

# **ILLEGAL FOREIGNERS REPATRIATION PLAN & PAKISTAN'S NATIONAL SECURITY: A LEGAL PRISM OF INTERNATIONAL LAW**



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## **Abstract**

Pakistan has been one of the largest refugee hosting countries. After Soviet invasion, Pakistan welcomed millions of Afghan refugees, particularly at a time when its own economy was not flourishing enough to bear the burden of such a sizeable population. Starting off since 1979, then followed by 2001 United States (US) invasion and 2021 Taliban takeover, this refugee influx came to an end when, the Interim Government announced Illegal Foreigners Repatriation Plan (IFRP), a policy decision which is completely justified in the eyes of International law. Nonetheless, not being a signatory to the 1951 Refugee Convention, Pakistan has gone so far in hosting Afghan refugees, but currently on the grounds of National Security it becomes imperative to safeguard state's interests.

## **Keywords**

Afghan Refugees, 1951 Refugee Convention, Illegal Foreigners Repatriation Plan (IFRP).

## Introduction

Pakistan has been hosting Afghan refugees since four decades. Despite not being signatory to the 1951 Refugee Convention, Pakistan is among one of the largest refugee hosting countries. But last year witnessed a paradigm shift in State's policy due to the potential national security threats, upsurge in terrorist activities, drug, human trafficking and various attributing crimes.

## Historical Background

Pakistan and Afghanistan share a strained relationship beginning from the border claims to the refugees repatriation. The 1<sup>st</sup> influx of Afghan refugees began in 1979 when Soviet Union invaded the landlocked country. As per the Statistics of United Nations High Commissioner for Refugees (UNHCR), there were 400,000 refugees displaced to Pakistan.<sup>1</sup>

Although, the Soviet Union withdrew from Afghanistan in 1989, civil war began followed by 2<sup>nd</sup> influx in 2001 when US toppled Taliban regime. Lately, the 3<sup>rd</sup> influx was triggered in August 2021 when US Forces pulled out from Afghanistan and Taliban regained their throne. This wave led to further escalation of the refugee crisis.<sup>2</sup>

## Categories of Afghan Refugees and their Legal Status

As per Article 1 of the Refugee Convention, refugee (customary International law) is someone who is unable to return to his country of origin due to fear of being persecuted for religion, race, nationality, political opinion or membership of a particular social group.<sup>3</sup> In Pakistan a refugee is categorised as follows:-<sup>4</sup>

- **Illegal Immigrant**

Illegal immigrant means a foreigner who illegally enters in a country, in violation of that country's immigration laws.

- **Proof of Registration (PoR) Holders**

PoR is an identity document, first issued in 2006, that entitles an Afghan to legally remain in Pakistan. PoR cardholders have the right to reside in Pakistan and cannot be arrested under the 1946 Foreigners Act or other preventive laws. Nevertheless, it neither gives immunity from criminal prosecution nor does it amount to a travel document.

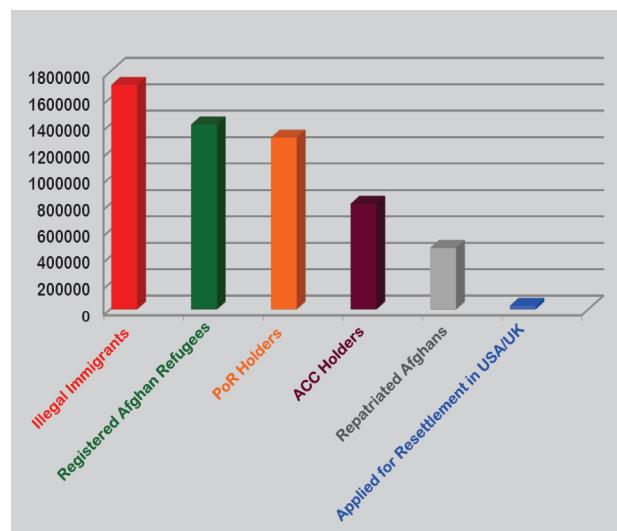
- **Afghan Citizenship Card (ACC) Holders**

ACC was issued to Afghans in 2017 who did not hold PoR cards irrespective of the fact, when they had arrived in Pakistan. Similar to PoR it also provides legal protection from arbitrary arrest, deportation or detention under the Foreigners Act.

## Contours of the Illegal Foreigners Repatriation Plan (IFRP), 2023

On October 3, 2023 Pakistan's Government, after detailed deliberations, announced October 31, 2023 as deadline for voluntary repatriation of illegal immigrants including Afghan nationals. Basically, this repatriation comprised 3 phases starting with deportation of illegal foreigners, with the 2<sup>nd</sup> phase to deport ACC and 3<sup>rd</sup> to PoR holders.<sup>5</sup>

**Table-1: Statistics of Afghan Refugees 2023**



**Source: UNHCR Data Portal**

It is pertinent to mention here that this Plan is not "Afghan Specific" rather irrespective of the nationality. This policy will apply to every individual who is living in Pakistan in violation of Pakistan immigration laws. The Plan also authorises the law enforcement agencies to arrest/ detain any individual who is illegally residing in Pakistan; a legal power provided in Section 15 of the Foreigners Order, 1951. Furthermore, the current Plan is being implemented for the repatriation of only illegal immigrants, those who neither hold PoR nor ACC. Notwithstanding this repatriation drive, Pakistan will still be hosting millions of registered Afghan refugees. That's why to share this humanitarian responsibility;

Pakistan is facilitating those undocumented Afghans who are awaiting for their resettlement to UK<sup>6</sup> and US.<sup>7</sup>

## Governing Laws and Policies in Pakistan

Although, Pakistan does not have a national refugee law, the movement, entry or stay of illegal immigrants is dealt with in accordance with the following laws:-

### • The Foreigners Act, 1946

- This law imposes an obligation on the foreigners to provide their particulars or relevant information to the hotel keepers, the record of which shall be maintained and open for inspection at all times by a Police Officer (Section 7).
- It also prohibits the act of providing assistance for facilitating an illegal entrant to enter in Pakistan (Section 13A).
- This law bars the Illegal immigrants to be employed (Section 13B) and the punishment for contravening the provisions of this Act is 3 years/ fine or both (Section 14).

*Afghan refugees were exempted from the application of the Foreigners Act, due to a circular issued in July 1997. But the Government clarified, by issuing another circular, in February 2001 that the Foreigners Act does apply on illegal/ undocumented Afghan immigrants.*

### • The Prevention of Smuggling of Migrants Act, 2018

This law aims to implement the measure against the smuggling of migrants by land, air or sea. It penalises the act of crossing the borders without complying Pakistan's legal requirements and particularly, the offence of harbouring illegal resident/ immigrant (Section 5).

### • National Action Plan (NAP), 2014

After the Army Public School (APS) attack in December 2014, Pakistan devised a comprehensive regime for countering terrorism; a 20-point agenda was chalked out by developing a national consensus to come down hard on extremist elements.<sup>8</sup> Its agenda item 19 explicitly states that there needs to be a comprehensive policy to deal with the issue of Afghan refugees. Similarly, the agenda point 14 of the revised edition of 2021 NAP stipulates the repatriation of Afghan refugees. Being enshrined in such a paramount policy document is indicator of the fact that repatriating of Afghan refugees is one of the prioritised national interests.

### • International Agreements and Memorandum of Understanding (MoU) with United Nations High Commissioner for Refugees (UNHCR)

UNHCR is a UN refugee agency which is mandated to provide humanitarian assistance to asylum seekers/ refugees/ stateless persons and assists their repatriation to home or third country. There



### • The Foreigners Order 1951

This law is enacted in pursuance of the Foreigners Act; a power given to Federal Government in Section 03 of the said Act.

- This Order further limits the movement of foreigners to the prohibited places as mentioned under Official Secret Act 1923.
- Most importantly, it empowers the Federal Government to arrest and detain any foreigner if it's necessary for National Security of Pakistan.



have been various agreements between Pakistan and UNHCR:-

- 1993 Cooperation Agreement between Pakistan & UNHCR.
- 2004 MoU between Pakistan & UNHCR.
- 2006 MoU between Pakistan & UNHCR.
- 2007 Tripartite Agreement among Pakistan, Afghanistan & UNHCR (Later extended till 2021).

These legal instruments are specifically meant to extend humanitarian cooperation, to conduct census of Afghans who arrived after 1979 and to facilitate their voluntary repatriation. Notably, these instruments explicitly mention the mechanism of repatriation and deregistration followed by the responsibility of Afghanistan to create conditions that could be conducive for repatriation. Therefore, due to the presence of these legal provisions (Articles 06–09 of 2007 Tripartite Agreement), the Government of Pakistan is authorised to carry out this repatriation drive which is completely in line with Pakistan's domestic or international commitments. Moreover, in accordance with the above mentioned agreements UNHCR is mandated to provide operational support and serves as a supervisory body in Pakistan.

#### • **Question of Marriage and Birthright Citizenship**

There are many instances where Afghan nationals have married to Pakistani women and vice versa. But Section 10 of the Pakistan Citizenship Act, 1951 categorically states that Pakistani women may marry a foreigner but is silent on otherwise. However, the Federal Shariat Court held that this section is discriminatory, un-Islamic and unconstitutional. (Suo Moto Case 1/K of 2006). Similarly, in another case the Lahore High Court had the same observations (Rukhsana Bibi vs Government of Pakistan 2016 PLD 857). Thus, in legal parlance, an Afghan female can marry a Pakistani male and may acquire nationality with the pre requisite of denouncing her citizenship because Pakistan does not have a dual nationality agreement with Afghanistan.

***Section 4 of the Citizenship Act 1951 caters the question of Jus Soli (birthright citizenship) but it's a policy decision that child of a refugee parent will also be a refugee.***

The announcement of IFRP kicked off a debate regarding the fate of those Afghan children who were born in Pakistan. As a principle of international law, Jus Soli (Right of the Soil) provides the right of citizenship by birth and similarly as per Section 10 of the Pakistan Citizenship Act, 1951 every person born in Pakistan shall be a citizen of Pakistan by birth. But it's a policy decision that child of a refugee parent will also be a refugee. Rational behind is because then the parents might ask for right to stay in Pakistan on the basis of right to family. Additionally, there are many global instances where the Government has stripped off their nationals of birthright citizenship. For example, in UK under British Nationality Act, 1981 & Nationality and Borders Act, 2022 the government has the power to remove someone's UK citizenship. (Case Studies of Shamima Begum<sup>9</sup> and Tauqir Sharif Case).<sup>10</sup>

#### **Supreme Court Ongoing Case**

On December 1, 2023 Pakistan Supreme Court began the hearing on a joint Constitutional Petition [(Constit.P.40/2023 (U/A 184(3) Senator (R) Farhatullah Babar & Others vs Federation of Pakistan



through Caretaker Prime Minister, Islamabad & Others] filed by politicians, lawyers and human rights activists against the repatriation of Afghan refugees. The Court observed that this issue needs constitutional interpretation and referred the matter to the larger bench; a condition precedent of Section 04 of the Supreme Court (Practice & Procedure) Act, 2023 which states that petition under Article 184(3) of the Constitution should be heard by a bench comprising of not less than five judges. However, the matter is still subjudice before the Court.

### **Repatriation in International Law: Justification of National Security**

Pakistan's decision of repatriating illegal immigrants drew criticism from International bodies including UNHCR, Amnesty International, Human Rights Commission of Pakistan (HRCP) etc, claiming that these deportations violate Pakistan's obligations as a party to the UN Convention against Torture (CAT) and under the customary international law's principle of non-refoulement.<sup>11</sup>

- Firstly, Pakistan's decision is completely in line with its international obligations. As the [(Article 1C (1) to (6)] of the 1951 Refugee Convention enshrines the conditions under which a refugee ceases to be a refugee. Out of those many refusal grounds for refugee status, the one [Article 1C (5)] which applies to Afghan situation is that he/ she can no longer enjoy the same status, because the circumstances in which he/ she was recognised as a refugee have come to an end now. In addition

to this, Articles 32(1) and 33(2) of the same Convention justify the IFRP on the grounds of National Security & Public Order.

***In International Law, as an exception to the general Principle of Non-Refoulement, the States can repatriate a refugee on the grounds of National Security or Public Order.***

- Secondly, as far as the Principle of Non-Refoulement (Article 33 of Refugee Convention & Article 03 of the CAT) is concerned then being customary international law, it's equally binding on non-state parties also. However, there are certain exceptions to this general rule as the Sates can repatriate a refugee on the grounds of National Security.
- Thirdly, in current circumstances, undocumented Afghans pose a detrimental threat to Pakistan's National Security. The recent upsurge in the terrorists' attacks conducted by Tehrik-i-Taliban Pakistan (TTP) across Pakistan is an irrefutable evidence of Afghan soil being used as a launching pad of terrorism. Statistics show that the militant attacks in the first nine months of last year killed more than 700 security forces and civilians marking an eight-year high.<sup>12</sup> To further substantiate this argument, recently Inspector General of Police (IGP) of Khyber Pakhtunkhwa (KPK) has disclosed that 75% of suicide bombings in province have the hands of Afghan nationals.<sup>13</sup>



**Table-2: Punishment of Illegal Immigration in Different Countries**

 <b>USA</b>	 <b>UK</b>	 <b>INDIA</b>
<p><b>Title 08 U.S Code Section 1325 (Improper Entry by Alien) provides punishment of illegal immigration up to 06 months/fine or both and for a subsequent commission, an imprisonment of 02 years/fine, or both.</b></p> <p>Section 1324 of the same Code (Bringing in and harbouring certain Aliens) penalizes the offence of bringing or attempt to bring and harbouring the alien with imprisonment of up to 10 years/fine or both.</p>	<p><b>In UK, Section 24 of the Immigration Act, 1971 provides punishment of illegal entry up to 12 months/fine or both for summary conviction (Less serious offence) and 05 years/fine or both for conviction on indictment (More serious offence).</b></p> <p>And more recently passed, UK Illegal Migration Act, 2023 extinguishes access to asylum in UK for anyone who arrives irregularly and bars them from claiming refugee/human rights protection.</p>	<p><b>Under the Foreigners Act, 1946 and the Passport (Entry into India) Act, 1920 the illegal immigrants may be deported or imprisoned.</b></p> <p>The Citizenship Act, 1955 prohibits the illegal immigrants from acquiring Indian Citizenship. However, the Citizenship (Amendment) Act, 2019 provides citizenship only to the non muslim illegal immigrants from Pakistan, Afghanistan and Bangladesh.</p>

### Illegal Immigration: A Globally Recognised Offence

The global outcry regarding IFRP is unwelcomed because illegal immigration is an internationally recognised offence and it is a State prerogative to safeguard its own national interest. Recently, Mexico has closed its borders for illegal immigrants while the US and Canada have signed a border deal to halt the flow of asylum seekers and to send them back.<sup>14</sup>

### Way Forward for Pakistan

- Pakistan should legislate its own national refugee law because the Foreigners Act, 1946 is not sufficient to deal with refugee crisis.
- Pakistan should build its counter narrative, highlighting the presence of voluntary factor which is in compliance with international law.
- The government should continue with this policy decision and this process should not be kept in halt.

### Conclusion

Not being signatory to the Refugee Convention 1951, Pakistan was providing shelter, food, and living to Afghan nationals since last 40 years. But the country has faced numerous economic difficulties due to the presence of illegal immigrants, therefore, prioritising its own national interests takes precedence. Due to an international outcry, it becomes all important to note that Pakistan is repatriating only those individuals who are illegally residing and do not possess any legal document. In addition, this policy decision has been taken by the Federal Government in the Apex Committee's meeting, a body which is chaired by Prime Minister and includes Chief of Army Staff along with Federal Cabinet and Chief Ministers of all Provinces. Meaning thereby, every stakeholder had its say in the final decision making process which is completely aligned with Pakistan domestic law. Moreover, International law also provides legal permissibility to repatriate a refugee. It is the sovereign right of any State to implement its immigration laws, so is the case with Pakistan, therefore, IFRP is conducive to our National Security and larger interests.

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