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AFGHAN REFUGEE ISSUE: LEGAL AND SECURITY DIMENSIONS OF REPATRIATION OF ILLEGAL AFGHAN MIGRANTS

Overview

On 3rd October 2023, Pakistan's government via executive order of Apex Committee headed by the care taker Prime Minister, decided to deport all illegal migrants, including unregistered Afghan refugees from Pakistan. The Interior Minister explained the context of the decision later in a press conference, where he claimed of having proof that Afghan nationals had been involved in terror attacks in Pakistan. In November 2023, Balochistan's caretaker Information Minister claimed that six terrorists killed in recent Zhob attacks had Afghan IDs.¹ He also said that 100,000 fake Computerised National Identity Cards (CNIC) held by migrants had been blocked in Balochistan, and some 20,000 fake CNICs in Sindh.²

% OF ARRESTS BY LOCATION (1 October – 18 November 2023)



UNHCR and IOM data on arrests of Afghans made since Apex Committee Decision³

As a consequence of Pakistan's decision to deport illegal migrants in year 2023, around 21,608 Afghan nationals were arrested. As per UNHCR, the rate of arrests by November 2023, has increased by almost thirteen-fold compared to 2022.⁴ To implement the government's deadline 49 detention centers have been set up across Pakistan, to manage the repatriation of Afghans. So far, some 553,000 Afghans have left Pakistan,⁵ most are being received by Afghan Taliban via main camps near Torkham and Spin Boldak.⁶



DOCUMENTATION – TOTAL NUMBER OF RETURNEEES



DOCUMENTATION – TOTAL DEPORTEES



This section only applies to PoR holders and undocumented Afghans.

UNHCR and IOM data on total number and categories of Afghans returnees since September 2023

Data from IOM and UNHCR depicted above shows a clear spike in returns, arrests and detentions of Afghans after the Apex Committee's decision. Some Proof of Registration (PoR) card holder Afghans have also opted to repatriate on accounts of fear of arrest, communal pressure and non-employment in Pakistan.⁷

Local Refugee Laws and Pakistan

Pakistan has handled the matter of refugees in a unique manner - a way which was reflective of the ideological foundations of the country, the international obligations upon the country, and its unique geography. Pakistan espouses the Jus Soli principle in terms of provision of nationality. The legal corpus of Pakistan includes the Pakistan Citizenship Act 1951, which provides the statutory effect to this principle in Section 4 of the Citizenship Act. Jus Soli allows any person born in the country to automatically possess citizenship except for the children of foreign diplomats. This

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is in contrast to Jus Sanguinis principle in which the ethnic or national ancestry of a person is relevant in granting citizenship.⁸

The Citizenship Act, though, does not mention the word ‘refugee’ within the ambit of Section 4 of the Act. In Ghulam Sanai v. The Assistant Director, National Registration Office (PLD 1999 Peshawar 18), the Peshawar High Court decided that refugees are governed under **Foreigners Act 1946** rather than the **Pakistan Citizenship Act 1951** as anyone who is not a citizen is a foreigner. The Foreigners Act 1946 further allows the Government of Pakistan to determine the conditions of entry into Pakistan under section 3(2) of the Foreigners Act as well as to be detained and arrested in the interests of national security provided there are sufficient reasons.⁹ Moreover, section 14-D of the Foreigners Amendment Act 2016, further imposes a condition that any foreigner without permission to stay in the country must apply for registration in NADRA and can work in the country under section 14 – D (2) of the Act. It is important to mention that the **Lahore High Court in the Muhammad Akbar Cheema** case reiterated that the Foreigners Act 1946, cannot infringe **Article 10** of the Constitution of Pakistan 1973, which protects all people including Afghan refugees from arbitrary arrest and detention.¹⁰ Lastly, it must be noted that currently Pakistan does not have any comprehensive domestic laws on handling of refugees.

History of Pakistan’s handling of Refugees and Migrants

Afghans are not the only category of refugees in Pakistan as Karachi’s Machar colony also hosts some 45,5000 Bengali refugees. Total population of Bengali population in Pakistan is estimated to be around 2 million. Many of them have been living in the country even before the 1971 civil war, after which their ID cards were cancelled. Though majority are born in Pakistan, ethnic Bengalis are deprived of any official recognition and citizenship¹¹ they are still unable to



Karachi Machar Colony - Images by DAWN and Reddit

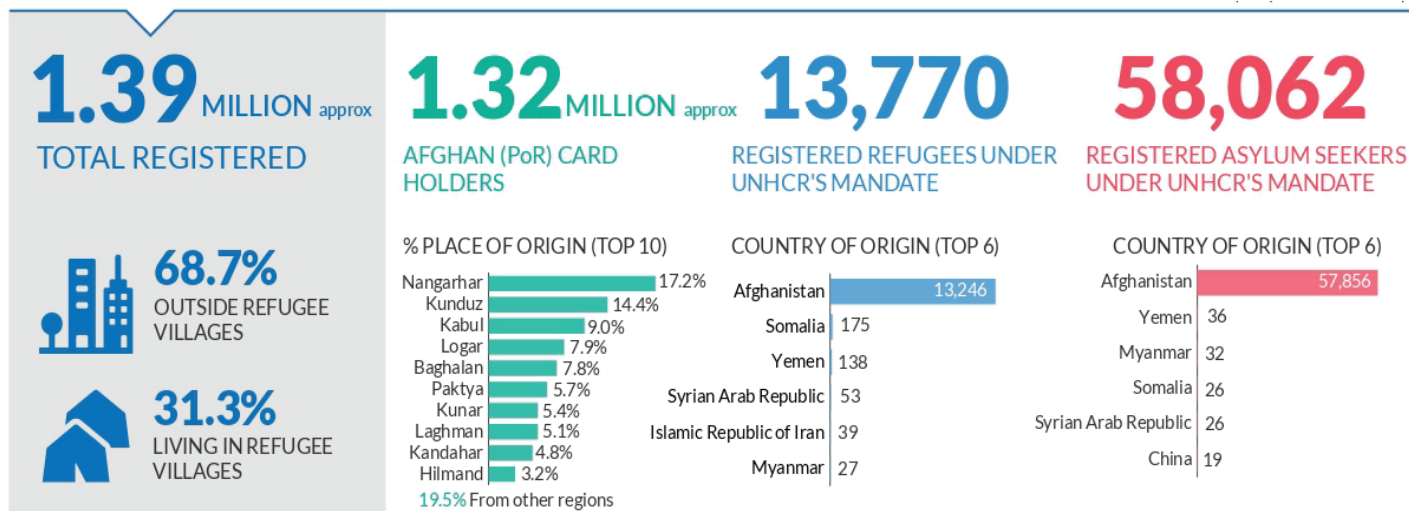
get an ID card, open bank accounts and get government jobs, or even admission in public schools.

Another ethnic group living as refugees in Pakistan is Biharis. They either migrated at the time of partition in 1947, or moved from Bangladesh to Pakistan after the fall of Dhaka in 1971. Around 1.5 million Biharis entered Pakistan in intital years of Pakistan’s independence. After 1971, Pakistan accepted only 170,000 Bihari refugees.¹² Both Biharis and Bengalis are amongst stateless communities in Pakistan, a majority amongst these residing in Karachi are settled in ghettos and slums.¹³

In case of Behari Refugees, Pakistan did not provide them any citizenship status nor legislate a domestic law to legalise their status.¹⁴ Beharis were left stranded in East Pakistan for supporting Pakistan after the separation of East Pakistan, and are now accommodated in Bangladesh after a historic Bengali Supreme Court Judgment.¹⁵ Similarly, around 55,000 Rohningya people also live in Karachi with no citizenship.¹⁶

Four Decades of Afghan Refugee Hosting in Pakistan without Refugee Laws

Pakistan hosted around 3 million Afghans before 2021, out of which 1.39 million are Proof of Registration



UNCHR data on Afghans that comes under its mandate⁹

Card (PoR) holders, approximately 88,299 hold an Afghan Citizen Card (ACC), and the rest accounted as unregistered.¹⁷ Combined with the 700,000 new arrivals after 2021, the figure of unregistered Afghans reached around 1.7 million.¹⁸ Approximately 4 million Afghans presently reside in Pakistan.

In the absence of clear categorisation backed by refugee laws, UNHCR and Pakistan government differ on the number of Afghans that come under their respective mandates. Though UNHCR works in close coordination with Pakistan’s government, it only entertains POR card holders and focuses its funds on refugees residing in refugee camps, which is only 31.3% of registered POR population.

Due to lack of refugee laws, the government relied on ad-hoc decisions and mechanisms like agreements with UNHCR, donor states, Ministry of SAFFRON and Chief Commissionerate of Afghan Refugees (CCAR) to create mechanisms for the registration of refugees, generation of funds for their upkeep, and hosting as well as repatriation arrangements for Afghan Refugees. The Proof of Registration (POR) card was issued by NADRA, Government of Pakistan, for identity purpose and provides temporary legal stay and freedom of movement for 1.4 million registered Afghan refugees in Pakistan.²⁰ The POR cards were first issued in 2006, and updated regularly ever since. No new POR cards were issued afterwards, and the old ones since their expiration in 2023 June, have been updated till 31st December 2023 via executive order of SAFRON.²¹

NADRA, in collaboration with SAFRON and Afghanistan's, Ministry of Refugees and Repatriation, (MORR), tried to document post 2006 arrivals from Afghanistan through the Afghan Citizen Cards (ACC) initiative, facilitating legalisation of their stay in Pakistan based on government policy.²² Post Federal Cabinet approval on February 7, 2017, SAFRON in coordination with NADRA registered 88,299 Afghan Nationals in Punjab, by issuing ACCs from August 16, 2017 onwards, updated yearly till 2019, via Federal Cabinet Notification. Those cards have also not been updated after their expiry in 2019.²³

In terms of legal status of Afghan Refugees, the refugees entitled to legal stay in Pakistan are the ones who register themselves under the tripartite agreement between Afghanistan, Pakistan and UNHCR.²⁴ They possess many rights under the POR cards as the procedures, and the rights enunciated within the tripartite agreement shall apply on them.²⁵ In comparison, the Afghan Citizen Card, issued in 2017 only documents unregistered Afghan Refugees, and the mandate of UNHCR is not applicable on them. The ACC only allows them to legally stay in Pakistan until they obtain the passport without making a clear statement in relation to their refugee status while protecting them from any arbitrary detention.²⁶

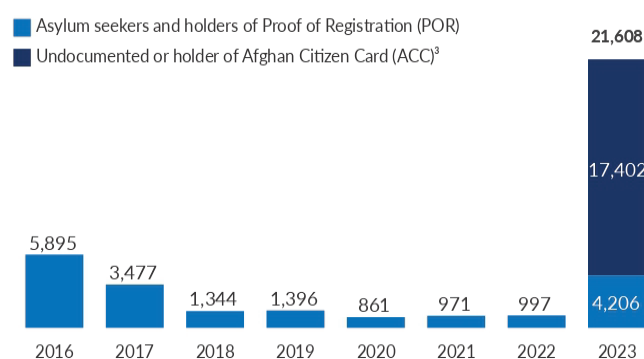
Introduction of ACC as a separate category, reflects the state’s decision not to accommodate post 2006 arrivals under the PoR scheme. It deflect legal obligations as an implementing partner of UNHCR, under whose mandate PoR holders are protected from non-refoulment, and given access to basic rights as mentioned above. Sudden decision to deport millions of refugees within a month’s notice has elicited criticism from those benefiting from the illegal stay of Afghan Refugees. As a host nation, Pakistan in the past, has allowed a permissive environment for cross border entry of Afghan Refugees and migrants without legislating on refugees’ status and introducing mainstreaming options. Pakistan however has realised the need for tightening the border control measures, and allowing only bonafide passport and visa holders to cross border.

Border Situation Amidst Mass Deportations

The deportation of illegal and unregistered migrants is also a step motivated by the same spirit of eradicating the whole illegal spectrum of border crossing and illegal migration. This decision however, due to lack of legislative clarity in Pakistan, is affecting some PoR and ACC card holders as they face detentions and deportations.²⁷

Some experts are of the view that the government’s intimation for crackdown counts as a coercive mean to push Afghans back, though many of them when interviewed, seemed vary of unstable security and economic situation in Afghanistan.²⁸

Arrests and detentions (from 2016 up to 18 Nov. 2023)



UNHCR data on arrests and detentions faced by Afghans in Pakistan since Apex Committee decision²⁹

Harassment and extortion at the hands of law-enforcement authorities was reported by Afghans According to a UNHCR report even those registered under PoR or ACC categories are being rounded up for detention and deportation by Pakistan.³⁰

Cessation Guidelines in light of Situation in Afghanistan

Articles 1C (5) and 1C (6) of the Refugee Convention do not require the consent for repatriation of the refugees.

However, these do require certain conditions to be fulfilled and those conditions must be strictly fulfilled since repatriation will potentially uproot the entire ecosystem which the refugees have established for themselves in the host country over the years. Cessation Clauses mean that the circumstances due to which a person has been recognised as a refugee had ceased to exist. However, it does provide an exception that if there are compelling reasons arising out of previous persecution then the refugee can still refuse to re-avail himself or herself of the protection of the country of origin. In this regard, UNHCR guidelines require that states must carefully assess the ‘fundamental character of the changes’ in the country of nationality.³¹



A young Afghan boy poised to return to Afghanistan near Torkham when interviewed said: “I was born in Pakistan and have not even seen Afghanistan, how do I call it home?”

Photo Credits: IPRI sources in ex-FATA.

The states hosting refugees should objectively verify the human rights situation in the country of origin in relation to the particular cause of fear of persecution, in order to make sure that the situation which justified the granting of refugee status has ceased to exist. Thus, such change should be stable and durable in character and fundamental change in circumstances shall require that armed conflict; serious violations of human rights; severe discrimination against minorities; or the absence of good governance have significantly improved. Similarly, if the return of refugees has the possibility to generate fresh tensions in the country of origin, fundamental change in the circumstances shall not be considered to have been occurred.

For example, the enduring nature of change in the Afghan context can be demonstrated through a stable government elected through a transparent and fair electoral process. It would ensure political and economic stability in the country besides provision of public goods without prejudice to all the citizens. In order to establish that such conditions exist in country of origin, the responsibility devolves on the country which has granted refugee status and also the responsibility that any implementation process of cessation clauses is conducted in a transparent manner with the supervisory role of UNHCR. In relation

to the exception of Article 1 - C (5) of 1951 Convention, that compelling reasons arising out of previous persecution, shall result in pausing of cessation clauses, cessation guidelines state that the article applies to those refugees, who themselves or their family members have suffered atrocious forms of persecution such as sexual violence, including at the hands of elements of the local population. In this regard, children must be accorded special consideration.³²

Repatriation of Refugees in light of International Law and Local Realities

Some critics are referring the current movement of Afghans back to Afghanistan as forceful repatriation. They point out that the political and economic situation in Afghanistan is not safe enough for refugees’ return, especially women and children.



A group of Afghans waiting to cross border near Torkham, Photo Credits: IPRI sources in ex-FATA.

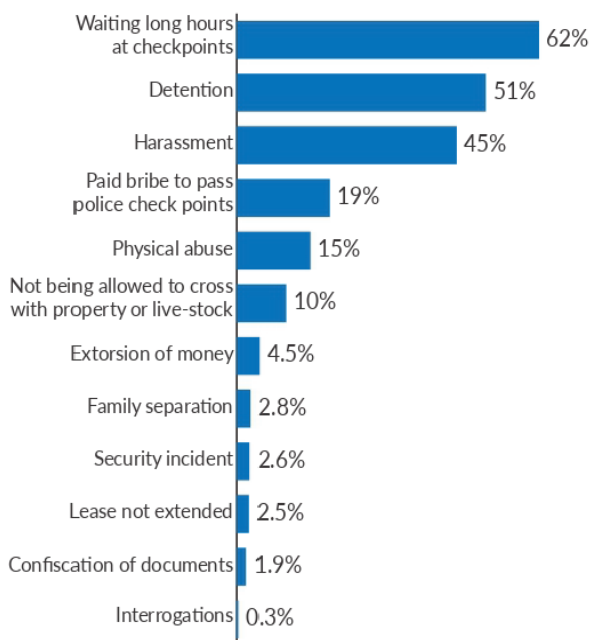
Secondly, there are concerns of state coercion in case of unregistered or illegal Afghans. While the term illegal is being used for unregistered migrants, there is neither a law on refugees nor a state level definition of the word refugee. Post 2021 arrivals, who are unregistered, tried to get registered with either Pakistan government or UNCHR but were refused. This creates further confusion on the identification of “illegal migrants,” and whether post 2021 arrivals which are being deported on accounts of lack of legal documents or IDs, were even given a fair chance to get registered by Pakistan. It also brings into question the role of developed states especially EU, US and Canada, which promised thousands of former allies in Afghanistan to use Pakistan as a temporary asylum until facilitated for resettlement abroad. Many such cases are still unprocessed as thousands of Afghans are left stranded in Pakistan.³³

UNHCR Handbook states that 1951 Refugee Convention requires that the obligation of non-refoulement, stemming from the customary international law, must be fulfilled in relation to voluntary repatriation. Therefore, for voluntary repatriation, subjective fear of persecution should also be considered in addition to the objective

fear of persecution. The Handbook further elucidates that ‘voluntariness’ means that there should be an absence of measures which push the refugee to repatriate either physically, psychologically, economically and politically. However in order to determine the voluntariness, the legal status of refugees is important as a sound legal basis to ensure that their rights are protected. In case of Pakistan, in the absence of domestic laws for refugees, the reliance is placed on UNHCR’s grant of asylum which makes registration of refugees difficult. The need for domestic legislation for refugees therefore emerges as an important factor to reclaim the territory ceded to international organisations like UNHCR.

Moreover, the repatriation must be a return with ‘safety and dignity. Return in safety requires that there should be at least legal safety in the form of some public assurances/amnesties; physical security, which protects them from armed attacks and provides them a mine-free route; and material security which means access to means of livelihood. Return with dignity implies return by national authorities which accepts their inalienable rights, and they can return according to their own pace with no compulsory separation from family members. The return with safety and dignity must be throughout the journey and after the return.³⁴

Problems experienced in Pakistan prior to the cross-border movement⁴



UNHCR data on Afghan experiences of deportation and repatriation³⁵

The handling and managing of Afghan refugees seeking to repatriate from Pakistan remains a point of concern to many. Some activists and politicians have collectively filed a petition in the Supreme Court of Pakistan to challenge the government’s decision.³⁶

Political Leaders, INGO and NGO Stance

The process of the issuance of Asylum Certificates to Post 2021 arrivals from Afghanistan has remained slow due to lack of policy consensus between UNHCR and the Pakistan government on this issue.³⁷ On 8th November, Ministry of Interior advised UNHCR to stay clear from border regions on account of security concerns already agreed with UNHCR. Several INGOs, NGOs and human rights groups have expressed deep concerns over Pakistan’s decision to deport Afghans. International refugee regime and host states often indulge in such narratives and policy stalemates. Pakistan for example, suffered from choked funding, and international criticism but prioritised its own internal, economic and border security concerns by introducing a strict visa regime at the border.

In a recent Gallup Pakistan survey respondents from across Pakistan revealed their stance on deportation of Afghans. 84% of respondents expressed strong approval of the government's policy, considering it a commendable decision, 77% advocated for their return to Afghanistan. If Afghan refugees seek permission to stay in Pakistan, 42% of respondents think the government should allow it, while 46% lean towards rejecting these requests.³⁸

Most of post 2021 arrivals from Afghanistan were allies of NATO, and the previous Afghan government. They were promised and given assurances by foreign embassies like the US, UK, and Australia to be given asylum. However, most of these states are reluctant to process asylum and visa requests of these Afghans. Canada initially announced that it would accept 41000 Afghans, but now insists on taking only 14000.³⁹ Instances like these raise huge questions on the integrity of democratic and liberal societies that are criticising Pakistan, while shirking their own responsibility vis a vis refugees. Some 3000 Afghans working as allies to British troops in Afghanistan, were stuck in Pakistan since 2021. Though UK recently did accept them for resettlement but majority of those are stuck in camps, surrounded by barbed wires in UK. Afghans that were promised resettlement by the US have also not been accommodated as per their expectations.



Photo Credits: Voice of America. Afghans that were Former US allies, and flee to Pakistan after 2021, protesting and asking US to process visas as they face deportation from Pakistan⁴⁰

Pakistan's government has restricted the amount of Rs. 50,000 that deported Afghans can take with them. Undocumented Afghans are also required to give up their assets like cattle and businesses, or selling them at minimal returns.⁴¹ A lot of undocumented Afghans were doing business in Pakistan and had purchased properties in Pakistan too. Now they are selling those properties and out of frustration many are inadvertently funneling the surplus amounts to crime and terrorism franchises. The TTP terrorism thus was facilitated by some of the deported Afghan illegal migrants.

Way Ahead

Pakistan needs to encourage political actors and stakeholders to come up with a concrete domestic Refugee Law. This is essential for giving a clear pathway for repatriation and prosecution of illegal migrants involved in crime and terror in a transparent manner. It will also enable registered refugees to get integrated in mainstream economy rather than be pushed towards shadow economy.

Pakistan must ensure its compliance with the International Obligations under International Refugee Law and International Human Rights Law. It needs to make a case before repatriation that there is no risk of inhumane treatment or persecution in Afghanistan which might trigger the application of customary obligation of non-refoulement.

Pakistan should also explore the option of repatriation to a third country if there is any chance of threat to life or physical integrity in Afghanistan to those refugees who are a national security concern or a threat to public safety. Ongoing consultations with INGOs like UNHCR, IOM and foreign embassies are a good step in the right direction and may continue to facilitate resettlement of Afghans in the developed states.

Pakistan needs to clarify the national refugee legal framework. The local law clearly adheres to Jus Soli principle. If the current consensus of Pakistani state is not to adhere to this principle in case of refugees, the government must provide a legal framework for naturalisation and permanent refugee cards to all refugees either from Myanmar, Bangladesh and Afghanistan. This is essential to ensure that there is enough incentive for the refugees to register and benefit from the refugee card which gives them access to all human rights. The measure will enable Pakistan to adhere to international legal obligations besides encouraging refugees to enter the fold of documented economy.

The government should ensure that this deportation exercise is not implemented in a way which empowers the Law Enforcement Agencies and Immigration official to exploit the refugees. Otherwise, history will judge Pakistan harshly quoting a few months of chaos and use of force against refugees rather than as a generous host

of the most protracted Post Cold War refugee problem in the world.

The Single Document Entry regime of Passport and Visa should be implemented with consistency and clarity and no tolerance for border crossing activities be shown. Training of Law enforcement agencies, corresponding legislative progress and facilitative administrative infrastructure, like formal check posts and repatriation centers needs to be set up.

The border surveillance and counter smuggling arrangements should be made foolproof. The bold and consistent application of the Single Document Entry regime should not be derailed by other institutions of the state. Dialogue and engagement with all stakeholders is necessary.

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