lacked a statutory foundation. The Court held that tribunals exercising judicial or quasi-judicial power must be created by legislation, and that their establishment cannot be left to executive discretion. It further asserted that "creation, continuance or existence of a judicial authority in a democracy must not depend on the discretion of the executive but should be governed and regulated by appropriate law enacted by a legislature."[75] The Court warned that allowing tribunals to be created by executive order alone, without statutory backing, could result in tribunals without clear regulations governing their constitution, functions, powers, appeals, and enforceability of orders—leading to "chaos and confusion."[76] Crucially, it ruled that neither high courts nor governments can, through judicial orders or administrative notifications, confer exclusive jurisdiction on such bodies.

The Supreme Court, thus, stressed that tribunals must be backed by a clear legal regime specifying their constitution, powers, procedures, and the enforceability of their decisions. Without this framework, such bodies cannot enjoy the independence necessary for judicial functions. The Court warned that allowing tribunals to emerge from executive orders alone would lead to "chaos and confusion." [77]

These constitutional principles were plainly disregarded in *Bahaluddin Sheikh*, where the Gauhati High Court effectively converted the FTs into exclusive judicial forums without requiring any legislative mandate. In doing so, it bypassed the fundamental requirement that quasi-judicial bodies derive their legitimacy from statute, not administrative convenience or judicial assumption. Given that FTs have been created through an executive order, they clearly do not satisfy the requirement of being established by legislation.

In summary, the Foreigners Tribunals' origins in an executive order, their structural design as administrative bodies, and the absence of any enabling legislation undermine their claim to be "tribunals established by law." The post-*Sonowal* jurisprudence, particularly *Bahaluddin Sheikh*,

[74] (2011) 13 SCC 99.
[75] ibid [24].
[76] ibid [27].

attempts to construct a judicial role for FTs without the statutory foundation required under Indian constitutional doctrine and international human rights law.

2.3 Missing Legal Oversight

The FTs are also incompatible with the requirement of legal oversight and statutory clarity. The principle that tribunals must be "established by law" is designed to safeguard against arbitrary executive discretion and to ensure the independence, impartiality, and competence of adjudicatory bodies. It also requires that such tribunals operate within a publicly accessible and clearly prescribed legal framework—one that guarantees procedural consistency, fairness, and legitimacy.

This requirement entails more than merely having procedurally sound mechanisms for tribunal creation. It demands a broader legal architecture: one that includes clearly defined adjudicatory procedures, oversight mechanisms, and meaningful rights of appeal. In the case of the FTs, such a framework is conspicuously absent.

The principle of legal oversight resonates with the right to an effective remedy under international human rights law—particularly Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), which is legally binding on India. This provision requires state parties to ensure that remedies for human rights violations are competent, independent, and effective. While these may be administered through judicial, administrative, or legislative authorities, the ICCPR places clear emphasis on judicial mechanisms to uphold due process. Article 2(3) calls for remedies to be determined by "competent" authorities and urges States to "develop the possibilities of judicial remedy"—highlighting that judicial oversight is paramount, particularly where administrative remedies fail to ensure impartiality.

The drafting history of Article 2(3) further underscores this emphasis. While some states preferred flexible approaches, others insisted on judicial safeguards. The eventual compromise struck a balance—allowing administrative mechanisms but insisting that executive authorities not serve as sole arbiters, and that judicial mechanisms be prioritised where necessary.

The Human Rights Committee (HRC) has reinforced this interpretation through its jurisprudence and General Comments. In *Poma Poma v. Peru*,[78] the HRC found a violation of Article 2(3)(a) when the State, acting as both judge and party, prevented judicial proceedings from being initiated. The HRC affirmed that only judicial remedies can uphold the objectivity and independence necessary for fair adjudication. General Comment No. 31 goes further, stating that judicial bodies are central to ensuring effective remedies, particularly in addressing serious human rights violations.[79] While

[77] ibid [27].
[78] HRC 'Poma Poma v. Peru' (27 March 2009) UN Doc CCPR/C/95/D/1457/2006.
[79] HRC, 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 15.

administrative mechanisms may be permitted in certain cases, they must be impartial, adequately resourced, and vested with sufficient legal authority—including the power to impose proportionate sanctions.

The HRC has consistently held that administrative remedies are inadequate for addressing grave violations such as the right to life or the prohibition of torture. The same logic applies to the right to nationality, which is often a precondition for accessing all other rights. In *Bautista de Arellana v. Colombia*,[80] the Committee explicitly held that administrative remedies cannot effectively redress violations of this magnitude.

This position is echoed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation, which advocate for judicial remedies in cases of gross human rights violations and emphasise the need for independent adjudication to ensure justice.[81]

Regional human rights systems also stress the necessity of judicial safeguards. In *Chahal v. United Kingdom*,[82] the European Court of Human Rights (ECtHR) held that the lack of judicial review in deportation proceedings violated Article 13 of the European Convention of Human Rights. The Court was especially critical of the advisory panel system used by the United Kingdom, which denied individuals access to legal representation, failed to disclose the basis for deportation, and did not bind the Home Secretary. The Court held that an effective remedy is secured only when the body reviewing decisions of the executive meets high standards of independence, impartiality, and procedural fairness.

The African Court on Human and Peoples' Rights reached similar conclusions in *Anudo v. Tanzania*,[83] where it found that Tanzania's citizenship law violated the right to an effective remedy due to the absence of judicial review in nationality deprivation cases. The Court warned that executive discretion, unchecked by judicial oversight, exposed individuals to arbitrary treatment. Similarly, the Inter-American Commission on Human Rights has consistently emphasised the importance of fair, impartial, and judicially reviewable processes in nationality cases.[84]

The United Nations Secretary-General has also underscored the importance of judicial review in nationality matters.[85] He has warned that leaving such determinations solely to the executive raises serious due process concerns, making individuals vulnerable to arbitrary deprivation of nationality, detention, or deportation. He has specifically called for effective remedies to be available in all nationality-related decisions—remedies that must be accessible, impartial, and subject to independent review.

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[80] HRC, 'Bautista de Arellana v. Colombia' (27 October 1995) UN Doc CCPR/C/55/D/563/1993, para 8.2.
[81] UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147, paras 12, 23.
[82] *Chahal v. United Kingdom* (1996) 23 EHRR 413.
[83] *Anudo v. United Republic of Tanzania* (Application No. 012/2015) [2021] AfCHPR 2.
[84] *Case of the Yean and Bosico Children v. The Dominican Republic*, Judgment, Inter-American Court of Human Rights (IACrtHR), 8 September 2005, para 171; *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment, Inter-American Court of Human Rights (IACrtHR), 28 August 2014, para 356-358.
[85] HRC, 'Human rights and arbitrary deprivation of nationality', Report of the Secretary-General, A/HRC/25/28, para 31, 44.

Judicial oversight is particularly critical in the context of citizenship determination, where decisions have life-altering consequences. The right to nationality is a gateway right—its denial may lead to statelessness, prolonged detention, and exclusion from access to other fundamental rights. As emphasised in *Chahal*, the absence of judicial safeguards in such cases exposes individuals to severe risks, including torture or inhuman treatment. Citizenship determination procedures must therefore include judicial guarantees to ensure fairness, transparency, and accountability.

The Committee on Economic, Social and Cultural Rights (CESCR) has similarly affirmed the importance of judicial remedies in contexts where administrative processes alone render rights ineffective. It has identified judicial recourse as indispensable in cases of discrimination.[86] While administrative remedies may be acceptable in some contexts, they must meet strict criteria of accessibility, timeliness, and procedural fairness. Moreover, such mechanisms must include provision for judicial appeal wherever necessary. The burden lies on States to justify why judicial remedies are not appropriate—particularly in cases involving serious human rights concerns.

Taken together, these international norms clearly require that mechanisms adjudicating citizenship claims be subject to meaningful judicial oversight. Administrative bodies may play a role, but they must operate under conditions that replicate the procedural safeguards found in judicial forums.

Under international practice, administrative bodies handling citizenship in other jurisdictions are both established and regulated by law. In Canada, for instance, decisions on citizenship are made by administrative bodies under the Citizenship Act, 1985, within the Immigration, Refugees and Citizenship Canada (IRCC) framework.[87] These decisions follow clearly defined statutory criteria and are subject to judicial review by the Federal Court, embedding procedural fairness within a legislative regime.

In Kenya, under Article 21(1) of the Kenya Citizenship and Immigration Act, the Cabinet Secretary may revoke citizenship acquired by registration only on constitutionally prescribed grounds,[88] and only following a recommendation by the Citizenship Advisory Committee (CAC).[89] The law mandates that individuals be given written notice and an opportunity to respond before revocation,[90] thereby instituting procedural safeguards against arbitrary action. The requirement that the Cabinet Secretary act only on the CAC's recommendation[91] exemplifies the legal insulation of citizenship adjudication from unilateral executive discretion.

These examples demonstrate that administrative decision-making on citizenship, where permitted, is accompanied by statutory mandates, procedural checks, and the availability of appeal. Where

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[86] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, 2 July 2009, para 40.
[87] Department of Citizenship and Immigration Act, 1994, S.C. 1994, c. 31; Immigration, Refugees and Citizenship Department.
[88] Kenya Citizenship and Immigration Act 2011, s 21(1).
[89] ibid s 21(2).
[90] ibid s 21(3).
[91] ibid s 21(1).

executive discretion plays a role, it is constrained by law and subject to independent judicial review. Most legal systems, even where administrative stages exist, provide for a second-tier tribunal "established by law"—to uphold the principle of access to justice.

In the case of the FTs, these guarantees are wholly absent. As detailed further below, the FTs fail to meet the standard of judicial bodies. They are neither governed by statutory procedure nor provided with any legislative framework to regulate their operation. Their decisions are not subject to any formal appellate process. While judicial review is available in theory, as discussed later (see Chapter 5), this mechanism is inconsistent, limited, and often ineffective. Moreover, the FTs themselves remain structurally embedded within the executive apparatus. Their members are appointed and supervised by the executive; their procedures are not governed by law; and there is no independent oversight mechanism. This entanglement undermines any presumption of impartiality or legal accountability.

State Practice: Effective Remedy in Citizenship Revocation Cases

State practice across jurisdictions emphasize the importance of effective remedies in citizenship revocation cases, highlighting the role of judicial oversight or judicial guarantees in administrative processes:

African Practice	Countries like Gambia, Ghana, and South Africa ensure judicial recourse in nationality cases, while others, including Comoros and Mozambique, provide for appeals to courts against administrative decisions.[92]
Australia	Citizenship revocation decisions by the Minister are subject to review by the High Court or Federal Court under the Judiciary Act, 1903. Revocations based on terrorism or fraud must comply with procedural safeguards, including ensuring no resultant statelessness.[93]
Canada	Citizenship revocation due to fraud requires judicial involvement. The Federal Court oversees revocation cases, ensuring procedural fairness, including oral hearings, impartial decision-makers, and an opportunity to present and challenge evidence.[94]
Dominican Republic	Nationality decisions are contestable in regular civil courts. The Inter-American Commission has critiqued inadequate due process in cases involving Dominicans of Haitian descent, highlighting the need for fair trials and effective judicial mechanisms.[95]
Ecuador	Judicial review is mandatory for nationality withdrawal. The Constitutional Court has upheld due process requirements, emphasizing public hearings and state accountability in administrative processes.[96]
France	Denial of nationality certificates by the Chief Clerk can be appealed before a judicial tribunal, ensuring applicants understand the grounds for denial and available remedies.[97]
Germany	Administrative decisions on nationality are binding but subject to appeal in administrative courts, which operate under fairness safeguards, such as access to evidence and reasoned judgments.[98]
Ireland	Citizenship revocation involves written notice, hearings before a Committee of Inquiry, and judicial procedures, including evidence submission and witness examination.[99]
Kenya	Citizenship revocation decisions by the Cabinet Secretary must include written, reasoned notice and allow for contestation. Appeals are permitted to the High Court.[100]
United Kingdom	Revocation decisions by the Home Secretary can be challenged before the First-tier Tribunal or the Special Immigration Appeals Commission (SIAC), with subsequent appeals to regular courts.[101] SIAC panels include judicial and security-cleared experts.
United States	Revocation of naturalized citizenship is adjudicated by regular civil or criminal courts, ensuring judicial oversight and adherence to procedural safeguards.
Zambia	Determination of nationality for children involves judicial proceedings in the Children's Court, underscoring the role of judicial processes even in age and parentage disputes.[102]

These examples confirm that effective remedies in citizenship cases must involve either judicial review or administrative processes incorporating robust judicial guarantees, such as impartiality, fairness, and access to appeal. Judicial safeguards are crucial where the right to nationality is at stake, given its profound implications for other human rights.

92 Bronwen Manby, Citizenship Law in Africa: A Comparative Study (1st edn, African Minds 2010) 9; Bronwen Manby, 'Citizenship and Statelessness in the Member States of the Southern African Development Community' (UNHCR 2020).
93 Judiciary Act 1903 (UK), s 39B. See also s 36K: If a court finds that the event which is the basis of citizenship cessation did not occur, the determination of cessation is revoked.
94 Citizenship Act 1985 (Canada) s 10.7.
95 *Case of Expelled Dominicans and Haitians v. Dominican Republic* Inter-American Court of Human Rights Series C No 282 (28 August 2014).
96 Judgment No. 335-13-JP/20 12 August 2020 (Constitutional Court of Ecuador).
97 H Flavier and Ch Froger, 'Administrative Justice in France. Between Singularity and Classicism' (2016) 3 BRICS Law Journal 80, 86.
98 Chapter 6 of the Code of Administrative Court Procedure (VwGO) entitles persons to challenge administrative decisions, including those relating to citizenship, in an administrative court. See also Administrative Court Regulations (VwGO) 1960.
99 *Ali Charaf Damache v. Minister for Justice* [2020] IESC 63 (Supreme Court of Ireland).
100 Kenya Citizenship and Immigration Act 2011, s 21(1).
101 The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (UK); Special Immigration Appeals Commission (Procedure) Rules 2003 (UK).
102 Bronwen Manby, 'Citizenship and Statelessness in the Member States of the Southern African Development Community' (n 92) 21.

2.4 The Rule of Law Norms of Institutional Integrity

Although the FTs are *sui generis* in their legal evolution, this singularity does not exempt them from constitutional scrutiny. On the contrary, when such bodies are tasked with adjudicating core constitutional values and rights like citizenship, their structure and functioning must adhere to foundational constitutional principles.

Following the Gauhati High Court's ruling in *Bahaluddin*, the Foreigners Tribunals in Assam act as substitutes for ordinary courts in citizenship cases, yet lack the institutional integrity such a role requires. When bodies charged with decisions as grave as citizenship are neither constituted by law nor equipped with the independence and competence of proper courts, they do more than breach constitutional norms—they erode the core of the rule of law.

Domestic legal norms, particularly those flowing from the Indian Constitution's commitment to the rule of law, impose stringent requirements on any adjudicatory forum exercising judicial power, especially one that displaces the ordinary judiciary. These requirements—of independence, impartiality, and competence—are part of the basic structure of the Constitution and therefore non-derogable, even by legislative action.

The Indian Supreme Court has repeatedly affirmed that the rule of law is a constitutional constraint that governs how tribunals may be established and function. In *Union of India v. Madras Bar Assn.* (2010) ("*MBA I*"),[103] the Supreme Court explicitly held that "independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the Rule of Law."[104] It elaborated that,

> "Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the Executive."[105]

Equally crucial, the Supreme Court held, is that the principle of equality before the law—which animates Article 14 of the Constitution—can only be realised when individuals have access to an independent forum capable of impartially adjudicating their rights. The Court noted that,

> "[T]he fundamental right to equality before law and equal protection of laws guaranteed by Article 14… includes a right to have the person's rights adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognized principles of adjudication."[106]

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[103] (2010) 11 SCC 1.
[104] ibid [40].
[105] ibid [40].
[106] ibid [40].

This right to adjudication by an independent forum becomes even more critical when the tribunal in question replaces a court. The Supreme Court in *MBA I* made clear that any legislative move to alter, abridge, or substitute access to courts must be tested against the requirement that the new forum possess institutional integrity. In its words: "If Tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such Tribunals should possess the independence, security and capacity associated with courts."[107]

The principle here is straightforward: if a tribunal is to be clothed with judicial power, particularly in place of ordinary courts, it must mirror those courts in their structure, safeguards, and independence. It is not enough for a tribunal to be formally constituted—it must be functionally and institutionally equivalent to the court it replaces.

This principle of institutional equivalence has been elaborated in subsequent jurisprudence. In *Madras Bar Assn. v. Union of India* (2014) ("*MBA II*"),[108] the Supreme Court insisted that "while constituting the analogous court/tribunal, it will have to be ensured, that the appointment and security of tenure of judges of that court would be the same, as of the court sought to be substituted."[109] Not only must judges have equivalent status, the Court held, but "all conventions/customs/practices of the court sought to be replaced, have to be incorporated in the court/tribunal created."[110]

In *Rojer Mathew v. South Indian Bank Ltd.* (2019), the Court reiterated what it called a "well-established principle": wherever Parliament transfers jurisdiction from traditional courts to tribunals, "the qualification and acumen of the Members in such tribunal must be commensurate with that of the court from which the adjudicatory function is transferred."[111] It further stated that "a Tribunal to have the character of a quasi-judicial body and a legitimate replacement of courts, must essentially possess a dominant judicial character through their members/Presiding Officers… knowledge, training and experience of members/Presiding Officers of a Tribunal must mirror, as far as possible, that of the Court which it seeks to substitute."[112]

In all of these formulations, the constitutional benchmark remains the same: when tribunals are given powers formerly exercised by courts, they must match the courts in terms of independence, capacity, and procedural safeguards. The courts, in other words, are the reference point. As *MBA I* makes explicit, "only if continued judicial independence is assured, tribunals can discharge judicial functions… It is fundamental that the members of the tribunal shall be independent persons, not civil servants. They should resemble the courts and not bureaucratic Boards."[113] This is not simply a matter of form—it is a matter of constitutional substance. The Court concluded unequivocally: "There seems to be no doubt… that the Members of a court/tribunal to which adjudicatory functions are transferred must be manned by Judges/members whose stature and qualifications are commensurate to the court from which the adjudicatory process has been transferred."[114]

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[106] ibid [40].
[107] ibid [90].
[108] (2014) 10 SCC 1.
[109] ibid [113.2].
[110] ibid.
[111] *Rojer Mathew v. South Indian Bank Ltd.* (2020) 6 SCC 1 [159].
[112] ibid [161].
[113] *Madras Bar Assn.* (*MBA I*) (n 103) [64].
[114] ibid [128].

2.5 Compromised Independence

Measured against constitutional and international human rights standards, the FTs in Assam fail categorically to meet the requirement of judicial independence. These bodies are constituted not by legislation but by executive order; their members are often drawn not from the judicial ranks; and their procedures lack the safeguards, transparency, and guarantees of independence that are constitutionally required.

First coming to independence. The Human Rights Committee (HRC) has repeatedly emphasised that the right to be tried by an "independent and impartial tribunal established by law" under Article 14 of the ICCPR is an absolute right[115] and a "cardinal aspect of a fair trial."[116] These standards are reinforced in General Comment No. 32 and the jurisprudence of the HRC, as well as reports by the UN Special Rapporteur on the independence of judges and lawyers, which affirm that judicial independence and impartiality constitute "general principles of law recognised by civilised nations."[117]

Judicial independence requires that a tribunal be free from external influence and especially from other branches of government. The separation of powers demands clear boundaries between executive and adjudicatory functions. The HRC has recommended that judicial review and appointments be conducted by independent professional bodies, based on objective criteria and judicial competence, rather than political expediency.[118] The Indian Supreme Court has underscored the importance of shielding appointment and reappointment of tribunal members from executive involvement.[119] The HRC has also noted that lack of security of tenure undermines judicial independence,[120] and has expressly discouraged short, renewable appointments, as they create incentives for adjudicators to align with executive preferences to secure reappointment.[121] Moreover, it has warned against executive control over judicial removal,[122] stressing that disciplinary procedures must be governed by independent legal processes.[123] Likewise, the Indian Supreme Court disapproved of short tenures coupled with the possibility of suspension, citing the risk of tribunals functioning at the whims of the executive.[124]

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115 HRC 'Gonzalez del Rio v. Peru' (28 October 1992) UN Doc CCPR/C/46/D/263/1987, para 5.2.
116 HRC 'Polay Campos v. Peru' (6 November 1997) UN Doc CCPR/C/61/d/577/1994, para 8.8.
117 UN Commission on Human Rights 'Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy' UN Doc E/CN.4/1998/39/Add.1, para 55.
118 HRC 'Concluding Observations of the Human Rights Committee: Viet Nam' (5 August 2002) UN Doc CCPR/CO/75/VNM, para 10.
119 *Madras Bar Assn.* (*MBA I*) (n 103) [132].
120 HRC 'General Comment No. 32' (n 47); HRC 'Concluding Observations of the Human Rights Committee: Uzbekistan' (26 April 2005) UN Doc CCPR/CO/83/UZB, para 16; HRC 'Concluding Observations of the Human Rights Committee: Republic of Moldova' (4 November 2009) UN Doc CCPR/C/MDA/CO/2, para 24.
121 HRC 'Concluding Observations of the Human Rights Committee: Peru' (15 November 2000) UN Doc CCPR/CO/70/PER, para 10; UNGA 'Report of the Human Rights Committee, Volume I' GAOR A/51/40, paras 352, 364; HRC 'Concluding Observations of the Human Rights Committee: The Kyrgyz Republic' (24 July 2000) UN Doc CCPR/CO/69/KGZ, para 15; HRC 'Concluding Observations of the Human Rights Committee: Uzbekistan' (n 120) para 16; HRC 'Concluding Observations of the Human Rights Committee: Republic of Moldova' (n 120) para 24; HRC 'Concluding Observations of the Human Rights Committee: Viet Nam' (n 118) para 10.
122 HRC 'Concluding Observations of the Human Rights Committee: Democratic People's Republic of Korea' (27 August 2001) UN Doc CCPR/CO/72/PRK, para 8; HRC 'Concluding Observations of the Human Rights Committee: Sri Lanka' (1 December 2003) UN Doc CCPR/CO/79/LKA, para 16; HRC 'Concluding Observations of the Human Rights Committee: Viet Nam' (n 118) para 10; HRC 'Concluding Observations of the Human Rights Committee: Slovakia' (4 August 1997) UN Doc CCPR/C/79/Add.79, para 18.
123 HRC 'General Comment No. 32' (n 47); HRC 'Concluding Observations of the Human Rights Committee: Republic of Moldova' (5 August 2002) UN Doc CCPR/CO/75/MDA, para 12.
124 *Rojer Mathew* (n 111) [171].

The Special Rapporteur has similarly underscored that removals must respect due process, ensuring equality before the law and adherence to principles of fairness and impartiality.[125] Dismissals should only occur on serious grounds such as misconduct or incapacity, and adjudicators must have access to judicial protection when contesting removal.[126]

To meet these standards, the FTs would require robust safeguards against executive interference, clear guarantees of tenure, and the creation of an independent body to oversee appointments, performance assessments, and terminations. In the absence of these, their institutional design fails the test of judicial independence under both Indian constitutional law and international human rights law. But as of today, FTs are not independent institutions since there is executive interference in various facets like security of tenure, procedure for renewal, and removal process. FT members are frequently appointed on short-term, renewable contracts. Their performance reviews and tenure extensions are overseen by executive authorities—placing their continued appointment at the mercy of the state. This institutional design vitiates the independence of the FTs.

[125] HRC 'Safeguarding the independence of judicial systems in the face of contemporary challenges to democracy' (21 June 2024) UN Doc A/HRC/56/62, para 41, 71(a), 71(b), 71(c), 71(d).

[126] HRC 'General Comment No. 32' (n 47); HRC 'Concluding Observations of the Human Rights Committee: Belarus' (19 November 1997) UN Doc CCPR/C/79/Add.86, para 13; HRC 'Mikhail Ivanovich Pastukhov v. Belarus' (5 August 2003) UN Doc CCPR/C/78/D/814/1998, para 7.3; HRC 'Paul Perterer v. Austria' (20 July 2004) UN Doc CCPR/C/81/D/1015/2001, para 9.4; HRC 'Bandaranayake v. Sri Lanka' (24 July 2008) UN Doc CCPR/C/93/D/1376/2005, para 6.5.

The appointment process for FT members is opaque, with no fixed tenure guaranteed. Advertisements by the Gauhati High Court,[127] and notifications from the Assam Government's Political Department specify terms of one or two years, varying by executive whim, and extendable at the state's discretion.[128] This tenure is governed by no legislation or by-laws and depends entirely on executive whim despite being an "essential legislative function."[129] Moreover, it is violative of the Supreme Court's judgments holding that a tenure of less than 5 years threatens to compromises the quality of adjudication by tribunals.[130]

The qualifications for FT members have progressively weakened. In 2011, only retired judicial officers from the Assam Judicial Service—experienced in procedural law—were eligible. They could serve until age 67, with salaries based on last drawn pay plus allowances. This ensured appointments of individuals with judicial expertise. By 2015, eligibility expanded to include advocates with at least 10 years of practice, lowering the standard. Appointments became two-year contracts with fixed monthly pay, enabling lawyers without judicial experience to decide critical citizenship matters. The 2019 revisions diluted requirements further: minimum practice dropped to 7 years, minimum age to 35, and appointments became more flexible, allowing less experienced candidates to adjudicate complex citizenship issues, thereby compromising the quality of justice.

A Gauhati High Court notification added criteria of "fair knowledge of the official language of Assam" and "Assam's historical background giving rise to foreigner's issues."[131] Yet, no requirement exists for expertise in immigration or citizenship law. Under another notification,[132] the selection process consists of a 100-mark interview overseen by a Gauhati High Court committee, but **transparency is lacking on how candidates are scored or evaluated within these criteria.**

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127 Registrar (Judicial), Gauhati High Court 'Advertisement for Filling Up Posts of Members of Foreigners Tribunal in the State of Assam' (2 April 2015); Registrar (Judicial), Gauhati High Court 'Notification No. HC.XXXVII-13/2017/2687/R.Cell' (21 June 2017); Registrar General, Gauhati High Court 'Notification No. HC.XXXVII-22/2019/442/R.Cell' (10 June 2019).

128 Government of Assam, Political (B) Department 'Terms and condition for appointment of Judicial Officer as Member, Foreigners Tribunals, Assam' (25 May 2011) No. PLB.163/2010/181; Government of Assam, Political (B) Department, 'Terms and Conditions for appointment of Advocates and Member, Foreigners Tribunals, Assam' (29 July 2015) No. PLB.163/2010/229; Government of Assam, Political (B) Department, 'Terms and Conditions for appointment of retired Civil Servants as Member, Foreigners Tribunals, Assam' (6 June 2019) No. PLB.136/2019/13; Government of Assam, Political (B) Department, 'Terms and Conditions for appointment of Advocates as Member, Foreigners Tribunals, Assam' (6 June 2019) No. PLB.136/2019/14.

129 *Rojer Mathew* (n 111) [347], [348].

130 *Madras Bar Association v. Union of India* ("*MBA III*") (2021) 7 SCC 369 [39], [40], [60.4]; *Rojer Mathew* (n 111) [171].

131 Registrar General, Gauhati High Court 'Notification No. HC.XXXVII-22/2019/442/R.Cell' (10 June 2019).

132 Registrar General, Gauhati High Court 'Notification No. HC.XXXVII-22/2019/502/R.Cell' (5 July 2019).

133 *Ashim Kumar Baruah v. State of Assam* Writ Petition (Civil)) 4478/2017 (Gauhati High Court, 22 December 2017).

134 Response by Minister of Home Department, Unstarred Question No 159, Assam Legislative Assembly (21 March 2022); Government of Assam, Judicial Department 'Assessment report of opinions of existing 100 nos. of Foreigners Tribunals Members' (14 July 2021) No. JDJ.187/2021/10.

Similarly, the integrity of the reappointment process is compromised due to executive involvement. In *Ashim Kumar Baruah v. State of Assam*,[133] the Gauhati High Court held that tenure extensions depend on performance, suitability, and periodic assessment by the High Court. However, no norms were set for such assessments. Moreover, no safeguards were put in place to ensure that the executive is not involved in preparing the preparatory material for these reviews. Despite the Court's assertion that the High Court alone would conduct these reviews, in 2021 the Judicial, Home, and Political Departments assessed 100 Members,[134] placing them at the mercy of the executive. No public record shows meaningful High Court involvement in these decisions.

Reports suggest bias in these assessments. A former Member alleged termination because of the low percentage of people he declared foreigners, despite a high disposal rate, while others with lower disposal rates were retained for declaring more people foreigners.[135] See FT Member Appraisal 2017' below). In 2020, the Assam Government unilaterally terminated a Member, citing "unbecoming conduct," without disciplinary proceedings.[136]

Finally, being a contractual appointment with no specified removal process, there is risk of arbitrary termination mid-contract. In 2020, the Assam Government arbitrarily removed an FT Member for donating to the COVID-19 fund with a rider on how his money should be disbursed. Finding his conduct to be "unbecoming" of a Member, the Assam Government released him from his services without any disciplinary proceedings or judicial involvement.[137]

In 2019, 221 additional Members were appointed on one-year contracts. In 2021, the Assam Government abruptly terminated their services, citing future consideration only "once the NRC is notified"—despite no mention of the NRC in the original recruitment notification. These terminations, now under challenge in the Gauhati High Court and Supreme Court, were based on executive decisions, not disciplinary processes or judicial assessments.[138] They expose the lack of safeguards against executive interference in the removal process and the absence of security of tenure for FT Members.

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[135] Poonam Agarwal, 'Assam NRC I Lost Job as I Declared Fewer Foreigners: Ex-Officer' (The Quint, 6 October 2020) <https://www.thequint.com/news/india/nrc-former-judicial-officer-of-assams-foreigners-tribunals-interview> accessed 2 July 2025; 'Assam Decides Tribunal Member's Term on Rate of Declaring Foreigners: Amnesty' The Hindu (12 March 2020) <https://www.thehindu.com/news/national/other-states/assam-decides-tribunal-members-term-on-rate-of-declaring-foreigners-amnesty/article31051919.ece> accessed 2 July 2025. (See 'FT Member Appraisal 2017' below)

[136] 'Assam Govt. Removes Foreigners' Tribunal Member' The Hindu (24 May 2020) <https://www.thehindu.com/news/national/other-states/foreigners-tribunal-member-removed/article31666251.ece> accessed 2 July 2025.

[137] ibid.

[138] *Rojer Mathew* (n 111) [165].

Reducing Qualification Requirements for FT Members from 2011-2019

Source: 21.03.2022, Assam Legislative Assembly, Unstarred Question No. 159

On 25 May, 2011,

only retired Judicial Officers

as Members of Foreigners Tribunals

On 29 July, 2015,

also, Advocates with more than 10 years of experience

as Members of Foreigners Tribunals

On 6 June, 2019,

also, retired Civil Servants and Advocates with more than 7 years of experience

as Members of Foreigners Tribunals

Terms and Conditions for Appointment of Foreigners Tribunal Members, Assam from 2011–2019

Source: 21.03.22, Assam Legislative Assembly, Unstarred Question No. 63

25th May 2011:	**Terms and Conditions for Judicial Officers**
Eligibility:	**Retired judicial officers from Assam Judicial Service**
Age Limit:	Max 67 years
Term:	1 year, extendable based on requirement
Pay & Allowances:	Last pay drawn or minimum revised scale, minus pension
Special Pay:	15% (up to ₹20,000)
Duty Allowance:	12.5%
HRA:	₹4,000/month
Other Benefits:	Travel and medical benefits as per judicial service rules
29 July 2015:	**Conditions of Appointment for Advocates**
Eligibility:	**Advocates with at least 10 years of practice**
Age Limit:	45–60 years (extendable by 1 year)
Term:	2 years, extendable
Pay:	Fixed ₹85,000/month
Conveyance:	Car with driver or ₹5,000/month (+ 60 liters of fuel)
Leave:	12 days/year + earned leave as per Leave Rule 1934
Selection Process:	3-member Special Bench of Gauhati High Court
6 June 2019:	**Revised Conditions for Appointment of Advocates**
Eligibility:	**Advocates with 7+ years of practice**
Minimum	Age: 35 years
Age Limit:	Max 67 years
Term:	1 year, extendable
Pay:	Fixed ₹85,000/month
Conveyance:	Car with driver or ₹5,000/month (+ 60 liters of fuel)
Leave:	12 days/year, plus earned leave as per rules
Selection Process:	Gauhati High Court Special Bench
6 June 2019:	**Revised Conditions for Retired Judicial Officers**
Eligibility:	**Retired judicial officers from Assam Judicial Service**
Age Limit:	Max 67 years
Term:	1 year, extendable
Pay:	Last pay drawn or minimum revised scale, minus pension
Special Pay:	15% (up to ₹20,000)
Duty Allowance:	12.5%
HRA:	₹4,000/month
Other Benefits:	Travel and medical benefits, LTC, orderly peon
Selection Process:	Gauhati High Court Special Bench

FT Member Appraisal 2017

This data was furnished by the Principal Secretary, Home and Political Department, Government of Assam in an affidavit submitted to the Gauhati High Court in ***Ashim Kumar Baruah v. State of Assam & Others***, in WP(C) 4478/2017.

Name of Member	% of disposal	% of foreigners declared	General views of Govt. upon the Member
Arup Kr. Sharma	18.3	0.45	not satisfactory
Nilay Kanti Ghose	19.29	0.82	not satisfactory
Kamal Uddin Ahmed Choudhury	14.57	1.06	not satisfactory
Kartik Ch. Ray	25.92	1.32	not satisfactory
Haresh Ch. Sarma	29.94	1.4	not satisfactory
Dinesh Ch. Choudhury	36.93	1.42	not satisfactory
Dwijen Ch. Dutta	12.47	1.46	not satisfactory
Navanita Mitra	11.17	2.28	not satisfactory
Bhaba Kr. Hazarika	42.66	2.43	not satisfactory
Minakshi Rongpi	17.65	2.61	need to improve
Surajit Chakravarty	39.02	2.68	not satisfactory
Lal Chand Dey	17.67	3.31	need to improve
Hali Ram Basumatary	7.06	4.15	need to improve
Dilip Kr. Barman	26.3	4.33	not satisfactory
Kulendra Talukdar	24.96	7.67	not satisfactory
Indranee Bordoloi	2.17	7.75	not satisfactory
Ashim Kr. Baruah	41.2	7.83	not satisfactory
Mamoni Rajkumari	23.01	8.05	not satisfactory
Giti Kakati Das	29.42	8.68	not satisfactory
Lakheshwar Hazarika	23.28	8.89	need to improve
Arun Dutta	31.79	9.36	good
Binod Kr. Basumatary	61.53	9.48	need to improve
Subrat Bhuyan	18.75	9.79	not satisfactory
Bibhas Barman	28.02	10.26	need to improve
Sheela Dey	28.9	10.51	good
Anurupa Dey	27.32	11.55	need to improve
Dharmeswar Saikia	28.26	14.7	good
Deepak Bora	11.49	14.87	need to improve
Tarkeswar Lohar	88.91	15.46	good
Rama Kanta Khakhlary	33.91	15.55	good
Sonit Saikia	21.67	17.54	good
Abhijit Das	15.34	19.05	good
Bijoya Boiragi	73.46	19.12	good
Ajay Phukan	10.15	19.38	good
Rita Bora Saikia	21.82	20.37	joined late
Dhiman Talukdar	46.6	21.05	good
Jilly Mahanta	9.45	24.5	good
Rafiqul Islam	17.02	24.64	good
Pratap Ch. Das	99	25.33	good
Junmoni Borah	18.4	25.37	good

Whether may be considered for further retention or may be terminated

may be terminated	may be retained
term will end soon; may not be extended	may be retained with warning
term will end soon	term will end soon; may be warned
term already ended	term already ended; may be warned

Name of Member	% of disposal	% of foreigners declared	General views of Govt. upon the Member
Debananda Das	33.61	26.32	good
Kalpana Baruah	12.12	26.91	need to improve
Habibur Rahman	34.28	27.89	good
Pranab Kr. Talukdar	15.39	30.92	good
Sachin Kr. Sarma	9.09	32.77	need to improve
Ranima Gogoi	57.65	33.78	good
Navanita Baruah	22.74	33.81	improper conduct
Narayan Kr. Nath	15.85	34.57	good
Mahendra Bora	11.99	35.1	good
Jayanta Kr. Mishra	44.22	37.06	good
Rina Hazarika	2.85	37.7	need to improve
Dhiraj Kr. Saikia	23.63	41.16	good
Hemanta Mahanta	8.23	41.67	need to improve
Dipenjyoti Duta	12.31	42	good
Babita Das	11.32	42.95	not satisfactory
Saiful Islam	17.41	45.48	good
K. K. Chandak	3.85	47.96	good
Santanu Ratan Rajbongshi	79.29	50.15	good
Pranab Kr. Baruah	14.08	51.71	need to improve
Jyotish Purakayastha	34.21	51.97	good
Dibakar Bhattacharjee	9.19	53.41	need to improve
Brajendra Kr. Talukdar	58.08	55.28	good
Gopal Karmakar	34.36	55.39	good
Narendra Kr. Jha	41.81	65.79	good
Moonmoon Borah	27.3	68.08	good
Nibedita Tamuli Nath	17.17	68.47	good
Bikash Kumar	10.59	71.43	good
I. P. Barthakur	3.14	72.16	good
Ranjan Kr. Bharali	83.95	73.53	good
Naba Kr. Barua	27.25	74.77	good
Subrata Shome	34.5	74.94	good
Alin Sarma	3.36	91.18	need to improve
K. K. Gupta	29.78	96.39	good
Goutam Soren	17.19	219.08	good
Gautam Soren	11.76	345.21	good
Ananta Ram Medhi	56.84	Nil	

Year-wise details of expenditure for Foreigners Tribunals (2005-2021)

Source: 21.03.2022, Assam Legislative Assembly, Unstarred Question No. 159

Sl.	Financial Year	Amount
1	2005-06	**Rs.2,71,93,004**
2	2006-07	**Rs.3,28,63,342**
3	2007-08	**Rs.3,58,71,124**
4	2008-09	**Rs.4,56,11,096**
5	2009-10	**Rs.2,45,73,217**
6	2010-11	**Rs.7,82,70,970**
7	2011-12	**Rs.9,59,39,710**
8	2012-13	**Rs.10,26,79,634**
9	2013-14	**Rs.10,07,96,789**
10	2014-15	**Rs.9,87,43,939**
11	2015-16	**Rs.14,22,01,954**
12	2016-17	**Rs.21,63,28,870**
13	2017-18	**Rs.23,73,87,469**
14	2018-19	**Rs.33,21,12,533**
15	2019-20	**Rs.36,60,82,329**
16	2020-21	**Rs.63,74,55,420**

2.6 Violating Impartiality

The guarantee of impartiality under international human rights law encompasses both objective and subjective dimensions. According to the HRC:

- Objective impartiality requires that a judge or adjudicator not hold preconceived views or act in ways that favour one party.[139]
- Subjective impartiality requires that a tribunal appear impartial to a reasonable observer.[140]

To secure these qualities, separation of powers is indispensable. The HRC has expressed that a lack of clear boundaries between the executive, legislative, and judicial branches may jeopardise the rule of law.[142] Therefore, a clear delineation between the roles of the executive and judiciary is essential, ensuring that judicial bodies maintain autonomy in areas within their jurisdiction.[143]

In the case of the FTs, serious concerns arise over both objective and apparent impartiality. The adjudicatory function of FTs is structurally entangled with executive control. Political influence pervades every stage of the tribunal process—from appointment to tenure review and discipline. As outlined earlier, members are appointed by the executive, with minimal transparency or safeguards, and are assessed and reappointed through executive mechanisms. This compromises their ability to rule independently in cases where the executive's interest in expelling or excluding certain populations—particularly Bengali-origin Muslims—is explicit and well documented.

The HRC has observed that such political influence fatally undermines impartial adjudication. To prevent this, adequate financial and institutional resourcing is also essential.[144] Under-resourced judicial bodies are more susceptible to corruption, and low remuneration can distort adjudicative incentives.[145] The Committee has thus emphasised that judicial actors must receive adequate pay and institutional support to function impartially.

The FTs fail on both fronts. They are not insulated from executive pressure in appointment or tenure. For the FTs to align with international standards, reforms must ensure secure funding and an independent structure for appointments, promotions, and disciplinary actions—conditions necessary for any meaningful claim to impartial adjudication.

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[139] HRC 'Arvo O. Karttunen v. Finland' (October 1992) UN Doc CCPR/C/46/D/387/1989, para 7.2.
[140] HRC 'General Comment No. 32' (n 47) para 21.
[141] UN Commission on Human Rights 'Report on the situation of human rights in Nigeria prepared by Mr. Bacre Waly Ndiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions, and Mr. Param Cumaraswamy, Special Rapporteur on the independence of judges and lawyers' (4 February 1997) UN Doc E/CN.4/1997/62, para 71.
[142] HRC 'Concluding Observations of the Human Rights Committee: Slovakia' (n 122) para 3.
[143] HRC 'Concluding Observations of the Human Rights Committee: Romania' (28 July 1999) UN Doc CCPR/C/79/Add.111, para 10. See also HRC 'Concluding Observations of the Human Rights Committee: Peru' (n 121) para 10; HRC 'Comments of the Human Rights Committee: El Salvador' (18 April 1994) UN Doc CCPR/C/79/Add.34, para 15; HRC 'Comments of the Committee: Tunisia' (23 November 1994) UN Doc CCPR/C/79/Add.43, para 14; HRC 'Comments of the Human Rights Committee: Nepal' (10 November 1994) UN Doc CCPR/C/79/Add.42, para 18.
[144] HRC 'Concluding Observations of the Human Rights Committee: Central African Republic' (27 July 2006) UN Doc CCPR/C/CAF/CO/2, para 16.
[145] ibid.
[146] Clooney and Webb (n 49) 77-78.
[147] *Lavents v. Latvia* App no 58442/00 (ECtHR, 28 Nov 2002) para 115.

2.7 Absent Competence

The requirement that tribunals be "established by law" entails jurisdictional and institutional competence. As Clooney and Webb argue, this requirement encompasses the qualifications of tribunal members and the legal definition of the tribunal's jurisdiction.[146] A tribunal must be empowered by law, and its adjudicators must possess relevant expertise and professional competence. The European Court of Human Rights (ECtHR) has held that the absence of legally qualified adjudicators may itself constitute a breach of the right to a fair hearing.[147]

Competence includes qualifications, appointment processes, training, and promotion. According to the HRC, judicial appointments should be grounded in transparent procedures and objective criteria,[148] which prioritise merit and exclude political considerations.[149] The Special Rapporteur on judicial independence has further stressed that the integrity, qualifications, and independence of appointees are critical considerations in the selection of judges.[150] To ensure judicial competence, the HRC has recommended that judicial appointments and promotions be carried out by independent mechanisms.[151] Adequate training is another safeguard essential to judicial competence.[152] Promotions should also be regulated by law, using transparent procedures and objective criteria,[153] preferably overseen by an independent body.[154]

FTs lack independence from the executive in the appointment of members. While the FT Order states that members must have "judicial experience,"[155] this term remains vague and overbroad.[156] Crucially, there is no legislative prescription of the specific qualification and expertise of members, leaving it in the hands of the executive to pick and choose them without any control of the legislature. In the absence of any legislative guidance, the qualification criteria has remained at the whims of the Ministry of Home Affairs, Government of India, which has diluted it over the years from 2011 to 2019. In 2011, only retired judicial officers from the Assam Judicial Service could be appointed. These officers brought judicial training and experience in applying procedural norms. The maximum age was capped at 67, and salaries were based on the last drawn pay scale, supplemented with allowances—conditions designed to preserve the status and independence of appointees.[157]

By 2015, however, the qualifications were expanded to include practising advocates with ten years of experience, reducing the standard of judicial training. Appointments became contractual, with a fixed monthly salary and a two-year tenure. This shift allowed lawyers—without prior judicial experience or requisite expertise in nationality law—to determine cases involving fundamental rights.[158] The eligibility requirements were relaxed even further in 2019, which allowed retired civil servants (with the rank of Secretary/Additional Secretary or above) to be appointed as Members.[159] The minimum practice period for advocates also dropped to 7 years, and the minimum age fell to 35 years. For retired judicial officers, the age limit was extended, and appointments became more flexible.[160] These changes opened the door to lesser experienced candidates, raising concerns about whether they could navigate the nuanced legal issues tied to identity and citizenship in Assam.

This compromises the quality of adjudication in the Tribunals. The state conducted no formal examination, imposed no training requirements, and offered no continuing education in immigration law, citizenship law or constitutional adjudication. Unlike district judges—who undergo rigorous selection via a written examination and training,[161] and whose decisions are subject to appeal—FT members operate in a legal vacuum, with no mandatory professional development and virtually no accountability. This erosion of competence is made more troubling by the absence of an appellate structure. In effect, these tribunal members serve as both trial and final adjudicators in matters of immense legal and existential consequence.

To bring the FTs in line with domestic and international standards, a complete overhaul is necessary. Tribunal members must be appointed through transparent, independent procedures. Independent bodies should oversee appointments and promotions, and formalised training in constitutional and citizenship law should be mandatory. Without these structural guarantees, FTs lack the competence necessary to perform their adjudicatory functions, and their decisions lack legitimacy.

[148] HRC 'Concluding Observations of the Human Rights Committee: Azerbaijan' (12 November 2001) UN Doc CCPR/CO/73/AZE, para 14; HRC 'Concluding Observations of the Human Rights Committee: Paraguay' (24 April 2006) UN Doc CCPR/C/PRY/CO/2, para 17.
[149] HRC 'Concluding Observations of the Human Rights Committee: Bolivia' (5 May 1997) UN Doc CCPR/C/79/Add.74, para 34.
[150] UN Commission on Human Rights 'Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, submitted pursuant to Commission on Human Rights resolution 1995/36' (1 March 1996) UN Doc E/CN.4/1996/37, para 92.
[151] HRC 'Report of the Special Rapporteur on the independence of judges and lawyers' (2 May 2018) UN Doc A/HRC/38/38, para 48, 49.
[152] HRC 'Concluding observations on the second periodic report of Angola' (8 May 2019) UN Doc CCPR/C/AGO/CO/2, paras 37, 38; HRC 'Concluding Observations of the Human Rights Committee: Republic of the Congo' (25 April 2000) UN Doc CCPR/C/79/Add.118, para 14.
[153] HRC 'General Comment No. 32' (n 47) para 19.
[154] HRC 'Concluding observations of the Human Rights Committee: Honduras' (13 December 2006) UN Doc CCPR/C/HND/CO/1, para 16; HRC 'Concluding observations of the Human Rights Committee: Tajikistan' (18 July 2005) UN Doc CCPR/CO/84/TJK, para 17.
[155] Foreigners (Tribunals) Order 1964, para 2(2).
[156] Rahman (n 21) 126-128.
[157] Government of Assam, Political (B) Department, 'Terms & condition for appointment of Judicial Officer as Member, Foreigners Tribunals, Assam' (25 May 2011) No. PLB.163/2010/181.
[158] Government of Assam, Political (B) Department, 'Terms & condition for appointment of Advocates as Member, Foreigners Tribunals, Assam' (29 July 2015) No. PLB.163/2010/229.
[159] Government of Assam, Political (B) Department, 'Terms & condition for appointment of retired Civil Servant as Member, Foreigners Tribunal, Assam' (6 June 2019) No. PLB.136/2019/13.
[160] Government of Assam, Political (B) Department, 'Terms & conditions for appointment of Advocate as Member, Foreigners Tribunals, Assam' (6 June 2019) No. PLB.136/2019/14.
[161] According to available records, the most recent training for Foreigners Tribunal members was conducted in August 2015, lasting a mere four days. See Gauhati High Court, 'Notification No. HC.VII-133/2014/3342/A' (1 August 2015).

Some global practices

Within various domestic practices, the principles of competence, independence, and impartiality are generally upheld by each state's judicial mechanisms. However, the unique aspect of citizenship determination is that it varies across states. Some states have strived to adhere to the principles of competence, independence, and impartiality.

In Germany, citizenship determination begins with district administrative authorities overseen by the Landrat, an elected district administrator, which is clearly not a judicial entity under Article 14 of the ICCPR.[162] Since these authorities are not judicial and make initial determinations, the principles of competence, independence, and impartiality do not apply as they would for tribunals under Article 14. However, in appeals, administrative decisions are reviewed by independent courts that are separate from these authorities, ensuring impartiality.[163] Security of tenure further supports judicial independence. Judges in these independent courts are appointed at the state level on a merit basis, ensuring competence and shielding them from partisan influences.[164]

In Canada, citizenship determination operates through a quasi-judicial process. The Citizenship Commission, an administrative body within the Immigration, Refugees, and Citizenship Canada department, may not be considered a tribunal under Article 14 of the ICCPR.[165] Despite this, Canada ensures that citizenship judges adhere to the Citizenship Judge Code of Conduct, which mandates independence and impartiality.[166] These judges must understand administrative law, natural justice, and relevant legislation, thus meeting a baseline of competence, though legal experience is not mandatory.[167] Citizenship revocation cases fall under the jurisdiction of the Federal Court, bound by Article 14. However, the executive retains some influence, as the Minister of Immigration, Refugees, and Citizenship may intervene in specific cases under exceptional circumstances.[168]

In Ivory Coast, citizenship determination is solely managed by the judiciary, ideally free from interference by other government branches, thus aligning with the principles of Article 14 of the ICCPR.[169] The Constitution itself enshrines judicial independence,[170] though the President and the Minister of Justice retain considerable authority over judicial appointments, transfers, and promotions, which may impact judicial independence.[171] The law prescribes procedures for judge appointments, ensuring their competence.[172] Thus, in Ivory Coast, independence, impartiality, and competence are upheld in law and, ideally, in practice for citizenship determination proceedings.

In the United States, citizenship determination is conducted exclusively by the judiciary without executive interference. The Federal Court system handles such proceedings, fulfilling the requirements for a tribunal under Article 14 of the ICCPR. This judicial process consistently maintains the principles of independence, competence, and impartiality in both civil and criminal courts. Citizenship determination proceedings can occur in either context, ensuring that all Article 14 principles are thoroughly respected.

In the United Kingdom, the Special Immigration Appeals Commission (SIAC) is a superior Court of Record tasked with overseeing Home Office decisions related to deportation, asylum, immigration, and citizenship issues.[173] Established under the Special Immigration Appeals Commission Act of 1997, SIAC incorporates mechanisms to ensure independence, impartiality, and competence.[174] Both SIAC and the Court of Appeal (which hears appeals from SIAC) adhere to Article 14, General Comment 32, and uphold all three principles through safeguards like judicial independence, secure tenure, professional qualifications, and impartiality protections.[175]

Conclusion

In sum, the Foreigners Tribunals in Assam fail to meet the most basic legal and normative standards required of adjudicatory bodies, both under the Indian Constitution and international human rights law. Lacking legislative foundation, judicial independence, and meaningful oversight, these tribunals operate under the shadow of executive control. Their members are appointed through opaque, politically vulnerable processes, with limited tenure security, inadequate qualifications, and no guarantee of impartiality or competence. The structural deficiencies are not incidental—they are systemic, and they shape the outcomes of citizenship determinations in ways that disproportionately harm already marginalised communities. This institutional design corrodes the rule of law and undermines fundamental rights by turning life-altering decisions into administrative formalities. When the tribunals empowered to determine whether someone is a citizen function without independence, impartiality, or competence, the process ceases to be adjudication in any meaningful sense. Rather, it becomes a bureaucratic instrument of exclusion masquerading as law. These institutional failures demand urgent scrutiny and reform, for they speak not only to procedural injustice but to a broader legal architecture of dispossession.

[162] Administrative Court Regulations [Verwaltungsgerichtsordnung (VwGO)] 1960 (Germany), ss 15-17, 68-73.
[163] Basic Law for the Federal Republic of Germany 1949, art 97.
[164] Administrative Procedure Act (Verwaltungsverfahrensgesetz) 1976 (Germany), s 21; Administrative Court Regulations 1960 (n 164) s 54.
[165] Government of Canada, 'Citizenship Commission' (31 March 2007) <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/citizenship-commission.html> accessed 19 December 2024.
[166] Government of Canada, 'Citizenship judge code of conduct' (27 January 2017) <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/citizenship-commission/citizenship-judge-code-conduct.html> accessed 19 December 2024.
[167] ibid.
[168] Canadian Passport Order SI/81-86, Rule 9, 10.
[169] Ivory Coast Nationality Code (Code de la Nationalite Ivoirienne) 1961, art 77; Questions of a person's status as an Ivorian national or as a foreigner are considered matters of "public order". Civil courts, in exercise of their ordinary civil jurisdiction, are competent to hear disputes on nationality.
[170] Constitution of Ivory Coast (Constitution de la République de Côte d'Ivoire) 2016, art 139.
[171] Law No. 78-662 of 4 August 1978 establishing the status of the Judiciary (Ivory Coast), art 5.
[172] ibid chapter 2.
[173] Refworld, 'United Kingdom: Special Immigrations Appeals Commission (SIAC)' <https://www.refworld.org/document-sources/united-kingdom-special-immigration-appeals-commission-siac> accessed 28 December 2024.
[174] The Special Immigration Appeals Commission (Procedure) Rules 2003 (UK) (amended from time to time) contain provisions providing inter alia guidance on what dealing with a case fairly and justly means (Rule 6), the power of the Tribunal to issue directions as to the issues on which it requires submissions or evidence (Rule 14). The Tribunal may also admit evidence whether or not such evidence may be admissible in a civil trial in the United Kingdom (Rule 14). See further Rules 44, 46 & 53 of the Special Immigration Appeals Commission (Procedure) Rules, 2003.
[175] The chairman of a panel hearing each SIAC is a person who is a High Court judge, with the second member drawn from a panel of judges experienced in hearing appeals on ordinary immigration matters and a third member with experience of analyzing and assessing secret intelligence [Special Immigration Appeals Commission Act, 1997, para 5 of Schedule I].


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GOVT. OF ASSAM
FOREIGNERS' TRIBUNAL
(2NO.)
BARPETA

3 | Illusions of a Process: Violating the Right to Fair Trial

The procedures of the Foreigners Tribunals in their everyday operation violate the right to a fair trial—a right recognised under Article 21 of the Indian Constitution and international human rights law. Central to this right is the principle of equality of arms, which demands that individuals facing trial have a fair and equal opportunity to defend themselves. Yet, the defining features of the Foreigners Tribunal procedure—the wrongful application of the burden of proof and the absence of a meaningful appellate or review mechanism—create a structurally unfair process that denies individuals both constitutional protections and international legal guarantees.

Introduction

This chapter argues that the procedures of the FTs in Assam fundamentally violate the right to a fair trial as guaranteed under Article 21 of the Indian Constitution and Article 14 of the ICCPR. The chapter's central claim is that the FT process fails to meet the basic procedural guarantees required by both Indian constitutional law and international human rights law, particularly the principle of equality of arms. The chapter proceeds in five parts. §3.1 outlines the procedural framework envisaged by the Supreme Court and Gauhati High Court, including the phased burden of proof and duties of the State. §3.2 critiques how the concept of "burden of proof" has been misconstrued and weaponised against defendants. §3.3 presents detailed empirical evidence of how FT practice departs from judicially prescribed safeguards. §3.4 draws on constitutional and international standards to articulate what a fair trial should entail, focusing on the requirement of equality of arms. §3.5 evaluates the Gauhati High Court's failure to correct procedural deficiencies, particularly in the absence of an ordinary appellate mechanism. §3.6 evaluates the absence of an appellate and judicious mechanism and its implications for human rights in the context of citizenship status determination. Together, these sections demonstrate that the FT system's legal architecture and day-to-day functioning lack the institutional, procedural, and substantive guarantees required for fair adjudication in citizenship cases—thereby undermining the rule of law and rendering the process illegitimate.

3.1 The Imagined Process

The legal process envisioned for the FTs is informed by several landmark decisions of the Supreme Court of India and the Gauhati High Court. Over the years, these rulings have at least formally laid down procedural safeguards to lend a semblance of fairness to the FT process, given its original lack of due process protections.[176]

The Foreigners (Tribunals) Order, 1964 is notably silent about the initial process of referring a case to the tribunal. While it authorises specific referral authorities—such as the Central or State Government, District Collector, or District Magistrate—it provides no guidance on how these authorities should assess whether the allegation is baseless or not.[177] In the companion case to *Sonowal I*, the 2006 judgment of *Sonowal II*, the Supreme Court mandated that referral authorities must apply their mind to any materials collected during investigation.[178] Referral authorities must conduct a preliminary inquiry to ensure that suspicion is adequately substantiated before referring a case to the tribunal.[179] Although the Supreme Court stopped short of requiring a detailed recorded order, it emphasised that the referral authority must, at a minimum, confirm that the suspicion is grounded in evidence.

After a reference is made, the next step is for the FT to issue notice to the defendant.[180] *Sonowal II* laid down that the FT should verify that grounds exist to justify suspicion before burdening the individual with proving their citizenship.[181] The Supreme Court expanded this in *Rahim Ali v. Union of India* (2024),[182] holding that the State must provide materials supporting the allegation. If such materials are absent, the FT should refrain from issuing a notice.[183] This requires that the State must possess documents when the reference is heard, and these are shared with defendants at the time of serving notice, thereby allowing the defendant a fair opportunity to understand the case against them.[184] Paragraph 3(1) of the 1964 FT Order, which mandates a copy of the "main grounds" of suspicion to be shared with the defendant, embodies this requirement.[185]

The core of the FT process hinges on the burden of proof, which, under Section 9 of the Foreigners Act, is initially on the defendant to prove their citizenship.[186] The Supreme Court has envisioned a phased shifting of onus to ensure fairness. As per *Sonowal I*, once a defendant presents their evidence—such as birth records, identification documents, and witness testimonies—the State has a duty to verify these claims and, if necessary, provide rebuttal evidence.[187] This implies that upon

[176] Since the FT Order 1964 does not include any appellate mechanism, litigants can challenge an opinion of the Tribunal only as writ petitions under Article 226 (to the Gauhati High Court) and Article 32 (to the Supreme Court of India) of the Constitution of India.
[177] Foreigners (Tribunals) Order 1964, para 2 (as amended in 2019).
[178] *Sonowal II* (n 42) [30].
[179] ibid [29], [31]. Also reiterated in *State of Assam v. Moslem Mondal* 2013 SCC OnLine Gau 1 [98].
[180] Foreigners (Tribunals) Order 1964, para 3.1.
[181] *Sonowal II* (n 42) [60].
[182] *Rahim Ali* (n 2) [35]
[183] ibid [35], [40].
[184] ibid [38], [39].
[185] Foreigners (Tribunals) Order 1964, para 3.1.
[186] Foreigners Act 1946, s 9.
[187] *Sonowal I* (n 40) [26-29]; see also *Sonowal II* (n 42) [61].

establishing their citizenship status as a matter of preponderance of probability, the onus should shift to the State to disprove the evidence presented by the defendant.

The Gauhati High Court in *State of Assam v. Moslem Mondal* ("*Moslem Mondal*")[188] clarified several procedural expectations from the FTs to ensure a fair hearing. The High Court outlined that the FT process should begin with an investigation where the individual is given a reasonable opportunity to establish their citizenship before referral.[189] Although these investigations are not as rigorous as criminal ones, they must still be substantial enough to justify a reference to the tribunal.[190] The High Court, further, directed that, upon receiving a valid reference, the FT must issue a notice with a clear statement of the grounds for suspicion and allow the defendant 10 days to respond.[191]

Upon response, the FT is expected to conduct a reasoned analysis, examining the defendant's evidence and permitting them to make a complete representation of their case. Defendants are allotted a 10-day period after response to submit supporting evidence, and the FTs are encouraged to avoid *ex parte* judgments except in instances of non-response without valid cause.[192] Additionally, if required, the FT may grant bail to defendants during the trial.[193] At the end of the proceedings, it is required to submit a reasoned opinion based on an evaluation of all presented evidence, ensuring transparency and accountability in its decisions.[194]

Once the FT has issued an opinion, the Gauhati High Court and Supreme Court serve as the only review bodies for defendants who challenge the tribunal's orders. While there is no statutory appeal process under the FT Order, defendants may approach the Gauhati High Court through writs under Article 226.[195] Upon dismissal of these writs, they may approach the Supreme Court under Article 136, seeking special leave to appeal.[196] This limited recourse positions constitutional courts as crucial oversight bodies tasked with rectifying any lapses in the FT's determinations.

3.2 Misconceptualized "Burden of Proof"

While §3.1 outlines the apparent procedure to be followed in the FT system, the actual process as it unfolds in the system is contrary to the picture outlined above. This is primarily because the structuring principle of the FT process—the shifting of the burden of proof on suspected foreigners—is profoundly misunderstood and wrongly applied in proceedings.

The legal construction of the burden of proof in citizenship cases before the FTs has, in theory, established a mechanism of fairness whereby the onus shifts between the defendant and the State at

[188] 2013 SCC OnLine Gau 1.
[189] ibid [97].
[190] ibid.
[191] Foreigners (Tribunals) Order 1964, paras 3(1), 3(3), 3(4).
[192] ibid para 3(8)
[193] ibid para 3(6)
[194] ibid paras 3(1), 3(16).
[195] Constitution of India 1950, art 226.
[196] ibid art 136.

critical stages of the process. As outlined in *Sonowal I* and *II*, this shifting of burden was envisioned to ensure that both parties participate meaningfully, with the State actively substantiating any *bona fide* suspicion, and the FT members applying judicial rigour in assessing and communicating each party's evidentiary responsibilities. This mechanism, if operationalized, would require that:

1. Defendants Are Provided with Grounds and Evidence: The State must present clear grounds and evidence to the litigant, as a prerequisite for the defendant to address their burden effectively.

2. FT Members Facilitate Evidentiary Clarity: FT members should communicate transparently with defendants regarding any deficiencies in their evidence, as is standard in ordinary legal trials, to support a fair and informed burden-shifting process.

3. Active State Participation in Rebuttal: For a balanced evidentiary process, Assistant Government Pleaders (AGPs) must participate actively in each case, particularly in rebuttal stages where they assess and challenge the defendants' evidence to uphold the integrity of the proceedings.

However, the burden shifting mechanism has not materialised in practice, including because the Gauhati High Court has weakened its conceptualisation. First, in *Moslem Mondal*, the Gauhati High Court characterised Section 9 as placing a persuasive burden on defendants, meaning that they will fail if evidence is not adduced on either side. Reverse onus clauses impose either a persuasive or an evidentiary burden.[197] The former refers to the burden to establish a case, whereas the latter pertains to adducing evidence. The implication of placing a persuasive burden on defendants in FT cases is clearer in *ex parte* orders when FTs can declare somebody as a foreigner by default.[198] This is because the State Government is not required to even prove the grounds it has relied upon to initiate the reference since the defendant did not appear and discharge their burden.[199] Moreover, *Moslem Mondal* did not cite the paragraph in *Sonowal I* that explicitly directed shifting the onus after the defendant has discharged its burden.[200] Effectively, this erased the State Government's role from the hearings. *Moslem Mondal* also paved the way for the burden of proof to devolve into an abstract legal phrase that imposes an often insurmountable standard on the defendant.

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[197] *Rangappa v. Sri Mohan* (2010) 11 SCC 441 [26]; Kunal Ambasta, 'Woolmington's Long Shadow: The Dissipation of the Presumption of Innocence under the Indian Evidence Act, 1872' [2025] The International Journal of Evidence & Proof 1, 6.

[198] *Moslem Mondal* (n 188) [78].

[199] The 2013 *Moslem Mondal* judgment reconsidered a previous decision of the High Court's Division Bench in *Moslem Mondal v. Union of India* 2010 SCC OnLine Gau 241 [86], which had reached the opposite conclusion on this point: "The Tribunal cannot, therefore, render an opinion that the proceedee is a foreigner merely because the proceedee does not respond to the notice. The omission to respond to such a notice, issued by the Tribunal, as indicated hereinabove, would deny him the opportunity of placing his case before the Tribunal. It will not, as a corollary, absolve the State of its burden to prove the truth of the grounds on which it claims the proceedee to be a foreigner. If the State establishes the grounds before the Tribunal by bringing such materials, which would establish the truth of the assertions made in the 'reference', the Tribunal would be free to give its opinion if it finds that the grounds are sufficient to hold the proceedee a foreigner. The evidence to be given by the State, as already mentioned above, may remain confined to the grounds on which the State rests its case and it will have no responsibility to prove (apart from the grounds, which the State must prove) that the proceedee is not an Indian citizen."

[200] *Moslem Mondal* (n 188) [81], [88].

This procedural gap is reflected in the government's routine absence from meaningful participation in FT proceedings. This absence can be attributed to two primary factors:

1. **Persuasive Burden resulting in Minimal State Participation:**
   The burden is treated as a persuasive burden, meaning the State is only incentivized to engage actively in specific circumstances. The State is not obligated to participate further as it would achieve a legal victory if the defendant is not able to discharge their burden. For example, unlike in criminal law, where the onus shifts meaningfully to the prosecution when the accused raises reasonable doubt,[201] the FT process lacks analogous safeguards. Neither is there a safeguard that the State must prove foundational facts.[202] Without a meaningful obligation for the State to prove its case before the burden shifts to the defendant, participation is limited.

   - At the reference stage, there is minimal *prima facie* verification by the State, resulting in poorly substantiated references. (See Chapter 4, §4.1)
   - After notice is issued, burden shifts to the defendant without any structured requirement for the State to prove foundational aspects of its case.[203]
   - If, at all, the State is only incentivised to participate when defendant is likely to secure a legal victory.

2. **Presumptive Passivity in Evidence Presentation:** Treating the burden of proof as a persuasive burden has further minimised the State's obligations in the FT process:

   - The State is neither required to prove the materials it submits nor is there a clear stage where it must substantiate the foundational facts of its case.
   - Even when the State ought to step in—such as to rebut a defendant's strong evidence—the system discourages intervention, as the presumption towards documents rarely shifts in favour of the defendant.

This incentivized passivity is compounded by the FT members' overly active roles in the proceedings. Advocates' experiences illustrate that FT members often assume roles akin to that of a government pleader, questioning and scrutinising evidence presented by defendants while the State remains silent.[204]

Consequently, the burden of proof in the FTs has come to embody an ill-defined standard that operates to the significant disadvantage of defendants, with none of the safeguards that typically ensure a fair adjudicative process in cases of such profound consequence.

The following section will analyse, through extensive empirical evidence, the practical deficiencies in the FT process that prevent the fair application of the burden of proof as envisioned by the judiciary.

[201] *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat* AIR 1964 SC 1563.
[202] *Noor Aga v. State of Punjab* (2008) 16 SCC 417.
[203] Rahman (n 21) 131-132.
[204] Lawyer interviews on file with authors. See also Sagar (n 21).

3.3 Everyday Experiences in the Foreigners Tribunals

In *Sonowal I* and *Sonowal II*, the Supreme Court ruled that the burden of proof in citizenship cases involving the FTs must shift between the State and the defendant at different stages to ensure a fair process. Initially, at the time of reference, the State must provide a *prima facie* basis to demonstrate a *bona fide* suspicion that a person is a foreigner. Then, as the proceedings unfold, the onus may shift back to the State if the defendant sufficiently meets their burden by presenting credible evidence of citizenship. In theory, this back-and-forth shift is essential to uphold fairness, as imagined by the judiciary, with the FTs expected to apply their minds to both parties' evidence, communicate effectively with defendants on whether the burden has been met under Section 9 of the Foreigners Act, and ensure State presence to rebut any evidence offered. However, interviews with advocates practising in these tribunals reveal that these conditions are often absent, leading to a deeply flawed system.

Advocates report that FTs frequently bypass the initial requirement for the State to establish a bona fide suspicion before initiating proceedings. According to Advocate ARB, the FTs issue notices based on generic, "cyclostyled" statements without indicating specific grounds or materials to justify suspicion of foreign status. "There is nothing to show cause, no documents or grounds," he explained. In one instance, the High Court dismissed ARB's challenge to a faulty notice, instructing him to address his grievances with the FT—a process that ultimately revealed the inquiry officer's admission that the reference was baseless. This highlights the superficiality of the initial State inquiry, directly contravening the requirement for a *prima facie* case.

Multiple advocates shared experiences of being denied the opportunity to challenge the veracity of inquiry reports. Advocate HP recounted that in most cases, incomplete or inaccurate inquiry forms lay the groundwork for references. "In maximum cases, the enquiry forms were not completely filled up," she explained, noting instances where false references were allegedly made due to police demands for bribes. Despite such serious allegations, advocates have found that FT members typically dismiss or ignore objections raised in the written statement. Advocate ZH shared that in his experience, preliminary objections are seen as unnecessary delays, with FT members encouraging him to proceed directly with evidence rebuttal rather than questioning inquiry accuracy: "No point in filing preliminary objections… cases ought to be finished in a summary manner, within 60 days," he noted.

An underlying principle set in *Sonowal I* and *Sonowal II* requires the State to rebut evidence presented by defendants. However, the interviews reveal that State representatives often do not appear at hearings or fail to provide meaningful rebuttals when present. Advocate HP emphasised that even though the burden is on the defendant, "there should be a rebuttal" by the State, especially when key documents like school or panchayat certificates are introduced. In practice, however, this rebuttal is often omitted, leaving the defendant's evidence unchallenged, not due to acceptance, but due to procedural neglect.

Moreover, advocates reported consistent refusals from FT members to summon inquiry officers for cross-examination, effectively shielding questionable investigation practices from scrutiny. According to Advocate N, despite requests, Tribunal members refrain from summoning officers, with some members expressing prejudicial views about certain communities. He recalled a member openly stating in court, "All Muslims are Bangladeshis… whatever documents you produce, we will make you Bangladeshi." Such statements cast a troubling light on the attitudes influencing FT rulings and underscore a system where procedural fairness is neither valued nor upheld.

Tribunal members' refusal to follow fair procedures extends to denying defendants access to key documents, further undermining the burden-shifting framework. Advocate MR noted that although some FTs allow certified copies of police inquiry reports, many others deny access altogether or demand a High Court order to obtain a copy. Without these records, it becomes virtually impossible for defendants to contest their cases effectively. "Without a certified copy, one cannot approach the High Court," MR remarked, illustrating how procedural opacity blocks avenues for redress.

In many cases, the absence of government pleaders during FT hearings has resulted in members assuming dual roles as both adjudicator and prosecutor, violating principles of natural justice. Advocate SA highlighted instances where FT members took over the examination of witnesses, conducting cross-examinations themselves and posing as representatives of the State. "In this case, the Government Pleader was absent and so the Tribunal member himself put all the questions," he observed. The systemic absence of government pleaders shifts the burden entirely onto the defendant, undermining the concept of fair rebuttal by the State and effectively collapsing the adversarial process into a one-sided adjudication.

The reliance on a fixed burden of proof on the defendant renders the "shifting onus" concept set out in *Sonowal I* practically meaningless. When asked whether the burden ever shifts to the State, Advocate SA explained, "The member does not ask…the persuasive burden is assumed to be on the proceedee." As a result, State officials are not required to demonstrate the legitimacy of their claims, while Tribunal members often refrain from asking questions or pressing the State to present corroborative evidence, even when doubts about the defendant's evidence arise.

The experiences recounted by advocates expose a systematic departure from the procedural safeguards envisioned in Supreme Court rulings. The FT process, as currently practised, does not fulfil the Court's mandate for a burden-shifting mechanism that promotes fairness. Instead, the absence of accountability for State actors, combined with the FT's reluctance to critically assess inquiry reports (see §4.1), has fostered a system where procedural deficits compound, stripping defendants of their fundamental right to a fair hearing. These testimonies underscore the urgent need for reforms to ensure that the FTs operate with transparency, fairness, and due regard for judicial standards. Without addressing these foundational issues, the FT process remains a far cry from the equitable system envisaged by the Supreme Court.

3.4 Violating the Principle of Equality of Arms

Articles 14 and 21 of the Indian Constitution have been expansively interpreted to include a capacious right to fair trial. Article 14 encompasses the principles of natural justice, rule of law, and non-arbitrariness,[205] while Article 21 guarantees that procedure must be 'just, fair, and reasonable,'[206] and the law itself must be substantively constitutional.[207] Articles 14 and 21 do not operate in isolation; the procedure under Article 21 must meet the requirements of Article 14.[208]

Article 14 guarantees equality before the law and equal protection of the laws to all people within the country.[209]

Article 21 guarantees that no person shall be deprived of his life or personal liberty except according to procedure established by law.[210]

Articles 14 and 21 are effectively protected when citizens have access to an impartial and independent judicial forum that upholds the principles of adjudication.[211] Trials must aim to ascertain the truth and be fair to all parties involved.[212]

There are two components of this. First, the forum an individual has access to must be an effective adjudicatory mechanism. Disputes should be decided by impartial judges who are independent of the executive.[213] Second, hearings must comply with the requirements of fair trial. Emerging from administrative law, the concept is built on the principles of natural justice.[214] Fair trial includes the right to have notice of the other side's case, bring evidence and argue.

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[205] *E.P Royappa v. State of TN* (1974) 4 SCC 3 [85]; *M. Nagaraj & Ors v. Union of India* (2006) 8 SCC 212 [118]; *Shayara Bano v. Union of India* (2017) 9 SCC 1 [101].
[206] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248 [7], [48], [85].
[207] *Bachan Singh v State of Punjab* (1980) 2 SCC 684 [40]; *K. S. Puttaswamy v. Union of India* (2017) 10 SCC 1 [291].
[208] *Maneka Gandhi v. Union of India* (n 206) [7].
[209] Constitution of India 1950, art 14.
[210] Constitution of India 1950, art 21.
[211] *Anita Kushwaha v. Pushap Sudan* (2016) 8 SCC 509 [34]; *Madras Bar Association* (*MBA I*) (n 103) [102]; *Rattiram & Ors v. State of Madhya Pradesh* (2012) 4 SCC 516 [42].
[212] *Zahira Habibullah Sheikh v. State of Gujarat* (2006) 3 SCC 374 [36]; *Imtiyaz Ahmad v. State of U.P.* (2012) 2 SCC 688 [25]; *Anita Kushwaha* (n 211) [31].
[213] *Anita Kushwaha* (n 211) [31].
[214] *Anita Kushwaha* (n 211) [34]; *Brij Mohan Lal v. Union of India* (2012) 6 SCC 502 [137]; *Sheela Barse v. Union of India* (1988) 4 SCC 226; *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81.

Components of Fair Trial

- Proceedings must be premised on a fair investigation.[215]
- Principles of natural justice consist of the following: Decision makers must give prior notice to the affected persons and an opportunity to them to make representation. Moreover, person cannot judge a matter in which they have a personal bias.[216]
- There should be a calm atmosphere in the trial. Neither parties nor witnesses should feel intimidated in the proceedings or threatened or forced to give false evidence.[217]
- Trial cannot be hasty, stage-managed, tailored or partisan.[218]
- Parties must be able to adduce evidence.[219]
- Evidence must be appreciated in accordance with settled legal principles.[220]
- Evidence should be evaluated in totality and not by an isolated scrutiny.[221]

We can gain from reading these constitutional principles in light of the conceptualisation of the right to fair trial under international human rights law. Most relevant here is the international human right to equality of arms. The principle of equality of arms ensures that legal proceedings strike a fair balance between the parties involved, preventing undue advantage to one side and ensuring that the process operates equitably. It is a cornerstone of the right to equality before courts and tribunals, essential for safeguarding an individual's access to an effective remedy. For such a remedy to be meaningful, every party must be placed on equal footing, with the opportunity to contest evidence, present their case, and respond to arguments without procedural or systemic disadvantages.

The principle of equality of arms is incorporated in Article 14(1) of the ICCPR, which guarantees equality before courts and tribunals. General Comment 32 by the Human Rights Committee (HRC) clarifies that the principle applies to both criminal and civil proceedings and mandates that each party must have the opportunity to contest arguments and evidence presented by the other. Furthermore, Article 13 of the ICCPR, addressing the expulsion of aliens, is interpreted in light of Article 14 and its due process guarantees, including equality of arms.

In *Robinson v. Jamaica*, the HRC found a violation of Article 14(1) due to the denial of an adjournment for the author to secure legal representation, even though multiple adjournments had been granted to the prosecution. This case underscores how procedural imbalances undermine equality of arms and deny parties an effective opportunity to participate and defend themselves in legal proceedings.

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[215] *Vinubhai Haribhai Malaviya & Ors v. State of Gujarat* (2019) 17 SCC 1 [18].
[216] *Mahipal Singh Tomar v. State of U.P.* (2013) 16 SCC 771 [15].
[217] *Zahira Habibullah Sheikh* (n 212) [36].
[218] *Zahira Habibullah Sheikh* (n 212) [38].
[219] *Kalyani Baskar v. M.S. Sampoornam* (2007) 2 SCC 258 [12].
[220] *Noor Aga* (n 202) [113].
[221] *Zahira Habibullah Sheikh* (n 212) [37].
[222] HRC 'General Comment No. 32' (n 47).
[223] HRC '*Frank Robinson v. Jamaica*' (30 March 1989) UN Doc CCPR/C/35/D/223/1987 para 10.4.

The principle of equality of arms also extends to international and regional judicial settings. Charles Kotuby and Luke Sobota, in their commentary on General Principles of Law and International Due Process, highlight juridical equality as requiring each party to have a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage compared to their opponent.[224]

At the International Court of Justice (ICJ), the principle of juridical equality is foundational, ensuring all states, irrespective of factual inequalities, are treated equally in proceedings. In the *Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor Leste v. Australia*),[225] Judge Trindade emphasized that arguments of national security cannot override the court's obligation to uphold juridical equality and due process. This principle is codified in Article 2(1) of the UN Charter, affirming the equality of states in international law.

The European Court of Human Rights (ECtHR) has also recognized equality of arms as an integral part of the broader right to a fair trial. In *Delcourt v. Belgium*,[226] the ECtHR affirmed that equality of arms ensures fairness by providing both parties with equal opportunities to present their case and respond to evidence or arguments presented by the other side.

State Practice: Equality of Arms in Citizenship Proceedings

South Africa	Article 35(3) of the Constitution guarantees a right to a fair trial, including the right to be informed of charges in sufficient detail to prepare a defense and the right to adduce and challenge evidence.[227]
United Kingdom	Under the British Nationality Act 1981, Section 40(5) requires the Secretary of State to serve written notice to a person facing citizenship deprivation.[228] Affected individuals have the right to appeal before the First Tier Tribunal (Immigration and Asylum Chamber), governed by the Tribunal Procedure Rules 2014.[229] These rules emphasize fairness and participation, allowing parties to fully present and challenge evidence.
Canada	In *Abdullah Ahmad Hassouna et al. v. The Minister of Citizenship and Immigration*,[230] the Federal Court underscored that procedural fairness in citizenship revocation requires three safeguards: an oral hearing before an independent tribunal in cases involving credibility issues, a fair opportunity to present and contest the case, and an impartial decision-maker. The absence of these safeguards violated Section 2(e) of the Canadian Bill of Rights.
Kenya	Section 21 of the Kenya Citizenship and Immigration Act, 2011 mandates written notice to individuals facing citizenship revocation, including reasons for the decision.[231] It also provides an opportunity for the individual to present arguments against revocation before a decision is finalized.
Pakistan	Section 16(6) of the Citizenship Act, 1951 requires the Federal Government to issue written notice detailing the grounds for proposed citizenship deprivation before proceeding further.[232]

[224] Charles T Kotuby and Luke A Sobota, General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes (Oxford University Press 2017), 176-179.
[225] *Questions relating to the Seizure and Detention of Certain Documents and Data* (*Timor-Leste v. Australia*) (Request for the indication of provisional measures: Order) (Separate Opinion of Judge Cancado Trindade) [2014] ICJ Rep 167 [40].
[226] *Delcourt v. Belgium* App No 2689/65 (ECtHR, 17 January 1970), para 28.
[227] Constitution of the Republic of South Africa 1997, art 35(3).
[228] British Nationality Act 1981, s 40(5).
[229] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (UK).
[230] [2017] FC 473 [195].
[231] The Kenya Citizenship and Immigration Act 2011, s 21.
[232] Citizenship Act 1951 (Pakistan), s 16.

The right to participate fully in proceedings, as highlighted in the UK Tribunal Procedure Rules 2014, or the right to challenge evidence and have notice of charges, as guaranteed under the South African Constitution, are essential components of equality of arms. Similarly, the requirement of procedural fairness outlined in Canada's Federal Court in *Hassouna*[233]—including oral hearings, an independent tribunal, and the right to know the case to be met—stands in sharp contrast to the FT system's practices.

These international and state practices underscore the importance of the right to notice and grounds, participation and challenge, and judicial oversight—all of which are missing in the FT framework. The FTs in Assam operate in stark violation of these principles of fair trial and equality of arms, with systemic flaws denying individuals basic safeguards. Without adequate judicial oversight or the ability to respond on equal terms, the FT system fails to ensure juridical equality or prevent procedural imbalances. The denial of these rights not only violates procedural fairness but also jeopardises the fundamental rights of individuals subjected to these proceedings, leaving them without meaningful access to justice or an effective remedy.

3.5 Failing Self-Correction Mechanisms

The Supreme Court's jurisprudence on the FTs rests on the assumption that the Gauhati High Court, at the apex of this system, would ensure fairness and legality in FT proceedings. In principle, the High Court should act as a corrective force: establishing standards, addressing procedural violations, and providing redress when FTs fail to uphold due process. In practice, however, this promise remains unfulfilled. The High Court has fallen short on multiple fronts, enabling procedural deficiencies to persist and fairness to be compromised.

A key role of the High Court is to correct legal violations that derogate from fair trial standards. Yet, as this report shows (see also Chapter 5), the Court has consistently failed to set or apply meaningful legal standards. Instead of establishing protections to safeguard rights, its rulings have allowed procedural deficiencies—such as inadequate notice of grounds for suspicion, absence of clear communication on evidentiary standards, and lack of State rebuttal—to remain unchecked, creating a legal vacuum that undermines fairness.

This failure is closely tied to the High Court's reliance on its *certiorari* jurisdiction under Article 226. Since *Bahaluddin* conferred exclusive jurisdiction over citizenship determination to FTs, individuals have been left without an ordinary appellate process and must seek redress through the High Court's discretionary writ powers. Yet, *certiorari*, as a discretionary remedy, limits intervention to errors of law as defined by judges themselves—foreclosing correction of factual errors and requiring judges to distinguish between errors of fact and law. In the FT context, what constitutes an error of law has been left frustratingly unclear.

[233] *Abdullah Ahmad Hassouna* (n 230) [195].

Scope of writ of Certiorari under Article 226[234]

A writ of *certiorari* can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction.

A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice.

The jurisdiction to issue a writ of *certiorari* is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings.

An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of *certiorari* can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of *certiorari*.

The High Court's approach has compounded these limits. Rather than engaging with whether writ petitions disclose errors of law, judges have often used the restrictive frame of *certiorari* as a cover for non-intervention, skirting any meaningful assessment. In doing so, they effectively refuse to exercise their discretion to define an error of law or assess whether cases meet that threshold. This abdication is not compelled by *certiorari* but reflects a judicial choice, as illustrated by multiple examples discussed below.

Problematic Invocations of *Certiorari*

The following paragraph has been reproduced in many cases: "Needless to say that the Writ Court exercising its power of judicial review under Article 226 of the Constitution of India cannot re-appreciate the evidence and/or sit on appeal over the findings recorded by the Tribunal appreciating the evidence on record."

On this basis, non-interference into writ petitions has been frequently justified by the Gauhati High Court.

Illustration (1): Hasina Begum (WP(C) 6752/2016) filed a writ arguing that the evidence she submitted in support of her citizenship claim was not properly considered. Justice Bhuyan dismissed the writ pertition, citing lack of jurisdiction to interfere with factual findings. However, he did not justify how this non-appreciation of evidence does not amount to an error of law. Instead, he proceeded to review the evidence and commented on its shortcomings, specifically her inability to prove a link to her grandfather. This suggests that the jurisdictional ground cited was more of a pretext, and the Court's use of *certiorari* as a reason for dismissal appears to be a legal facade, obscuring the true basis for the decision and muddling the interpretation of error of law.

Illustration (2): In Md. Tafer Ali's case (WP(C) 4369/2015), Justice B.K. Sharma invoked *certiorari* to justify non-interference, despite the tribunal's decision containing an error of law. The tribunal had dismissed Tafer Ali's claim due to minor discrepancies in names across documents, which constitutes an improper consideration of evidence. Justice Sharma's refusal to intervene without explaining why this did not meet *certiorari's* threshold raises questions about the lack of meaningful assessment in the Court's decision making.

[234] *G. Veerappa Pillai v. Raman & Raman Ltd.* (1952) 1 SCC 334 [5]; *T. C. Basappa v. T. Nagappa* (1954) 1 SCC 905 [5]; *Hari Vishnu Kamath v. Syed Ahmad Ishaque* 1954 SCC OnLine SC 8 [7]; *Syed Yakoob v. K.S. Radhakrishnan* (1964) 5 SCR 64 [5].

This is particularly troubling because many writ petitions do disclose errors of law—especially errors of jurisdiction or improper exercise of jurisdiction (see Chapter 4, §4.1.3). Moreover, *certiorari* is not limited to correcting pure errors of law; it can also address errors of fact where findings are unsupported by evidence or admissible evidence has been overlooked (see Chapter 4, §4.2.10, 4.2.11, 4.2.12). Yet the High Court has declined to exercise this power. Its selective docket discretion results in fewer interventions on issues arising from preliminary investigations, while it engages more readily with other kinds of issues (see Chapter 4, §4.1.4).

Worse still, the High Court has, at times, used their jurisdiction not to correct legal errors but to fill gaps in FT reasoning or reinterpret FT law to strengthen findings against defendants (see Chapter 5, §5.2). This self-defeating use of *certiorari* privileges outcomes aligned with the State's coercive objectives, rather than safeguarding procedural justice. This inconsistency has also fostered unpredictability and undermined legal coherence. The result is a system in which due process violations go undetected, are dismissed as insignificant, or are acknowledged but not treated as serious errors of law warranting intervention.

The Court's misinterpretation of its jurisdiction has entrenched a regime where those accused of being foreigners face immense procedural obstacles in proving their citizenship. Without a robust appellate mechanism or meaningful judicial oversight, defendants are left navigating a legal framework where due process guarantees exist more in form than in function.

In sum, the absence of appellate standards, combined with the High Court's erratic use of *certiorari*, has exacerbated the legal vulnerability of defendants. They are subjected to arbitrary procedures and denied equal protection, left to contend with a legal "black hole" that contrasts starkly with the rights and remedies available in other domains of law.

3.6 Need for an Appellate and Judicious System

Critically, the FT system offers no ordinary right of appeal to individuals contesting the determination of their citizenship—contravening basic principles of due process and effective remedy under international law. The primary recourse is through the High Court's writ jurisdiction, most commonly by a petition for *certiorari*. This limited and discretionary pathway offers neither the procedural depth nor the substantive safeguards required for robust review. Compounding this is the jurisprudential legacy of *Sonowal I*, which invalidated the IMDT Act and its stronger procedural guarantees, thereby foreclosing more comprehensive appeal mechanisms. Together, these developments have undermined a core element of lawful adjudication: the right to appeal in cases where the stakes—loss of citizenship and potential statelessness—are existential.

This absence of an appellate mechanism should be construed as a violation of the right to an effective remedy. Article 14(5) of the ICCPR explicitly recognizes this right in criminal cases, allowing

convicted individuals to have their cases reviewed by a higher tribunal.[235] While this provision does not directly extend to administrative or civil proceedings, analogous protections can be found in Article 13 of the ICCPR, which safeguards the rights of aliens facing expulsion.[236] This article mandates that individuals be afforded the opportunity to submit reasons against their expulsion and to have their case reviewed by a competent authority, unless compelling national security concerns exist. Similarly, Article 7 of the African Charter on Human and Peoples' Rights guarantees the right to appeal decisions violating fundamental rights,[237] as interpreted by the African Court in cases such as *Anudo Ochieng Anudo v. State of Tanzania*. The Court in *Anudo* held that Tanzania's denial of an appeal mechanism in citizenship disputes contravened the Charter's guarantees, underscoring the critical role of appellate review in protecting fundamental rights.[238]

The right to appeal has also been embedded in other human rights instruments, reflecting its universality. Article 12 of the European Convention on Nationality requires states to provide for administrative or judicial review of decisions related to citizenship.[239] The Inter-American Convention on Human Rights, through Resolution 04/19, emphasises the right to appeal as a minimum guarantee of due process, requiring notification of this right in a language understood by the affected individual.[240] Regional frameworks such as the Bangkok Principles further extend this guarantee, specifically in the context of expulsion and deportation, mandating that refugees be allowed to present evidence, appeal decisions, and be represented during the appellate process.[241] These instruments collectively affirm that the right to appeal is a cornerstone of effective remedies, ensuring fairness and preventing arbitrary decisions.

The absence of a meaningful appellate mechanism in the FT system is particularly troubling when viewed through the lens of the evolving international jurisprudence on effective remedies. The Human Rights Committee has repeatedly emphasised that remedies must be effective in both theory and practice, offering individuals a real prospect of success. In *The Nubian Community in Kenya v. The Republic of Kenya*,[242] the African Commission clarified that a remedy must be available, sufficient, and effective, highlighting that procedural bottlenecks and theoretical remedies without practical implementation do not meet this standard. The International Court of Justice, in the *LaGrand*[243] and *Avena*[244] cases, similarly emphasised the importance of accessible and effective review mechanisms, particularly where procedural barriers have limited the ability of individuals to challenge decisions affecting their fundamental rights.

[235] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14(5).
[236] ibid art 13.
[237] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 28 December 1988) 1520 UNTS 217 (African Charter), art 7.
[238] *Anudo v. United Republic of Tanzania* (n 83) [113]-[115].
[239] European Convention on Nationality (adopted 6 November 1997, entered into force 1 February 2001) 2135 UNTS 213, art 12.
[240] Inter-American Commission on Human Rights, 'Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking' Resolution 04/19 (approved 7 December 2019).
[241] Asian African Legal Consultative Organization, 'Bangkok Principles on the Status and Treatment of Refugees' (adopted 24 June 2001), art V(4).
[242] African Commission on Human and Peoples' Rights 'The Nubian Community in Kenya v. The Republic of Kenya' Communication 317/2006 (28 February 2015).
[243] *LaGrand (Germany v. United States of America* (Judgment) [2001] ICJ Rep 466.
[244] *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004] ICJ Rep 12.

In the context of citizenship determination, the implications of the absence of appellate mechanisms are profound. Citizenship status determines an individual's legal identity, access to rights, and protection from statelessness, detention, or deportation. The lack of appellate recourse in Assam leaves affected individuals vulnerable to the consequences of erroneous or arbitrary decisions, with limited opportunities for redress. This deficiency not only contravenes India's obligations under international human rights law but also exacerbates the systemic injustices and procedural flaws endemic to the FT system. The FT system's failure to integrate an appellate mechanism reflects a broader departure from the standards established under international law.

State Practice: Appeals and Effective Remedies in Citizenship Determination

United Kingdom	The British Nationality Act 1981 provides two routes for appeals. Under Section 40A(1),[245] individuals may appeal decisions of the Secretary of State before the First Tier Tribunal (Immigration and Asylum Chamber), established by the Tribunals, Courts and Enforcement Act 2007. For cases involving national security or public interest concerns, Section 2B of the Special Immigration Appeals Commission (SIAC) Act 1997 provides a separate appeals route. However, in *R (on the application of Begum) v. SIAC and SSHD*,[246] the UK Supreme Court noted that, in cases of national security, fair hearing rights might not always prevail over public interest concerns, emphasising the complexity of balancing these competing interests.
Bangladesh	Under the Bangladesh Citizenship (Temporary Provisions) Rules 1978,[247] individuals deprived of citizenship by an order under the Bangladesh Citizenship Order 1972 may appeal to the government within 30 days of receiving the order. The appellant must be granted an opportunity to be heard before the appeal is decided.
Ghana	Article 23 of Ghana's Constitution guarantees the right to seek redress before a court or tribunal against administrative decisions. The Supreme Court serves as the final appellate body. In *Olympio v. Commissioner for the Interior*,[248] the High Court ruled in favour of a plaintiff claiming citizenship by descent, voiding a Ministry of Interior directive that sought to deport him based on erroneous assumptions about his status.
Nepal	The Nepal Citizenship Act 2063 (2006) allows individuals deprived of Nepali citizenship by a government directive to appeal to the concerned Appellate Court within 35 days of the directive. (The provision in question provides for the power to revise orders)
Kenya	Under Section 21(6) of the Kenya Citizenship and Immigration Act 2011,[249] individuals whose citizenship has been revoked by the Cabinet Secretary may appeal to the High Court within 30 days. Further appeals to the Court of Appeal and the Supreme Court are permitted under Section 21(8). Importantly, such individuals cannot be removed from Kenya until all appeals are exhausted.
South Africa	Section 25 of the South African Citizenship Act 1995 grants any provincial or local division of the Supreme Court jurisdiction to review decisions of the Minister of Home Affairs, including those on deprivation of citizenship.[250] The court can require the Minister to provide reasons, evaluate the matter on its merits, and confirm, vary, or set aside the Minister's decision.
Canada	Part V.1 of the Canadian Citizenship Act (R.S.C., 1985) provides for judicial review of citizenship-related matters.[251] Applications must be filed within 30 days of notification and may proceed to the Federal Court of Appeal only if a judge certifies that a serious question of general importance is involved.

[245] British Nationality Act 1981, s 40A(1).
[246] [2021] UKSC 7.
[247] Bangladesh Citizenship (Temporary Provisions) Rules 1978, r 8.
[248] *Olympio v. Commissioner for the Interior* 1970 Ghana Law Report 4.
[249] The Kenya Citizenship and Immigration Act 2011, s 21.
[250] South African Citizenship Act 1995, s 25.
[251] Citizenship Act 1985 (Canada) part V.1.

Conclusion

This chapter has demonstrated that the FT process, as it currently operates, systematically denies individuals the right to a fair trial. The improper construction of the burden of proof, the State's abdication of evidentiary responsibility, the denial of basic procedural safeguards, and the absence of judicial accountability mechanisms together create a structurally unjust system. These deficiencies not only violate Articles 14 and 21 of the Indian Constitution but also fall short of India's obligations under international human rights law. Without substantive reform—including clarification of legal standards, enforcement of procedural rights, and creation of an effective appellate mechanism—the FT system remains incapable of delivering justice in cases that carry life-altering consequences.

4 Violations of Natural Justice and the Right of Due Process

There is a systematic, widespread, and consistent pattern of violations of due process and natural justice in Assam's citizenship determination process. Both the Foreigners Tribunals and the Gauhati High Court have enabled this dismal state of adjudication. The High Court has entrenched norms that erode fair trial rights—such as denying summons, refusing to entertain challenges to flawed inquiries, and adopting arbitrary evidentiary standards—while the Foreigners Tribunals routinely disregard even these inadequate safeguards. The result is a broken system that gravely undermines constitutional guarantees in determining citizenship.

Introduction

This chapter examines the systemic procedural violations that characterise the FT system. In ordinary process, discrete stages are expected: an initial investigation by the border police to identify suspected foreigners; the issuance of notices to defendants to appear before the FTs; and, if unsuccessful at trial, the right to seek relief through writ petitions in the Gauhati High Court. While Chapter 5 addresses the legal shortcomings of the High Court's review, this chapter focuses on the FT proceedings themselves. It argues that at every stage—leading up to and during the trial—the process in the FTs violates fundamental principles of natural justice and due process.

The process for identifying and declaring an individual as a foreigner in Assam unfolds in three distinct stages: the Inquiring Authority, the Referral Authority, and the FT. The Assam Police Border Organisation, led by the Superintendent of Police (Border) in each district, serves as both the Inquiring and Referral Authority, while a designated member of the FT presides over the third stage.

Stage One: Inquiring Authority

When there is a reasonable suspicion regarding a person's citizenship status, the Inquiring Authority is required to conduct a fair and thorough investigation. While this inquiry need not meet the standards of a criminal investigation, it must be grounded in credible evidence suggesting that the individual is a foreigner who entered from a "Specified Territory" (typically Bangladesh under existing notifications). This suspicion must be based on materials gathered from or relating to the individual.

In *Moslem Mondal*, the Gauhati High Court held that the suspected individual must be given an opportunity at this stage to demonstrate their citizenship. If the person cannot be located, the investigating officer must document their efforts in the presence of a village elder, headman, or other respected local figure. The officer should, where possible, obtain the individual's signature or thumb impression and record any available statement. A proper and impartial inquiry at this stage is essential for safeguarding the right to a fair trial.

Stage Two: Referral Authority

The Referral Authority—typically the Superintendent of Police (Border)—must conduct an independent, *prima facie* assessment of the materials submitted by the Inquiring Authority. If the evidence appears insufficient, the Referral Authority may return the file for further investigation or close the matter altogether. The case should be forwarded to the FT only if the suspicion remains reasonably substantiated.

Stage Three: Foreigners Tribunal

On receiving the case, the Tribunal must verify that the enquiry and supporting materials provide a substantial basis for proceeding. Notice can be issued to the individual concerned only after this threshold is met. The Tribunal's role is to assess whether the standards of investigation and referral have been properly met before making a determination of foreign status.

In practice, however, these safeguards are often weakly implemented or disregarded altogether—leading to serious procedural lapses that undermine the fairness and legality of the entire process.

The report identifies three types of rights violations that are overlapping and mutually reinforcing, yet analytically distinct.

First	Rights violations resulting from problematic norms laid down by higher courts. Several norms in judgments by the Supreme Court and Gauhati High Court fail to align with due process and fair trial principles. These norms often introduce standards that either increase the burden on individuals disproportionately or fail to ensure adequate safeguards.
Second	Rights violations resulting from the FTs not complying with norms that are mentioned in law or laid down by higher courts. As documented below, despite clear directives from the higher judiciary, the FTs often fail to serve notice properly, deny individuals a meaningful opportunity to respond, or pass orders without following even basic procedural safeguards. Such violations are not merely isolated lapses but systemic failures that compromise the legitimacy of the entire adjudication process.
Third	Failures of higher courts to address violations of rights. These are distinct from the first category of violations. Rather than arising from wrongful standards, these violations result from the inability—or unwillingness—of superior courts to recognize systemic violations by officials in the FT system, including the Border Police and FT members. In many cases, the Gauhati High Court has not laid down comprehensive guidelines to ensure adherence to correct procedural norms. It has inadequately adjudicated claims of procedural violations, either dismissing them as routine pleas or failing to scrutinise the materials on record effectively (see Chapter 5). This judicial laxity exacerbates the procedural failures and leaves affected individuals without meaningful recourse.

This chapter focuses primarily on the first and second categories of violations, before the initiation of status determination proceedings in the FTs and during the FT proceedings. The third category of violations—resulting from the inaction of Gauhati High Court by either not laying down standards, keeping them under or undefined, or systematically overlooking their violations—will be taken up comprehensively in the next chapter (Chapter 5).

The cumulative effect of these violations is the erosion of basic principles of justice in FT proceedings. By replacing reasonable procedural expectations with arbitrary and onerous ones, these practices disregard the broader implications of citizenship determination, trivialising its constitutional significance. This not only undermines the individuals subjected to these proceedings but also reflects poorly on the integrity of the adjudicative process itself.

4.1 Systemic Violations Leading Up to Status Determination

4.1.1 What the Superior Courts Have Said

In the absence of the Foreigners (Tribunals) Order, 1964 prescribing any meaningful procedure for pre-trial inquiries, the Gauhati High Court has laid down essential procedural norms. In *Moslem Mondal* (2013), the full bench of the Court held that the jurisdiction of Foreigners Tribunals is conditional on the Referral Authority's satisfaction, based on material evidence, that the person in question may be a foreigner.[252] Nine years later, Justice Kotiswar Singh further clarified in another High Court judgment in 2022 that referrals must clearly articulate the grounds of suspicion—including the alleged date or period of entry—and that vague referrals result in a jurisdictional defect.[253]

In *Rahim Ali* (2024), the Supreme Court ruled that the burden of proof under Section 9 of the Foreigners Act can only shift after authorities provide the defendant with sufficient information and materials to enable a meaningful defence. Without substantive allegations or access to evidence, proceedings amount to a denial of a fair hearing.[254]

The Gauhati High Court in *Anjana Biswas* (2022) made explicit that "if there was no proper enquiry, the subsequent acts including the reference made, and proceeding before the Tribunal may be vitiated and the opinion of the Tribunal may not be sustained."[255] Courts have thus affirmed that jurisdictional facts—established through due and diligent inquiry—are a legal prerequisite for initiating proceedings under the FT system.

These standards include: (1) reasonable suspicion based on material evidence; (2) fair inquiry with opportunity to present documents; (3) evaluation by the Referral Authority; and (4) a *prima facie* review by the Tribunal. Each stage is constitutionally significant. In *Moslem Mondal*, the Court underscored that "fair investigation and fair trial [are] fundamental human right[s] of a person,"[256] protected under Article 21 of the Constitution.

4.1.2 Denying Access to Inquiry Reports

Despite these judicial pronouncements, the implementation of these standards has been negligible. For these standards to have any viable chance of being met, defendants must have access to all materials collected against them, allowing them to challenge the jurisdiction of the FTs effectively. The inquiry report serves as the basis for initiating proceedings, and its validity must be subject to preliminary challenges. If a defendant raises concerns about an impartial inquiry, the FT should summon the inquiry officer and allow scrutiny of the inquiry process. This step is crucial because a fair assessment of preliminary challenges forms the foundation of the FT's jurisdiction.

[252] *Moslem Mondal* (n 188) [98].
[253] *Anjana Biswas v. Union of India* WP(C) 7280/2021 (Gauhati High Court, 28 September 2022) [52], [63].
[254] *Rahim Ali* (n 2) [35].
[255] *Anjana Biswas* (n 253) [47].
[256] *Moslem Mondal* (n 188) [97].

Advocate ZH pointed out that inquiry officers involved in older cases may be unavailable due to death, mental incapacity, or transfer. FT members frequently argue that summoning them would waste time. Hussain said, “References sometimes are very old... calling them would be like wasting time,” with members emphasizing that the priority should be for the opposing party to “satisfy the burden” within the 60-day limit imposed by the Foreigners Tribunal Act.

ZH described a “trend” in the Tribunals to reject preliminary objections and expedite cases in a summary manner. He recounted that filing preliminary objections has become futile, as FT members dismiss such motions to avoid prolonging the case. ZH observed, “No point of filing preliminary objections because nobody is going to agree to it, and would ask for a Written Statement because they don’t want to give the opportunity to drag the case on for long.”

But applications to access the inquiry report in the FTs are routinely dismissed or simply not entertained, and objections to the absence of inquiry are recorded, at best, only as part of the final order, without any reasoned determination. Legal practitioners repeatedly emphasise that preliminary objections—such as the absence of material, contradictions in the referral, or findings in favour of citizenship within the inquiry itself—are treated as “inconvenient” or “disruptive” by FT members. They are not viewed as jurisdictional matters requiring prior adjudication but instead as distractions that “waste time.”

Advocate SD attempted to challenge the inquiry by requesting the FT to allow him to examine the Inquiry Officer, but this request was denied. He told us: “I did want to examine the Inquiry Officer but that was not allowed” and “I asked on that very date... that this is what has happened and the entire inquiry is not true and it’s false and I want to examine the Enquiry officer so kindly issue summons.” The FT, however, dismissed his request, stating, “we don’t issue summons to anyone and it’s not our lookout.”

Advocate MI requested the FT to summon the Local Border Officer (LBO) and other investigative officers to question them about the enquiry’s accuracy. His request was denied. MI told us: “No tribunal has till now summoned the LBO... the investigation has not been fair.”

Defendants are also often denied access to the materials gathered by the inquiring authorities. In many cases, even after counsels have filed formal applications to obtain these materials, the FTs refuse to share them. Applications are frequently dismissed without explanation, and counsels are often discouraged from filing such requests.

FT members typically tell defence counsels to challenge the inquiry report in their Written Statement—a plea that is often either summarily dismissed without explanation or rejected on the basis that the burden of proof lies with the defendant, who must demonstrate that the inquiry was improperly conducted or lacked due diligence. However, without access to the underlying report, defendants are unable to effectively mount such a challenge.

According to lawyers practicing before the FTs, review of these inquiries is rarely conducted in practice. In one infamous case,[257] a retired Army officer and veteran of the Kargil War was declared to be a foreigner by the FT, solely on the basis of a faulty inquiry report. The FT failed to note his Army service as well as the fact that he had been serving as a Sub-Inspector in the Assam Border Police, while the inquiry report wrongly claimed he was a "labourer" by profession. Despite the glaring factual errors and the absurdity of the claim, neither the FT nor the High Court undertook any meaningful review of the inquiry process. The proceedings continued as if the referral were legally sound.

> Advocate NN told us: "In 90% of these references, inquiries are not conducted. The inquiry officers usually sit in police stations and make inquiry reports, and no chance is given to the proceedee to furnish their documents… [My client] is present on voters rolls of 1966, on what basis at a preliminary stage can they say that he has crossed over from Bangladesh? These are all non-factual claims, you will see three or four districts in Bangladesh being repeated across inquiries. The inquiring officer never bothers actually finding out…."

This indifference facilitates widespread and unchecked abuse by Referral Authorities. One lawyer cited the case of a person from the Dhubri district who was referred even though the Inquiry Officer had concluded that the individual was an Indian citizen. Despite this, the Referral Authority—without giving any reasons or justification—proceeded to initiate the FT process.

These practices severely compromise fair trial, which includes the right to fair disclosure. This is certainly the case in criminal proceedings, but fair trial would demand that it is applicable in citizenship status determination cases because of their profound significance. The Indian Supreme Court has underscored this principle of fair disclosure, noting that this right is "the very foundation of a fair investigation and trial" and materials that have bearing on the case must be disclosed to the accused "in the interest of justice and fair investigation and trial."[258] The Court has ruled that "the

[257] Manu Sebastian, 'Ex-Army Man, Who Was Detained After Being Declared A "Foreigner" By Assam Tribunal, Moves Guahati HC For Release' (LiveLaw, 1 June 2019) <https://www.livelaw.in/top-stories/ex-army-man-who-was-detained-after-being-declared-a-foreigner-moves-guahati-hc-for-release-145395> accessed 22 January 2025.

[258] *Sidhartha Vashisht @ Manu Sharma v. State* (*NCT of Delhi)* 2010 (6) SCC 1 [92].

right of the accused to receive the documents/statements submitted before the court is absolute and it must be adhered to by the prosecution and the court must ensure supply of documents/statements to the accused in accordance with law."[259] Although the Foreigners (Tribunals) Order, 1964 does not explicitly guarantee the right to fair disclosure, this right is integral to ensuring a reasonable opportunity to be heard, as underscored by these judgments.

4.1.3 Shielding of Inquiry Officers

Closely related to denying access to inquiry reports is the systemic refusal to summon inquiry officers and allow their cross-examination. Even where referral documents contain material contradictions or flawed inquiry reports, applications to summon the responsible officer are routinely rejected—often on the pretext that the officer is no longer in service, has been transferred, or that "the Tribunal does not issue summons."

As one senior lawyer put it: "They simply say, 'not our lookout.' Even if you point out that the EO has made false statements, the Tribunal will say, 'you prove your case; the burden is on you.'" This approach relieves Referral Authorities of lawful accountability and shields them from scrutiny. The 2012 amendment to the FT Order has entrenched this further, shifting focus almost entirely to the defendant's documentation and rendering procedural objections—even those raising jurisdictional failings—effectively irrelevant.

The result is a system where the very agents initiating proceedings are insulated from legal oversight. Tribunals ignore the legality of referrals, dismiss objections without reason, refuse to summon inquiry officers, and operate with no meaningful enforcement of procedural standards—turning the State's failure to follow lawful process into a legally inconsequential fact.

4.1.4 Failure of the High Court

Despite these systemic defects, the Gauhati High Court has consistently treated procedural failures in the referral process as remediable technicalities rather than as fundamental violations. The Court has also contributed to lowering the threshold for lawful referral. Lawyers report that judges often assert an "enquiry need not be exhaustive" and that it suffices for the Referral Authority to have "subjective satisfaction" based on "some material"—a standard so vague it enables arbitrary action.

> Advocate ZH has attempted to challenge the accuracy of inquiries through writ petitions in the High Court, but has been unsuccessful. He told us that the High Court often rejects petitions as "factually useless" and "time-wasting" tactics, and tells petitioners to "worry about proving their citizenship and not waste time on these things."

[259] *V.K. Sasikala v. State Rep. by Superintendent of Police* (2012) 9 SCC 771 [19].

As one lawyer put it: “When the Court says even a half-page enquiry is sufficient, you can’t expect much justice.”

As a result, neither the FTs nor the High Court has developed a jurisprudence of procedural fairness suited to citizenship determination. Instead, there is growing tolerance for procedural evasion. Courts focus narrowly on the sufficiency of documentation submitted by the defendant, sidestepping questions about referral legality or FT jurisdiction.

The failure to treat defective referrals as jurisdictional flaws reflects a deeper institutional pathology. The law recognises that proceedings based on unlawful or baseless referrals are void. Yet, the High Court routinely remands cases rather than quashing them, seemingly out of fear that rigorous scrutiny would expose the system’s illegality and overwhelm it. As one practitioner noted: “If you apply the law strictly, 80% of referrals would be thrown out. They don’t want that. So the law is bent to accommodate the process.”

Our review of 1,193 High Court orders from 2010 to 2019 found that only 20 mentioned objections regarding referral legality or inquiry quality—despite lawyers routinely raising such issues and deficiencies being evident on the record. Where such objections were acknowledged, the Court’s engagement was superficial or absent . For example, six of these orders disregarded essential contentions, such as allegations that no inquiry was conducted or that the defendant was denied an opportunity to supply documents.

Interviews with lawyers indicate that, in practice, Tribunals consistently refuse to consider objections concerning the pre-referral inquiry.

For instance, in Isha Hoque’s case,[260] the defence lawyer argued that the Referral Authority had disregarded the Inquiry Officer’s report concluding that she was in fact a citizen based on her documentation. Justice Manojit Bhuyan declined to engage with this argument, holding instead that Isha Hoque had not produced additional evidence in the FT to prove the Referral Authority’s lack of due diligence. However, this response sidesteps the issue: the Referral Authority is obligated to apply its mind to the materials already collected. Given the Inquiry Officer’s finding of citizenship, the Referral Authority’s decision required justification, including concrete material collected both before and during the inquiry. Justice Bhuyan should have required the Referral Authority to justify its departure from the inquiry report rather than placing the burden on Isha Hoque to prove its inadequacy.

Justice Bhuyan’s reasoning also indicates a concerning latitude granted to Referral Authorities. He stated that preliminary investigations need not be detailed or exhaustive—a mischaracterization that undermines the legal requirement for administrative authorities to apply their mind in making

[260] *Isha Hoque @ Md. Isha Haque Ali v. Union of India* WP(C) 6472/2018 (Gauhati High Court, 21 September 2018).

decisions. This perspective essentially grants the Referral Authority broad discretion to make referrals arbitrarily, undercutting the mandate that such referrals be grounded in thoughtful consideration of collected evidence.

A similar disregard for investigative integrity appears in the case of Md. Jalaluddin,[261] who was referred to the Tribunal despite the Inquiry Officer's conclusion that he was a citizen. Justice Ujjal Bhuyan remanded the case, merely noting that the Referral Authority should have provided brief reasons for disagreeing with the Inquiry Officer's conclusion. However, a remand was unwarranted, as there was no basis for the reference: the Referral Authority had failed to apply its mind to the evidence and provided no additional material to justify its decision. Remanding the case served no purpose, as the Tribunal cannot correct a fundamental defect caused by the Referral Authority's failure to follow the required process.

In another case, Justice B.K. Sharma noted the lawyer's submission on behalf of Sulema Khatun, alleging that the Inquiry Officer had falsified the report. However, the Court dismissed the writ petition on unrelated grounds,[262] displaying a dismissive attitude toward this serious allegation. Similarly, in Usharani Biswas's case,[263] the contention that the inquiry officer had failed to seek her defense during investigation was ignored; Justice Manojit Bhuyan merely remanded the case to the Tribunal for reconsideration without directing any review of this critical procedural lapse. Such dismissals reveal a reluctance to scrutinize or remedy procedural defects in the inquiry process.

These cases illustrate a troubling pattern wherein both the Foreigners Tribunals and the High Court sideline essential procedural norms by failing to acknowledge or record challenges to flawed inquiries. This neglect not only undermines the fairness of the citizenship determination process but also erodes the foundational principles of due process in administrative adjudication.

4.2 Systemic Violations During Status Determination Proceedings

While the FTs are empowered to depart from strict procedural and evidentiary norms of civil law, they are nonetheless bound by fundamental principles of natural justice and due process.[264] This obligation is particularly pressing given the critical constitutional significance of citizenship status. But these principles have been systematically undermined. Rather than ensuring that the procedural norms reflect the seriousness of citizenship adjudication, the FTs have frequently replaced ordinary adjudicative standards with onerous and unreasonable burdens that disregard these serious constitutional stakes.

[261] *Jalal Uddin v. Union of India* WP(C) 2528/2016 (Gauhati High Court, 22 April 2016).
[262] *Sulema Khatun v. Union of India* WP(C) 1691/2015 (Gauhati High Court, 25 March 2015).
[263] *Usharani Biswas v. Union of India* WP(C) 4869/2019 (Gauhati High Court, 9 September 2019).
[264] *Sonowal II* (n 42) [50]; *Mohd. Misher Ali v. Union of India* 2021 SCC OnLine SC 3432 [13].

4.2.1 Service of Notice

Paragraph 3(1) of the FT Order, 1964, mandates that proceedings should only commence after serving the grounds of suspicion to the concerned individual, ensuring their right to a fair trial. Despite the importance of proper service, the Order originally did not prescribe specific procedures for serving notice. In *Moslem Mondal*, the Gauhati High Court addressed this lacuna by issuing guidelines for uniformity in serving notices.[265] It held that notices must be personally served in English, Assamese, or Bodo, with the process server obtaining the thumb impression of the recipient as proof. These guidelines were later incorporated, with minor amendments, in the FT Order, 2013.[266]

While aligning broadly with the Code of Civil Procedure, some peculiar features of these rules, introduced by the Gauhati High Court, undermine the objective of ensuring individuals have a reasonable opportunity to respond. For instance, *Moslem Mondal* prescribes that individuals must inform the investigating agency before changing their address. If they cannot be located, notice can be served by pasting it at their last known residence.[267] Effectively, the burden of tracking address changes is placed on the individual, not the investigating agency. This contrasts with the Code of Civil Procedure that requires the party initiating proceedings to ascertain the correct address before serving notice. Substituted service—affixing the notice to a conspicuous part of the premises—is permitted, but efforts have to be made to ensure that it is pasted at the updated address.[268] This procedural imbalance has led to unfair outcomes, as individuals are expected to inform the agency of their movements even before being suspected of being a foreigner.

For example, in *Rabiya Bibi*,[269] notice was affixed to her previous residence, even though she had relocated before the proceedings began. Despite this, the FT deemed the service valid because she had not informed the agency of her new address. In fact, Justice Manojit Bhuyan held that Rabiya Bibi did not deserve another opportunity as her actions had clearly indicated that she had "evaded" from appearing before the tribunal.[270] This verdict is clearly based on the assumption that Rabiya Bibi is a foreigner who deliberately relocated to avoid the notice she would have known was coming for her. The High Court dismissed her plea for reconsideration, effectively imposing an undue burden on Bengali-origin populations in Assam to constantly update government agencies as though they are presumed foreigners.

These procedural norms overlook the reality of mobilities among the marginalised populations in Assam. Many poor and illiterate defendants live in the *char* (riverine island) areas, which are prone to frequent floods and erosion.[271] As a result, they are forced to move frequently while notices from the FTs are sent to their old addresses. In one case documented by scholar Salah Punathil, a middle-

[265] *Moslem Mondal* (n 188) [103].
[266] Foreigners (Tribunals) Amendment Order 2013.
[267] *Moslem Mondal* (n 188) [103(vi)]
[268] Code of Civil Procedure 1908, Order V rules 9, 17.
[269] *Rabiya Bibi v. Union of India* WP(C) 6330/2018 (Gauhati High Court, 15 September 2018).
[270] ibid 4.
[271] Jharna Gogoi and Nazimuddin Siddique, 'Flood, Displacement and Politics: The Assam Chapter' (2023) 58 Economic and Political Weekly 1.

aged Muslim woman was compelled to move due to such floods and consequently missed her FT proceedings. The case was decided *ex parte* and she spent the next ten years in detention before finally being released.[272]

There is also a lack of procedural clarity, particularly related to how proceedings should be transferred to the FTs. Proceedings may be transferred from the IMDT to the FT or between FTs. While some High Court rulings have directed that notice be re-sent in such cases, no formal guidelines exist, leaving individuals vulnerable to procedural uncertainty. For example, Manik Mazumder and Jainal Ali were both unaware of their cases being transferred and had not received notice from the new FTs, requiring judicial intervention.[273] While the High Court did provide favourable remedies here, such *ad hoc* solutions underscore the systemic failure to address this recurring issue.

The lack of clear procedural guidelines for service of notice is compounded by inconsistent judicial approaches. Difficulties in service of notice often arise when there is a mismatch between the particulars of the person to whom the notice is addressed and the person to whom it is attempted to be served. In such instances, the recipient may refuse the notice, claiming that the notice is not intended for them. Alternatively, the person being proceeded against may claim that the notice was never served on them due to errors in addressing or personal details. But, the High Court has not laid down meaningful guidelines to cover such cases. For instance, Justice Manojit Bhuyan, in two cases,[274] remanded writ petitions where defendants argued that the notices contained incorrect details, such as errors in their relatives' names. Although the cases were remanded "in the interest of justice", no binding legal precedent was established regarding the proper course of action. Crucially, when notices are acknowledged to have incorrect details, the proceedings should ideally be set aside as this reflects deficiencies in the preliminary investigation.

In another case, Justice Ujjal Bhuyan declined to remand the case of Ushab Ali,[275] who had refused a notice citing an incorrect address. The notice mentioned "Baladmari No. 3" instead of "Baladmari No. 2," leading Ushab Ali to believe it was meant for another individual, also named Ushab Ali, who lived in Baladmari No. 3 and had previously been marked as a D-voter. The judge ruled that Ushab Ali did not deserve another opportunity as he was aware of the proceeding but refused to cooperate. He further asserted that there was "no iota of doubt" that the reference pertained to Ushab Ali, relying on an affidavit from the Superintendent of Police alleging that Ushab Ali had failed to provide documents during the inquiry. However, this conclusion is problematic in the absence of any evidence that inquiry had actually been conducted. Firstly, the affidavit was unreliable since neither the inquiry officer nor the Superintendent of the Police had been cross examined. Secondly, the address on the notice being incorrect raises legitimate doubts about whether Ushab Ali was even visited. At a minimum, the address in the inquiry report should have been verified to ascertain which house was visited.

[272] Punathil (n 14) 62.
[273] *Manik Mazumder @ Manik Chandra Mazumdar @ Manik Lal Mazumdar v. State of Assam* WP(C) 5022/2013 (Gauhati High Court, 13 March 2014); *Jainal Ali @ Jainal Abedin v. Union of India* WP(C) 4821/2016 (Gauhati High Court, 9 September 2016).
[274] *Abul Kasem @ Abdul Kasem @ Kasem Ali @ Kasem Moulabi and Ors. v. Union of India* WP(C) 7500/2018 (Gauhati High Court, 3 April 2019); *Amiruddin v. Union of India* WP(C) 3472/2019 (Gauhati High Court, 12 June 2019).
[275] *Md. Yusab Ali @ Ushab Ali @ Yusuf Ali v. Union of India* WP(C) 4509/2010 (Gauhati High Court, 21 July 2016).

In the absence of clear guidelines, FTs have adopted the practice of verifying names when notices are sent. However, lawyers often need to submit requests for such verification, and there remains a lack of clarity regarding what this verification process entails. This *ad hoc* approach underscores the systemic gaps in ensuring proper service of notice, leaving defendants vulnerable to procedural inconsistencies.

Improperly serving notice further exacerbates these issues. The High Court has repeatedly emphasised that notices cannot be served by affixing them in public places, such as shops or river ghats, but such practices persist.[276] Moreover, the FTs often pass orders deeming individuals untraceable after a single failed attempt at service, without attempting substituted service.[277] These orders, though occasionally overturned, highlight the ineffectiveness of existing guidelines in ensuring that tribunals follow the law.

The Gauhati High Court has also shown inconsistency in evaluating writ petitions challenging improper notice. In some cases, it has dismissed such pleas without verifying the materials on record, relying solely on observations in the tribunal's order.[278] This lack of uniformity and scrutiny trivialises the serious consequences of these proceedings, treating citizenship as something easily provable while disregarding the punitive outcomes that follow procedural lapses.

These procedural failures in serving notice demonstrate the broader due process deficits within the FT system. The lack of clarity, uniformity, and adherence to basic principles of fairness undermines the defendants' ability to defend themselves effectively, highlighting the systemic flaws that plague the adjudication of citizenship in Assam.

[276] *Bipula Das v. Union of India* 2019 SCC OnLine Gau 3582 [5]; *Kabir Uddin v. Union of India* WP(C) 7901/2019 (Gauhati High Court, 2 September 2021).

[277] *Dulal Goswami v. Union of India* WP(C) 4616/2013 (Gauhati High Court, 19 August 2013); See also the FT orders in *Mohibur Rahman v. Union of India* WP(C) 1994/2019 (Gauhati High Court) and *Bidhan Ch. Das v. Union of India* WP(C) 3476/2017 (Gauhati High Court).

[278] *Smt. Mamta Sarkar v. Union of India* WP(C) 609/2016 (Gauhati High Court, 9 February 2016); *Birendra Biswas @ Bijen Biswas v. Union of India* WP(C) 656/2016 (Gauhati High Court, 9 February 2016); *Md. Ramjan Khan v. Union of India* WP(C) 776/2016 (Gauhati High Court, 11 February 2016); *Bithika Purkayastha @ Bithika Biswas v. Union of India* WP(C) 1231/2016 (Gauhati High Court, 25 February 2016).

4.2.2 Legal Aid

As of January 2025, there were 85,162 cases pending before the FTs in Assam.[279] With new references and remanded cases adding to the backlog, FT matters account for about 14% of Assam's total pendency—nearly equivalent to all other civil cases combined (17%).[280] This scale of adjudication makes access to effective legal aid critical, both for institutional efficiency and for upholding fair trial guarantees.

Article 39A of the Constitution mandates the State to provide free legal aid to ensure that no citizen is denied justice due to economic or other disabilities. The Supreme Court has recognised this as part of the right to life under Article 21,[281] and held that the right to legal aid extends to foreign nationals.[282] In *Suk Das v. Union Territory of Arunachal Pradesh*, the Supreme Court elaborated that the State has a duty to inform persons facing deprivation of liberty of their right to legal aid.[283] Given that a finding of non-citizenship can result in detention or deportation—restrictions that directly engage the right to life and personal liberty—this right is even more crucial. The Gauhati High Court has even affirmed that this right applies to FT proceedings.[284]

International law underscores the same principle. Article 14(3)(d) of the ICCPR requires states to provide free legal assistance where interests of justice so demand.[285] General Comment No. 32 encourages extending this guarantee to non-criminal matters where legal aid is essential for access to justice.[286] Similar protections are found in Article 6(3)(c) of the European Convention on Human Rights, Article 8(2)(e) of the American Convention on Human Rights, and Article 7(1)(c) of the African Charter.

Despite these clear obligations, most defendants in FTs—largely poor, landless, illiterate persons engaged in subsistence labour—remain without meaningful legal assistance. There are formal barriers to availing State legal aid since there is no structured manner to approach lawyers practicing FT cases. The bifurcation of DLSA empanelment into civil and criminal panels leaves no clear pool of lawyers for FT cases. The Legal Aid Defence Counsel Scheme (2022) establishes a public defender system for criminal cases,[287] but excludes FT matters. There is also no public record of FT-specific empanelled lawyers, leaving litigants with no information on whom to approach.

Statutorily, under Section 12(h) of the Legal Services Authorities Act, 1987, persons earning below ₹300,000 annually—and groups like SCs, STs, women, children, and victims of ethnic violence—are

279 Assam Legislative Assembly, 'Report on Demands for the Grant No. 19 for the year 2025-26' (n 7).
280 'National Judicial Data Grid - Assam, India' <https://njdg.ecourts.gov.in/njdg_v3//?p=home/index&state_code=18~6&dist_code=&app_token=0102acb6ada374427c541d3d85b0454681361f0396d11726f52dd9ed845a9973> accessed 24 June 2025.
281 *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81 [7].
282 *Mohd. Hussain @ Julfikar Ali v. NCT of Delhi* (2012) 9 SCC 408; *Ajmal Kasab v. State of Maharashtra* (2012) 9 SCC 1.
283 *Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401; *Khatri and Others (II) v. State of Bihar* (1981) 1 SCC 627.
284 In *Shariful Islam @ Soriful Islam v. Union of India* WP(C) 2780/2019 (Gauhati High Court, 7 June 2019) a Division Bench of the Gauhati High Court observed that access to justice was a fundamental right of the persons against whom reference was made to the FTs. The Gauhati High Court, in the case of *Swapan Kumar Dey v. Union of India* WP(C) 5648/2009 (Gauhati High Court, 10 September 2013) filed against the order of the FT for non-consideration of material documents to prove citizenship, not only set aside the order and directed a fresh hearing, but also directed the State to provide legal aid to the proceedee in case the proceedee could not afford to engage any counsel.
285 ICCPR (n 235) art 14(3).
286 HRC, 'General Comment No. 32' (n 47) para 10.
287 National Legal Services Authority, 'Legal Aid Defense Counsel Scheme 2022' (2022) <https://kslsa.kar.nic.in/pdfs/NALSA_schemes/12.Legal%20Aid%20Defence%20Council%20Scheme_2022.pdf> accessed 24 June 2025.

entitled to free legal aid.[288] While this should cover most FT litigants, systemic barriers persist. Many are unaware of their right to free legal aid. Neither the FTs nor District Legal Services Authorities (DLSAs) conduct active outreach to inform them.[289] Moreover, litigants are often not informed of their rights at first appearance, and most engage lawyers privately after receiving notice, unaware that legal aid is an option.

However, even engaging private lawyers is a challenge as quality is compromised. There are fewer number of lawyers who practice before FTs due to structural disincentives since many lawyers see FT cases as falling outside both civil and criminal practice, given their hybrid legal character. Often, those who do take them up exploit litigants—taking advantage of their illiteracy and desperation—and do not provide them with effective legal representation.

Review of Gauhati High Court cases reveals that legal representation is a persistent concern. In over 91 writ petitions, litigants cited problems with legal assistance at the FT stage: 21 challenged *ex parte* orders on grounds of lacking legal aid, and 68 claimed their lawyers failed to provide adequate legal representation to them. Despite these challenges being evident through the judicial record, the Gauhati High Court has not taken any steps to increase the availability and improve the quality of legal aid for FT litigants.

State Practice on Legal Representation

United Kingdom In proceedings before the Special Immigration Appeals Commission (SIAC), appellants may act in person or be represented by a "Special Advocate" or another individual with the Commission's leave (Special Immigration Appeals Commission Act, 1997).[290] Special Advocates are appointed to represent the appellant's interests in proceedings from which the appellant and their legal representatives are excluded. When no Special Advocate is appointed, either party may request their appointment under Rule 34(4) of the SIAC Rules.[291]

South Africa Article 35(3) of the Constitution guarantees the right to a fair trial, including the right to have a legal practitioner assigned by the State at its expense, if substantial injustice would otherwise result.[292] This provision ensures legal representation is accessible for vulnerable individuals unable to afford private counsel.

Nepal Article 20(10) of the 2015 Constitution provides indigent persons with the right to free legal aid,[293] as detailed in the Legal Aid Act, 2054 (1997).[294] Eligibility is determined based on an individual's annual income, with an authorized committee assessing requests for legal aid under Section 3(2) of the Act.

Kenya Article 50 of the Constitution establishes the right to a fair hearing,[295] including the right to choose and be represented by an advocate promptly. Clause (h) further mandates that an accused person must be assigned state-funded counsel if substantial injustice would otherwise result, ensuring equitable access to justice.

Sri Lanka Article 13(3) of the Constitution guarantees that any person charged with an offense is entitled to be heard in person or represented by an attorney-at-law, ensuring fair trial rights within a competent judicial framework.[296]

[288] Government of Assam, Legislative Department, 'Notification No LGL 165/2018/7' (28 December 2018).
[289] CJP Team, 'Inadequate Legal Aid for NRC Excluded Persons, CJP Moves Guwahati HC' (Citizens for Justice and Peace, 1 March 2021) <https://cjp.org.in/inadequate-legal-aid-for-nrc-excluded-persons-cjp-moves-guwahati-hc/> accessed 24 June 2025.
[290] Special Immigration Appeals Commission (Procedure) Rules 2003 (UK), r 33(1).
[291] ibid r 34(4).
[292] Constitution of the Republic of South Africa (promulgated on 18 December 1996, commenced on 4 February 1997) art 35(3).
[293] Constitution of Nepal 2015, art 20(10).
[294] Legal Aid Act, 2054 (1997) (Nepal), s 3(2).
[295] Constitution of Kenya 2010, art 50.
[296] Constitution of the Democratic Socialist Republic of Sri Lanka (as amended upto 31 October 2022), art 13(3).

4.2.3 Filing Written Statement

Defendants are required to file a written statement that outlines the necessary averments to prove their citizenship, including references to supporting documents and annexed duplicates. While the procedural rules for pleadings under the Code of Civil Procedure (CPC) do not strictly apply in these proceedings,[297] the broader procedural principles are still relevant and expected to be applied generally.

This flexibility–rather than permitting an approach informed by due process and suitable for citizenship determination–has become a way of undermining participation in proceedings. For instance, the FTs reject requests of defendants to introduce information about relatives or documentary evidence that were not initially mentioned in the written statement. As lawyers consistently mentioned, FTs often reject additional evidence or statements filed after the original written statement, ignoring the significance of such evidence in helping defendants meet their burden of proof. Notably, this is not legally sanctioned. Under Section 4 of the Foreigners' (Tribunals) Order, 1964, the FTs and the High Court can permit additional written statements or evidence to be filed. The Gauhati High Court has clarified that the CPC provision prohibiting amendment of pleadings after the trial's commencement (Order VI Rule 17) does not apply to the FTs.[298] The High Court has underscored the need to provide defendants with every opportunity to introduce evidence in their defence, holding that procedural technicalities should not impede justice. The Court has observed that introducing new facts or documents at a later stage, provided they are relevant and do not prejudice the State's case, should not be disallowed. It has also emphasized that non-disclosure of certain details in the written statement cannot automatically lead to adverse inferences if such details are disclosed during cross-examination or at a later stage.[299] The FTs must allow amendments to the written statement and admit additional evidence where relevant, particularly when such evidence bolsters the case without contradicting the initial defence.[300]

In practice, the FTs often disregard the probative value and deny admissibility of such evidence, despite the lack of any legal requirement for all evidence to be included at the outset. [301] Not being able to provide more information in the written statement can be fatal to a defendant's case. This is because the Gauhati High Court has held in other cases that the failure to disclose material facts in the written statement may result in adverse inferences against the defendant,[302] making written statements the primary defence of defendants. This approach undermines fair process and the ability of defendants to participate in proceedings, because it fails to recognize the realities of FT proceedings where defendants need time to gather and file evidence over a period of time because of lack of access or need for resources.

[298] *Safiya Khatun v. Union of India*, WP (C) 7617/2018 (Gauhati High Court, 16 November 2018).
[299] *Shahjahan Ali v. Union of India* WP(C) 6176/2019 (Gauhati High Court, 16 June 2022).
[300] *Haidar Ali* (n 297) [39].
[301] *Jehirul Islam v. Union of India* WP(C) 7347/2016 (Gauhati High Court, 16 May 2017); *Saru Sheikh v. Union of India*, (2017) 4 GLR 295.
[302] ibid.

Moreover, the FTs frequently reject additional evidence in the form of affidavits. The Gauhati High Court has ruled that affidavits constitute a form of written evidence and cannot be outright dismissed unless their authenticity or veracity is specifically challenged.[303] However, interviewed lawyers reported that the FTs dismissed evidence, for instance regarding the age and residence of the petitioners, even when the Assistant Government Pleader (AGP) failed to contest averments made in the written statement. This contradicts the Gauhati High Court's rulings that the FT cannot ignore uncontested witness depositions if such evidence corroborates the defendant's claim of citizenship.[304]

These practices highlight a systemic failure to ensure fair trial standards in FT proceedings. The procedural inconsistencies in handling written statements, coupled with the improper rejection of evidence, impose insurmountable barriers on defendants. This disregard for principles of natural justice and procedural fairness undermines the legitimacy of the FT system and its ability to adjudicate citizenship claims accurately and fairly.

4.2.4 Obtaining Public and Private Documents

Defending citizenship status in the FTs places an immense burden on defendants to produce extensive documentation.[305] These documents fall into two categories: first, "legacy" documents proving that the defendant or their ancestors resided in Assam before March 25, 1971; and second, "linkage" documents establishing the relationship between the defendant and these ancestors.[306] Common documents include voter rolls, Gaon-Panchayat Certificates, Gaon-Burah Certificates, and school records.

Documents such as voter rolls and land records are public documents that must be supplied by government officers upon application. Defendants, however, are often at the mercy of these officers to obtain certified copies. In *Moslem Mondal*, the Gauhati High Court recognized that disposing of a reference would be impossible if public officers delayed supplying these certified copies. Consequently, it directed that such documents be promptly provided to defendants to ensure a fair trial and reasonable opportunity to defend themselves.[307]

Despite the High Court's directive in *Moslem Mondal* requiring the timely provision of certified public documents to defendants, systemic issues persist. The absence of a systematic, transparent process for supplying documents often leads to delays or denials, undermining the right to a fair trial. The Criminal Procedure Code (CrPC), under Section 173, mandates that investigation materials against an accused be provided free of cost. This principle, rooted in the right to effective remedies under international human rights law, is frequently violated in FT proceedings.

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[303] *State of Assam v. Ohab Ali* WP(C) 2641/2017 (Gauhati High Court, 29 May 2018).
[304] *Hajarat Ali v. Union of India* WP(C) 7386/2017 (Gauhati High Court, 14 June 2022).
[305] Bhat (n 21).
[306] See § 2.3.3.
[307] *Moslem Mondal* (n 188) [98], [99].

While the Gauhati High Court has sometimes directed the State to provide copies of Lower Court Records (LCRs) and inquiry reports to defendants, these directives have not translated into a consistent or accessible process. The *ad hoc* nature of these orders highlights the absence of a systematic mechanism to ensure compliance, leaving defendants at a severe disadvantage.

Obtaining documents often incurs significant financial burdens, which are prohibitive for many impoverished individuals. A lawyer shared the struggles of his client, who lost daily wages as a labourer every time he travelled to the Election Commission's office to obtain certified voter rolls. Similarly, another lawyer estimated that his client spent ₹700 on obtaining voter rolls and land documents—an insurmountable expense for someone struggling to make ends meet. A litigant recounted spending ₹6000 to obtain voter rolls and other documents, further underscoring the economic barriers in accessing documents.

Additionally, many individuals lack critical documents, such as birth certificates, due to the absence of mandatory registration requirements before the 1970s.[308] School records are also often unavailable, particularly for those with little or no formal education.[309] Further, internal displacement caused by natural calamities, such as floods or the shifting course of the Brahmaputra River, has resulted in the loss or destruction of essential documents.[310]

The process of obtaining documents is acutely gendered. Women often face additional challenges, including the need to gather documents from multiple locations due to marriage or migration.[311] A lawyer highlighted the case of Pariskar Begum, who had to collect documents from both Kamrup and Nalbari, incurring double the costs and logistical challenges. Women also tend to rely heavily on male family members to navigate the complex legal process. Many lack access to education or legal awareness, and familial dynamics often limit their ability to manage non-domestic affairs independently.[312] In the absence of male support, their claims to citizenship are severely weakened, as exemplified by Sandhya Rani Biswas' case. Her brother, who held her documents, neglected to assist her, resulting in her being declared a foreigner through an *ex parte* order.[313]

The procedural and logistical barriers to obtaining documents in FT proceedings place an unjust and often insurmountable burden on defendants. The economic, logistical, and gendered challenges they face are exacerbated by the lack of a transparent, accessible system for document provision. These systemic shortcomings undermine the principles of natural justice and fair trial, rendering the FT process inequitable and ineffective.

[308] Registration of Births and Deaths Act 1969; Assam Registration of Births and Deaths Rules 1978.
[309] Kalantry and Tarafder (n 21) 20-22; Baruah (n 21) 25.
[310] Recorded as a submission in *Md. Moksed Ali v. State of Assam* WP(C) 6262/2015 (Gauhati High Court). See also Jharna Gogoi and Nazimuddin Siddique, 'Flood, Displacement and Politics: The Assam Chapter' (EPW Engage, 6 January 2023) <https://www.epw.in/engage/article/flood-displacement-and-politics-assam-chapter> accessed 24 June 2025; Anindita Chakrabarty, 'The Double Jeopardy of Climate Change and Citizenship: Envisioning Resilience in the Chars of Assam', *Oxford Migration Conference* (2024) <https://www.routedmagazine.com/post/the-double-jeopardy-of-climate-change-and-citizenship-envisioning-resilience-in-the-chars-of-assam> accessed 24 June 2025.
[311] Sabhapandit and Baruah (n 22); Choudhury (n 24); Amnesty International India (n 21).
[312] *Sandhya Rani Biswas @ Sandhya Biswas v. Union of India* WP(C) 2740/2010 (Gauhati High Court, 19 August 2015); *Kalpana Das and Ors. v. Union of India* WP(C) 5611/2015 (Gauhati High Court, 18 September 2015); *Rina Bala Karmakar @ Rina Karmakar v. Union of India* WP(C) 6084/2011 (Gauhati High Court, 29 September 2015); *Basanti Saha @ Basana Saha v. Union of India* WP(C) 5353/2018 (Gauhati High Court, 13 August 2018).
[313] *Sandhya Rani Biswas* (n 312).

4.2.5 Challenging *Ex Parte* Orders

In *Moslem Mondal,* the Gauhati High Court held that an *ex parte* order may be set aside if the litigant proves that there was sufficient cause for their non-appearance—reasons beyond their control.[314] In the same breath, the Court cautioned that such an application should not be entertained in a routine manner and should succeed only if the defendant could demonstrate the existence of a special or exceptional circumstance.[315]

Empirical Overview of Writ Petitions Against *Ex Parte* Orders (2009–2019)

Between 2009 and 2019, 556 of the 1,193 Gauhati High Court orders analysed—nearly 47%—were writ petitions challenging *ex parte* declarations by *Foreigners Tribunals (FTs)*. Of these, 250 petitions (45%) were dismissed outright on merits, with the High Court upholding the *ex parte* declarations. In 167 cases (30%), the matters were remanded to the FTs for fresh adjudication. Another 132 cases (24%) were disposed off by granting the petitioner liberty to file an application before the FT, without any binding direction—placing the burden entirely on the discretion of the Tribunal to decide whether to re-admit the case. In 6 cases (1%), the Court issued directions that did not involve remand or liberty to apply, offering varied forms of relief. Strikingly, only 1 case out of 556 resulted in the High Court quashing the proceedings on the grounds of improper referral—a preliminary jurisdictional error. This pattern reveals a deeply constrained judicial approach: the Court has shown extreme reluctance to intervene even when procedural violations are apparent, reinforcing the sense that redress in *ex parte* cases is not governed by clear or generous legal standards, but by narrow and inconsistently applied judicial discretion.

Total Ex Parte Cases	Petitions Dismissed	Petitions Remanded to the FT	Liberty to file application in the FT	FT Opinion Quashed	Others
556	250	167	132	1	6

[314] *Moslem Mondal* (n 188) [92].
[315] ibid.

The terminology of sufficient cause has been borrowed from the CPC.[316] While interpreting this standard, the Supreme Court has emphasised that the defendant's conduct should be measured against the reasonable standard of a cautious person. This standard is fulfilled if the defendant made sincere efforts to be present for the hearing within the facts and circumstances of their case.[317] If the defendant approaches the court within the statutory time frame, discretion should be exercised in their favour, as long as the absence was not *mala fide* or intentional.[318] Additionally, *ex parte* orders can be set aside even if the defendant was negligent, provided they monetarily compensate the other side.[319]

The Gauhati High Court, however, has modified the sufficient cause standard, replacing the settled test of whether the defendant undertook sincere efforts.[320] Instead, the test is whether the circumstances were beyond the defendant's control. This change has catalysed an unfairly burdensome interpretation of sufficient cause. It deems a situation to be within the defendant's control if it was possible to take any additional steps, with little realistic assessment of the reasonableness of these expectations. These assumptions often disregard the socio-economic realities of the defendants' lives.

This is illustrated below through examples of writ petititons filed to set aside *ex parte* orders, highlighting the circumstances that prevented defendants from appearing.

Inadequate Legal Representation

Writ petitions commonly assert the ground that the defendant was unable to appear during the proceedings because their lawyer had miscommunicated the date of the hearing or misled them into believing their presence was not required.[321] Out of 63 writ petitions filed on this ground, 66.7% were rejected.

Illustration 1: In 1990, Abdul Hamid entrusted his lawyer with handling his case. The lawyer assured him that everything would be taken care of and his presence was unnecessary. Twenty-six years later, at a Fair Price Shop, Abdul Hamid discovered that he had been declared a foreigner through an *ex parte* order passed in 2000. He promptly filed a writ petititon, claiming he had no knowledge of the order until that moment.[322] However, Justice Ujjal Bhuyan denied him another opportunity, reasoning that Hamid should have followed up with his lawyer. The judge noted that it was his "duty to discharge the burden under s.9."

316 Code of Civil Procedure 1908, Order IX rule 13.
317 *Parimal v. Veena* (2011) 3 SCC 545 [13], [16]; *GP Srivastava v. R.K. Raizada* (2000) 3 SCC 54 [7].
318 *GP Srivastava* (n 317) [7].
319 ibid.
320 *Moslem Mondal* (n 188) [92].
321 *Md. Abdul Hamid @ Abdul Hamid and Ors. v. Union of India* WP(C) 7475/2016 (Gauhati High Court, 15 December 2016); *Kutub Uddin v. Union of India* WP(C) 7169/2016 (Gauhati High Court, 29 November 2016); *Amina Bibi v. Union of India* WP(C) 5672/2018 (Gauhati High Court, 24 August 2018); *Aijuddin v. Union of India* WP(C) 4343/2016 (Gauhati High Court, 4 October 2016).
322 *Md. Abdul Hamid* (n 321).

This reasoning harshly judged Hamid's reliance on his lawyer and failed to account for the power imbalance between impoverished litigants and legal professionals. The Court did not meaningfully consider whether it was reasonable to expect Hamid to hold his lawyer accountable as imagined by the judge. Given the socio-economic realities—where many litigants lack telephonic access or familiarity with legal processes—such an expectation appears disconnected from their lived experience.

Illustration 2: Bhanu Biswas maintained contact with his lawyer, repeatedly enquiring about his case. His lawyer threatened to withdraw due to these repeated reminders and assured Biswas in 2009 that all necessary steps had been taken. However, Biswas later learned that he had already been declared a foreigner via an *ex parte* order in 2003. When he filed a writ petition in 2011, Justice B.K. Sharma dismissed it, providing no clarity on what further steps Biswas could have taken to mitigate the situation.[323]

Biswas's case illustrates that diligence on the defendant's part does not necessarily improve outcomes. The structural power imbalance between poor litigants and their lawyers is stark. Lawyers often exert expertise dominance, while defendants typically lack the financial means or leverage to hold them accountable.

Viewed alongside Biswas's case, Abdul Hamid's situation underscores a critical point: following up with one's lawyer is unlikely to alter the course of events in such cases. Judges failed to ask the essential question that would give the control test any practical meaning: could the defendant realistically have done anything to prevent the injustice?

Illustration 3: Rekha Rani Das missed her hearing because her lawyer did not inform her of the date. Illiterate and entirely dependent on her lawyer, she was unable to take any additional steps. Justice B.K. Sharma dismissed her writ petition without suggesting what reasonable steps she could have taken to control the situation.[324]

[323] *Bhanu Biswas v. State of Assam* WP(C) 1663/2012 (Gauhati High Court, 22 September 2015).
[324] *Smti Rekha Rani Das v. Union of India* WP(C) 4833/2011 (Gauhati High Court, 18 November 2015)

Wrong Delivery of Notice

Under the rules of service, notice may be delivered to an adult family member if the defendant is unavailable. This is deemed valid through the principle of constructive knowledge, based on the assumption that the defendant would learn of the notice from their family or upon returning home. Yet, several writ petitions have challenged *ex parte* orders on the ground that family members who received the notice failed to inform the defendant.

The Gauhati High Court routinely dismissed such claims, reasoning that notice had been lawfully served. However, this response misinterprets the core argument: defendants did not dispute the fact of service, but rather their lack of actual knowledge of the proceedings. The Court failed to consider whether sufficient cause existed for their non-appearance despite formal compliance with service rules.

Illustration 1: Anjum's husband, being illiterate, failed to understand the gravity of the notice and did not communicate it to her. Justice Manojit Bhuyan dismissed her plea, describing her as negligent for failing to inquire proactively about notices as if she should have expected it was coming.[325]

Illustration 2: Amiran claimed her husband had not informed her that he had received a notice on her behalf. Justice M.R. Pathak dismissed this, stating, "The issue relating to illegal Bangladeshi migrants entering Assam is very much alive since last more than 30 years..."[326] This reasoning assumes that all residents in Assam should proactively expect notices.

In neither case did the High Court inquire whether the claim made by the petitioner was factually correct.

Special or Exceptional Circumstances

The Gauhati High Court has further restricted the sufficient cause standard, requiring litigants to demonstrate that the circumstances preventing their appearance were special or exceptional.[327] This has placed an undue burden on defendants.

Pinki Das, who gave birth a month after the *ex parte* order was passed, argued that pregnancy prevented her from attending hearings. Justice A.K. Goswami dismissed her plea, stating, "We are also not inclined to take a view that for giving birth to a child, she was unable to take part in the proceedings."[328]

Such an interpretation of sufficient cause overlooks the legitimate constraints faced by defendants, reinforcing the Court's unrealistic expectations.

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[325] *Anjum Begum @ Nessa v. Union of India* WP(C) 6550/2018 (Gauhati High Court, 14 November 2018).
[326] *Amiran v. Union of India* WP(C) 5504/2018 (Gauhati High Court, 16 August 2018).
[327] *Moslem Mondal* (n 188) [103].
[328] *Pinki Das v. Union of India* WP(C) 5359/2018 (Gauhati High Court, 13 August 2018).

"Routine" Grounds as Unjustified

The High Court frequently rejects writ petitions on the ground that they rely on "routine" arguments, asserting that widespread procedural defects cannot justify setting aside *ex parte* orders. In *Moslem Mondal*, the High Court stressed the need to balance fairness with efficiency, warning against routinely entertaining such challenges.[329] However, this principle has been applied in a troubling manner, with judges dismissing writ petitions simply because they have "heard it all before,"[330] rather than engaging with the substance of the procedural violations raised.

In Fatema Khatun's case, she argued that her lawyer's failure to adduce evidence led to the *ex parte* order against her. She even lodged a complaint with the Bar Council, the statutory body responsible for upholding professional standards. Despite highlighting this, Justice B.K. Sharma dismissed her petition, reasoning that similar claims were often made by declared foreigners.[331]

This approach undermines fair trial rights by privileging efficiency over individual justice and disregarding the systemic barriers that defendants face in securing effective legal representation.

4.2.6 Admission and Denial Stage

Under the CPC, litigating parties are required to file a statement of admission or denial of documents, with any denial accompanied by reasons.[332] This process aims to narrow the scope of the trial to only the contested documents, as the primary purpose of admission is to dispense with the need for further proof.[333]

The FT Order 1964 does not explicitly mandate this stage. Consequently, parties do not formally articulate their position regarding the documents submitted by the opposing side in writing. Incorporating this stage is crucial, as it is an integral part of the right to a fair trial, providing both parties with the opportunity to clarify their stance on the documents presented by the other side.[334]

The absence of this procedural safeguard has significant implications for the fairness of proceedings in citizenship determination cases. Many documents involved in these cases are public records that the State Government is best positioned to verify. However, because the Government is not required to formally declare its position on these documents, it frequently challenges them during cross-examination of the defendant or at the argument stage without prior notice. This practice disadvantages defendants, as they are often unprepared to address these objections or defend the authenticity of their documents.

[329] *Moslem Mondal* (n 188) [92].
[330] This has been observed in multiple jurisdictions, where judges who regularly hear the same types of cases adopt such an attitude. See Jessica Hambly and Nick Gill, 'Law and Speed: Asylum Appeals and the Techniques and Consequences of Legal Quickening' (2020) 47 Journal of Law and Society 3, 23.
[331] *Mustt. Fatema Khatun v. Union of India* WP(C) 6030/2015 (Gauhati High Court, 11 December 2015).
[332] Code of Civil Procedure 1908, Order XI Rule 4(1).
[333] Indian Evidence Act 1872, s 58.
[334] *A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu* (2012) 6 SCC 430 [29].

If the Government were compelled to declare its stance on public documents in writing, it would mitigate the risk of such surprises. Defendants would have a clearer understanding of the Government's objections, enabling them to prepare an adequate defence. Furthermore, requiring the Government to state its objections in writing would impose a degree of accountability, compelling them to provide at least a minimal rationale for their challenges. At present, the Government often avoids supplying any justification for its objections, further exacerbating the procedural imbalance.

Incorporating an admission and denial stage would enhance procedural fairness by ensuring transparency and reducing the scope for ambush tactics. It would align the FT procedures with the broader principles of fair trial rights enshrined in Indian law. Moreover, this reform would ensure that challenges to documents, particularly public records, are raised in a timely and justified manner, safeguarding the defendants' ability to adequately respond.

4.2.7 Marking Documents as Exhibits: Admissibility Stage

Under ordinary civil procedure, after filing the written statement, original or certified copies of attached documents must be submitted to form part of the judicial record.[335] Judges then mark these as exhibits, signalling their admission into evidence pending proof. At this stage, the opposing party may object to a document's admissibility.[336]

Objections fall into two categories:

- *Ab initio* inadmissibility: where the document is inherently inadmissible under the law.
- Mode of proof: where there are irregularities in how the document was proved (e.g., presenting an uncertified copy when certification is required).[337]

This distinction matters because objections regarding the mode of proof must be raised when the document is marked as an exhibit. If not, the right to object is waived, as such defects are curable. The rule of fair play ensures that timely objections allow the submitting party a chance to remedy deficiencies, such as by providing alternate proof.[338] Once waived, the document is treated as admissible evidence.[339]

In the FTs, this process is routinely ignored. Lawyers report that members raise objections late in the proceedings, with documents being disregarded even when no timely objection was made. This undermines procedural fairness and departs from principles applied in ordinary courts. The Gauhati High Court has mostly endorsed this deviation—explicitly or implicitly—by failing to intervene or affirming tribunal orders, thereby lending legitimacy to these flawed practices.

[335] Code of Civil Procedure 1908, Order XIII Rule 4.
[336] *Sudir Engineering Co. v. Nitco Roadways Ltd.* 1995 SCC OnLine Del 251 [14], [15].
[337] *RVE Venkatachala Gounder v. Arulmigu Visweswaraswami* (2003) 8 SCC 752 [20].
[338] *Gopal Das v. Sri Thakurji* 1943 SCC OnLine PC 2 [19]; *Bipin Shantilal Panchal v. State of Gujarat* (2001) 3 SCC 1 [13]-[15]; *Hemendra Rasiklal Ghia v. Subodh Mody* 2008 SCC OnLine Bom 1017 [76].
[339] *Dayamathi Bhai v. K.M Shaffi* (2004) 7 SCC 107 [13], [15].

In a case decided by Justice Ujjal Bhuyan, an ordinary copy of the voter roll (a public document) was deemed inadmissible under Section 65 of the Indian Evidence Act, 1872. This provision requires that secondary evidence of a public document must be in the form of a certified copy. Placing reliance upon this provision, he refused to consider the voter roll submitted by Borhan Ali, as it was not a certified copy.[340]

However, this decision overlooked a crucial distinction: objections regarding the form of secondary evidence relate to the mode of proof, which is a curable defect. If raised during the trial, Borhan Ali could have rectified the issue by providing a certified copy. Moreover, settled law permits secondary evidence other than a certified copy in situations where the original and certified copies are lost.[341] Had the tribunal adhered to proper procedures, Borhan Ali could have justified why an uncertified copy was submitted.

In another case, Aysha Bibi faced procedural obstacles when attempting to submit original versions of her documents. Initially, she submitted the originals with her written statement, but the tribunal returned them after retaining photocopies. Later, she resubmitted the originals with her evidence-on-affidavit, but the tribunal again returned them, requiring their presentation during cross-examination. However, during cross-examination, the tribunal refused to accept the originals, claiming they should have been filed earlier.

Instead of addressing this procedural irregularity, Justice K.R. Surana remarked that Aysha Bibi could have filed a petition seeking permission to submit the original documents.[342] This response ignored the FT's failure to properly mark exhibits and unfairly shifted the burden onto Aysha Bibi. Such practices disregard the significant challenges faced by defendants in navigating the legal process, including limited resources and lack of effective legal representation.

The absence of a clear stage for marking exhibits in FTs erodes the right to a fair trial. It enables the State to challenge documents unpredictably, leaving defendants ill-equipped to defend themselves. By contrast, a transparent and rule-bound procedure, as followed under ordinary civil law, compels parties to raise objections promptly, ensuring clarity and procedural fairness.

[340] *Borhan Ali @ Barhan Ali v. Union of India* WP(C) 7669/2016 (Gauhati High Court, 8 June 2018). See also *Ajupa Khatun @ Ajufa Khatun v. Union of India* WP(C) 6560/2016 (Gauhati High Court, 23 February 2018); *Tapsir Ali v. Union of India* WP(C) 7959/2016 (Gauhati High Court, 11 May 2018); *Isiran Nessa v. Union of India* WP(C) 2460/2016 (Gauhati High Court, 10 April 2018); *Sri Bhupen Debnath v. Union of India* WP(C) 6351/2016 (Gauhati High Court, 23 April 2018).

[341] *Marwari Kumhar v. Bhagwanpuri Guru Ganeshpuri* (2000) 6 SCC 735 [10].

[342] *Aysha Bibi @ Ayesha Khatun @ Ayesha Bewa* WP(C) 4935/2019 (Gauhati High Court, 11 September 2019).

4.2.8 Summoning of Witnesses

The Foreigners (Tribunals) Order, 1964 grants the FTs the powers of a civil court, including the authority—under the Code of Civil Procedure (CPC)—to summon and examine witnesses on oath.[343] Yet, FTs routinely fail to exercise this power, leaving defendants to secure the presence of witnesses themselves. This practice sharply diverges from ordinary legal procedure: under the CPC, courts are required to issue summons upon a party's request to ensure witness attendance.[344]

Lawyers have reported that tribunals, even upon filing of applications to issue summons, refuse to issue summons to official witnesses including inquiring authorities as well as Gaonburahs and Gaon Panchayat Secretaries. Defendants are themselves asked to produce witnesses, and failure to do so results in the FT drawing adverse inferences against the defendants as well as non-consideration of important evidentiary documents.

This approach has serious consequences for defendants proving their case before FTs. First, unlike official summons, defendants' individual requests to witnesses are non-binding and it is entirely dependent upon the witnesses to attend. Moreover, in the absence of an official summons, witnesses also often charge money to appear before the FT, which is burdensome and compromises the defendant's case. As one of the AGPs reported in an interview, in many cases, defendants have had to pay official witnesses to appear before the FT and even cover their travel and accommodation expenses.

> AGP: "There were no prosecution witnesses, and it seems like no other witnesses requested to appear by the proceedee. It however has to be incumbent upon the Member to call upon the issuing authority in case of proving documents, as it is well within their powers to do so. Instead however it is seen most times that Members don't entertain prayers to send official summons, but ask the proceedee themselves to call such authorities. That becomes almost impossible, since more often than not the proceedee cannot compel attendance but can only request them to come if they have access to them."

Consequently, many defendants are unable to discharge their burden since official witnesses do not show up to depose about the contents of documents they have issued, leading to the FT summarily dismissing these documents in their entirety (see Chapter §4.2.10). Not issuing of official summons has also compromised the lawyer's ability to make legal arguments. In instances where the defendant wants to challenge a faulty inquiry, non-issuance of summons to the inquiring authorities means that they have no avenue to cross-examine the officer and successfully prove their case. As one lawyer explained, when they asked the Member to summon the Inquiry Officer for cross examination, the Member refused to do so, saying it is not their "lookout". As a result, the lawyer had no choice but to give up on challenging the enquiry before the Tribunal.

[343] Foreigners (Tribunals) Order 1964, para 4.
[344] Code of Civil Procedure 1908, Order XVI rule 1; *State of Punjab v. Naib Din* (2001) 8 SCC 578 [8].

While lawyers report that this issue regarding the non-issuance of summons has been raised in multiple writ petitions before the Gauhati High Court, our dataset of over 10 years of High Court orders does not reflect even a single case where the Court has addressed this issue or passed directions for FT members to follow. A notable exception is a 2022 verdict by Justice Kotiswar Singh, who criticised tribunals for failing to summon witnesses and held that the responsibility should not entirely rest on the defendants.[345] He held that "there is ample power prescribed under the Foreigners Act read with the Foreigners' (Tribunals) Order, 1964 to enforce attendance of any person by issuing summons for the purposes of examining him/her on oath."

It is thus vital on part of the tribunal to issue summons and enforce attendance of a witness if they deem it necessary for any such witness to testify to prove the contents of the document at hand. Every opportunity in law must be made available to the defendant to discharge their burden, and it should not become incumbent on them to procure witnesses, especially when FTs have the power to enforce attendance of such witnesses.[346]

The tribunals' reluctance to summon witnesses severely undermines fair trial rights by shifting an unreasonable burden onto litigants. This is especially damaging where state officials are needed as witnesses. By expecting defendants—already disadvantaged by systemic power imbalances—to bear this burden, FTs obstruct the presentation of crucial evidence.

4.2.9 Improper Cross-Questioning

Cross-examination is a crucial part of trial proceedings, allowing the opposing party to test the credibility of witnesses. After a witness is examined by the party that summoned them, the other side has the opportunity to cross-examine.[347] However, FT members frequently conduct cross-examinations on behalf of the State Government, particularly when the Assistant Government Pleader (AGP) is absent, which is a common occurrence.

Government Pleaders are often deliberately absent during cross-examinations, relying on an implicit understanding with FT members that the latter will conduct the questioning. One lawyer even objected to a member taking over cross-examination in the absence of the AGP, but such objections rarely modify the FT's practices. An AGP reported that while AGPs would be aware of the matter coming up for cross-examination and intend to appear, the member would deliberately proceed without them and conclude the hearing. He exclaimed that it is "immaterial" for most members whether the AGP is present during the course of the proceedings, and there are instances where AGPs have to inform the member in advance so that they do not proceed without them.

[345] *Md. Tafajjul Hussain @ Tafajjul Hussain* WP(C) 364/2020 (Gauhati High Court, 7 April 2022) [18]; *Nashima @ Nasima Begum v. Union of India* WP(C) 8838/2019 (Gauhati High Court, 29 January 2021).
[346] Foreigners (Tribunals) Order 1964, para 4.
[347] Code of Civil Procedure 1908, s 138.

The environment in the FTs is often hostile, particularly for witnesses. If present at all, AGPs adopt irrelevant or aggressive lines of questioning, seemingly intended to intimidate or badger witnesses. Since family members of defendants are not well-versed with the legal know-how of depositions, even a slight deviation in the cross-examination leads to the members drawing adverse inferences against the defendant. This is in derogation to well established norms of evidence,[348] according to which a minor deviation cannot lead to judges discarding entire witness testimonies. FT members themselves often adopt an intimidating tone, exacerbating the pressure on witnesses. They also routinely fail to take into consideration the uncontested evidence of witnesses, which otherwise corroborates the evidence adduced by the defendant. If the testimony of a witness is not challenged by the State in cross-examination, or there are no discrepancies found in such, it has to be considered and cannot be set aside.[349] Despite the clear irregularities in how cross-examinations are conducted, the Gauhati High Court has not taken meaningful steps to address these practices.

Interview with Advocate MI:

"In this case, in Barpeta according to me there are three tribunals FT no. 5, 9 and 1 where the government pleader plays their role well, the questions are asked by government pleaders, in other tribunals, the government pleader does not ask anything, the member asks everything. Similarly, in this case too, the government pleader in the end, one or two times during cross examination asked questions, otherwise everything was asked by members himself. The member did the interrogation himself, I could not see the government pleader play his role. From what I know, the member interrogates and argues and, in the end, as a formality, once or twice the govt pleader asks a question otherwise he plays no role."

Interview with AGP:

"However on having become an AGP, the nature of my interaction with the member has changed. While I am informed by them regarding cross examinations and arguments for each case, sometimes they have proceeded without me present which has not been very professional.

The AGPs are irregular in many FTs. I have seen that unless the AGP is actively pushing to be there, it becomes immaterial for most members if they are absent or present. Some members have an understanding with the AGPs that the member would cross-examine the proceedee. I make it a point to appear for cross-examination and for arguments.

While the FT can ask questions, it has to be noted down in the record that the question was posed by the Member and not the Prosecution. However, the member in the name of asking a question cannot conduct a cross-examination. The prosecution arguments and cross should never be done without an AGP, and I make it known to the member. Some disputes have happened between us in the past when the member has interfered while I am conducting my cross and asked a question. They have also asked me to ask a particular question to the proceedee. This not only disrupts the flow of the cross, but the member also did not want to note that this question was asked by the FT. I always ask them to specifically mention it in the record if the Member has asked a question during the course of the cross examination, and that is being done here. But I also know of FTs in which AGPs never appear, and members end up conducting the whole proceedings as prosecution, while also supposedly being the fair adjudicators that they are required to be by the law. Since members also have a say in the removal of the AGP, since they can point out conduct and send in reports to the Government based on such, most AGPs prefer to have good relations with them."

[348] *Sucha Singh v. State of Punjab* (2003) 7 SCC 643 [18]; *Haidar Ali* (n 297) [40].
[349] *Pinjira Khatun @ Pinjira Bibi v. Union of India* WP(C) 159/2019 (Gauhati High Court, 14 June 2022); *Hajarat Ali* (n 304); *Shahjahan Ali* (n 299).

4.2.10 Proving Public and Private Documents

Proving a document requires establishing both its authenticity and the reliability of its contents. Yet, practices in the FTs—compounded by Gauhati High Court rulings—frequently depart from settled evidentiary norms, imposing onerous burdens on litigants and undermining fair trial guarantees.

Public Documents and Presumption of Genuineness

Under Indian evidence law—now governed by the Bharatiya Sakshya Adhiniyam (BSA), which replaced the Indian Evidence Act, 1872 (IEA) on 1 July 2024—public documents enjoy a presumption of genuineness and correctness. Certified copies of such documents, including voter rolls, are admissible without further proof unless that presumption is rebutted.[350] This rests on the assumption that public officers act in good faith.

However, the FTs and the High Court routinely disregard this principle. In *Borhan Ali v. Union of India*,[351] Justice Ujjal Bhuyan rejected a voter roll's authenticity, citing the absence of the voter's age and the general suspicion surrounding Assam's voter lists. He remarked that "it would be safer to insist for proof as it is in the public domain that a large number of voter lists have been suspected to not be genuine." This stance reflects systemic distrust, overriding the statutory presumption.

Similarly, Justice Manojit Bhuyan dismissed handwritten voter rolls due to their "deplorable condition" and inconsistent ink usage, imposing arbitrary standards that ignore the legal presumption of regularity.[352] In *Sati Baishya v. Union of India*,[353] Justice M.R. Pathak upheld the FT's demand for certified voter rolls to be compared with original records or corroborated by testimony from issuing authorities — again imposing extra-legal burdens on litigants.

These rulings force defendants to prove documents that the law presumes genuine. Under Indian evidence law, proof should be required only where the presumption is rebutted with evidence. Yet in these cases, no such rebuttal occurred, and defendants were denied an opportunity to establish authenticity once doubt had been arbitrarily raised.

By contrast, in *Mazibar Miah v. Union of India*,[354] Justice A.M. Bujor Barua adhered to the correct principle, affirming that voter rolls are public documents and do not require validation by the officer who prepared them. However, such fidelity to the law remains the exception rather than the norm.

Frequently annexed documents in the 1,193 High Court orders under study

Document	No. of petitioners	No. of women
Gaonburah certificates	165	85
Gaonpanchayat certificates	146	94
School certificates	118	63
Jamabandi and other land documents	160	67
Electoral rolls	523	266

[350] Indian Evidence Act 1872, ss 77, 79, 114(e).
[351] *Borhan Ali* (n 340).
[352] *Musstt Joynab Bibi and Ors. v. Union of India* WP(C) 7035/2016 (Gauhati High Court, 15 November 2018).
[353] *Smt. Sati Baishya @ Sati Mitra @ Saraswati Baishya v. Union of India* WP(C) 8585/2018 (Gauhati High Court, 20 September 2024).
[354] *Mazibar Miah v. Union of India* WP(C) 871/2019 (Gauhati High Court, 13 February 2019) [4].

Gaon Panchayat Certificates: Misclassification and Burdensome Proof Requirements

Gaon Panchayat (GP) Certificates, issued by the Secretary of the Gaon Panchayat, serve as critical linkage documents in citizenship verification, particularly for women from economically disadvantaged backgrounds who often lack other records, such as birth, school, or property certificates.[355] Yet, these certificates have been subjected to inconsistent and onerous evidentiary treatment.

Earlier rulings of the Gauhati High Court, formalised in *Manowara Bewa v. Union of India*,[356] wrongly treated GP Certificates as private documents, requiring proof through the issuing authority's testimony. The Supreme Court in *Rupajan Begum v. Union of India* corrected this,[357] holding that GP Certificates are public documents issued in the discharge of official duties, and noting that the Assam Government had directed their use for NRC linkage purposes.

Despite recognising GP Certificates as public documents, *Rupajan Begum* imposed dual verification of authenticity and content accuracy,[358] effectively erasing the distinction between public and private documents. This unjustifiably disregards the presumption of correctness for public documents and imposes undue burdens on litigants.

Post-*Rupajan Begum*, the High Court has failed to apply the presumption of genuineness to GP Certificates and defendants are expected to prove them despite their status as public documents. Typically, the issuing authority is expected to testify before the court. In the cases we reviewed, the certificate was produced in 125 instances, with the Secretary deposing in only 13, with nearly 73% being rejected for lack of legal testimony. It is noteworthy that the GP Certificate has been rejected even when the Gram Panchayat Secretary deposed before the Tribunal to prove its contents (see §4.2.10).[359] In other cases, defendants were expected to corroborate these documents through an official register. For example, Justice Manojit Bhuyan rejected GP Certificates due to the absence of an official register, contradicting *Rupajan Begum*'s clear holding.[360] This reasoning implies that the GP Certificate is itself not a public document and it must rely on another public document, in this case the official register. In summation, there is not a single decision in which the GP Certificate was considered a public document. Rather, it was rejected even when attempts were made to corroborate the document.

[355] Rhydhi Gupta, 'Rupajan Begum v. Union of India, (2018) 1 SCC 579' (*Parichay Case Laws*, 5 December 2017) <https://www.parichay.org.in/case-laws/rupajan-begum-v-union-of-india-2018-1-scc-579> accessed 25 June 2025.
[356] *Monowara Bewa @ Manora Bewa v. Union of India* WP(C) 2634/2016 (Gauhati High Court, 28 February 2017) [71].
[357] *Rupajan Begum v. Union of India* (2018) 1 SCC 579 [13], [17]. See also *Manoj v. State of Haryana* (2022) 6 SCC 187 [39] where the Supreme Court held that public documents are those which are both statutorily required and made in the course of the official's duty; *Kanwar Lal Gupta v. Amar Nath Chawla* (1975) 3 SCC 646 [28], where the test was whether the document had been made by a public official in the course of their duty or not.
[358] *Rupajan Begum* (n 357) [16].
[359] *Jamal Ali @ Jamal Uddin v. Union of India* WP(C) 5402/2016 (Gauhati High Court, 27 February 2020). See also Bhat (n 21); Yesmin (n 21).
[360] *Asthami Das v. Union of India* WP(C) 4161/2019 (Gauhati High Court, 9 August 2019).

Rejection Based on Use of State Emblem

FTs also routinely dismiss Gaon Panchayat or Gaonburah Certificates bearing the state emblem, claiming that such use is illegal as per the State Emblem of India (Prohibition of Improper Use) Act 2005,[361] and therefore the entire document is inadmissible as evidence. However, even if their use of the emblem is unauthorized, this would, at most, render the document irregular, not inadmissible.[362] Yet, the High Court has upheld this flawed reasoning, further undermining fair trial standards.[363]

These deviations from ordinary evidentiary norms, including the disregard of statutory presumptions and the imposition of excessive proof requirements, severely compromise procedural fairness in citizenship determinations. They highlight an urgent need for reform to restore alignment with established evidentiary principles and safeguard the integrity of adjudication.

Proving the Genuineness and Authorship of Documents in Citizenship Proceedings

Proving the authenticity of documents is central to fair adjudication. Under Indian evidence law, authorship can be established through direct testimony, circumstantial evidence, or by examining witnesses familiar with the author's handwriting or the document's creation.[364] The law emphasises flexibility—authorship need only be linked to the purported author through credible means.[365] Yet, the practices of the FTs and the jurisprudence of the Gauhati High Court depart sharply from these principles, imposing rigid evidentiary demands that undermine procedural fairness and burden defendants unfairly.

The High Court has consistently insisted that certificates must be proven solely through testimony from the issuing authority, corroborated by contemporaneous records such as issue registers. Absent such testimony, tribunals routinely dismiss documents with boilerplate findings: "...cannot be said to be proved as the issuing authority did not testify before the tribunal on the basis of contemporaneous record to prove not only…certificate but also the contents thereof."[366] This rigid approach disregards lawful alternatives for proving authorship, such as circumstantial evidence or witnesses acquainted with the author's handwriting or the document's making. The insistence on a narrow method of proof has, in practice, foreclosed these options altogether.

[361] State Emblem of India (Prohibition of Improper Use) Act 2005, s 3.

[362] It is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. See *Umesh Kumar v. State of A.P.* (2013) 10 SCC 59 [35]; *R. M. Malkani v. State of Maharashtra* (1973) 1 SCC 471 [24], [25], [27].

[363] *Smti. Bela Rani Devi @ Debnath v. Union of India* WP(C) 5852/2016 (Gauhati High Court, 10 May 2018); *Salema Khatun v. State of Assam* WP(C) 7629/2016 (Gauhati High Court, 5 June 2018); *Jalekha Khatun v. Union of India* WP(C) 7919/2018 (Gauhati High Court, 27 March 2019); *Khudeja Begum v. Union of India* WP(C) 2889/2019 (Gauhati High Court, 13 May 2019); *Dulal Uddin v. Union of India* WP(C) 1197/2020 (Gauhati High Court, 4 June 2020); *Najrul Islam v. Union of India* WP(C) 4775/2019 (Gauhati High Court, 4 November 2019); *Aroti Bala Mandal v. Union Of India* WP(C) 7643/2017 (Gauhati High Court, 6 December 2018); *Sultana Begum v. Union of India* Review.Pet. 1352/2019 (Gauhati High Court, 30 May 2019).

[364] Indian Evidence Act 1872, ss 45, 47, 67.

[365] *Mobarik Ali Ahmed v. State of Bombay* 1957 SCC OnLine SC 46 [11]; *Gulzar Ali v. State of H.P.* (1998) 2 SCC 192 [9], [11].

[366] *Anowara Khatun v. Union of India* WP(C) 6190/2016 (Gauhati High Court, 4 October 2018); *Sufiya Khatun v. Union of India* WP(C) 3611/2019 (Gauhati High Court, 19 July 2019); *Basiran Begum v. Union of India* WP(C) 3711/2019 (Gauhati High Court, 16 August 2019); *Gulagjan Bibi @ Gulabjan Bibi v. Union of India* WP(C) 300/2017 (Gauhati High Court, 25 August 2017); *Jamiran Bibi v. Union of India* WP(C) 6202/2016 (Gauhati High Court, 26 April 2018); *Abdul Mojid @ Mojid Ali v. Union of India* WP(C) 6090/2016 (Gauhati High Court, 15 March 2018).

Requiring testimony from issuing authorities imposes serious practical burdens. Gaon Panchayat Secretaries or Gaonburahs—the typical issuing authorities—are senior officials, and litigants, often poor and marginalised, have little power to compel their appearance. Even where willing, logistical barriers—such as travel costs and time away from official duties—make their attendance difficult. Lawyers report that defendants are frequently expected to bear these costs themselves, an inequitable and prohibitive demand.

This rigid approach also fails to account for situations where the issuing authority is not the document's true author. In one case, a Gaon Panchayat Secretary testified that his office assistant had prepared the certificate and he had merely signed it.[367] The FT nonetheless rejected the certificate because the Secretary lacked personal knowledge of its contents, and the High Court declined to permit the summoning of the assistant—the actual author. This illustrates the narrow evidentiary view that excludes more just and flexible avenues for proving genuineness.

The insistence on corroboration by contemporaneous records—such as registers or counterfoils—finds no basis in law. The Indian Evidence Act accepts the testimony of the document's maker as sufficient proof. Demanding corroboration from records prepared under the same official's authority creates circular logic that undermines even direct testimony. Moreover, confusion surrounds the term "register": Panchayats are not required to maintain formal registers containing the contents mentioned in the certificate, though many keep counterfoils as informal records of issuing certificates.

Certificates are also rejected for failing to meet undefined "prescribed formats"—for example, the absence of a memo number—even when issuing authorities explain these as clerical errors.[368] The High Court often disregards substantive evidence in favour of such technicalities, penalising defendants for minor omissions.

The rejection of certificates often has gendered implications, particularly for women who migrate to new villages upon marriage. Courts have applied inconsistent reasoning to certificates issued by officials in a litigant's native or marital village. For example, certificates from a litigant's native village have been dismissed on the grounds that only officials in the marital village could attest to the litigant's identity.[369] Conversely, certificates from the marital village have been rejected because officials there could not have witnessed the litigant's birth or early life.[370] This contradictory logic leaves women in a precarious position, with their certificates subject to arbitrary and unpredictable scrutiny.

[367] *Joynab Bibi v. Union of India* WP(C) 6605/2016 (Gauhati High Court, 27 March 2018).
[368] *Joyful Bibi v. Union of India* WP(C) 2880/2016 (Gauhati High Court, 11 January 2017).
[369] *Alaluddin v. Union of India* WP(C) 5197/2016 (Gauhati High Court, 20 March 2018).
[370] *Borhan Ali* (n 340).

Proving the Truth of a Document's Contents in Citizenship Proceedings

Establishing the truth of a document's contents is fundamental to fair adjudication. This involves demonstrating that the statements within a document accurately reflect the facts they describe. While Indian evidence law provides a structured and flexible framework for this purpose, practices in the FTs and rulings of the Gauhati High Court have frequently departed from these norms, imposing excessive and arbitrary burdens on defendants and undermining procedural fairness.

Under settled law, the truth of a document's contents may be proven through the testimony of someone with direct knowledge of the information recorded.[371] The testimony of the document's maker suffices where they possess such personal knowledge—such as a village official who, through long acquaintance, knows a family's relationships. This is direct evidence under Indian law, as it comes from someone who directly observed or knew the facts documented.

Yet, the Gauhati High Court has routinely discredited even credible testimony from issuing authorities with personal knowledge. Instead of assessing the testimony's intrinsic reliability, the Court has focused on immaterial omissions—such as the official's inability to recall the exact year a family moved to the village, the date of a marriage, or a birthdate.[372] These minor lapses, irrelevant to the core question of parentage or identity, have been grounds for rejecting evidence that are credible testimonies.

This approach contradicts settled law, which holds that witness testimony should only be discredited for contradictions in material details.[373] It also creates absurd outcomes, as decisions are based on omissions unrelated to the core claims. Defendants, often unaware of such details themselves, cannot reasonably be expected to provide this information to the issuing authority. Furthermore, the issuing authority cannot anticipate the precise details the FT or the Court might require, given that judicial expectations vary widely and only become clear in the order. This creates an impossible standard for defendants, effectively denying them the opportunity to establish their claims.

The Court's reliance on such omissions reflects flawed assumptions: that more detailed statements are inherently more truthful, and that people can recall facts comprehensively and accurately. Both assumptions are debunked by psychological research.[374] Detailed testimony does not guarantee honesty—fabrication and memory distortion are possible. Nor is memory for dates or precise events reliable;[375] variations in detail often reflect cognitive differences rather than dishonesty.

[371] *Birad Mal Singhvi v. Anand Purohit* 1988 Supp SCC 604 [14]; *Ramji Dayawala & Sons v. Invest Import* (1981) 1 SCC 80 [16]; *Madan Mohan Singh v. Rajni Kant* (2010) 9 SCC 209 [22].

[372] *Md. Sayed Ali v. Union of India* WP(C) 6774/2016 (Gauhati High Court, 16 May 2018); *Jalaluddin v. Union of India* WP(C) 7677/2016 (Gauhati High Court, 11 June 2018); *Joyful Bibi* (n 368); *Jaygan Nessa v. Union of India* WP(C) 5460/2018 (Gauhati High Court, 24 September 2018); *Mahiruddin v. Union of India* WP(C) 576/2019 (Gauhati High Court, 6 May 2019); *Khalilur Rahman v. Union of India* WP(C) 3256/2017 (Gauhati High Court, 18 September 2017); *Tejiran Nessa v. Union of India* WP(C) 4855/2019 (Gauhati High Court, 9 September 2019).

[373] *Narayan Chetanram Chaudhary v. State of Maharashtra* (2000) 8 SCC 457 [42]; *Duleshwar & Anr. v. State of Madhya Pradesh* (2020) 11 SCC 440 [15.1]; *Mritunjoy Biswas v. Pranab Alias Kuti Biswas & Anr.* (2013) 12 SCC 796 [28].

[374] Nienke Doornbos, 'On Being Heard in Asylum Cases – Evidentiary Assessment through Asylum Interviews' in Gregor Noll (ed), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers 2005), 118-119.

[375] James Parry Eyster, 'Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees' (2011) 30 Boston University International Law Journal 1, 34-40.

In some cases, the High Court has disregarded personal knowledge entirely, insisting instead on contemporaneous records to corroborate the testimony.[376] According to the Court, such a record may be in the form of a village register containing a description of married persons based on which certificates may be issued,[377] which are non-existent in practice. Guidelines by the Assam Government for issuing GP Certificates explicitly state that certificates should be based on evidence presented by the defendants, with no requirement for contemporaneous records.[378] Even the High Court, in an order passed by Justice K.R. Surana acknowledged that village-level functionaries are not required by law to maintain a register of villagers.[379] Yet, the High Court continues to impose this unattainable burden, demanding records that were never meant to exist. For example, in one case,[380] a Gaonburah candidly testified that he does not maintain birth or death records and thus could not confirm a defendant's birthdate. The absence of a contemporaneous record was nonetheless used to reject the certificate. This reasoning disregards local administrative realities and undermines the value of personal knowledge as valid evidence.

4.2.11 Dealing with Discrepancies

Discrepancies in details such as name, age, or address commonly arise when different pieces of evidence are read together. Yet, the Gauhati High Court has often treated such inconsistencies as fatal, driven by a pervasive culture of suspicion. This suspicion is reflected in judicial comments that "it is very easy to pick up any name so as to claim to be one's own and then refer to his father, grandfather…as his own."[381] As a result, even minor mismatches are interpreted as proof that identity has not been established.[382]

This rigid approach disregards the realities of how documents are prepared and the lived experience of many in Assam, where it is common for individuals to possess more than one name or for variations to occur across records. It also conflicts with settled law, which holds that evidence should not be discarded solely due to discrepancies. Courts have repeatedly cautioned against attaching undue significance to contradictions, describing such an approach as unrealistic. Instead, the nature and materiality of discrepancies must be examined, and evidence assessed as a whole to see if it carries a ring of truth. Judicial analysis must account for the context in which records were created,

[376] *Joynab Bibi* (n 367); *Anowar Hussain v. Union of India* WP(C) 6527/2016 (Gauhati High Court, 20 March 2018); *Musstt. Sahara Begum @ Sahara Khatoon* WP(C) 4173/2016 (Gauhati High Court, 22 February 2018); *Rahima Khatun v. Union of India* WP(C) 4892/2019 (Gauhati High Court, 11 September 2019); *Alaluddin* (n 369); *Romila Khatun v. Union of India* WP(C) 3807/2016 (Gauhati High Court, 8 June 2018); *Sajeda Khatun v. Union of India* WP(C) 6283/2016 (Gauhati High Court, 22 May 2018); *Hasina Begum v. Union of India* WP(C) 6752/2016 (Gauhati High Court, 27 August 2019); *Md. Sayed Ali* (n 372); *Sona Bhanu Begum @ Sona Bhanu* WP(C) 6589/2018 (Gauhati High Court, 9 November 2018); *Jyotsna Das v. Union of India* WP(C) 6638/2018 (Gauhati High Court, 26 November 2018); *Khalilur Rahman* (n 372); *Tejiran Nessa* (n 372); *Jalaluddin* (n 372); *Sohrab Ali v. Union of India* WP(C) 1991/2016; *Musstt. Joynob Bibi @ Begum* WP(C) 6677/2016 (Gauhati High Court, 16 May 2018).

[377] *Rahima Khatun* (n 376).

[378] *Monowara Bewa* (n 356) [43.7].

[379] *Rahima Khatun* (n 376).

[380] *Md. Chabu Ali v. State of Assam* WP(C) 3602/2010 (Gauhati High Court, 30 November 2016).

[381] *Hussain Ali v. Union of India* WP(C) 6053/2011 (Gauhati High Court, 21 December 2012).

[382] Sampurna Das, 'Living with "Thin" Documents: A Note on Identity Documents and Liminal Citizenship in the Chars of Assam, India' (2024) 50 Journal of Ethnic and Migration Studies 4891; Baruah (n 21); Amnesty International India (n 21).

as this may readily explain minor errors or inconsistencies.[383]

In a few decisions, the Gauhati High Court and the Supreme Court have taken a more judicious stance, recognising that discrepancies should not outweigh the overall reliability of evidence when viewed in context.[384] Nevertheless, in practice, the mere presence of discrepancies continues to serve as a basis for rejecting entire bodies of evidence wholesale.

In the sections that follow, we explore plausible explanations for common discrepancies, demonstrating how they could have been reconciled rather than treated as grounds to discard the evidence in its entirety.

Spelling Errors

Discrepancies in names across documents often arise from spelling errors, transliteration mistakes, or inconsistent recording of names. Yet, the Gauhati High Court has largely failed to recognise that such errors are an inherent feature of document preparation.

For example, Rahman Ali provided his father's name as Khurshed Ali. In the 1965 and 1970 voter rolls, however, his father's name appeared as Furshed Azli, while later rolls from 1989, 1997, and 2010 correctly recorded it as Khurshed Ali. Justice B.K. Sharma nonetheless held that Rahman Ali failed to prove that Furshed Ali and Khurshed Ali were the same person, overlooking that the discrepancy could have resulted from corrections of earlier misspellings.[385] Similarly, Justice Bujor Barua ruled that Atifa Begum Barbuiya's citizenship was unproven, as there was no evidence linking Wakul Ali (1985 voter roll) with Tuakul Ali (1965 voter roll).[386]

Such discrepancies are unsurprising given how voter rolls are prepared in India. The Election Commission verifies, drafts, finalises, and translates voter lists into multiple official languages of the state. Assam has four official languages: Assamese, Bodo, Meitei, and Bengali (in certain districts). Names, transliterated across languages and dialects, often vary in spelling. For instance, Faizur Rahman might appear as Fazal Rahman or Faizur Rihman depending on pronunciation, dialect, or enumerator error—particularly where no cross-checking occurs.

The Supreme Court of India has acknowledged this reality,[387] observing that variations in names arise when names are recorded based on pronunciation across different languages and scripts.

Due to such variations, there is also a lack of consistency between names of the same people in successive voter lists. However, the Gauhati High Court has refused to recognize this ground reality in several cases. In one instance, Justice Amitava Roy noted that the 1970 Voter Roll identified

383 *State of MP v. Chhaaki Lal & Anr.* (2019) 12 SCC 326 [22]; *Manoj & Ors v. State of M.P.* (2023) 2 SCC 353 [180].
384 *Rahim Ali* (n 2) [41]; *Sirajul Hoque v. State of Assam* (2019) 5 SCC 534 [4]; *Md. Anuwar Hussain @ Md. Anowar Hussain* WP(C) 4258/2013 (Gauhati High Court, 4 March 2014) [11]; *Motior Rahman v. Union of India* WP(C) 3185/2017 (Gauhati High Court, 26 November 2019) [11], [12].
385 *Rahman Ali @ Rakhman Ali and Ors. v. Union of India* WP(C) 2017/2013 (Gauhati High Court, 9 September 2013).
386 *Atifa Begum Barbhuiya @ Atifa Begum* WP(C) 7292/2018 (Gauhati High Court, 31 January 2019).
387 *Rahim Ali* (n 2).

Rajendra Das as the son of Radha Charan, whereas the 1966 Voter Roll identified Rajendra Das as the son of Radhacharan Das.[388] This was termed as a discrepancy without considering the possibility that the official who recorded Rajendra Das as a voter might have inadvertently omitted the surname 'Das' from his father's name. Thus, Justice Roy failed to consider that this should not have been the sole basis for rejecting the evidence. Similarly, Justice Manojit Bhuyan ruled that Ibrahim Ali was unable to establish that Late Nurul, listed as his father in the 1989 Voter Roll, was the same person as Nurul Islam, recorded in the 1965 and 1970 Voter Rolls.[389] Again, he overlooked the possibility that the official may have dropped 'Islam' from the father's name, or the family may have referred to the father as 'Late Nurul' after his death.

Spelling errors also explain mismatches between names in voter rolls and Gaon Panchayat certificates. In one case, Hazara Khatoon's father appeared as Amul Suvan in the 1966 roll, while the Gaon Panchayat Secretary testified she was the daughter of Abdul Sobhan, whom he had known for 15 years.[390] Despite her explanation that Abdul Sobhan was misrecorded as Amul Suvan—most likely by an Election Commission officer unfamiliar with linguistic and religious traditions of this minority—Justice Bujor Barua dismissed the writ petition, holding that lineage must link to the specific name in public records and rule out other possibilities. Disconcertingly, Justice Barua articulated an unseemly high—and one might argue unrealistic—evidentiary standard. The order noted that the defendant must establish "that the lineage is not only with respect to the person whose name appears in the public documents relied upon but at the same time rules out the possibility of it being linked to any other person having a same or a similar name."[391]

Yet there are rare cases where the High Court appears to take a more realistic view of documentation. In *Subha Das*, Justice B.K. Sharma accepted that variations in surname (e.g., Roy and Das) could arise from clerical error, especially when later rolls corrected the names.[392] But, such rare cases do not ameliorate an otherwise dismal picture of adjudication, and in fact further highlight the capriciousness in the appreciation of evidence (see Chapter 5, §5.2.1)

388 *Rajendra Das v. State of Assam* WP(C) 1602/2010 (Gauhati High Court, 27 July 2010).
389 *Ibrahim Ali Mir @ Md. Ibrahim Ali v. Union of India* WP(C) 3260/2019 (Gauhati High Court, 14 June 2019).
390 *Musst. Hazara Khatoon v. Union of India* WP(C) 7317/2016 (Gauhati High Court, 22 January 2019).
391 ibid [15].
392 *Subha Rani Das @ Subha Das v. State of Assam* WP(C) 3854/2010 (Gauhati High Court, 7 October 2015).

Titular Variations

Among Muslims in Assam, variations in names frequently arise because titles or honorifics are used interchangeably.[393] Yet, the Gauhati High Court has often interpreted these variations as evidence that the names refer to different individuals.

For example, Jeleka Begum's father appeared as Jaynal Seikh in the 1965 and 1970 voter rolls, but as Jaynal Ali in the 1997 roll, where his name was listed alongside hers. Despite the common, interchangeable use of Seikh and Ali, Justice B.K. Sharma held that Jeleka had failed to prove the names referred to the same person.[394] Similarly, Justice B.P. Katakey ruled that Abdul Aziz Sheikh and Abdul Aziz could not be treated as the same individual.[395]

The Court has overlooked the social and cultural realities behind such titular variations. Among Bengali Muslims, Sheikh is not a fixed surname but an honorific commonly added to men's names. Likewise, women often adopt Khatun (meaning "noble woman") as a title.[396] This led, for instance, to Rahman Ali's mother being recorded both as Hajera Nessa and Hajera Khatun, a discrepancy that unfairly undermined his claim.[397]

Nicknames or Multiple Names

It is not always the case that a person has a single, unique official name. In Assam, particularly among Bengali-origin and Assamese communities, it is common to have multiple names, including a *daak naam* (pet name or nickname) used within family or close circles alongside an official name. These multiple names can appear across documents, often leading to inconsistency because names are not always treated as unique identifiers.[398]

For example, Surap Ali's father was listed as Tosuruddin Sheikh in the 1966 and 1970 voter rolls, while Surap himself appeared as the son of Achimuddin in the 1989 voter roll, Sohrab Ali son of Ochi in the 1997 roll, and Achimuddin again in 2015 and 2017. No document clarified whether Tosuruddin Sheikh, Achimuddin, or Ochi were the same person. Rather than exploring whether these were nicknames for the same individual, the FT–followed by the High Court–treated the variations as fatal to Surap's claim.[399] By contrast, in *Md. Anuwar Hussain v. Union of India*,[400] Justice Ujjal Bhuyan recognised that rural Muslims often have multiple names or spellings. He rightly concluded that variations in Anuwar's father's name—Samed Ali, Abdul Samed, Samed—did not undermine his citizenship claim.

393 Zeba Siddiqui, 'In India's Citizenship Test, a Spelling Error Can Ruin a Family' Reuters (17 August 2018) <https://www.reuters.com/article/idUSKBN1L206H/> accessed 26 June 2025.
394 *Jeleka Begum v. Union of India* WP(C) 1876/2013 (Gauhati High Court, 30 August 2013).
395 *Abdul Matali @ Md. Matalek @ Abdul Mutaleb @ Mutaleb @ Md. Abdul Matleb v. Union of India* WP(C) 1291/2013 (Gauhati High Court, 6 May 2013).
396 KM Sharma, 'What's in a Name: Law, Religion, and Islamic Names' (1998) 26 Denver Journal of International Law & Policy 151, 164-165.
397 *Rahman Ali* (n 385).
398 *Rahim Ali* (n 2) [41], [42].
399 *Shorab Ali @ Shurap Ali v. Union of India* WP(C) 3713/2019 (Gauhati High Court, 9 August 2019).
400 *Md. Anuwar Hussain* (n 384).

Similarly, in another case, Jahura Bibi's father appeared as Alepuddin Sekh, Alek Uddin Sekh, and Alim Uddin Sheik in successive records. The High Court dismissed her writ for failing to prove these referred to the same person, despite her Gaon Panchayat certificate linking her to Alim Uddin of the 1971 voter roll—evidence that should have sufficed.[401] Perhaps, these discrepancies could have been resolved if the judge had asked the defendant to explain if these names referred to the same individual, as it did in *Pinjra Khatun v. Union of India*, where Justice N. Kotiswar Singh held that the State ought to have pointed out discrepancies, giving an opportunity to the defendant to explain them.[402]

These cases illustrate how excessive focus on name discrepancies often derails the adjudication, making the resolution of these variations the core issue, even when it is irrelevant to the fact in issue.

4.2.12 Evidence is not read as a whole

Citizenship determination typically involves a combination of documents and oral testimony. Proper adjudication requires evidence to be read holistically, as individual pieces gain meaning when seen in relation to one another, forming a coherent picture. However, the FTs—and, affirmatively, the Gauhati High Court—have consistently failed to adopt this approach.

Instead, evidence is examined in isolation. Documents that could corroborate or contextualise other material are discarded if they do not independently establish the claim. Likewise, documents are rejected for inaccuracies about facts they were not intended to prove. This piecemeal reading of evidence prevents the interaction of different pieces of proof, undermining fair adjudication.

This has happened despite the recognition of higher courts—including by Gauhati High Court in some cases—that evidence must be treated holistically, and not determined solely by minor inaccuracies or some missing documents. For instance, Justice N. Kotiswar Singh, in *Haidar Ali v. Union of India*, noted that the standard of proof in citizenship determination proceedings being "preponderance of probability," FTs should not reject claims based on "minor inconsistencies here and there in the evidence of the proceedee,"[403] or "merely because some documentary evidence were [sic] not produced."[404] Apart from a few similar judgments which have emphasised the importance of cumulative assessment[405] (see Chapter 5, §5.3)—the High Court has largely failed to promote a holistic approach. In this section, we explore the pitfalls of this fragmented reading and illustrate how such practices have compromised the integrity of the citizenship determination process.

[401] *Jahura Bibi v. Union of India* WP(C) 6407/2016 (Gauhati High Court, 8 August 2019).
[402] *Pinjira Khatun* (n 349).
[403] *Haidar Ali* (n 297) [43].
[404] ibid [46].
[405] *Uttam Ghosh v. Union of India* WP(C) 93/2022 (Gauhati High Court, 23 June 2022).

Ignoring Identifiers Besides the Name

The excessive focus on names in citizenship cases has led to the neglect of other identifiers that could confirm identity. The FTs and the High Court have wrongly assumed that consistency in names is essential for proving identity, overlooking settled law that a person's description encompasses more than just their name. If one part of a person's description sufficiently identifies them, discrepancies in other particulars should not vitiate the evidence. A holistic reading can often dispel doubts.

Consider Hussain Ali's case.[406] Hussain Ali was recorded as the son of Taniruddin in the 1989 Voter Roll. His writ was rejected because he was unable to prove that his father—who appeared variously as Taniruddin Morol, Tamiruddin Mandal, or Tanoya Morol—was the same person. Yet, the *Khiraj Patta* recorded his father as Taniruddin Moral, which should have sufficed to link Hussain Ali of the 1989 Voter Roll to Taniruddin Moral of the Patta. Further, his father appeared as Tamiruddin Mandal, *son of Madan*, in the 1965 Voter Roll, while the *Khiraj Patta* also recorded Taniruddin Moral as son of Madan Moral. The consistency of the grandfather's name across these records strongly indicated that both entries referred to the same person.

Additionally, Hussain Ali was recorded as the son of Tonir in the 1970 Voter Roll, and even his Gaon Panchayat Certificate referred to his father as Tonir. This demonstrates that his father was known by multiple names, with variations likely entering the records over time. Tonir appeared in the 1970 roll, while Taniruddin was recorded afresh in 1989. It is crucial to recognise that when a voter roll is prepared afresh, it is a *de novo* process: earlier rolls are not referenced to ensure consistency with prior entries.[407] Likewise, when a person's name appears as a parent on the voter list, no comparison is made with how that person's name appeared as a voter in earlier rolls. This structural feature of voter roll preparation helps explain such discrepancies—yet the Court failed to appreciate this context.

A similar approach could have resolved discrepancies in Atifa Begum Barbuiya's claim.[408] Her father appeared as Tuakul Ali in the 1965 Voter Roll and as Wakul Ali in 1985, but always as son of Mafur/Mofur Ali and resident of Village Bairabpur. Despite minor changes in house numbers, this consistency and the absence of another individual with these identifiers should have been enough.

Likewise, in Jeleka Begum's case, Jaynal Seikh (1965, 1970) and Jaynal Ali (1997) may well have been the same person who moved to his daughter's village—Karagari Nonke. Yet, the Court did not seek clarification, instead using the address discrepancy to reinforce doubts stemming from the title variation.

[406] *Hussain Ali* (n 381).
[407] Election Commission of India, 'Manual on Electoral Rolls, Document 10 - Edition 2' (March 2023) Document No. 324.6.ERD:MB:10:2023 <https://ceotripura.nic.in/sites/default/files/2023-10/MANUAL20ELECTORAL%2520ROLLS.pdf> accessed 26 June 2025, para 9.3.1; Government of Assam, 'White Paper on Foreigners' Issue' (n 59) para 2.7.4.
[408] *Atifa Begum Barbhuiya* (n 386).

Such an approach could have confirmed identity even where there were inconsistencies beyond just the name. Consider the case where Justice B.K. Sharma doubted whether Jaynal Seikh and Jaynal Ali referred to the same individual.[409] A key factor in this finding was that Jaynal Ali appeared alongside his daughter, Jeleka Begum, and her husband in the 1997 Voter Roll for Karagari Nonke Village, whereas Jaynal Seikh had been listed as a voter in Gadeshalipam Village in the 1965 and 1970 Voter Rolls. Justice Sharma pointed to the absence of any evidence that Jeleka's father had shifted residence.

However, even a simple review of the circumstances suggests that Karagari Nonke might well have been Jeleka Begum's matrimonial home, to which her father relocated later in life. A straightforward clarification could have resolved this issue, yet the Court did not seek one. Notably, the emphasis on the address discrepancy appears to have been used mainly to reinforce an already drawn conclusion—namely, that the variation in title (Seikh versus Ali) meant the two names referred to different people. As explained earlier, had the title variation been treated as immaterial—as it should have been—the difference in address would have similarly lost its significance.

In fact, in *Sirajul Hoque v. State of Assam*,[410] the Supreme Court of India reversed the finding that Sirajul Hoque was a foreigner by adopting a holistic reading of the evidence, as advocated above. Sirajul Hoque sought to establish his citizenship by proving that his grandfather had resided in Assam before 1971. His grandfather appeared as Kefatullah in the 1966 and 1970 Voter Rolls for Village Sotobashjani. His father, however, was recorded as Hakim Ali, son of Kematullah, in the 1997 Voter Roll for Village Sagolchora.

The FT accepted that Sirajul Hoque was indeed the son of Hakim Ali, but held that he had failed to prove that Hakim Ali was the son of Kefatullah of the 1966 and 1970 Voter Rolls. The Tribunal refused to infer that Kematullah and Kefatullah referred to the same person, citing the spelling difference in the names and the discrepancy between the villages where the father and projected grandfather were recorded as voters. This, in the Tribunal's view, created doubt about the linkage Sirajul Hoque sought to establish.

The Supreme Court, however, disagreed. Justice R.F. Nariman held that the minor spelling variation between Kematullah and Kefatullah was inconsequential, especially in light of the consistent details found in other particulars—such as the names of the great-grandfather and other family members—which reinforced the connection. Justice Nariman further noted that the mere fact that Hakim Ali was recorded as a voter in a different village from his father did not justify rejecting the document, as relocation over time is common and should not cast doubt on identity without concrete contrary evidence.

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[409] *Jeleka Begum* (n 394).
[410] *Sirajul Hoque* (n 384).

The Supreme Court's decision demonstrated how a reasoned approach—focused on reconciling discrepancies rather than magnifying them—can ensure fair adjudication. By reading the evidence as a whole, the Court found that Sirajul Hoque had sufficiently established his lineage and, therefore, his citizenship.

Yet, the Gauhati High Court has often failed to apply this approach. In *Arabinda Biswas*,[411] despite the petitioner submitting over 12 documents and oral testimony, the evidence was discarded wholesale without reasoned analysis. The High Court did not intervene to correct the FT's failure to consider the evidence cumulatively, instead endorsing the dismissal on minor discrepancies.

Reading Documents Together to Reach Adverse Findings

As discussed earlier, the FTs and the High Court often fail to compare documents with the aim of reconciling discrepancies and establishing identity. Instead, documents are read together primarily to draw adverse conclusions about the defendant's claim. This approach focuses not on what the documents aim to prove, but on collateral details to undermine the evidence. This approach contradicts established legal principles that allow courts to consider the credible portions of evidence, even if parts of it are false, as long as the truth can be separated from the falsehoods.[412]

A striking example is how the High Court has treated discrepancies in recorded ages across documents. Instead of recognising these as minor or understandable errors—given the socio-economic realities of those involved—the Gauhati High Court has treated such variations as fatal to the entire claim. Typically, a person's stated age is cross-referenced across multiple documents, such as voter rolls, and if the chronology appears implausible, all the evidence is dismissed as unreliable.

Consider the case of Abdul Matali.[413] His father was recorded as Abdul Aziz, aged 40, in the 1965 Voter Roll, but his passport identified him as Abdul Aziz Sheikh, born in 1913. Accepting the FT's decision in the writ challenge in the High Court, Justice B.P. Katakey reasoned that if Abdul Aziz Sheikh was born in 1913, his age in 1965 should have been 52, not 40. On this basis, he concluded that Abdul Aziz and Abdul Aziz Sheikh were different people. The contention that the Election Commission may have erred in recording the age was rejected because no separate evidence was produced to prove this. This reasoning is problematic on several counts:

- Passports have been routinely dismissed as irrelevant for proving citizenship.[414] Yet, here, the passport was used selectively to draw an adverse inference. This displays a contradictory approach towards the document; it is rejected if it favours defendants, but it is relied upon for drawing an adverse inference against them.

411 *Arabinda Biswas and Ors. v. Union of India* WP(C) 2618/2019 (Gauhati High Court, 10 April 2024).
412 *Balaka Singh v. State of Punjab* (1975) 4 SCC 511 [8].
413 *Abdul Matali* (n 395).
414 *Sankar Das v. Union of India* WP(C) 3362/2019 (Gauhati High Court, 10 June 2019); *Rukiya Khatun v. Union of India* WP(C) 4049/2020 (Gauhati High Court, 12 October 2020). See also Bhat (n 21).

- It is unclear what "evidence" could have been produced to show an error in a voter roll entry made fifty years earlier.
- More broadly, the weight placed on such minor discrepancies is misplaced. Age entries in voter rolls are self-declared, unverified, and prone to error, especially in contexts where people lack birth certificates or are illiterate.

It is widely known that many individuals subject to these proceedings lack official documents, such as birth certificates or school records, that record their date of birth. Moreover, illiteracy is prevalent amongst many. It would be amiss to presume the accuracy of the age indicated on the document and thereby draw conclusions regarding the individual's identity.

A similar issue arose in the case of Ismail Ali Talukdar.[415] During his 2016 hearing, Ismail Ali first gave his age as 69, then as 72, suggesting a birth year of either 1944 or 1947. However, the 1966 Voter Roll listed him as 26 years old (implying a birth year of 1940), while the 2011 Voter Roll stated he was 56 (born 1955). Justice Ujjal Bhuyan—presumably like the FT before—seized upon these inconsistencies to reject his claim that he was the same person as the voter recorded in 1966. The Court further pointed to his oral statement that he had voted in Haflong for 35 years—something that appeared inconsistent with his claim of having previously voted in Badarpur. Yet, rather than seeking clarification, the Court used these inconsistencies to discredit the entirety of his case.

There are several problems with this approach:

- Minor discrepancies in age are common, especially among people without formal education or official birth records.
- The assumption that oral or documentary statements can provide a precise account of age is unrealistic. In the social context, people often do not know their exact age.
- The Court and the FT before failed to meaningfully examine or clarify Ismail Ali's claim about his voting history; instead, an isolated and potentially mistaken statement was given undue weight.

In both these cases, the variations in age were not viewed in context, nor were efforts made to reconcile them with other consistent aspects of the evidence. Instead, they were used as a pretext to dismiss the entire claim, reflecting a culture of suspicion rather than impartial adjudication.

It is worth noting that some High Court judges have recognised the dangers of this approach. For instance, Justice N. Kotiswar Singh explicitly declined to reject voter rolls due to age discrepancies, noting that voter rolls often contain inaccurate age data.[416] Similarly, a Division Bench (Suman Shyam and P.J. Saikia JJ.) held that minor inconsistencies in age, name, or address should not, by themselves, discredit a case.[417] These decisions demonstrate that a more balanced, context-sensitive approach is both possible and legally sound.

[415] *Ismail Ali @ Ismail Ali Talukdar v. Union of India* WP(C) 6770/2016 (Gauhati High Court, 12 January 2018).
[416] *Attaur Rahman v. Union of India* 2022 SCC OnLine Gau 2199 [15].
[417] *Motior Rahman* (n 384) [11].

By contrast, the dominant approach of using age inconsistencies to discredit entire bodies of evidence is deeply flawed. It fails to appreciate:

- The known inaccuracy of voter roll ages.
- The absence of age verification mechanisms in such records.
- The broader socio-economic context in which these discrepancies arise.

Furthermore, this practice reflects a troubling double standard: documents like passports or voter rolls are dismissed as unreliable when they support the defendant's claim, but relied upon when they offer a basis for adverse findings. This selective reliance on evidence undermines the fairness of the process and erodes confidence in the integrity of citizenship adjudication.

Ignoring Other Documents That Can Corroborate Evidence

Defendants often submit documents such as Aadhaar cards, passports, PAN cards, ration cards, LIC policies, election photo identity cards, and special family identity cards to corroborate their citizenship claims or establish linkage with ancestors. Yet, these documents are routinely and summarily rejected on the ground that they are "not proof of citizenship." This approach is puzzling, because while these documents may not independently establish citizenship, their value lies precisely in corroborating other evidence — a function that the tribunals and the Gauhati High Court have largely refused to consider.

Take the case of Maharajan Nessa.[418] Her father was included in the 1967 and 1970 Voter Rolls, but the only document linking her to him was her PAN card. Justice Manojit Bhuyan acknowledged that the PAN card was the only linkage document submitted, yet dismissed it as insufficient proof of citizenship. Simultaneously, her relatives' oral testimonies were rejected for lacking detail and supporting documentation. Ultimately, she was declared a foreigner.

Similarly, in the case of Md. Jonab Ali,[419] the defendant submitted multiple documents — voter rolls, a gaonburah certificate, PAN card, Aadhaar card, and voter ID — along with the oral testimony of his father, Majom Ali. Despite this, Justice M.R. Pathak summarily discarded the PAN card, Aadhaar card, and voter ID on the ground that they do not prove citizenship. Further, the bench reasoned that since no officials from the issuing departments had been summoned and examined, the documents had no corroborative value. As a result, the FT's declaration of Jonab Ali as a foreigner was upheld.

This treatment reflects a deep-rooted suspicion, shaped by political anxieties in Assam that migrants can easily obtain official documents fraudulently. Such anxieties have fuelled a judicial posture in which documents are viewed as suspect — not for what they prove or corroborate, but for the fear that they might conceal illegality.[420] Ironically, this stance is stricter than that adopted by the State

[418] *Maharjan Nessa v. Union of India* WP(C) 3741/2019 (Gauhati High Court, 25 June 2019).
[419] *Md. Jonab Ali @ Janeb Ali v. Union of India* WP(C) 1859/2024 (Gauhati High Court, 19 December 2024).
[420] Bhat (n 21) 4869.

itself: documents like PAN and ration cards were accepted as valid linkage documents for the purposes of the 2019 NRC.[421]

Notably, the legal basis for this judicial posture is dubious. Justice N. Kotiswar Singh, in *Uttam Ghosh v. Union of India*,[422] rightly observed that while PAN cards and Aadhaar cards are not proof of citizenship, they can and should be relied upon to corroborate a defendant's claim. Yet, during the period under review, such documents were routinely dismissed by the Gauhati High Court without any meaningful engagement.

Even more troubling is the selective reliance on these documents. When they favour the defendant, they are rejected as irrelevant or insufficient. But when they present any inconsistency, they are seized upon to undermine the entire case. For example, in the case of Abdul Aziz Sheikh,[423] Justice B.P. Katakey used a discrepancy between the birth year in his passport (1913) and the age recorded in the 1965 Voter Roll (40 years) to infer that they were not the same person. The passport, though dismissed as insufficient proof when supporting the claim, became the basis for drawing an adverse inference.

Similarly, in Joyful Bibi's case,[424] Justice Ujjal Bhuyan focused on an age inconsistency between her father's Electoral Photo Identity Certificate (which suggested he was born in 1947) and his alleged inclusion in the 1951 NRC. The judge reasoned that if her father was indeed born in 1947, he would have been only four in 1951 and should have been included in the NRC — a conclusion that ignored both the known unreliability of age data in such documents and the broader corroborative context.

Another troubling pattern is the blanket exclusion of post-1971 documents.[425] There is no legal basis for the automatic rejection of documents created after 1971. Justice P. J. Saikia, in *Idrish Ali v. Union of India*, recognised that it is improper for tribunals to reject such evidence solely for being post-1971.[426] Nevertheless, the FTs and the High Court have continued to do so.

Furthermore, claims are often rejected because the written statement or the evidence does not name all possible relatives. For example, Mazibar Rahman did not mention his mother in his written statement, though she was present in the 1966 Voter Roll.[427] Similarly, Usharani Biswas' written statement omitted her brother's name, though he had testified before the tribunal.[428] In *Haidar Ali v. Union of India*,[429] Justice N. Kotiswar Singh clarified that evidence cannot be disbelieved merely because it does not name all relatives — the focus should be on proving lineage to a parent or grandparent. The absence of other names might weaken a case, but cannot justify outright rejection.

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421 'What Are Admissible Documents?' (*Office of the State Coordinator of National Registration* (NRC), Assam) <https://nrcassam.nic.in/admissible_documents.html> accessed 26 June 2025.
422 *Uttam Ghosh* (n 405) [33], [44].
423 *Abdul Matali* (n 395).
424 *Joyful Bibi* (n 368).
425 *Rekha Das v. Union of India* WP(C) 7789/2016 (Gauhati High Court, 26 April 2018); *Abdur Rashid v. Union of India* WP(C) 7413/2016 (Gauhati High Court, 27 September 2018); *Musstt. Sahara Begum* (n 376).
426 *Idrish Ali v. Union of India* WP(C) 4116/2019 (Gauhati High Court, 27 February 2020).
427 *Majibar Rahman v. Union of India* WP(C) 5287/2016 (Gauhati High Court, 7 September 2016).
428 *Usharani Biswas* (n 263).
429 *Haidar Ali* (n 297).

The High Court's approach demonstrates a contradictory and fundamentally flawed evidentiary standard:

- Documents that could provide corroborative value are ignored when they support the defendant.
- The same documents are used selectively to highlight inconsistencies and discredit the claim.
- Documents are rejected for reasons that have no basis in law (e.g., post-1971 creation).
- The unrealistic expectation that all possible relatives must be named or that issuing authorities must appear for cross-examination further burdens already vulnerable litigants.

The result is a process that systematically disregards or misuses evidence, rendering it almost impossible for many defendants to prove their citizenship, no matter how much or what kind of evidence they produce.

Not Reading Documentary and Oral Evidence Together

A fair adjudication requires that documentary and oral evidence be read together. Testimonies provide crucial context for understanding documents, clarifying ambiguities, and filling gaps. However, the FTs and the Gauhati High Court have consistently failed to integrate these sources of evidence, treating them in isolation instead of as complementary parts of a coherent narrative.

Consider Sahera Khatun's case.[430] Her parents, Achan Ulla and Amatan Nessa, were listed alongside her brother Mohammad Ali in the 1966 and 1970 Voter Rolls. Lacking a direct linkage document, Mohammad Ali's testimony was vital. He testified that he had voted with their father in 1966 — an uncontroverted statement. When read together with the voter roll, this testimony should have sufficed: if Mohammad Ali was indeed her brother, and he was Achan Ulla's son as recorded in the 1966 Voter Roll, this would establish Sahera's linkage to a pre-1971 voter. Yet, Justice Manojit Bhuyan dismissed the testimony on the trivial ground that Mohammad Ali's name did not appear in Sahera's written statement. This rejection disregarded the probative value of unchallenged oral evidence that, when read with the documents, formed a coherent chain supporting Sahera's citizenship claim.

In Jahura Khatun's case,[431] the Gaon Panchayat Secretary issued a certificate, based on documents such as the *patta* (land deed) and 1966 voter list, and deposed in support of Jahura's claim. However, Justice M.R. Pathak dismissed the certificate on the vague assertion that the Secretary's evidence "failed to inspire confidence." The judgment failed to explain why the Secretary's testimony

[430] *Sahera Khatun @ Sahera Begum v. Union of India* WP(C) 3602/2019 (Gauhati High Court, 7 August 2019).
[431] *Jahura Khatun v. Union of India* WP(C) 364/2021 (Gauhati High Court, 4 October 2024).

and the certificate, both formally proved, lacked probative value. Nor did the Court consider the testimony of Jahura's husband and brother, who had long-standing personal knowledge of her identity. Instead of evaluating this cumulative evidence holistically, the Court simply discarded it, leading to an unjust dismissal of Jahura's writ petition.

Similarly, in *Manikjan Bibi v. Union of India*,[432] the petitioner presented multiple voter lists, a sale deed, a school transfer certificate, a Gaonburah certificate, and the testimonies of her husband, brother, and a relative who knew her since birth. These were summarily dismissed. Justice M.R. Pathak neither read the documents and testimonies together nor considered how they corroborated each other. The Court accepted the FT's conclusion that the oral evidence was "unbelievable" without scrutinising why, nor did it consider key documents like the Gaonburah certificate or land deed. This mechanical endorsement of the FT's flawed reasoning amounted to a failure of judicial review and misapplication of both *certiorari* principles and evidentiary law.

In Basiran Nessa's case,[433] she claimed citizenship through her grandfather Mahar Fakir (on the 1965 voter roll) and father Zakir Hussain (1989 voter roll). Her husband supported this link through his testimony. However, the Court failed to read this testimony alongside the voter rolls, which together could have formed a complete and credible narrative of Basiran's lineage and citizenship.

By contrast, the High Court has been quick to juxtapose oral and documentary evidence only to find inconsistencies that can be used to discredit a claim. For example, in Khalilur Rahman's case,[434] his brother testified that their mother died in 1963. Khalilur stated he was 52 in 2016, implying birth in 1964. Justice Ujjal Bhuyan seized on this minor discrepancy — that Khalilur could not have been born in 1964 if his mother died in 1963 — to dismiss his claim. This rigid parsing of testimony disregarded the real-world challenges that illiterate or marginalised litigants face when recalling dates accurately. Such minor inconsistencies should not outweigh substantial documentary evidence or the core credibility of a claim.

Conclusion

This chapter has laid bare the deep and systemic procedural failings of Assam's citizenship determination process, as conducted by the FTs and sanctioned by the jurisprudence of the Gauhati High Court. The evidence reveals a pervasive culture of procedural evasion, arbitrary adjudication, and denial of fair trial rights in a domain as constitutionally significant as the determination of citizenship—a process that has life-altering consequences for millions of residents. These failures do not represent isolated lapses or aberrations but form a consistent, predictable pattern of injustice, underpinned by defective legal norms, institutional apathy, and a political climate of suspicion.

[432] *Manikjan Bibi v. Union of India* WP(C) 4763/2019 (Gauhati High Court, 4 October 2024).
[433] *Mustt. Basiran Nessa v. Union of India* WP(C) 4614/2013 (Gauhati High Court, 21 August 2017).
[434] *Khalilur Rahman* (n 372).

At the heart of these failures is the FTs' systematic violation of natural justice and due process. The tribunals routinely deny defendants the basic safeguards that define fair adjudication. They refuse to summon inquiry officers for cross-examination, thereby shielding defective and unlawful inquiries from scrutiny. They impose excessive, extra-legal burdens for proving documents and ignore well-established principles of evidence law, including the presumptive validity of public documents and the flexibility in proving authorship or contents. The FTs adopt hyper-technical approaches to discrepancies in names, addresses, and other particulars—disregarding context, linguistic variation, or cultural naming practices—and refuse to read evidence holistically. They fail to summon witnesses even when requested, and decline to assist litigants in securing official testimony, shifting unreasonable logistical and financial burdens onto individuals who are often impoverished and powerless.

These procedural defects are not corrected, and are often reinforced, by the Gauhati High Court's jurisprudence. Instead of acting as a constitutional safeguard against executive arbitrariness, the High Court has laid down norms that undermine fair trial rights and depart from settled legal principles. The Court's approach has been marked by:

- Endorsing subjective, vague standards for referrals, enabling arbitrary initiation of proceedings;
- Downplaying the seriousness of defective inquiries and treating jurisdictional defects as mere technicalities;
- Insisting on unnecessary corroboration (such as requiring issuing authorities to produce contemporaneous records that do not exist in practice);
- Dismissing legitimate procedural challenges as "routine" or frivolous, thus failing to engage with the structural barriers faced by defendants;
- Prioritising efficiency and system survival over legality and fairness, reflecting judicial anxiety that close scrutiny would expose the system's illegality.

The net effect is the emergence of a dismal legal regime that violates constitutional guarantees, including Articles 14, 21, and 22 of the Indian Constitution, as well as India's obligations under international human rights law. The right to equality before the law, the right to a fair hearing, and the right against arbitrary deprivation of nationality are all rendered hollow in practice. The system has created conditions where citizenship determination no longer functions as a neutral, legal exercise but as a site of structural violence against marginalised communities—particularly Bengali-origin Muslims in Assam.


Conform

5 Embedding Violations: Role of Assam's High Court

The Gauhati High Court's adjudication in citizenship cases is marked by inconsistency, internal contradiction, and the absence of clear legal standards. The Court's shifting, selective, and opaque reasoning has failed to provide meaningful guidance to Foreigners Tribunals, officials, or litigants, enabling arbitrary decision-making and eroding procedural safeguards. By undermining principles of due process, natural justice, and transparency, the Court has contributed to a legal environment in which citizenship determinations are arbitrary and risk violating constitutional rights and India's international human rights obligations.

Introduction

This chapter offers a critical examination of the Gauhati High Court's role in adjudicating citizenship status determinations arising from decisions of the Foreigners Tribunals (FTs). Through an in-depth analysis of High Court orders, we uncover a troubling and consistent pattern of rulings that expose both systemic and systematic failures in citizenship adjudication. These findings point not only to deep weaknesses in the High Court's approach but also to its role in perpetuating the deficiencies of the FT system itself.

The Gauhati High Court has often imposed standards of proof and procedure that are excessively onerous—far beyond what fairness or constitutional due process would require. This has placed an unfair and often insurmountable burden on litigants seeking to establish their citizenship. As explored in detail in Chapter 4, these standards fall short of both constitutionally and internationally mandated norms of natural justice. In this chapter, we demonstrate that the High Court's selective and inconsistent application of these heightened standards systematically amplifies the burden on individuals, without sufficient regard for the life-altering consequences of a citizenship determination.

A recurring concern is the Court's rigid, "one-size-fits-all" framework for decision-making. This straitjacketed approach ignores the social, cultural, and personal contexts that are critical for fair adjudication. It transforms what should be a fact-sensitive process into a mechanical and decontextualised exercise. In doing so, it fails to account for the realistic expectations and lived conditions of individuals in Assam's specific socio-cultural landscape. Effective adjudication in citizenship cases demands sensitivity to these factual nuances—something the Court has repeatedly failed to show.

Most concerning is the evidence of an unchecked regime of discretion reflected in the High Court's decisions, which has perpetuated and deepened the issues already prevalent within the FT process. The writ jurisdiction, far from serving as a safeguard or corrective to the shortcomings of the FTs—including arbitrariness, bias, and lack of expertise—has itself become a site of systemic failure. Instead of clarifying the legal standards and laying down a transparent and guiding doctrine for citizenship determinations, the High Court's decisions have entrenched the deficiencies of the FT system. Its rulings are marked by lack of clear reasoning, inconsistency with precedent, and *ad hoc* approaches that foster uncertainty and undermine procedural integrity.

Judge-wise case outcomes

Name of judge	Judgments authored	Cases dismissed	Cases remanded	Other
Ujjal Bhuyan	453	317	55	81
B. K. Sharma	325	160	30	135
Manojit Bhuyan	237	142	81	14
A. K. Goswami	33	23	6	4
M. R. Pathak	23	16	4	3
P. K. Deka	21	10	7	4
Hrishikesh Roy	21	1	14	6
Manish Choudhury	18	16	1	1
A. M. Bujor Barua	13	5	7	1
K. R. Surana	10	10	0	0
S. K. Medhi	9	9	0	0
R. K. Phukan	8	8	0	0
N. Chaudhury	7	2	1	4
B. P. Katakey	4	2	2	0
Nani Tagia	3	3	0	0
Anima Hazarika	2	0	2	0
Amitava Roy	2	1	0	1
C. R. Sarma	1	0	0	1
R. S. Garg	1	0	1	0
S. Talapatra	1	0	1	0
P. K. Saikia	1	1	0	0
Total	**1193**	**726**	**212**	**255**

Sex-wise outcomes

Sex	No. of cases	Dismissed	Remanded	Other
Male	635	375	131	129
Female	558	351	81	126

Religion-wise breakdown

Religion	No. of cases	Dismissed	Remanded	Other
Hindu	386	173	91	122
Muslim	807	553	121	133

Rather than mitigating the injustices embedded in the FT process, the High Court's interventions have:

- Entrenched FT deficiencies: The Court's rulings have reinforced, rather than corrected procedural and substantive flaws in the Tribunal system.
- Failed to establish guiding principles: The Court has not articulated clear or consistent standards for adjudicating citizenship, leaving decisions opaque and arbitrary.
- Deepened systemic problems: Writ jurisdiction has not operated as a check on the system's failures; instead, it has exacerbated them.
- Enabled unchecked discretion and inconsistency: Decisions are often unreasoned, conflict with similar cases, and reflect *ad hoc*, improvised standards.
- Undermined procedural fairness: The cumulative effect is a deeply flawed system that erodes the right to due process and fair trial in a constitutionally vital area of adjudication.

This systemic failure has far-reaching implications, further undermining the integrity, transparency, and fairness that must lie at the heart of any process determining citizenship status.

5.1 *Ex Parte* Decisions by the Gauhati High Court

An important area of concern is the writ petitions challenging *ex parte* decisions by the FTs. The Gauhati High Court ostensibly applies the "sufficient cause" standard to decide whether such decisions should be reversed, remanded, or upheld. As discussed in §4.2.5, the Court has construed "sufficient cause" narrowly—requiring the cause to be beyond the litigant's control and showing that the litigant took all reasonable steps to avoid non-appearance.

Grounds asserted by Defendants for Non-Appearance at the FT	Petition Dismissed	FT Opinion Remanded	Liberty to file application in the FT	Other	Total
Improper Service of Notice	33	75	1	0	135
Lawyer did not Discharge his Duties towards the Defendant	43	10	0	0	68
Illness	44	16	0	1	87
Lack of Legal Aid/ Representation	6	4	0	0	21
Illiteracy / Ignorance	48	8	0	0	77
Reason Not Stated in the Court Order	51	25	0	4	103
Other	25	29	0	1	65

Our analysis of these cases reveals several troubling patterns.

First, the High Court imposes an impractically high and undefined threshold. Its interpretation of "sufficient cause" demands defendants anticipate and exhaust an open-ended range of actions to prevent *ex parte* orders, without clarifying what those actions should be. This leaves defendants unable to discern how to meet the burden, turning the standard into a moving target.

Second, the Court applies this standard without sensitivity to context. It imposes uniform expectations regardless of individual circumstances, undermining the protective purpose of the standard. In doing so, the Court disregards the need for a genuine opportunity to be heard—core to the guarantees of Articles 14 (equality) and 21 (life and liberty) of the Constitution.

Third, the decisions reflect *ad hoc* reasoning. Similar fact patterns yield inconsistent outcomes, with no clear rationale for the divergence. The supposed standard does not guide outcomes; instead, decisions appear arbitrary, driven by judicial discretion rather than coherent legal principles.

In effect, the "sufficient cause" standard provides neither guidance for FTs nor clarity for litigants. It fails to set actionable, predictable requirements, rendering it an empty exercise that neither safeguards due process nor informs litigants how to protect their rights.

5.1.1 Lack of Standards for Setting Aside *Ex Parte* Orders

As established in §4.2.5, the Gauhati High Court's interpretation of the "sufficient cause" standard places an undue and unrealistic burden on defendants, undermining principles of fair trial, due process, and natural justice. More troublingly, this standard is practically impossible for litigants to satisfy. A review of High Court orders reveals an *ad hoc*, inconsistent approach in which expectations are reformulated case by case without clear parameters. The Court's reasoning leaves the standard ill-defined, invoking hypothetical and open-ended steps defendants could or should have taken, rendering the standard unworkable. In effect, the "sufficient cause" standard fails as a legal tool—it does not meaningfully distinguish between circumstances within a defendants control and those beyond it.

Grounds of Illness

Defendants frequently cite severe illness as the reason for non-appearance, yet the High Court routinely dismisses such claims without clarifying how the standard applies to illness or what level of incapacity might satisfy it. The Court appears to expect that, regardless of illness severity, defendants should have taken mitigating actions—whether attending hearings despite illness or arranging for family members to act on their behalf. The implicit message is stark: defendants must prioritise attending their hearing above all else, no matter their medical condition.

- Abdul Kadir cited diabetes mellitus with neuropathy for missing several hearings. Justice Ujjal Bhuyan rejected the plea, finding no evidence that his illness was so severe as to prevent attendance over five years.[435] This decision suggests that complications from chronic illness are deemed manageable and within a litigant's control.
- Jyotsna Nath missed hearings while recovering from a stroke. After recovery, she discovered the *ex parte* order through her lawyer. Justice Bhuyan held that even in her incapacitated state, she should have remained informed via family members, who had cases pending before the same tribunal.[436] Serious illness, the Court suggested, did not absolve responsibility; family members should have acted as proxies.

[435] *Abdul Kadir @ Abdul Kadir Ali* and *Ors. v. Union of India* WP(C) 7457/2016 (Gauhati High Court, 8 December 2016). See also *Nur Banu Begum @ Nur Banu Khatun v. Union of India* WP(C) 3828/2017 (Gauhati High Court, 2 August 2017), where the Court opined that lumbar pain and spondylosis are not debilitating diseases.

[436] *Smti. Jyotsna Nath v. Union of India* WP(C) 5912/2018 (Gauhati High Court, 3 September 2018).

Grounds of inadequate legal representation

In cases where litigants cited inadequate legal representation to set aside *ex parte* orders, the Gauhati High Court has provided no workable standard for assessing when counsel's failure amounts to "sufficient cause." Pleas are routinely rejected without clarifying what steps the defendant should have taken or why their actions fell short. The Court simply asserts that additional efforts could or should have been made, without specifying what these might be. This pattern leaves the "sufficient cause" standard so undefined that no action seems sufficient. Crucially, the High Court fails to apply the standard's core inquiry: could further steps have realistically been within the defendants control? By sidestepping this question, the standard becomes hollow, incapable of distinguishing between what is and is not within a defendants power. As a result, no matter how diligent litigants are, they are unable to satisfy the standard.

- In Kodvan Nessa's case,[437] her lawyer failed to inform her of the need to submit evidence, leading to an *ex parte* order. Justice B.K. Sharma rejected her plea, reasoning that she should have independently known to adduce evidence despite hiring counsel for that purpose.
- Aijuddin's lawyer failed to file his written statement. Justice Ujjal Bhuyan held this did not amount to "sufficient cause,"[438] suggesting that Aijuddin should have filed the statement himself or ensured his lawyer did so—effectively requiring defendants to double-check or duplicate their counsel's work.

As it stands, the "sufficient cause" standard fails to provide any concrete, actionable requirements for litigants. With no coherent guidance on how it should be satisfied, the standard is unworkable. This lack of clarity not only renders the standard impractical but also creates a fundamental barrier to justice. The High Court's interpretation does not inform FTs when they may rightly proceed with *ex parte* decisions, nor does it offer any guidance to the public on what steps they must take to avoid such determinations. This results in a futile and counterproductive inquiry, leaving defendants without any meaningful way to meet the "sufficient cause" standard.

[437] *Kodvanu @ Kodvan Nessa @ Kodvan Bibi @ Kodvanu Bibi @ Begum Kodvanu Nessa v. State of Assam* WP(C) 1025/2010 (Gauhati High Court, 20 January 2012).
[438] *Aijuddin* (n 321).

Lack of Definitions in Successful Cases

Even in cases where pleas succeeded, the High Court's reasoning has failed to define how the "sufficient cause" standard was met. The decisions seem to turn on perceived merits rather than a principled application of the standard.

- In Sunil Ghosh's case,[439] Justice Hrishikesh Roy set aside the *ex parte* order, finding that Ghosh's lawyer had abandoned him. But the decision offered no analysis of why this abandonment qualified as "sufficient cause" or how the situation was beyond Ghosh's control.
- In Balen Ray's case,[440] psychiatric records showed he suffered from abnormal behaviour. Justice Manojit Bhuyan accepted this as a reason to set aside the *ex parte* order. Yet, he failed to clarify how undergoing psychiatric treatment constituted a "sufficient cause" for not managing the proceedings or arranging for someone else to handle them on Ray's behalf. Although the documents justified Ray's absence on specific dates, the essential question under the sufficient cause standard—whether the illness truly prevented him from fulfilling his obligations—was left unspecified.

Thus, even where relief is granted, the Court fails to clarify the standard, leaving defendants and FTs without meaningful guidance and reinforcing the standard's arbitrary application.

Undefinited Legal Criteria

A troubling feature of the Gauhati High Court's jurisprudence on *ex parte* orders is its arbitrary invocation of legal-sounding terminology without defining or applying these terms coherently. This casual reliance on undefined concepts obscures the true basis of decision-making in citizenship cases of profound constitutional significance. A striking example is the use of terms like "special" or "exceptional" circumstances under the "sufficient cause" standard. The Court fails to define what qualifies as special or exceptional, using these labels as though their meaning is self-evident. When pleas are rejected, there is rarely any explanation as to why the circumstances fall short.

[439] *Sunil Ghosh v. State of Assam* WP(C) 6470/2011 (Gauhati High Court, 29 May 2014).
[440] *Sri Balen Ray v. Union of India* WP(C) 6181/2018 (Gauhati High Court, 12 September 2018).

Reasons assigned by defendants to explain their non-appearance.	Deemed to not be a special/exceptional circumstance.
Lawyer erred in discharging his professional duties	Lawyer failed to conduct the case properly. Defendant was ignorant of the procedure.[441] Defendant was dependent on lawyer to inform about the next date of hearing as she is illiterate. He did not tell her.[442] Lawyer advised that there is no need to appear in the proceedings after the written statement has been filed.[443] Defendant failed to elaborate how the lawyer did not inform her about the trajectory of the case or why she stopped appearing.[444] Lawyer did not file the application for adjournment.[445]
Illness	Suffering from dysentery.[446] Severe lumbar pain and spondylosis.[447] Suffering from diabetes mellitus with neuropathy.[448] Defendant missed hearings while recovering from a stroke.[449]
Lack of legal aid/ representation	Unable to engage a lawyer due to poor financial situation.[450] Misunderstanding with the lawyer led him to withdraw from the case.[451] Lawyer stopped appearing because he fell ill. Afterwards, lost communication with lawyer.[452]

table continued on the following page

[441] *Musstt Sahara Kahtun v. Union of India* WP(C) 3424/2016 (Gauhati High Court, 16 June 2016).
[442] *Smti Rekha Rani Das* (n 324).
[443] *Md. Musraf Ali v. Union of India* WP(C) 6624/2015 (Gauhati High Court, 11 November 2016); *Jagadish Sutradhar v. Union of India* WP(C) 6587/2015 (Gauhati High Court, 4 November 2015); *Musstt. Saleha Begum v. State of Assam* WP(C) 4846/2010 (Gauhati High Court, 17 September 2010); *Najrul Islam @ Najir Miah @ Md. Nazrul Haque v. Union of India* WP(C) 1599/2012 (Gauhati High Court, 12 November 2015).
[444] *Smti. Lakhi Biswas v. Union of India* WP(C) 55/2016 (Gauhati High Court, 7 January 2016).
[445] *Musstt. Anowara Begum v. Union of India* WP(C) 4836/2015 (Gauhati High Court, 30 November 2015).
[446] *Maleka Khatun v. Union of India* WP(C) 5621/2016 (Gauhati High Court, 4 October 2016).
[447] *Nur Banu Begum* (n 435).
[448] *Abdul Kadir* (n 435).
[449] *Smti. Jyotsna Nath* (n 436).
[450] *Md. Atowar Ali v. Union of India* WP(C) 4120/2016 (Gauhati High Court, 23 August 2016); *Smti. Mina Sarkar v. Union of India* WP(C) 7275/2015 (Gauhati High Court, 2 December 2015); *Sahijuddin v. Union of India* WP(C) 6505/2015 (Gauhati High Court, 13 November 2015).
[451] *Smti. Roimon Nessa v. State of Assam* WP(C) 1396/2011 (Gauhati High Court, 28 February 2014).
[452] *Binoy Bhushan Choudhury @ Binoy Kumar Choudhury* WP(C) 557/2012 (Gauhati High Court, 7 January 2016).

Reasons assigned by defendants to explain their non-appearance.	Deemed to not be a special/exceptional circumstance.
Illiteracy/ignorance	Illiteracy and ignorance of the legal procedure, so failed to appear.[453] Defendant was cheated by someone who claimed to be an employee of the Tribunal and promised to settle the case on payment of money.[454] Defendant was ignorant of legal procedure and thought that submission of WS was enough. Did not know he had to prove documents.[455] Defendant was illiterate and her husband was taking care of proceedings on her behalf; after his death, she was ignorant of how to continue.[456]
Improper service of notice	Defendant had actually received the notice with signature.[457] Defendant left her marital house. Relocated to Arunachal Pradesh.[458] Notice was served on adult son who did not disclose it. Defendant had been working elsewhere.[459]

The supposed legal standard for setting aside *ex parte* orders is also applied inconsistently. In some cases, multiple conflicting standards are invoked within the same order, leaving it unclear which rationale was decisive. For instance, pleas based on improper service of notice were rejected both for failing to meet the "special/exceptional" threshold and for being factually implausible—without clarifying which ground governed the outcome.

In other cases, the Court appears to abandon legal standards altogether, defaulting to vague notions like deciding in the "interest of justice." This phrase is deployed without explanation or objective criteria, offering no guidance on what litigants must do to satisfy it. Notably, 12.7% of writ petitions citing illness succeeded not because the sufficient cause standard was met, but because they were allowed "in the interest of justice." Similarly, writ petitions challenging technically valid notice service were sometimes granted on this nebulous basis, reinforcing the impression of arbitrary discretion.

Such hollow invocations of legal terminology create the illusion of reasoned decision-making where none exists. They reveal a lack of judicial rigour—both in defining legal standards and in applying them faithfully to the facts.

[453] *Tara Bhanu v. Union of India* WP(C) 4930/2013 (Gauhati High Court, 30 August 2013); *Md. Abdul Subhan v. Union of India* WP(C) 4953/2013 (Gauhati High Court, 17 February 2014); *Anukul Das v. Union of India* WP(C) 7524/2015 (Gauhati High Court, 14 December 2015).
[454] *Md Nurul Islam v. Union of India* WA 64/2017 (Gauhati High Court, 17 May 2017).
[455] *Abdul Matin v. Union of India* WP(C) 5609/2013 (Gauhati High Court, 25 March 2013).
[456] *Kalpana Das* (n 312).
[457] *Mustt. Rahima Khatun v. Union of India* WP(C) 4116/2015 (Gauhati High Court, 5 November 2015); *Atobjan Bibi @ Atarjan Bibi v. Union of India* WP(C) 7409/2016 (Gauhati High Court, 13 December 2016); *Islamuddin Ali @ Islamuddin v. Union of India* WP(C) 6142/2015 (Gauhati High Court, 23 November 2015).
[458] *Morzina Begum v. Union of India* WP(C) 7372/2016 (Gauhati High Court, 8 December 2016).
[459] *Md. Alimuddin v. Union of India* WP(C) 1118/2017 (Gauhati High Court, 1 March 2017).

Reasons stated by the litigants to explain their non-appearance	Rate of success	Remanded on the merits of the ground stated by the litigant.	Remanded in the "interest of justice"	Remanded without mentioning any reasons.
Improper Service of Notice	75/135	49	23	2
Lawyer did not Discharge his Duties towards the Defendant	10/68	4	2	4
Illness	16/87	5	11	-
Lack of Legal Aid/ Representation	4/21	3	1	-
Illiteracy / Ignorance	8/77	3	5	-
Reason Not Stated in Court Order	25/103	5	13	7

Illustrations:

- Baten Ali claimed that notice was received by his brother, who failed to inform him. Justice Ujjal Bhuyan rejected this,[460] holding that his reason was not "special" or "exceptional" while simultaneously doubting Ali's account. The ostensible conflicting rationales were offered without indicating which controlled the outcome.
- Fakrul Islam submitted a medical certificate to justify his absence. His plea succeeded,[461] but on the vague ground of "interest of justice" rather than through application of the sufficient cause standard, with no reasoning as to what this standard required.
- Khadem Ali cited malaria as his reason for non-appearance. Although Justice Bhuyan criticised his "callous" attitude, the writ petition was allowed "in the interest of justice"—again suggesting arbitrary discretion.[462]
- Najima Bibi's notice was properly affixed at her last residence;[463] Ushna Ali's wife lawfully received notice on his behalf.[464] Despite lawful service, both writ petitions were allowed without reference to any legal standard. Likewise, in *Ruhi Das Mallick* and *Swapan Das*,[465] claims of non-receipt of notice were belied by service reports, yet the Court gave both another opportunity to contest.

[460] *Md. Baten Ali v. Union of India* WP(C) 3299/2016 (Gauhati High Court, 2 June 2016).
[461] *Fakrul Islam v. Union of India* WP(C) 7560/2016 (Gauhati High Court, 20 December 2016).
[462] *Khadem Ali @ Khadim Ali Sheikh v. Union of India* WP(C) 8014/2015 (Gauhati High Court, 29 February 2016).
[463] *Najima Bibi @ Nasima Khatun v. Union of India* WP(C) 7635/2018 (Gauhati High Court, 22 November 2018).
[464] *Ushna Ali @ Rasnai Ali v. Union of India* WP(C) 8043/2018 (Gauhati High Court, 14 December 2018).
[465] *Ruhi Das Mallick v. Union of India* WP¬(C) 3012/2019 (Gauhati High Court, 17 May 2019); *Swapan Chandra Das @ Swapan Das v. Union of India* WP(C) 7906/2015 (Gauhati High Court, 21 November 2017).

Conclusion

In sum, the Gauhati High Court's inconsistent application of legal standards, reliance on undefined terminology, and frequent resort to *ad hoc* reasoning have deeply undermined the integrity of the sufficient cause standard. Rather than functioning as a safeguard of due process, the standard has become so ill-defined and inconsistently applied that it fails to offer meaningful guidance either to defendants or to the Foreigners Tribunals.

The cost of this legal incoherence for individuals caught in these proceedings is stark. The High Court's interpretation of sufficient cause leaves defendants with no real opportunity to justify their absence in a way that satisfies the Court. No matter what steps they take, or what hardships they face—whether serious illness, inadequate legal representation, or procedural confusion—the standard remains unattainable. This reality is starkly illustrated in the story of Md. Nurul Islam, who approached the High Court in 2012 seeking to set aside an *ex parte* order that had declared him a foreigner. Like many others, he found no clear legal pathway to establish his claim.

Md. Nurul Islam before the bench led by Justice Ujjal Bhuyan[466]

Md. Nurul Islam was declared a foreigner in 2012 by FT Nalbari. Notice was sent to him in 2005 after his case was transferred from the IMDT where it had been languishing since 2002. By 2005, FTs had not been functionally operational since 1983, and had only reprised their role after *Sonowal I* was pronounced in July 2005. When Nurul visited FT Nalbari in 2005, he met someone who, by posing to be staff, convinced Nurul to pay him to handle his case. Being unfamiliar with FTs, Nurul paid him, and returned home feeling assured that his case will be taken care of. However, he later realised that he had been cheated as he was never represented in the hearings. It was then that Nurul sought the advice of the Gaonburah of his village who told him to go to the FT.

The FT allowed him time to file a written statement. But, when, on the advice of the Gaonburah, he met somebody else to help run the proceedings, he got swindled out of money for the second time. This is how Nurul ended up being marked absent for 4 years before the FT, and was declared as a foreigner in 2012.

In 2012, Nurul approached the Gauhati High Court. Upon perusing his plea, however, Justice Ujjal Bhuyan termed it as a "silly" and "untenable" story that did not disclose special or exceptional circumstances. Simultaneously, he disparaged Nurul for displaying a "callous" attitude, and not "cooperating" with the FT, ignoring the reality: Nurul kept trying to participate in proceedings, by paying people to help him navigate the proceedings, seeing it as the heavy price of admission.[467]

[466] *Md Nurul Islam* (n 454).
[467] ibid [6].

The High Court's casual and selective use of legal terminology—invoking phrases like "sufficient cause," "special circumstances," or "interest of justice" without defining their meaning or applying them coherently—signals a deeper failure. It reflects a judiciary that, at times, decides cases based more on impression than on principle. In doing so, the Court fails to uphold the constitutional and procedural safeguards that citizenship determinations demand. The result is a process that not only undermines fairness and due process but also erodes trust in the very institutions charged with protecting these fundamental rights.

5.1.2 Arbitrary Outcomes

In the previous subsection, we demonstrated that the Gauhati High Court's failure to define or apply the sufficient cause standard coherently has rendered it effectively meaningless. The standard imposes unattainable burdens on defendants v without offering actionable guidance. Here, we go further: even these supposed standards have no discernible correlation with case outcomes. The analysis points to troubling arbitrariness in High Court determinations, where legal standards cited in judgments appear to play little role in guiding final decisions.

This pattern becomes clear when examining writs challenging *ex parte* orders on similar grounds. Our review reveals that cases resting on identical or near-identical facts—whether citing serious illness, defective legal representation, or improper service of notice—have led to vastly different outcomes. The High Court variously dismissed petitions, remanded cases, granted liberty to apply before the FT, or outright quashed the *ex parte* orders. In most instances, these divergent remedies were handed down without reasoned explanation or principled justification for treating like cases differently.

Such inconsistency erodes the credibility of the adjudicative process and leaves defendants unable to predict or understand how their claims will be evaluated. The Court's failure to articulate why different remedies were appropriate in similar circumstances reflects not only the absence of clear standards but also the unchecked discretion at the heart of citizenship adjudication.

"Sufficient Cause" in Inadequate Legal Representation Pleas

Consider the case of Ram Krishna Das,[468] where the petitioner engaged a lawyer but struggled to file a written statement. The High Court accepted his plea, holding that he deserved reconsideration. In *Sersan Ali*,[469] Justice P.K. Deka went further, placing the onus on the FT to ensure that efforts to file evidence had been exhausted before passing an *ex parte* order. The Court recognised that the absence of counsel should not unduly prejudice the litigant.

By contrast, in *Binoy Bhushan Choudhury*[470] the High Court dismissed a similar plea. Although Chaudhary's local counsel had filed a written statement, he lost contact with him due to the lawyer's illness, and an *ex parte* order followed. Unlike in *Das* or *Sersan Ali*, the Court held Chaudhary personally accountable for his lawyer's failings, without examining whether he could have reasonably averted the outcome.

This inconsistency reveals how the High Court's application of sufficient cause arbitrarily shifts responsibility—sometimes to the defendants, other times to the lawyer or the FT—without principled engagement with the standard or a coherent basis for these differing expectations.

Ignorance of Proceedings

In cases where petitioners pleaded ignorance of the proceedings, outcomes have been equally arbitrary. For example, Rani and Gita Satnami argued they had relied on co-villagers who wrongly assured them the proceedings were irrelevant. Justice B.K. Sharma accepted this plea, implicitly acknowledging that poor, unrepresented individuals may be misled by others.[471] Yet, he provided no reasoning as to why these cases met the sufficient cause standard, nor did the facts clearly justify the exception.

By contrast, the same judge rejected similar pleas in other cases. Md Sukur Ali argued that his brother failed to inform him after receiving the notice;[472] Munnaf Ali claimed the same of his wife.[473] Both pleas were dismissed, with Justice B.K. Sharma finding that ignorance due to another's omission did not constitute sufficient cause. The absence of a consistent, articulated framework for determining when ignorance excuses non-appearance leaves outcomes dependent purely on judicial discretion.

[468] *Ram Krishna Das and Anr. v. Union of India* WP(C) 3625/2019 (Gauhati High Court, 19 June 2019).
[469] *Sersan Ali and Anr. v. Union of India* WP(C) 3141/2019 (Gauhati High Court, 27 May 2019).
[470] *Binoy Bhushan Choudhury* (n 452).
[471] *Smti. Tilmati Satnami @ Rani Satnami v. Union of India* WP(C) 4819/2015 (Gauhati High Court, 17 August 2015); *Smti. Gita Satnami v. Union of India* WP(C) 4817/2015 (Gauhati High Court, 17 August 2015).
[472] *Abdul Ajit v. State of Assam* WP(C) 3163/2010 (Gauhati High Court, 24 August 2015).
[473] *Munnaf Ali v. Union of India* WP(C) 1481/2010 (Gauhati High Court, 8 September 2015).

The Invocation of "Special or Exceptional" Circumstances

The use of terms like "special" or "exceptional" to justify relief further reveals inconsistency. In *Jatan Karmakar*,[474] Justice Hrishikesh Roy accepted the claim that the petitioner was misled by his lawyer, calling it "exceptional"—despite nothing in the facts distinguishing his case from others where similar claims were rejected. Likewise, in *Sudhir Sarkar*,[475] Justice B.K. Sharma quashed an *ex parte* order on the ground that the lawyer, not the client waiting outside the courtroom, bore the duty of reminding the client of the hearing date—a burden rarely imposed on lawyers in comparable situations.

Inconsistent Application of "Interest of Justice"

When should a writ petition be allowed "in the interest of justice"? And why do similar cases not receive the same relief? The Gauhati High Court's use of this standard reveals a troubling absence of clear criteria, leading to decisions that appear arbitrary and unprincipled.

Take Ushab Ali,[476] who declined to accept the notice because the village was wrongly recorded in the summons. The Court labelled him a "wilful defaulter", reasoning that there was no doubt the notice was intended for him. In contrast, Abul Kasem faced a similar error—his notice listed only his father's name correctly—yet Justice Manojit Bhuyan remanded the case "in the interest of justice."[477] Both cases involved errors in notice details, yet outcomes diverged without explanation.

The lack of consistent, articulated standards allows such decisions to rest on subjective interpretation. This opens the door to factors outside the legal record influencing outcomes. The "interest of justice" rationale, as applied, lacks transparency and fails to clarify why some petitions succeed while others do not, undermining confidence in the fairness of these rulings.

Application of different standards

The irrelevance of the "sufficient cause" standard in actual decision-making is starkly exposed when comparing similar cases involving elderly women citing illness for non-appearance.

Anjali Biswas argued that she missed hearings due to illness. Justice Ujjal Bhuyan dismissed her plea, emphasising the absence of medical proof and stating that her case did not meet the threshold of a "special" or "exceptional circumstance."[478] In contrast, Purnima Das submitted a medical certificate, yet Justice Bhuyan still rejected her plea, again finding no "special/exceptional circumstance."[479]

[474] *Jatan Karmakar and Ors. v. Union of India* WP(C) 3964/2011 (Gauhati High Court, 22 May 2014).
[475] *Sudhir Sarkar and Ors. v. Union of India* WP(C) 5592/2013 (Gauhati High Court, 21 February 2014).
[476] *Md. Yusab Ali @ Ushab Ali @ Yusuf Ali* (n 275).
[477] *Abul Kasem* (n 274).
[478] *Anjali Biswas @ Madhukola Mandal @ Madhukola Biswas @ Madhukola Sundari v. Union of India* WP(C) 2777/2017 (Gauhati High Court, 17 May 2017).
[479] *Purnima Das v. Union of India* WP(C) 3319/2016 (Gauhati High Court, 14 June 2016).

These contrasting rulings suggest that medical evidence was not genuinely decisive in either case. The absence of proof was highlighted in one case, but ignored when present in the other. This inconsistency reveals that such standards often serve as superficial rationalisations rather than genuine guides for decision-making. The result is a pattern of arbitrary judgments, where outcomes are untethered from the very standards courts purport to apply.

5.2 Writ Petitions Against Contested Cases

Breakdown of non-*ex parte* cases

No. of contested cases	Dismissed	Remanded	Direction to police to refer the case	Quashed	Clubbed FT cases	Other
637	476	45	62	16	3	35

This subsection examines a second set of cases adjudicated by the Gauhati High Court—writ petitions challenging FT decisions where individuals appeared and actively contested the proceedings. Much like writ petitions against *ex parte* orders, these cases expose a troubling absence of clear legal standards, consistent judicial reasoning, and meaningful guidance for the FT system.

There is a pattern of inconsistent application of evidentiary standards by the High Court, further highlighting the arbitrary and opaque nature of citizenship determinations. The Court has failed to establish coherent, stable standards for evaluating evidence, leaving FT members, lawyers, and defendants without a reliable framework. This has produced unpredictable, contradictory outcomes that undermine the integrity of citizenship adjudication.

The lack of clarity strikes at the core of the citizenship determination process, raising serious constitutional concerns about fairness, due process, and the reliability of judicial review. The evidence points to decisions that are often arbitrary, lacking transparency, and at times seemingly shaped by considerations outside the legal record.

5.2.1 Lack of Standards for Appreciating Evidence

As detailed in §4.2.6 to §4.2.12, the Gauhati High Court has departed from settled principles of evidence law in citizenship cases, substituting them with vague, inconsistent, and at times *ad hoc* criteria. This subsection argues that the Court's approach to evaluating evidence is both unpredictable and impractical. While its language suggests rigorous scrutiny, these standards are applied selectively and arbitrarily, leaving defendants unable to know what is required to prove their case. In reality, no standard emerges that, if met, would definitively establish the credibility of evidence. The result is a shifting and unattainable burden, undermining fairness and legal certainty in citizenship determinations.

Proof of Documents

A core problem in the Gauhati High Court's jurisprudence is its approach to proving the authenticity of documents, particularly certificates crucial to establishing citizenship. Historically, the Court required testimony from the issuing authority to confirm a document's genuineness. In 2016, it introduced another requirement: the issuing authority must now also produce contemporaneous records—such as a register or counterfoil—to corroborate their testimony.[480] This increased the burden on litigants without reconciling prior decisions, leaving both FT members and litigants without a coherent framework for proving document authenticity.[481]

An analysis of the High Court's decisions reveals glaring inconsistencies. While all judges demand testimony from the issuing authority, the content of that testimony is subject to shifting and arbitrary expectations. In some cases, judges have insisted that the authority must have personal knowledge of the facts stated in the certificate. Yet, when such testimony is provided, the focus conveniently shifts to other details framed as supposed deficiencies.[482]

Illustrations:

- Justice Ujjal Bhuyan questioned the Gaonburah's credibility in *Chabu Ali* for not knowing his birth year.[483]
- In Romila Khatun's case, Justice Ujjal Bhuyan expressed doubts because the Gaonburah did not mention the year of Romila's marriage.[484]
- The Gaonburah's knowledge of Ismail Khalifa's family for nine years was dismissed as insufficient,[485] and a similar approach was applied in *Jaygan Nessa* because of the Gaonburah's lack of knowledge about her parents' background.[486]

[480] *Alaluddin (n 369); Joynab Bibi* (n 367); *Anowar Hussain* (n 376); *Musstt. Sahara Begum* (n 376); *Md. Sayed Ali* (n 372).
[481] Bhat (n 21).
[482] *Anowara Bewa v. Union of India* WP(C) 905/2019 (Gauhati High Court, 17 May 2019).
[483] *Md. Chabu Ali* (n 380).
[484] *Romila Khatun* (n 376).
[485] *Ismail Khalifa @ Ismail Ali v. Union of India* WP(C) 3458/2016 (Gauhati High Court, 15 June 2018. See also *Abdul Barek v. Union of India* WP(C) 1478/2017 (Gauhati High Court, 2 April 2019), where the same approach was taken due to the Gaonburah's lack of knowledge about the defendant's mother..
[486] *Jaygan Nessa* (n 372).

This ever-moving target ensures no testimony can meet the Court's expectations: what is sufficient in one case becomes inadequate in the next, making the requirement hollow. Indeed, there is not a single recorded case in our dataset where an issuing authority's testimony was ultimately accepted as reliable.

In other rulings, judges have rejected personal knowledge altogether, instead demanding contemporaneous records as the basis for certification.[487] Yet this standard, too, is applied inconsistently: some judges insist on personal knowledge,[488] others on contemporaneous records,[489] often within the same line of cases, without explaining the divergence.

The result is a lack of stable, practical evidentiary criteria. Defendants and FT members are left guessing what standard will apply, and no amount of preparation or compliance ensures that a document will be accepted. These so-called standards function not as guidance but as shifting hurdles, impossible to satisfy and ultimately meaningless.

Inconsistent Requirements for Document Formatting and Form

The Gauhati High Court has introduced arbitrary and inconsistent formatting requirements for documents, further compounding the burden on defendants. These requirements, untethered from any legal or statutory standard, lead to judgments hinging on minor, irrelevant details rather than substantive evidence.

Illustrations:

- In one case, Justice Manojit Bhuyan questioned a Gaon Panchayat certificate because its handwritten entries were in black ink while other text appeared in blue—and lacked accompanying initials or signatures.[490]
- In another, Justice Ujjal Bhuyan dismissed a Gaonburah certificate because its serial number appeared below the header "Sarkari Gaonburah Certificate" but did not contain terms like "Government of Assam" or "Government of India."[491]

These orders do not clarify why such formatting features were deemed critical. There was no prescribed standard for comparison, nor any indication from cross-examination that these certificates were falsified. Such demands are legally irrelevant to the document's authenticity, yet were treated

[487] *Jyotsna Das* (n 376); *Sona Bhanu Begum* (n 376); *Hasina Begum* (n 376); *Rahima Khatun* (n 376); *Romila Khatun* (n 376); *Sohrab Ali* (n 376); *Md. Sayed Ali* (n 372); *Borhan Ali* (n 340).

[488] Justice Ujjal Bhuyan imposed this requirement in 7 orders out of 19. See: *Habibar Rahman v. Union of India* WP(C) 2656/2016 (Gauhati High Court, 9 March 2017); *Saher Ali v. Union of India* WP(C) 3115/2016 (Gauhati High Court, 11 May 2017); *Atab Ali v. Union* of India WP(C) 6072/2015 (Gauhati High Court, 9 March 2017). Justice Manojit Bhuyan imposed the requirement in 9 orders out of 13. See: *Musstt Joynab Bibi* (n 352); *Nur Islam v. Union of India* WP(C) 3829/2019 (Gauhati High Court, 26 August 2019); *Subiya Khatun @ Subiya Khatun v. Union of India* WP(C) 2960/2019 (Gauhati High Court, 24 June 2019). Justice K.R. Surana imposed the requirement in *Md. Sahidul Islam @ Sahidur Rahman v. Union of India* WP(C) 7081/2016 (Gauhati High Court, 22 August 2019). Justice Manish Choudhury imposed the requirement in *Abdul Barek* (n 485); *Anowara Bewa* (n 482); *Mahiruddin* (n 372).

[489] Justice Ujjal Bhuyan imposed this requirement in 12 orders out of 19. See: *Sajeda Khatun* (n 376); *Borhan Ali* (n 340); *Md. Sayed Ali* (n 372). Justice Manojit Bhuyan imposed the requirement in *Hasina Begum* (n 376); *Sona Bhanu Begum* (n 376); *Jyotsna Das* (n 376); *Jahura Bibi* (n 401). Justice K.R. Surana imposed the requirement in *Rahima Khatun* (n 376). Justice Manish Choudhury imposed the requirement in *Khudeja Begum* (n 363); *Kadarjan Nessa v. Union of India* WP(C) 2751/2019 (Gauhati High Court, 4 May 2019).

[490] *Jahura Bibi* (n 401).

[491] *Smt. Bela Rani Devi* (n 363).

as decisive. Despite the issuing authorities' testimony, these certificates were consistently rejected, highlighting the High Court's preoccupation with minor, subjective details over substantive evidence.

Other cases reveal similar inconsistencies. For instance, Justice Ujjal Bhuyan frequently required certificates to carry an issue number,[492] but in one decision, faulted a certificate because the date did not appear below the Block Development Officer's signature.[493] In this case, the absence of a memo number was cited as proof of inauthenticity. These fluctuating requirements reveal that no single criterion ensures a document's acceptance; new objections are readily devised to justify rejection.

This pattern fosters an appearance of bias, where documents are presumed dubious and scrutinised to find fault. The cumulative effect is to systematically disadvantage litigants. The Court's focus on inconsequential formatting over substantive evidence exposes a departure from sound evidentiary principles, revealing that these rulings are less about authenticating documents and more about erecting insurmountable barriers to proving citizenship.

Appreciating Oral Evidence

The Gauhati High Court's approach to oral testimony in contested citizenship cases is marked by inconsistency and arbitrariness, creating formidable hurdles for defendants. Judges apply shifting, *ad hoc* standards that lack coherence, often dismissing testimony on ever-changing grounds. Even when defendants meet one evidentiary demand, their testimony is rejected for a newly devised reason, leaving no clear path for satisfying the Court's requirements.

Consider decisions by Justice Manojit Bhuyan that highlight these shifting standards. In some cases, testimony was dismissed because the witness's name did not appear in the written statement.[494] In others, when witnesses were listed in the written statement, their testimony was rejected for a different reason: the Court required documentary evidence to corroborate the relationship.[495] The standard thus changes from case to case, creating a moving target for litigants.

Illustrations:

- In *Sahera Khatun*,[496] Justice Bhuyan rejected the testimony of her brother because he was not named in her written statement, finding his appearance suspicious.
- In *Maharjan Nessa*,[497] the testimonies of her brother, uncle, and neighbour were discarded for the reason stated above.
- Yet, in Rupbhanu Nessa's case,[498] her brother's testimony was rejected despite his name being included in the written statement. This time, the Court required documentary evidence to confirm their relationship.

[492] *Afuja Begum @ Afruja Begum v. Union of India* WP(C) 7340/2016 (Gauhati High Court, 19 April 2018); *Musstt. Sahara Begum* (n 376).
[493] *Joyful Bibi* (n 368).
[494] *Jahura Bibi* (n 401); *Sufiya Khatun* (n 366); *Maharjan Nessa* (n 418); *Basiran Begum* (n 366).
[495] *Abdul Ali v. Union of India* WP(C) 8198/2018 (Gauhati High Court, 10 May 2019); *Nur Begum v. Union of India* WP(C) 1900/2019 (Gauhati High Court, 18 February 2020).
[496] *Sahera Khatun* (n 430).
[497] *Maharjan Nessa* (n 418).
[498] *Rupbhanu Nessa @ Rup Bhanu v. Union of India* WP(C) 3383/2019 (Gauhati High Court, 16 September 2019).

This pattern implies an unspoken rule: oral evidence without documentary support will not suffice. But, even where documentary support exists, testimony is often still dismissed. In *Haliman Bewa*,[499] for instance, the FT rejected her brother Lokman Ali's testimony for lacking corroboration—overlooking that Lokman was named in the 1970 voter roll. Rather than correct this error, Justice Bhuyan introduced a new objection: Lokman's age made him four years older than Haliman, which supposedly cast doubt on her case. This shows how the Court frequently substitutes new grounds for dismissal rather than apply consistent principles.

This approach has serious consequences for the integrity of the citizenship determination process. A reliable criterion must be one that can feasibly be met; here, however, even when one criterion is ostensibly satisfied, a new requirement is devised to justify dismissal. In effect, no consistent criterion emerges, rendering the articulated standards meaningless.

This pattern also reveals ambiguity about whether testimonies require documentary support. Even when testimonies are corroborated by documents, they are frequently dismissed due to minor discrepancies, suggesting that the High Court's real approach is one of selective scepticism rather than principled reasoning.

Illustrations:

- In Khudeja Begum's case,[500] her sister's testimony was discarded because her citizenship status had not been independently confirmed. The High Court, required concrete proof of her citizenship to accept her testimony, an expectation not typically imposed on witnesses.
- In Maharjan Nessa's case, her uncle's testimony was dismissed because he was unaware of when her father had purchased land in the village, a detail that has no direct bearing on her citizenship status.[501] This excessive scrutiny suggests that the High Court may be invoking additional requirements on a case-by-case basis.

In stark contrast, testimonies contradicting the defendant's claims of citizenship are accepted without the same scrutiny. For instance, in Ibrahim Ali's case,[502] his brother's testimony that their father was Nur Islam was used to support the finding that Nurul Islam on the 1965 voter roll was not their father. Here, Justice Manojit Bhuyan did not question the veracity of the testimony, as he typically does when the evidence supports a defendant's case.[503] This selective application of standards reveals an inconsistent approach that has an appearance of bias.

499 *Haliman Bewa @ Haliman Nessa Bewa v. Union of India* WP(C) 7313/2016 (Gauhati High Court, 6 March 2018).
500 *Khudeja Begum* (n 363).
501 *Maharjan Nessa* (n 418).
502 *Ibrahim Ali Mir* (n 389).
503 *Maharjan Nessa* (n 418); *Sufiya Khatun* (n 366); *Subiya Khatun* (n 488).

In sum, the High Court's treatment of oral evidence reveals selective scepticism, arbitrary reasoning, and contradictory standards. The absence of a clear, consistent framework undermines fairness and injects systemic uncertainty into citizenship determinations. By failing to apply stable, manageable evidentiary standards, the Court has compromised the transparency, reliability, and constitutional integrity of its adjudication.

5.2.2 Arbitrary Outcomes

The previous subsection highlighted the Gauhati High Court's failure to apply consistent standards when assessing evidence in writ petitions challenging FT decisions on the merits. This lack of clear and coherent guidelines has made evidentiary standards not only unpredictable but, in practice, impossible to satisfy. As a result, defendants are left without a meaningful way to gather and present evidence to prove their citizenship, and FT members are deprived of the guidance necessary for fair and consistent adjudication. While the systemic flaws of the FT process are well known, the High Court's inconsistent and arbitrary approach has deepened these problems, fostering an environment where decisions appear to be driven by factors extraneous to the legal record rather than principled legal reasoning.

This subsection builds on that argument by demonstrating, through detailed analysis of High Court rulings, that the reasoning given in orders often fails to justify—or even directly contradicts—the outcomes reached in comparable cases. To do so, it draws on 16 cases where writ petitions were allowed and petitioners were declared Indians, comparing the reasoning with the typical reasoning discussed in Chapter 4.[504] This disconnect between reasoning and result raises serious concerns that decisions may be shaped by unrecorded or extraneous considerations rather than law. In effect, outcomes appear to rest on judicial whim rather than defined, legal standards, undermining the integrity of the entire process of citizenship adjudication.

[504] *Ambika Sarmah v. State of Assam* WP(C) 4812/2010 (Gauhati High Court, 8 September 2015); *Padma Newar @ Padmamaya Newar @ Sumitra Newar v. State of Assam* WP(C) 4313/2011 (Gauhati High Court, 7 September 2015); *Musstt Manowara Khatun @ Manowara Begum v. Union of India* WP(C) 3853/2010 (Gauhati High Court, 12 November 2015); *Dinesh Sarkar and Ors. v. Union of India* WP(C) 1644/2013 (Gauhati High Court, 21 January 2014); *Smti. Sadhana Rai v. Union of India* WP(C) 7276/2015 (Gauhati High Court, 2 December 2015); *Sadhan Chandra Biswas @ Sadhan Biswas v. Union of India* WP(C) 4928/2011 (Gauhati High Court, 25 August 2015); *Subha Rani Das* (n 392); *Maulavi Md. Daud Ali* and *Ors. v. State of Assam* WP(C) 5421/2011 (Gauhati High Court, 28 August 2015); *Smt. Rita Kundu Paul v. Union of India* WP(C) 5290/2013 (Gauhati High Court, 30 September 2015); *Ajitananda Das alias Ajit Das and Ors. v. Union of India* WP(C) 1175/2010 (Gauhati High Court, 7 October 2015); *Musstt. Gulesa Begum and Ors. v. Union of India* WP(C) 465/2015 (Gauhati High Court, 4 August 2015); Dipak Mandal v. Union of India WP(C) 32/2010 (Gauhati High Court, 21 August 2015); Arati Bhowmik v. Union of India WP(C) 1958/2010 (Gauhati High Court, 5 October 2015); *Subhash Bhowmik v. Union of India* WP(C) 1959/2010 (Gauhati High Court, 5 October 2015); *Smti Magadha @ Manoda Das v. State of Assam* WP(C) 1472/2010 (Gauhati High Court, 27 August 2015); *Manjula Nag @ Manjula Dhar v. Union of India* WP(C) 4504/2016 (Gauhati High Court, 11 June 2018).

Discrepancies in Names

One of the clearest markers of arbitrariness in High Court decisions appears in cases involving minor discrepancies in names, ages, or personal details (see §4.2.11). Across comparable cases, the Court has treated such inconsistencies in contradictory ways— accommodating the petitioner's evidence in only four cases,[505] while usually rejecting it outright. This inconsistency casts serious doubt on whether decisions are guided by any principled or coherent evidentiary standard.

In cases involving minor name discrepancies across documents, the Court's approach has been strikingly uneven. In *Subha Das*,[505] Justice B.K. Sharma ruled in favour of the petitioner despite variations in her parents' names: they appeared as "Ashini Kumar Roy" and "Primila Sundari" in some records and "Ashini Kumar Das" and "Urmila Sundari" in others. Sharma reconciled these discrepancies, reasoning that other particulars aligned and the variations did not undermine the overall reliability of the evidence.

By contrast, Rajendra Das was denied relief for an equally trivial discrepancy.[507] The 1970 voter roll listed him as the son of "Radha Charan," while the 1966 roll referred to "Radhacharan Das." Justice Amitava Roy treated this as a fatal inconsistency, without considering that the missing surname was likely an administrative oversight. No explanation was offered for why this variation was disqualifying, unlike in *Subha Das*. The inconsistency between these decisions suggests that discrepancies are invoked selectively, serving as a pretext for rejection rather than reflecting an objective evidentiary rule.

This pattern becomes even clearer in cases involving honorifics or culturally common name variations. In *Rahman Ali*,[508] the Court rejected the petitioner's claim because his mother's name appeared as both "Hajera Nessa" and "Hajera Khatun" across documents. The Court failed to acknowledge that "Khatun" is a common honorific for Muslim women in Assam, and such variation is culturally typical. Yet in *Manjula Dhar*,[509] Justice Ujjal Bhuyan reconciled a similar discrepancy in the mother's name, reasoning that it reflected a post-marriage name change, without subjecting the evidence to further scrutiny.

These examples reveal that whether discrepancies are reconciled or treated as disqualifying depends not on consistent legal reasoning, but seemingly on whether the judge is inclined to accept the petitioner's case. The result is not the application of a standard, but a discretionary choice.

[505] *Rahim Ali* (n 2); *Sirajul Hoque* (n 384); *Md. Anuwar Hussain* (n 384); *Motior Rahman* (n 384).
[506] *Subha Rani Das* (n 392).
[507] *Rajendra Das* (n 388).
[508] *Rahman Ali* (n 385).
[509] *Manjula Nag* (n 504).

Age Discrepancies

The High Court's handling of age discrepancies demonstrates the same pattern of unpredictability and selective reasoning seen in its treatment of name variations. It has reconciled these discrepancies in only 4 cases,[510] while considering it fatal in others. In *Md. Idrish Ali*,[511] despite documentary evidence linking Ali to his parents in the 1966 and 1970 voter rolls, his claim was dismissed on the basis of his age. His age was recorded as 45 in the 1989 voter roll, implying a birth year of 1944, yet he did not appear in earlier rolls where he should have been eligible. The 2005 roll listed him as 50, creating a minor inconsistency likely due to clerical error. The Court, however, treated this discrepancy as fatal, rejecting his claim despite the strength of his documentary linkage.

This rigid stance stands in stark contrast to the leniency shown in *Sadhan Biswas*. There, Justice B.K. Sharma overlooked age discrepancies between Biswas's HSLC certificate (which suggested a birth year that would make him ineligible to vote in 1970) and the voter rolls. Sharma reasoned that the consistency of Biswas's presence across multiple voter rolls from 1961 to 2004 outweighed the age conflict, accepting his claim.[512]

These cases illustrate the Court's selective rigidity: age discrepancies are used to reject a few claims while ignored in others, without any principled basis. Rather than developing clear, fair standards to guide future benches or FTs on how to evaluate and reconcile such discrepancies, the High Court has approached these matters on an *ad hoc*, case-by-case basis. This failure to articulate consistent evidentiary norms leaves decision-making opaque, undermines accountability, and denies defendants the clarity they need to effectively present their cases.

Pre-1971 Presence and Linkage Requirements

In cases where petitioners sought citizenship based on pre-1971 presence in Assam, the High Court displayed marked inconsistency, applying contradictory standards to similar evidence. These cases highlight a lack of coherent criteria in assessing the relevance of pre-1971 documentation and familial linkage.

In *Manowara Khatun*,[513] the Court accepted an HSLC certificate indicating her birth in Assam in 1964. Despite discrepancies between her self-declared date of birth and that on the certificate, Justice B.K. Sharma accepted the certificate's validity without requiring additional evidence linking her to her family's pre-1971 status. This suggested that possession of a pre-1971 document alone might suffice in some cases, exempting the petitioner from further lineage proof. Notably, unlike in other cases,[514] Justice Sharma did not suspect that Manowara was claiming another person's certificate, even though

[510] *Rahim Ali* (n 2); *Sirajul Hoque* (n 384); *Md. Anuwar Hussain* (n 384); *Motior Rahman* (n 384).
[511] *Md. Idrish Ali v. Union of India* WP(C) 6869/2016 (Gauhati High Court, 25 May 2018).
[512] *Sadhan Chandra Biswas* (n 504).
[513] *Musstt Manowara Khatun* (n 504).
[514] *Md. Akbar Ali and Ors. v. Union of India* WP(C) 2924/2013 (Gauhati High Court, 13 September 2013). See also *Hussain Ali* (n 381), where Justice Sharma remarked: "It is very easy to pick up any name so as to claim to be the one's own and then refer to his father, grandfather, mother and grandmother's name as his own."

the certificate's details did not fully align with her declaration. Similarly, in *Sadhana Bala Rai*,[515] the Court accepted her citizenship claim solely on the basis of her inclusion in the 1970 Voter Roll, without demanding further lineage documentation. This leniency was not extended to all petitioners.

In contrast, a more rigid approach appears in other cases. For example, in *Suruj Kazi*,[516] Justice Sharma disregarded the Headmaster's testimony, despite the Headmaster producing an Admission Register listing Suruj's birth year as 1972. The inability of the Headmaster to explain all the register details led to his evidence being deemed unreliable. By contrast, in Manowara's case, the Headmaster was not even questioned. In *Khatoon Nessa*,[517] Justice Sharma did not review her claim of citizenship by birth, despite her name appearing in the 1975 Voter Roll with her husband, aged 27.

This variation—leniency in some cases and rigidity in others—reveals an arbitrary judicial approach to citizenship claims based on birth.

Choice Between Quashing and Remanding FT Orders

The High Court's inconsistency also extends to the remedies it provides in similar cases. Sometimes, it quashes FT orders outright, affirming the petitioner's citizenship immediately. In other instances, it remands the case back to the FT for reconsideration, subjecting petitioners to renewed proceedings. These differing decisions carry significant consequences for petitioners.

Illustrations:

- In *Kayom Ali*,[518] Justice Bujor Barua remanded the case to the tribunal due to minor discrepancies in the petitioner's age in official records. Although Ali claimed to be the son of a declared citizen and his documents supported this, Justice Barua ordered reexamination focusing on an age discrepancy arguably trivial enough to overlook.
- Conversely, in *Reeta Kundu*,[519] with similar age discrepancies, Justice B.K. Sharma quashed the FT proceedings, holding such variations to be "immaterial" and irrelevant to citizenship claims.

This absence of a principled basis for choosing between quashment and remand suggests that judicial discretion, rather than consistent legal standards, drives outcomes. Both Kayom Ali and Reeta Kundu had been declared foreigners due to supposed age mismatches in public documents , yet the judges' remedies diverged sharply. The practical consequence is that while Reeta Kundu was promptly recognized as a citizen, Kayom Ali faced prolonged legal scrutiny. This discrepancy fuels perceptions of arbitrariness, with petitioners' fates hinging more on individual judicial preference than on coherent legal criteria.

[515] *Smti. Sadhana Rai* (n 504).
[516] *Suruz Kazi v. Union of India* WP(C) 7448/2013 (Gauhati High Court, 23 April 2014).
[517] *Musstt. Khatoon Nessa and Ors. v. Union of India* WP(C) 2098/2013 (Gauhati High Court, 30 August 2013).
[518] *Kayom Ali v. Union of India* WP(C) 6978/2018 (Gauhati High Court, 18 January 2019).
[519] *Smt. Rita Kundu Paul v. Union of India* WP(C) 5290/2013 (Gauhati High Court, 30 September 2015).

Irrelevant Observations and Lack of Justification in Decisions

The High Court's reasoning is further undermined by its reliance on irrelevant observations and its arbitrary dismissal of evidence without adequate explanation. In many cases, the Court's decisions hinge on minor formatting errors or trivial details that bear no clear relevance to determining citizenship. The reasoning often appears as an afterthought, offering no meaningful justification for the outcome (see §5.2.1).

In two orders, petitioners were declared Indians without any legal reasoning, further highlighting the lack of justification in decision-making. For instance, in *Dinesh Sarkar*,[520] the Court quashed the FT's order without addressing clear discrepancies in his evidence or explaining why his wife was granted citizenship. The decision rested primarily on counsel's submissions, with no requirement for proof or rationale provided for the conclusion. Similarly, in *Subhash and Aroti Bhowmik*[521] the Court ruled in their favour without referencing any evidence to substantiate their claim, leaving its reasoning entirely opaque.

Extraneous and potentially biased considerations also appear to shape decisions. In *Jiria Chouhan*,[522] Justice Ujjal Bhuyan remarked that certain individuals, by virtue of their surname, should not be suspected as illegal migrants—invoking non-legal factors in what should have been a strictly evidence-based determination. Such observations introduce subjective and potentially discriminatory elements into judicial reasoning, further eroding confidence in the fairness and integrity of citizenship adjudication.

Conclusion

The Gauhati High Court's inconsistent, *ad hoc*, and opaque approach to evidence in citizenship cases has created an environment in which judicial decisions appear arbitrary, unprincipled, and detached from any coherent legal framework. The Court's failure to articulate clear standards for evaluating discrepancies in names, ages, or other personal details leaves litigants without meaningful guidance on how to meet evidentiary requirements. This unpredictability not only undermines the credibility of individual judgments but also erodes trust in the judicial process itself, fuelling perceptions that outcomes are shaped as much by discretion—or bias—as by law.

Moreover, the Court's reliance on irrelevant observations, its dismissal of material evidence without adequate justification, and its inconsistent choice between remedies such as quashment and remand reveal a deeper structural problem: the absence of a principled and rigorous method for adjudicating citizenship claims. Decisions that invoke extralegal considerations, or hinge on minor procedural or clerical details, compound this concern, signalling a departure from constitutional guarantees of equality and due process.

[520] *Dinesh Sarkar and Ors. v. Union of India* WP(C) 1644/2013 (Gauhati High Court, 21 January 2014).
[521] *Arati Bhowmik* (n 504); Subhash Bhowmik (n 504).
[522] *Jiria Chauhan @ Jhiria Chawhan v. Union of India* WP(C) 3184/2017 (Gauhati High Court, 24 July 2017).

Ultimately, the High Court's approach weakens public confidence in the rule of law and exacerbates the inherent deficiencies of the Foreigners Tribunal system. Rectifying this requires more than individual judicial restraint; it demands the establishment of clear, consistent, and legally sound standards for assessing evidence and determining remedies. Only then can citizenship adjudication be aligned with constitutional principles of fairness, transparency, and justice.

5.3. A System Impervious to Reform

The Supreme Court and the Gauhati High Court have issued judgments that lay down norms addressing lacunae in the FT system.[523] Between February 2021 and February 2023, the Gauhati High Court bench led by Justice N. Kotiswar Singh delivered judgments that sought to enhance procedural integrity and fairness in the FTs. The following were some important areas of law that these judgments developed.

- The bench mandated requiring referral authorities to rigorously apply their minds and clearly state the grounds for each case, thereby limiting the FT's jurisdiction strictly to the matters specified in the reference.[524]
- It reinforced procedural safeguards: proper service of notice, accurate identification of individuals prior to proceedings, and a holistic evaluation of evidence.[525]
- It cautioned the FTs against mechanically rejecting documents—including post-1971 records—and affirmed the admissibility of corroborative materials such as Gaon Panchayat certificates.[526]
- The importance of maternal testimony under Section 50 of the Evidence Act was emphasised,[527] alongside the obligation on the FTs to summon key witnesses capable of substantiating claims.
- The bench extended the application of *res judicata* to prevent repeated proceedings against the same individual and allowed delays in review petitions where substantive justice required it,[528] urging decisions based on merit rather than procedural technicalities.
- The bench also clarified the question of territorial jurisdiction under Section 6A of the Citizenship Act, clarifying who the FT can and cannot proceed against.[529]

[523] *Safiya Khatun* (n 298); *Abdul Kuddus v. Union of India* (2019) 6 SCC 604; *Amena Khatun v. State of Assam* WP (C) 4146/2018 (Gauhati High Court, 27 September 2018); *Santosh Das v. Union of India* (2017) 5 GLR 510; *Sirajul Hoque* (n 384); *Md. Anuwar Hussain* (n 384); *Moslem Mondal* (n 188).

[524] *Sona Kha @ Sona Khan v. Union of India* WP(C) 1293/2021 (Gauhati High Court, 24 March 2021).

[525] *Amina Khatun v. Union of India* WP(C) 2975/2019 (Gauhati High Court, 28 April 2022); *Rina Rani Das v. Union of India* WP(C) 2706/2019 (Gauhati High Court, 10 March 2021); *Kabir Uddin* (n 276); *Abdul Azid @ Aziz @ Ajid Ali and Anr. v. Union of India* WP(C) 1153/2017 (Gauhati High Court, 13 December 2022).

[526] *Pinjira Khatun* (n 349).

[527] *Sujab Ali v. Union of India* WP(C) 2221/2020 (Gauhati High Court, 20 August 2021); *Karim Ali @ Abdul Karim v. Union of India* WP(C) 7361/2017 (Gauhati High Court, 16 June 2022).

[528] *Sital Mandal v. Union of India* WP(C) 2099/2018 (Gauhati High Court, 28 April 2022).

[529] *Anjana Biswas* (n 253); *Bablu Paul @ Sujit Paul v. Union of India* WP(C) 7229/2017 (Gauhati High Court, 14 December 2021).

Yet, as this section will demonstrate, none of these judicial reforms have permeated through the regime. This section will examine the Gauhati High Court's approach following Justice Kotiswar Singh's departure in February 2023 and analyse judgments passed in 2023, 2024 and 2025. Any and all piecemeal improvements introduced, including by the Supreme Court, have been routinely undermined. Since 2023, the Gauhati High Court could have drawn upon these jurisprudential reforms to guide FT adjudication. Instead, it has done the opposite, either through non-implementation or by layering additional, extra-legal burdens on litigants, often leading to a worse state of affairs than the previous one (Chapter 4).

Outcomes continue to disregard established adjudicatory norms, rely on selective interpretations of evidence, hinge on minor discrepancies, and irrelevant and trivial considerations unsupported by robust legal reasoning. As a result, even legal principles well-settled by earlier benches receive uneven and unpredictable treatment, exposing the system's deep resistance to meaningful reform in FT adjudication.

5.3.1 Adjudicating Oral Evidence

The Gauhati High Court has generally maintained that oral evidence, in the absence of documentary support, is inadmissible in FT proceedings—a stance that, as this report argues contravenes principles of due process and fair trial (§5.2.1). Since 2021, however, the High Court's bench dealing with FT-related writ petitions, led by Justice Kotiswar Singh, issued judgments that ostensibly recognise the significance of oral testimony in these cases, particularly testimony from family members, such as mothers, who possess direct knowledge of familial relationships.[530] These rulings sought to correct the FTs' frequent disregard for oral evidence and to follow Section 50 of the Indian Evidence Act,[531] which governs the admissibility of testimony regarding family relationships. The Court reiterated the three-part requirement under Section 50: that the witness must have special knowledge of the familial relationship, derived from being a family member or from personal proximity.

Properly applied, this framework should have provided clear guidance to the FTs, requiring them to evaluate oral testimony rigorously, assess whether it was rebutted by the State, and reject such evidence only with reasoned justification. Yet, these standards have largely failed to shape actual adjudication—whether by the FTs or by the High Court after Justice Singh's tenure. Despite the legal developments recognising the admissibility and value of oral evidence, particularly maternal

[530] *Karim Ali* (n 527); *Haidar Ali* (n 297); *Sujab Ali* (n 527).

[531] Indian Evidence Act 1872, s 50: "Opinion on relationship, when relevant. — When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact."

testimony and corroborative statements, the High Court has undermined its own precedents. It continues to disregard oral evidence from witnesses including family members citing little or no reasoning—either rejecting testimonies outright in the absence of documentary support or incorrectly appreciating them.[532]

In *Jamila Khatun* (2023),[533] the petitioner challenged her designation as a post-1971 foreigner. The High Court failed to document the FT's reasoning for this designation. Although Jamila produced certificates from the Gaon Panchayat Secretary and the Gaonburah linking her to her father, A. Jalil, the Court summarily dismissed both, asserting that they did not satisfy Section 50's requirement of special knowledge—without providing any substantive legal basis for this conclusion.

During the course of the depositions, the defendant relied on evidence rendered by Md. Abdul Jalil of village Baligaon, who identified the defendant as his daughter. In the 1966 voters list annexed by the defendant to prove linkage with her father, the same Abdul Jalil was a resident of village Podopari. This difference in villages was not addressed in the witness's deposition. However, further questioning by the State counsel during cross-examination revealed that Abdul Jalil had shifted to Baligaon about 20 years ago, and was the same person who was registered on the voters list of Podopari in 1966.

Rather than taking note of this and considering these facts in favour of the defendant, the Court remanded the matter back to the FT and directed the state authorities to reexamine the same witness. The Court further directed that the order be brought to the notice of the Principal Secretary to the Home Department of the Government of Assam "to ensure that the State authorities do not indulge in such acts of cross examination so as to come to an aid of the proceedees in the garb of cross examination and to conduct the cross examination in the manner as required under the law." The fact that the cross-examination aided the defendant in explaining a discrepancy was used as a basis for the Court to declare the evidence rendered by Abdul Jalil as unreliable, a position which is entirely unsupported by law.

Similarly, in *Rahimon Khatun* (2023),[534] the defendant contested her designation as a post-1971 foreigner by the FT at Goalpara. The High Court's ruling neither recorded the FT's reasoning nor analysed the evidentiary value of the Gaon Panchayat Secretary's certificate linking Rahimon to her father, Abdur Rahman. The Court dismissed this testimony simply by stating that the Secretary lacked special knowledge, without examining the substance of the testimony or considering whether the State had rebutted it. This summary rejection, contrary to established standards, reflects a failure to uphold legal consistency.

[532] *Abdur Rahim @ Abdul Rahim v. Union of India* WP(C) 4009/2019 (Gauhati High Court, 15 June 2023); *Falu Sheikh v. Union of India* WP(C) 6605/2018 (Gauhati High Court, 10 May 2023); *Abeda Bibi v. Union of India* WP(C) 4965/2017 (Gauhati High Court, 10 April 2023); *Keshmati Namasudra v. Union of India* WP(C) 5957/2022 (Gauhati High Court, 3 April 2023); *Jahura Khatun* (n 431).
[533] *Jamila Khatun v. Union of India* WP(C) 6705/2021 (Gauhati High Court, 14 August 2023).
[534] *Rahimon Khatoon @ Rahima Khatun @ Rohimon Nessa v. Union of India* WP(C) 1927/2023 (Gauhati High Court, 31 July 2023).

In Muslim Ali's (2024)[535] case, the FT summarily dismissed the oral evidence adduced by the defendant and his mother, since that did not affirm their Indian citizenship. The FT relied on minor discrepancies in age to entirely discard the evidence adduced by the defendant in his depositions, rendering them untrustworthy and unreliable. As established by the Supreme Court of India's judgment in *Sucha Singh v. State of Punjab,*[536] even material discrepancies in recording of names, age and address of the family members of the defendant cannot be grounds to doubt the entire oral testimony of the defendant. The Gauhati High Court[537] has held that failure to disclose names of family members and minor discrepancies within the course of the evidence do not render the entire evidence unreliable.

In *Amzad Talukdar* (2025),[538] the FT had disregarded the petitioner's documentary evidence and the corroborative testimony of his uncle and the village Gaonburah, even though this evidence went unrebutted during proceedings. The FT rejected the uncle's testimony solely because he produced only the 1970 voter list and his voter ID card—an incorrect reading of evidentiary requirements, as witnesses are not obliged to annex multiple documents to establish legacy. As established in Justice Kotiswar Singh's decisions, oral evidence should be admissible without documentary support. The Gaonburah's testimony was similarly discarded on the ground that it proved only residence, not parentage. The High Court remanded the case for reconsideration without properly engaging with the evidence or addressing the FT's flawed reasoning. The remand order lacked clarity as to its purpose or the legal standard to be applied. A meaningful reading of the record reveals that the petitioner's linkage to his father—whose pre-1971 presence in Assam was established—had been adequately proven.

These cases expose a persistent failure to engage in the careful, constitutionally attentive adjudication required by the High Court's own rulings. Despite clear standards established in 2021–2022 on the admissibility and value of oral evidence in FT proceedings, subsequent judgments have disregarded these principles, denying individuals a fair opportunity to establish citizenship through familial testimony.

[535] *Muslim Ali v. Union of India* WP(C) 1591/2017 (Gauhati High Court, 12 June 2024).
[536] (2003) 7 SCC 643 [18].
[537] *Haidar Ali* (n 297) [24].
[538] *Amzad Talukdar @ Amzad Ali v. Union of India* WP(C) 7440/2018 (Gauhati High Court, 8 January 2025).

5.3.2 Undermining *Res Judicata*

The Supreme Court, in *Abdul Kuddus v. Union of India*,[539] and the Gauhati High Court in Justice Kotiswar Singh's judgment of *Sital Mandal v. Union of India*[540] have firmly established that *res judicata* applies to the FT proceedings, barring repetitive litigation on the same issues involving the same individual. These rulings make clear that once an FT has adjudicated a person's citizenship status, any subsequent proceeding seeking to re-determine that status should be barred by *res judicata*. The FT must treat *res judicata* as a preliminary issue, requiring the defendant in any subsequent case to demonstrate that they are the same individual previously declared an Indian.

Despite this clear mandate, the Gauhati High Court has repeatedly circumvented the principle in recent cases by rejecting *res judicata* pleas on tenuous grounds. Instead of upholding prior FT findings, the Court has invalidated favourable earlier decisions by branding them "unreasoned" or insufficiently detailed, and remanding cases to the FTs for rehearing. This approach undermines *res judicata*'s core purpose: to prevent repetitive litigation, protect individuals from endless legal jeopardy, and preserve judicial finality.

In *Rafikul Islam* (2023),[541] the defendant was first declared an Indian by the FT in 2014 (F.T. Case No. 102/2014). However, in a subsequent proceeding in 2019 (F.T. Case No. 05/2019), the FT reversed its earlier finding and declared him a foreigner. When Islam invoked *res judicata* to challenge this second decision, the High Court refused to apply the doctrine. Rather than affirming the finality of the earlier ruling, the Court questioned the quality of the reasoning in the first FT opinion, holding that "an unreasoned order is unacceptable in law." It reached this conclusion without reproducing or engaging with the substantive findings or materials from the first FT decision, nor did it undertake any preliminary inquiry into whether the defendant was, in fact, the same individual. The Court remanded the matter to the FT "in the interest of justice," effectively reopening a settled issue in clear disregard of its own precedent.

A similar pattern emerged in *Amir Ali* (2023),[542] where the petitioner was declared Indian by the FT in 2016. Despite this, Ali received further notices and was subjected to multiple additional proceedings on the same question of citizenship. Ali rightly invoked *res judicata*, arguing that his prior adjudication barred further litigation. The High Court dismissed this plea, once again questioning the adequacy of the FT's initial reasoning and remanding the case for reconsideration. This enabled the State to introduce fresh evidence, forcing Ali to endure repeated proceedings on a matter already resolved. Instead of condemning the repetitive and burdensome nature of these proceedings, the Court compounded the problem by ordering yet another appearance before the FT, disregarding the very finality *res judicata* is designed to protect.

[539] 2019 (6) SCC 604 [24].
[540] WP(C) 2099/2018 (Gauhati High Court, 28 April 2022).
[541] *Rafikul Islam v. Union of India* WP(C) 251/2023 (Gauhati High Court, 3 March 2023).
[542] *Md. Amir Ali @ Amir Uddin v. Union of India* WP(C) 1248/2023 (Gauhati High Court, 27 March 2023).

These cases exemplify how the High Court has eroded the doctrine of *res judicata* by imposing extralegal standards—such as subjective assessments of the reasoning in prior judgments—rather than respecting their legal finality. By reopening settled matters on such grounds, the Court not only weakens the principle's protective function but also subjects individuals to repeated, redundant, and unjustified litigation, contrary to constitutional guarantees of due process and legal certainty.

5.3.3 Persistent Crisis of Due Process

§4.1.1 outlined the procedural requirements and legal standards governing the initiation of proceedings before the FTs, including the necessary stages of inquiry that must precede a valid reference. As noted in that section, in *Moslem Mondal*, a full bench of the Gauhati High Court held that an FT's jurisdiction arises only upon a duly considered referral made by an authority specified under Clause 2 of the FT Order 1964. The Supreme Court reinforced these standards in 2024 in *Rahim Ali*, holding that proceedings initiated without substantive, primary evidence violate the due process safeguards embedded in Indian law. The Court emphasised that life-altering determinations such as citizenship status require more than hearsay or vague allegations; mere accusations are insufficient to shift the burden of proof onto the accused.

Despite these clear mandates from both the Gauhati High Court and the Supreme Court, the Gauhati High Court has, in 2024, persistently failed to implement *Rahim Ali* and uphold challenges to the perfunctory and legally deficient inquiry reports that underpin many FT referrals. Where inquiry reports lack substantive assessment, the FT's jurisdiction is invalid. Yet, the Court repeatedly allows proceedings to advance on tenuous grounds, contravening binding judicial standards.

In *Aziz Mia* (2023),[543] the defendant challenged his declaration as a foreigner, arguing that the Inquiry Officer, in his report, had in fact recommended against referring his case to the FT, as Aziz had produced credible evidence—most notably, the 1966 voters' list identifying his father as an Indian resident. Despite this, the Superintendent of Police (Border) referred the case to the FT. The High Court dismissed Aziz Mia's challenge, holding that "any report submitted by the investigating authority would not be conclusive" and remanded the matter for further evidence on familial linkage. This ruling disregarded *Moslem Mondal*, allowing a jurisdictionally defective proceeding to continue. It failed to justify what material or evidence the Superintendent of Police (Border) relied on to refer the matter to the FT, particularly in the absence of the enquiry report supporting the referral.

[543] *Aziz Miya @ Md. Aziz Mia v. Union of India* WP(C) 2370/2023 (Gauhati High Court, 9 June 2023).

In *Asmita Khatun v. Union of India* (2023),[544] the Gauhati High Court was tasked with examining a petition in which the FT had declared an entire family—Md. Intaz Ali (father), Asmina Khatun (wife), Md. Jakir Hussain (son), and Musstt. Imrana Khatun (daughter)—to be foreigners. The petitioners challenged these declarations, raising a fundamental question of law: whether, consistent with *Moslem Mondal*, the failure to conduct a lawful inquiry under the Foreigners Tribunal Order 1964 vitiated the proceedings against them. Specifically, they relied on paragraph 97 of *Moslem Mondal*, which held that without a proper inquiry, proceedings before the Tribunal are without jurisdiction and liable to be set aside.

The petitioners demonstrated that the inquiry and reference had been made solely against Md. Intaz Ali (in WP(C) 8399/2022) and that no inquiry at all had been conducted against the other three petitioners (in WP(C) No. 3745/2019). They contended that the absence of any investigation or referral against those individuals fatally tainted the proceedings against them and that the FT's opinions were therefore without legal foundation.

Justice Bujor Barua, writing for the bench, departed from settled jurisprudence by reframing the requirements set out in *Moslem Mondal*. The Court held that paragraphs 92–97 of Moslem Mondal permit a more elastic standard: a "fair investigation" would suffice for proceedings under the Foreigners Act provided that the prospective defendant was given an opportunity during the inquiry to present their claim to citizenship. Crucially, the Court introduced an additional requirement not found in *Moslem Mondal*—that the defendant must cooperate fully with the investigating authority, including by making their whereabouts known at all times. The judgment suggested that where a litigant fails to so cooperate, the obligation of the investigating authority to conduct a fair inquiry is deemed satisfied, even in the absence of any substantive material justifying referral.

This reasoning effectively shifts the burden of ensuring a lawful inquiry from the State onto the individual—a position at odds with both *Moslem Mondal* and broader constitutional protections under Article 21. The Court further distinguished the inquiry requirement under the FT Order 1964 from the statutory inquiry once mandated under the now-defunct IMDT Act 1983 (struck down in *Sonowal I*). It reasoned that the *Moslem Mondal* standard, grounded in Article 21, was of a different "purport, nature, and extent," and could therefore be satisfied through lesser procedural safeguards if the defendant was deemed uncooperative.

Applying this novel standard, the Court found that for two of the petitioners—Md. Intaz Ali and Asmina Khatun—the investigation requirements had been met because they allegedly did not cooperate with the investigating authority. On this basis, it refused to set aside the proceedings against them. For the remaining petitioners, it offered no meaningful engagement with the argument that no inquiry or referral had ever been made against them at all, allowing the Tribunal's decision to stand despite this fatal jurisdictional flaw.

[544] WP(C) 3745/2019 tagged with WP(C) 8399/2022 (Gauhati High Court, 28 March 2023).

This judgment represents a significant and problematic departure from established precedent. The High Court's approach disregards the binding directives of *Moslem Mondal* and Justice Kotiswar Singh's verdict in *Anjana Biswas v. Union of India*, which make clear that a Tribunal's jurisdiction depends on a valid inquiry and referral grounded in material evidence. The imposition of a new, extra-legal requirement of "proceedee cooperation" shifts the focus from the State's duty to conduct lawful proceedings to the alleged conduct of the individual, in effect excusing defective or non-existent inquiries. Moreover, by distinguishing a constitutional norm (under Article 21) from a statutory obligation (under the IMDT Act) to justify weaker procedural protections, the Court undermines the very purpose of Article 21 safeguards, which exist to constrain State power in life-altering determinations like citizenship.

The *Asmita Khatun* judgment illustrates how the High Court has enabled the erosion of procedural safeguards by authorising proceedings without lawful basis and by introducing burdens on litigants that have no foundation in law. Rather than quashing proceedings initiated without jurisdiction, the Court has created extra-legal justifications for sustaining them, thereby deepening the crisis of due process in FT adjudication.

In *Mohammad Ali* (2025),[545] the defendant challenged the legality of proceedings initiated against him under the Foreigners Act, specifically questioning the validity of the reference made by the Superintendent of Police (Border). Mohammad Ali argued that the SP(B) had no lawful basis to make the reference, as the designated inquiry officer had already found him to be an Indian citizen by birth. The inquiry report contained clear findings supported by documentary evidence, including legacy documents that demonstrated his father's pre-1971 residence in Assam.

Under binding precedent—particularly *Moslem Mondal*, *Anjana Biswas*, and other rulings of the Gauhati High Court—a Foreigners Tribunal's jurisdiction arises only when the referral authority has applied its mind to the evidence gathered during a lawful inquiry and determined, on the basis of that material, that there are sufficient grounds to doubt the individual's citizenship status. The SP(B), as the referring authority under Clause 2 of the FT Order 1964, is bound to assess the materials collected by the inquiry officer and can issue a reference only if convinced that a case for proceeding exists. The inquiry report forms the very foundation of the FT's jurisdiction: without a valid referral based on reasoned analysis of substantive material, the FT's proceedings are vitiated.

In this case, the SP(B) referred the matter to the FT despite the inquiry officer's unequivocal finding that Mohammad Ali was an Indian citizen. The petitioner contended that this act represented a clear violation of established procedural safeguards, as the SP(B) failed to apply his independent mind to the evidence before initiating proceedings. The reference was thus jurisdictionally defective, and the FT's subsequent declaration of foreigner status ought to have been quashed on that ground alone.

[545] *Mohammad Ali and Ors. v. Union of India* WP(C) 3500/2018 (Gauhati High Court, 6 January 2025).

Rather than addressing this core procedural defect, the Gauhati High Court upheld the FT's proceedings. The Court reasoned that because the SP(B) is the competent authority under the FT Order 1964 to make a reference, the finding of the inquiry officer was "inconsequential." This position squarely contradicts Moslem Mondal, where the full bench of the High Court expressly held that the SP(B) must base its referral decision on a considered application of mind to the inquiry report and accompanying evidence. The Court's assertion effectively rendered the inquiry process meaningless, reducing it to a procedural formality rather than a substantive safeguard against arbitrary proceedings.

Moreover, the Court compounded this error by delving into the merits of the case, evaluating Mohammad Ali's documents and testimony rather than first resolving the threshold jurisdictional defect. This approach reversed the proper sequence of judicial scrutiny: where jurisdiction is lacking due to an invalid referral, the FT's opinion is legally irrelevant and cannot be examined on its merits. By disregarding this principle, the Court not only legitimised proceedings that were *void ab initio* but also imposed additional evidentiary burdens on the petitioner, forcing him to defend his citizenship in a process that should have been quashed at the outset.

The Mohammad Ali ruling exemplifies the Gauhati High Court's persistent failure to uphold its own procedural jurisprudence and constitutional due process requirements. It reveals how the Court's selective and inconsistent application of binding precedent facilitates arbitrary and unlawful denationalisation proceedings. By insulating defective referrals from scrutiny and prioritising a merits-based review over jurisdictional integrity, the Court has undermined the procedural safeguards intended to protect individuals from arbitrary state action in citizenship matters.

Conclusion

This chapter has examined in detail the jurisprudence of the Gauhati High Court in relation to citizenship determinations arising from the FTs. The comprehensive material surveyed reveals deep and persistent challenges in how the Court has approached these cases, marked by inconsistency, internal contradiction, and the absence of coherent, principled legal standards to guide decision-making. While the Court has, at times, articulated procedural safeguards and reforms intended to secure fair adjudication, these have too often remained aspirational, as they have not been consistently enforced. The actual outcomes of cases demonstrate a pattern of reasoning that is difficult to reconcile with constitutional guarantees of due process and natural justice.

Central to this chapter's analysis is the observation that the High Court's decisions in citizenship cases display significant variability in the application of legal criteria. Petitioners presenting broadly similar evidence—whether documentary, oral, or both—have received markedly different outcomes, with little indication as to why one set of evidence was deemed sufficient while another was not. Discrepancies in names, ages, or other personal details have, in some cases, been treated as fatal defects, while in others they have been overlooked as immaterial. Similarly, the admissibility and weight accorded to oral evidence, including maternal testimony recognised under Section 50 of the Indian Evidence Act, has fluctuated without clear guiding principles. This inconsistency has generated uncertainty not only for litigants but also for the FTs tasked with applying the law, and has contributed to a sense that decisions may turn less on legal standards than on the exercise of judicial discretion in individual cases.

These concerns are not abstract. The right to equality before the law under Article 14 of the Constitution requires that legal distinctions be based on relevant and objective criteria, while Article 21 guarantees that any procedure affecting life or liberty must be fair, just, and reasonable. The pattern of decision-making outlined in this chapter raises difficult questions as to whether these standards have been met in practice. The absence of stable legal tests for evaluating discrepancies or reconciling oral and documentary evidence means that individuals facing proceedings of the gravest kind—the potential loss of citizenship—are too often left without clear guidance as to what is required to establish their claims. The result is an adjudicatory landscape in which outcomes can appear unpredictable and where the safeguards of natural justice risk being eroded.

A further concern emerging from the case law is the manner in which burdens have been allocated in FT proceedings. In several instances examined in this chapter, the High Court has, whether expressly or by implication, shifted the burden from the State onto the individual in ways that sit uneasily with constitutional and international standards. This is evident, for example, in cases where the Court has introduced additional obligations on litigants—such as the expectation that defendants ensure their constant availability to investigating authorities or proactively overcome investigatory deficiencies not of their making. Such requirements go beyond what is contemplated in the Foreigners Tribunal Order 1964 or in judicial precedent and risk placing disproportionate burdens on individuals, many of whom already face significant structural disadvantages in navigating these complex proceedings. The decisions in cases such as *Asmita Khatun* and *Mohammad Ali* illustrate how procedural safeguards, designed to protect against arbitrary or unfounded referrals, can be weakened when the Court reframes or dilutes the obligations imposed on the State and its officers.

The chapter has also highlighted how the High Court's reasoning has, at times, failed to engage adequately with threshold jurisdictional defects, particularly where referrals have been made without a proper application of mind or on the basis of inquiries that do not meet the standards set out in *Moslem Mondal*, *Anjana Biswas*, and other binding decisions. The failure to address these defects at the outset, and the decision instead to enter into the merits of the cases, has permitted proceedings to continue where they arguably ought to have been quashed for want of lawful initiation. Such an approach risks undermining the procedural integrity that is central to the rule of law and to the legitimacy of citizenship adjudication.

Relatedly, the opacity of reasoning in many decisions compounds these challenges. The Court has, on occasion, placed considerable weight on minor clerical or documentary errors while overlooking more substantive issues, such as the adequacy of inquiries or the evidentiary basis for referrals. In certain instances, observations touching upon extraneous considerations, or resting on assumptions that do not clearly derive from the evidence, may give rise to perceptions of bias or selective scrutiny. It is essential that decisions affecting so fundamental a status as citizenship are not only fair but are seen to be fair, with clear, transparent reasoning that demonstrates adherence to legal principle rather than extraneous factors.

International human rights law underscores that decisions affecting nationality and legal identity must comply with standards of fairness, equality, and procedural propriety. The jurisprudence examined in this chapter illustrates the gap that persists between these obligations and current practice. At stake is not only the status of individual litigants but also the broader confidence in the justice system's ability to adjudicate such vital matters with the rigour, neutrality, and consistency they demand.

Finally, this chapter has noted the important reform initiatives articulated in certain periods—for example, the Supreme Court's ruling in *Rahim Ali*, the Gauhati High Court's *Moslem Mondal*, or the jurisprudential developments led by Justice N. Kotiswar Singh—it is clear that these reforms have not achieved the systemic change that might have been expected. The intended improvements in procedural fairness, evidence assessment, and protection against arbitrary referrals have too often been undermined by subsequent decisions that reintroduce uncertainty or add extra-legal burdens. The persistence of these issues signals completely reviewing the way citizenship status is adjudicated in India, to shape a framework of clear, consistent, and constitutionally sound principles.

6 Conclusion

There is a systematic, widespread, and consistent pattern of violations of due process and natural justice in Assam's citizenship determination process. Both the Foreigners Tribunals and the Gauhati High Court have enabled this dismal state of adjudication. The High Court has entrenched norms that erode fair trial rights—such as denying summons, refusing to entertain challenges to flawed inquiries, and adopting arbitrary evidentiary standards—while the Foreigners Tribunals routinely disregard even these inadequate safeguards. The result is a broken system that gravely undermines constitutional guarantees in determining citizenship.

Reframing the Problem: From Fragmented Flaws to Systemic Illegality

This report argues that the FT system in Assam is not just flawed in execution—it is fundamentally incompatible with the Indian Constitution and India's international human rights obligations. The failures documented across this report are not limited to implementation lapses or procedural errors. They are structural, embedded in the legal design and functioning of the system, and cannot be remedied by piecemeal reform.

The conclusion reframes the core legal problem by organising the findings around three foundational principles: the rule of law, the right to a fair trial and equality of arms, and due process and natural justice. Each principle independently raises serious legal concerns. But it is their interaction—across institutions, procedures, and judicial oversight—that reveals the full extent of the illegality. Taken together, they describe a system that is not occasionally unjust, but structurally incapable of delivering lawful outcomes.

Too often, assessments of the FT regime treat its elements in isolation: executive referrals, procedural informality, evidentiary rules, legal aid, judicial review. This fragmented view obscures how each part reinforces the others. Procedural unfairness is magnified by the absence of legal aid. Evidentiary burdens are made insurmountable by opaque standards. Judicial oversight not only fails to correct these deficits—it entrenches them. The result is a self-reinforcing system of exclusion, not a sequence of correctable errors.

This report instead adopts a systemic lens. It evaluates the FT regime not as a collection of discrete failings, but as a system—one that must be assessed holistically. When situated within this architecture, what might appear defensible in isolation—stringent evidentiary thresholds, limited review, informal procedure—becomes indefensible. In a setting where the adjudicator lacks independence, the defendant lacks legal support or clarity, the rules are undefined, and the courts ostensibly defer to executive-appointed adjudicators, even formally neutral standards produce unlawful outcomes.

From this perspective, the central claim of the report is clear: the FT regime is not merely imperfect—it is legally unsustainable. It violates the core requirements of the rule of law, fair trial, and due process not sporadically, but systematically and systemically. These are not policy shortcomings; they are breaches of binding constitutional and international legal norms. Addressing them demands more than administrative correction. It requires a root-and-branch rethinking of the entire regime's legality and legitimacy.

What follows in this conclusion is a synthesis of the report's findings across the three legal foundations—demonstrating how their systematic violation renders the FT system beyond repair.

6.1 The Rule of Law: Institutional Design, Legal Foundations, and Adjudicative Integrity

At the heart of this report lies a foundational concern: that the FT system in Assam is structurally incompatible with the principle of the rule of law as enshrined in both Indian constitutional law and international human rights law. This is not a claim about isolated procedural irregularities. It is a critique of the FT system's foundational design—its institutional architecture, its legal basis, and its operational logic—which together create a regime that is incapable of delivering lawful, fair, or constitutionally compliant adjudication of citizenship.

Under Indian constitutional law, the rule of law requires that any body entrusted with adjudicating the rights, liberties, or legal status of individuals must do so through procedures that are just, fair, and reasonable, as guaranteed under Articles 14 and 21 of the Constitution. International human rights law complements these requirements. Article 14 of the ICCPR, to which India is a State party, affirms the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Article 16 of the ICCPR affirms the right to recognition as a person before the law, while Article 9 prohibits arbitrary detention, and Article 15 of the Universal Declaration of Human Rights affirms not to be arbitrarily deprived of the right to a nationality.

Based on these norms, the report argues that where an institution exercises adjudicatory powers—determining facts, applying legal standards, and issuing binding decisions—it must meet the minimum requirements of a court-like structure. These include independence from executive control, a basis in law, appointment of legally qualified decision-makers, and the availability of safeguards such as appeal and judicial oversight. These safeguards are not optional—they are constitutional essentials, especially where a body displaces the jurisdiction of ordinary courts. This is precisely the case with FTs in Assam.

As Chapter 2 of this report demonstrates, FTs have emerged not as supplementary but as replacement institutions. They now exercise exclusive authority over the determination of citizenship in Assam, effectively displacing the jurisdiction of civil courts. And yet, despite adjudicating questions that go to the core of constitutional personhood—such as whether an individual is entitled to rights, status, protection from detention, or even presence in the country—they operate entirely outside the judicial structure and its safeguards. They are not creatures of statute. The Foreigners (Tribunals) Order, 1964, under which they are constituted, is not legislation passed by Parliament but an executive notification issued under the colonial-era Foreigners Act, 1946—a statute that provides no meaningful framework for the establishment of independent, impartial adjudicatory bodies. There is no statutory specification of appointment, tenure, qualifications, or appeal. In essence, citizenship adjudication in Assam has been transferred to a body that is untethered from the legal infrastructure that normally governs adjudication under the Constitution.

This structural defect is further deepened by the nature of FT appointments. Members are appointed on short-term, renewable contracts without any form of statutory tenure, independent appointment mechanism, or performance review based on judicial standards. As the report details, performance incentives are in fact often linked to the number of "declared foreigners," undermining even the appearance of impartiality. Members are not required to possess consistent or specialised legal qualifications. There is no system of training in constitutional or citizenship law, no codified procedure for hearings, no rules of evidence, and no institutional jurisprudence to guide decision-making. Yet, these bodies routinely decide cases involving the legal status of individuals—decisions that affect liberty, livelihood, and access to all other rights—with no right of appeal from factual findings.

From a constitutional perspective, this is an extraordinary departure from first principles. The FT system displaces courts, while refusing to assume their responsibilities. It issues binding decisions, while lacking statutory authority. It affects fundamental rights, while operating without transparency, oversight, or recourse. It is not simply a flawed institutional model—it is a system that bypasses the basic requirements of legality, adjudicative legitimacy, and constitutional accountability. The principle of the rule of law demands more. It demands that adjudication of such gravity be carried out by a body rooted in law, structured by judicial safeguards, and disciplined by constitutional norms. Viewed against these standards, the FT system fails across the board.

6.2 Fair Trial and Equality of Arms

At the heart of any adjudicatory system that determines citizenship—arguably the most foundational of rights—is the guarantee of a fair trial. This is not merely a procedural aspiration but a binding constitutional and international legal requirement. Under Articles 14 and 21 of the Indian Constitution, every person is entitled to equality before the law and a fair, just, and reasonable procedure. These guarantees are echoed and reinforced by Article 14 of the ICCPR, which affirms the right to a hearing before a competent, independent, and impartial tribunal with full procedural protections and equality of arms.

This right encompasses concrete entitlements: adequate notice, access to the case against oneself, time and facilities to prepare a defence, legal aid where required, the right to present evidence, cross-examine witnesses, and appear before a neutral adjudicator. Most importantly, the principle of equality of arms prohibits the creation of structural disadvantages that prevent a person from meaningfully contesting the case.

Yet, as Chapters 3, 4 and 5 of this report show, the FT system fails to comply with these standards—not occasionally, but as a matter of structure and design. The most acute example of this failure is the entrenched misinterpretation of Section 9 of the Foreigners Act, which places a reverse burden of proof on the individual. Rather than functioning as a rebuttable procedural device following a *prima facie* case by the State, it has become an absolute burden on the individual from the outset.

This inversion of evidentiary norms is not accompanied by any compensatory procedural safeguards. Missing hearings can be fatal for defendants, as they must meet an impossibly high burden in demonstrating that they were unable to attend proceedings. There is also no statutory guidance on what constitutes sufficient evidence, no clarity on acceptable documents or their weight, and no uniform approach to reconciling discrepancies. Instead, as documented in Chapter 3, the FTs regularly reject voter rolls, GP certificates, school records, oral testimony, and even official documents on arbitrary grounds—including ink colour, signature placement, or minor variations in age or spelling. The effect is to create a system in which individuals are held to unknowable, often shifting standards that they cannot hope to meet.

This procedural imbalance is further compounded by the role of the Gauhati High Court. Rather than correcting the imbalance, the Court's jurisprudence, especially post-*Moslem Mondal*, has entrenched it. By interpreting Section 9 as placing a purely persuasive burden on the individual, the High Court has effectively excused the State from producing evidence, appearing in hearings, or responding to rebuttals. The FT member thus becomes both adjudicator and proxy for the State, conducting inquiries, testing evidence, and ultimately rejecting claims—not from a position of neutrality, but from a presumption of guilt.

As Chapter 5 shows, the High Court's failures are not limited to interpretation. Its handling of writ petitions—both against *ex parte* FT orders and contested decisions—reflects a jurisprudence marked by inconsistency, opacity, and a lack of legal standards. Terms such as "sufficient cause," "special circumstances," or "interest of justice" are applied with no definitional clarity. Outcomes in seemingly identical cases vary unpredictably. Evidence is assessed without uniform standards, and decisions frequently rest on reasoning that contradicts the result or fails to explain it. The net effect is to render the constitutional safeguard of judicial review functionally meaningless.

When courts fail to articulate or enforce standards, the FTs are left to operate in a legal vacuum. As this report's analysis shows, FT members routinely deny summons, reject credible documents without explanation, and refuse to consider testimony on spurious grounds. Defendants—many of whom are illiterate, without legal representation, or from historically marginalised communities—face these proceedings without any effective procedural support. The result is not just an inequality of arms—it is the systematic denial of a fair hearing.

International human rights law reinforces the illegality of this design. Comparative standards in the UK, Canada, and South Africa require procedural fairness and equality of arms in any determination of legal status or nationality. The Human Rights Committee has held that proceedings involving the risk of statelessness must comply with Article 14 of the ICCPR, including the right to be heard, access to evidence, and the ability to challenge the case.

The FT system, viewed as a whole, fails every one of these standards. Its adjudicatory structure, evidentiary rules, and absence of judicial oversight form a system in which no element compensates

for the failures of another. The cumulative effect is a regime that functionally denies the right to a fair trial—systematically and systemically.

6.3 Due Process and Natural Justice

The right to due process and natural justice lies at the heart of any system that claims to adjudicate legal status, particularly in matters as grave as citizenship. In Indian constitutional law, this right derives from Articles 14 and 21, which guarantee non-arbitrariness, fairness, and reasonableness in both substance and procedure. In international human rights law, the ICCPR—particularly Article 14—reinforces these guarantees by requiring that all legal proceedings be conducted in a manner that is transparent, fair, and rights-respecting. Together, these frameworks articulate a substantive commitment: that legal systems must not only establish norms, but also implement them through predictable, intelligible, and enforceable procedures. Yet, as this report shows, the FT regime in Assam—when analysed across its multiple stages and sites—repeatedly and structurally violates this commitment.

Due process and natural justice are not abstract ideals. They comprise concrete requirements: timely and adequate notice; an opportunity to respond to allegations; access to material relied upon by the State; an impartial and informed adjudicator; legal representation; reasoned decisions based on defined and knowable standards; and access to a meaningful remedy. What Chapters 4 and 5 of this report establish is that each of these guarantees is systematically subverted in the FT process—either through erroneous legal norms, non-implementation of safeguards, or through judicial abdication that leaves wide swathes of adjudication unregulated.

The procedural breakdown begins at the very inception of an FT case. Individuals often receive notice without adequate information, or in some cases, without any service at all. As documented in Chapter 4, service of notice is frequently defective—delivered to the wrong address, affixed in non-visible locations, delivered to someone it was not addressed to or handed to neighbours or relatives without confirmation of receipt. When individuals fail to appear due to such procedural failures, the FT proceeds *ex parte*, declaring them foreigners without a hearing. Despite this, as Chapter 5 demonstrates, the Gauhati High Court has largely refused to treat such notice defects as jurisdictional errors.

Even when individuals appear before the FT, they face a legally undefined and procedurally hostile adjudicatory environment. There are no statutory norms defining what documents may be submitted to prove citizenship, what evidentiary weight they carry, or how discrepancies should be reconciled. As Chapter 4 details, voter rolls, gaon burah certificates, gaon panchayat certificates, school records, and identity documents are dismissed arbitrarily—often for irrelevant technicalities such as ink colour, serial number placement, or trivial age inconsistencies. Oral evidence is routinely disregarded if the

witness is not named in the written statement, lacks documentary corroboration, or is a relative. Yet oral evidence against defendants is often accepted without scrutiny. There is no intelligible threshold of proof—only an endlessly shifting set of requirements, often invented in the moment and applied selectively. This legal vacuum makes it impossible for individuals to know in advance what will satisfy the tribunal, rendering the opportunity to be heard effectively meaningless.

The situation is compounded by the refusal of FTs to summon witnesses or provide access to inquiry reports. In many cases, individuals are asked to respond to allegations without ever being told the basis on which suspicion was raised. In others, FTs decline to exercise their powers to secure testimony from gaon burahs, school officials, or panchayat functionaries, even when those individuals issued the very documents under scrutiny. The State rarely appears, almost never defends its inquiry, and is under no obligation to rebut the evidence of the defendant. Yet, FTs rarely draw adverse inferences against the State, choosing instead to scrutinise the individual's case for contradictions. As a result, the process collapses into a unilateral evaluation of defence evidence, stripped of any normative symmetry or procedural reciprocity.

These violations are not remedied at the level of judicial review. As Chapter 5 reveals, the Gauhati High Court has failed to act as a site of correction or normative clarification. In its jurisprudence on *ex parte* cases, it has refused to define "sufficient cause" with any precision, leaving litigants without guidance and allowing FTs to deny redress in arbitrary fashion. The Court's reasoning is inconsistent: similar factual situations lead to opposite outcomes, while judicial terms like "interest of justice," "exceptional circumstances," or "special circumstances" are invoked without explanation or definition. In contested FT cases, the High Court accepts or rejects discrepancies in names, ages, and other personal details without a coherent evidentiary approach. Oral and documentary evidence are evaluated not by legal standards, but by impressionistic and often unarticulated preferences. This erratic jurisprudence leaves both FTs and defendants without binding legal standards to follow, enabling—and even encouraging—adjudication in a vacuum.

The consequence is a regime of procedural arbitrariness at every level. There are wrong legal norms (such as the mistaken interpretation of the burden of proof under Section 9 of the Foreigners Act); non-implementation of existing procedural safeguards (such as the right to legal aid or notice); and vast normative vacuums where no standards exist at all. These defects do not exist in isolation. They are mutually reinforcing, compounding the disadvantage faced by individuals, and erasing any prospect of meaningful engagement with the law. Once viewed systemically, it becomes evident that the denial of due process is not a result of isolated lapses—it is the functional logic of the FT regime.

Conclusion: A Regime Beyond Repair

The findings of this report lead to one inescapable conclusion: the FT system in Assam is not merely a flawed mechanism in need of reform—it is a legally unsustainable regime that violates the most basic tenets of constitutional democracy and international human rights. At stake is not simply bureaucratic or judicial error, but the systematic erosion of a foundational status in law: Indian citizenship.

Citizenship, as the Indian Supreme Court has affirmed, is the "right to have rights."[546] It is the legal anchor of identity, belonging, and protection. The constitutional significance of citizenship status is profound: it determines access to welfare, political participation, and legal recognition. International human rights law is equally unambiguous. Article 15 of UDHR declares that "everyone has the right to a nationality" and "no one shall be arbitrarily deprived" of it. These guarantees impose strict obligations on States: to ensure that the legal processes which adjudicate citizenship are fair, independent, and non-arbitrary. The FT system in Assam meets none of these standards.

The time for incremental reform is over. The magnitude and nature of the violations—documented across more than a thousand cases, judicial decisions, and interviews—demand a categorical response. The FT system is not fit for the purpose. It must be dismantled and replaced by a framework grounded in law, fairness, and justice. Until then, the constitutional promise of equal citizenship remains a broken one, and the spectre of statelessness will continue to haunt those arbitrarily subjected to these procedures.

[546] *In Re : Section 6A of the Citizenship Act 1955* (n 6).

I. Gauhati High Court Data

Sources:

The analysis of High Court orders is based on the data collected and provided by Daksh to the research team. Daksh collected 1,536 final orders deciding writ petitions, challenging decisions of the Foreigners Tribunals (FTs) in Assam, filed before the Gauhati High Court. The research team read these orders and filtered out those not related to the FTs. After filtering, the research team retained 1,193 final orders, which included both ex-parte and contested cases.

Final Orders not related to challenges against Foreigners Tribunal Opinions were excluded, including:

- Cases concerning convicted foreign nationals under Section 14 of the Foreigners Act;
- Matters related to registration under the Passport (Entry Into India) Amendment Rules, 2015, and the Foreigners (Amendment) Order, 2015;
- Any Final Orders unrelated to writ petitions contesting the validity of Foreigners Tribunal Opinions.

Time Period:

Data covers the period from 2010 to 2019. Precise scraping start dates are unavailable.

Data Availability Statement

The dataset is based entirely on publicly available data from the Gauhati High Court website.

While every effort has been made to ensure the accuracy and completeness of the dataset, some limitations must be noted:

- The exhaustiveness of the dataset cannot be confirmed, as it relies entirely on the documents made available on the Court's website.
- If any Final Orders were missed by the scraper, DAKSH has no mechanism to detect or recover those omissions.
- Consequently, there may be data availability gaps that could affect the completeness of the findings. DAKSH has acknowledged this limitation and notes that it is not possible to estimate the margin of error, if any.

II. Qualitative Data

In addition to judicial analysis, this report draws on a qualitative dataset comprising:

- 20 case files from Foreigners Tribunal proceedings across different districts in Assam.
- Nine in-depth interviews conducted with defence lawyers practising before the Foreigners Tribunals.

The interviews were conducted remotely—via telephone or video conferencing—between August 2020 and August 2021. Prior to recording, informed consent was obtained from each participant. Interviews were recorded either in full or in part, depending on the interviewee's preference.

All interviews have been fully transcribed and are stored in a secure, access-controlled online folder, accessible only to the authors of this report.

To protect the privacy and security of the participants, all names and identifying details have been anonymised or removed.