

# Investigations and Trial under Immigration Law: A Critical Analysis on Procedural Law

Prithvi Raj<sup>1</sup>

---

---

## Abstract

*Even though the people moved without a passport or visa, they can still be considered Indian citizens because they have lived there for a long time. If a foreigner is found to be living illegally in Indian Territory, they must be treated with respect and dignity until they are sent back to their home country. Due to various reasons including political or economical, inimical reasons, some people from neighboring countries may enter India. May be due to some cultural and ethnic similarities, on many occasions such migrants go unnoticed, and they almost willing and try to settle in our country. These illegal migrants sometimes pose threat to the national security and infringe the rights of Indian Citizens. The Author critically analyses that how a foreign National who is considered to be an illegal immigrant shall be treated till they are deported to their country, or appropriate government taking any decision about their citizenship in general. The Author in this paper examines the procedures to be followed by the concerned authorities and Courts, when an offence said to have been committed by illegal immigrants, under the Foreigners Act, 1946 and offences under any other law of the land for the time being in force is detected.*

---

---

## Introduction

Once the competent governments, union territories, or other authorities have been assigned with the role of identifying, discovering, and deporting unlawful migrants, it is their responsibility to deport them as soon as possible to their respective countries. The courts should also keep in mind that

---

<sup>1</sup> Assistant Professor (Law) Narsee Monjee Institute of Management Studies (NMIMS), Hyderabad Campus.

India is a vast country with many countries on its borders. The people of the Indian subcontinent have a common history and physical appearance. Some people from neighbouring countries may enter India for a variety of reasons, including political, economic, and hostile motivations. Because of cultural and ethnic similarities, such migrants frequently go unnoticed and almost willingly strive to settle in our country. These illegal migrants might pose a threat to national security and violate Indian citizens' rights. It should also be remembered that terrorism has been a major issue for most countries in recent years. Illegal migrants who enter Indian Territory with the intent to harm national security are particularly susceptible. It is also clear from several incidents in India that some criminals have enlisted Indian nationals in their groups for their own ill-gotten gains, resulting in unjust loss of Indian territory. Infiltrators have committed inhumane atrocities in Jammu and Kashmir, as well as the Rohingyas in Myanmar. Retaining illegal migrants may be beneficial to the country at times if they came to our country to make a living and are all from hardworking communities. That does not, however, imply that they can be kept in India in violation of the country's various laws and regulations. As a result, preventing illegal migrants from entering India and deporting them to their home country if they are discovered to be illegal migrants or have an invalid passport or visa, or have continued to reside in India without legal authority, is a critical task, as they can put pressure on citizens and pose a security threat, particularly in sensitive areas. In this context, we must understand how those individuals should be dealt with and what the authorities' responsibilities are.

### **Foreign National Called an Illegal Migrant**

Section 2(1) (b) of Indian Citizenship Act, 1955, explains who is an illegal migrant, and how citizenship can be acquired. The provision reads as follows.

*“Section 2. 1(b) ‘illegal migrant’ means a foreigner who has entered into India -*

*(i) without a valid Passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or*

*(ii) with a valid Passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;*

Section 3 - 'Citizenship by birth' means -

*(i) Except as provided in sub-section (2), every person born in India,*

*(a) On or after the 26th day of January, 1950, but before the 1st day of July, 1987;*

*(b) On or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;*

*(c) On or after the commencement of the Citizenship (Amendment) Act, 2003, where*

*(i) both of his parents are citizens of India; or*

*(ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth."*

As a result, illegal migrants are not considered refugees under Indian law. The United Nations concept of non-refoulement and obstacle to removal does not apply to India because it is not a signatory to the 1951 Refugee Convention. If an illegal migrant does not meet the legal definition of a lawful refugee in the host country, they face removal. Illegal migrants are persons who enter a country in violation of immigration laws, do not gain Indian citizenship, or stay in our country without a legal right to do so. That is to say, individuals who have not obtained citizenship under the Indian Citizenship Act but stay in India are considered illegal migrants. Even children born to illegal migrant parents, or any one of them, are not immediately citizens of India. As a result, it is apparent that being born in

India is not a criterion, but that they should be included in the Citizenship Act's definition.

In ***Sarbananda Sonowal and Union of India***<sup>2</sup>, The Hon'ble Supreme Court, after a lengthy and detailed discussion, rejected the introduction of the 'Illegal Migrants (Determination by Tribunal) Act, 1983,' holding that the Act "has created the biggest hurdle and that is an impediment or barrier in the identification and deportation of illegal migrants." The Hon'ble Supreme Court, while hearing a Public Interest Litigation petition for the deportation of illegal migrants on August 9, 2012, stated that the Government of India's policy does not support any kind of illegal migration into its territory or illegal immigration, and that the Government is committed to deporting illegal migrants, but only in accordance with the law.

The Citizenship Amendment Act, amended in the year 2019 , which gave some relief to some persons, which reads as follows.

*“Under the Indian Citizenship Act, 1955 (hereinafter referred to as the Principal Act), clause (b) of sub-section (1) of Section 2, the following proviso shall be inserted, namely:- Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made there under, shall not be treated as illegal migrant for the purposes of this Act”. Therefore, it is clear that the persons who are not given with any neutralization certificate or who does not fall within the category of amended provisions of Citizenship Act and who are defined as illegal migrants are to be treated as illegal migrants to Indian Territory.*

---

<sup>2</sup> (2005) 5 SCC 174.

## **Detection, identification and determination of foreign nationals who are accused of committing offences in India**

All States/Union Territories, Administrations are instructed to alert all law enforcement and intelligence agencies to take quick steps in identifying illegal migrants and initiating the deportation process expeditiously and without delay in order to prevent any unfortunate incident from occurring. The Central Government's principal responsibility is to identify, detect, and remove foreign people who are illegally present in the country. In fact, numerous clauses under several notifications assign such rights to state governments and union territories.

### **The Passport (Entry into India) Act 1920**

#### ***The Passport (Entry into India) Act 1920***

*“Section 2 defines the word 'entry' means entry by water, land or air;*

*Section 3 of the Act 'Power to make Rules' says that the Central Government may make Acts and Rules to prohibit the entry into India or any part thereof any person who has not in his possession a Passport issued to him;*

*Section 4 of the Act 'Power of arrest' also provides that - (1) any officer of police, not below the rank of a sub-Inspector, and any officer of the Customs Department empowered by a general or special order of the (Central Government) in this behalf may arrest without a warrant any person who has contravened or against whom a reasonable suspicion exists that, he has contravened any rule or order made under section 3 of the Act.*

*Section 5 'Power of removal' also provides the Central Government may by general or special order, direct the removal of any person from India who, in contravention of any Rule made under Section 3 of the Act, prohibiting entry into India without Passport and thereupon any officer of the Government shall have all reasonable powers necessary to enforce such direction”.*

### **The Passports Act, 1967 and the Passport Rules, 1980**

The legislations are enacted to regulate the purpose of issue of Passports and travel documents, to regulate the departure from India, the Citizens of India and for other persons and for matters incidental or ancillary thereto. Under this Act particularly Sections 2 and 3, defines what is meant by 'departure', 'Passport', 'Passport Authority', 'Prescribed' and 'travel documents'.

- “Section 3, explains the 'Passport or travel document for departure from India'.
- Section 12 of the Act deals with the offences and penalties prescribed.
- Section 13 of the Act deals with the power to arrest such persons who have committed any offence under section 12 of the Act.
- Section 13(1) prescribes the Officers who are empowered to make arrest by a general or special order of the Central Government (like officer of police not below the rank of Sub-Inspector or Immigration Officer Etc.,
- *Under Section 14, 14A and 14B of the Foreigners Act, 1946, the offences are defined as to who can be treated as not a citizen of India. It can be safely said that, under Section 14, whoever*

- (a) remains in India exceeding the period mentioned in Visa,
- (b) does any act in violation of the conditions of the valid Visa regarding his entry and stay in India
- (c) contravenes the provisions of this Act or any order made or any direction given in pursuance of this Act or such order.

The said acts shall be punished with imprisonment for 5 years and with fine etc.,

- Section 14 (A) deals with 'penalty for entry of a person in a restricted area's etc., whoever -
- (a) enters into any area in India, which is restricted for his entry under any order made under this Act, or any direction given,

remains in such area without any authority of law beyond the period specified in any permit for his stay; or

(b) Any person enters into or stays in India in any area without valid documents required for such entry or stay;

shall be punished with imprisonment for two years and may extend to eight years with fine.

- Section 14(B) deals with 'Penalty for using forged Passport', whoever uses a forged Passport he shall be punishable with imprisonment which shall not be less than 2 years may also be extended to 8 years with fine.
- Section 14 (C) deals with 'Penalty for abatement'. It means whoever abets any offence under the Act also be made punishable with the same punishment provided for the offence abated.
- Apart from the above , the Central Government has also framed The Foreigners Order, 1948, is a subordinate legislation, framed exercising powers under section 3 of the Foreigners Act, 1946. Section 7 of the said Foreigners (Tribunals) Order, 1948 deals with Restrictions of Sojourn in India, which specifically mandates that;

(i) Every foreigner who enters India on any authority or Visa and Passport, he shall also obtain from the Registration Officer in accordance with Rule 6 of the Registration of Foreigners Rules, 1939 a permit indicating the period for which he would remain in India. In such an eventuality registering authority can restrict the stay at any place specified in the Visa.

(ii) If he has no Passport or Visa, he has to obtain a permit indicating the period during which he is authorized to remain in India from the Registration Officer.

(iii) He shall not visit any other place or places unless such Visa or permit prescribes and further that before the expiry of the period, he shall leave India.

- Under Rule 6 of the said Rules, it is also clear that every foreigner entering India shall submit a report submitting his address in India and other particulars in a specified Form

A. Rule 9 also speaks about proof of identity and Rule 8 speaks about the validity of the Certificate of registration.”

Under various enactments, rules, and orders, competent authorities (such as police, customs officers, immigration officers, FRRO, FRO, and others) are entrusted with the responsibility of identifying persons who are not citizens of India, who have entered Indian territory without a valid passport or visa, or who have stayed in the country with any licence or permission from the competent authority, and the same h "Where any person who has reason to believe that a foreigner has entered India without any valid documents or is staying in the country beyond the authorised period of his stay, accommodates such foreigner in a premises, occupied owned or controlled by him, for whatever purpose, it shall be the duty of such person to inform the same to the nearest police station withi As a result, as noted above, various Acts and Rules empower any person with responsibility as a citizen of this country to bring such illegal migrants, or any foreigner staying in India beyond the period of licence or permit, to the attention of the competent authority so that appropriate action can be taken, and such persons deported to their respective countries.

In ***El Mustafa El Fathi and State Of Karnataka***<sup>3</sup>, wherein this court has observed on facts and law that - " The judges who deal with the offences under the Foreigners Act are justified in giving direction to the State and concerned authorities to take appropriate steps to deport the accused (foreigner) after serving sentence." The relevant Para is extracted hereunder:

*“7. Every country, in its laws provides for restrictions on entry of foreigners into such country and rules regulating their stay in the country for the period permitted. Measures governing the foreigners are found in the Foreigners Act, 1946 and the Foreigners Order, 1948. Among other things, they provide for expulsion of foreigners, whose entry into India is unauthorized or whose permit for stay in India has expired.”*

---

<sup>3</sup> ILR 2004 KAR 4603

They also call for the imprisonment of such individuals pending deportation and the prohibition of their return following removal. If a court finds a foreigner guilty of illegal entry or overstaying in India, the court must order that the foreigner be deported unless the competent Authority grants the required permit to stay in India. It cannot be contended, then, that a court convicted a foreigner of an offence under Section 14(C) of the Foreigners Act committed an unlawful in ordering that such person be deported from India. As a result, a Foreign National (who is not a citizen of India) who enters Indian territory without a valid passport, visa, or permit, or who remains in the country after the expiration of the period stipulated in such Visa or permit, is deemed an illegal migrant and must be deported to his home country as soon as practicable, i.e., immediately after detection and identification of such Foreign Nationals. At the time of detection and identification, as noted in the first point, competent authorities and officers, such as police or vigilance departments, may discover that, in addition to violating the Passport Act or the Foreigners Act, such illegal migrants also violated various provisions of Indian Penal laws. What the authorities must do in such an occurrence must also be considered. It should go without saying that an accused who has broken any of the country's criminal laws will be handled equally to other accused who have broken the same laws and are on the same footing. The authorities must follow the same procedure when it comes to registration, investigation, and reporting to the courts, as well as investigation and trial before a competent court of law. Before going any farther on this subject, it's important to remember how a person's nationality might be determined prior to deportation to his home country.

***The Foreigners Act, 1946***

The Foreigners Act, 1946 is the present parent enactment which also says that how the determination of nationality has to be done. Section 8 of the said enactment is the relevant provision which reads as follows:

"8. Determination of nationality - (1) When a Foreigner is recognized as a national by the law of more than one foreign

country or where for any reason it is uncertain what nationality if any is to be ascribed to a foreigner, that foreigner may be treated as the national of the country with which he appears to be prescribed authority to be most closely connected for the time being in interest or sympathy or if he is of uncertain nationality, of the country with which he was last so connected:

Provided that where a foreigner acquired a nationality by birth, he shall, except where the Central Government so directs either generally or in a particular case, be deemed to retain that nationality unless he proves to the satisfaction of the said authority that he has subsequently acquired by naturalization or otherwise some other nationality and still recognized as entitled to protection by the Government of the country whose nationality he has so acquired.

(2) A decision as to nationality given under sub-section (1) shall be final and shall not be called in question in any Court:

Provided that the Central Government, either of its own motion or on an application by the foreigner concerned, may revise any such decision."

According to the above-mentioned rule, if a question arises in respect of a specific person as to which nation he belongs to or if he is an Indian citizen, the question must be resolved as a condition prior to his deportation from India. The proviso also clearly states that where a foreigner has acquired Indian nationality by birth, he is deemed to retain that nationality unless he proves to the satisfaction of the said authority that he has subsequently acquired by naturalization or otherwise some other nationality and is still recognized as entitled to protection by the Indian government, except where the Central Government so directs either generally or in a particular case. Sub-clause (2) also makes it clear that a judgement made under subsection (1) regarding nationality is final and cannot be challenged in court. The Central Government, on the other hand, has the authority to overturn any such judgement.

### ***Burden of Proof***

Section 9 of the Foreigners Act 1946 deals with 'Burden of proof on whom to prove that aspect is also predominantly explained. This provision meticulously casts the burden on the persons who claim that they are Indian citizen and is not a foreign national or an illegal migrant. Section 9 reads as follows:

"9. Burden of proof - If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person."

The onus of proving that a person is not a foreigner or is not a foreigner of a particular class or description, as the case may be, shall lie on such person, notwithstanding anything contained in the Indian Evidence Act, 1872. As a result, it is the individual who asserts that he is not a foreigner or a foreigner of a particular class or description who has the reverse burden, particularly when claiming to be an Indian citizen. That presumption will remain in place unless he refutes it in accordance with our country's accepted criminal jurisprudence rules. This assumption is almost universal. In contrast to the normal rule that the prosecution must provide the proof.

The Foreigners (Tribunals) Order, 1964, should also be mentioned in this connection. The Tribunals must be established by the Central Government in accordance with the Central Government's powers under the parent Act, the Foreigners Act of 1964, to determine the nationality of any person whose nationality is in dispute or questioned. It should be noted that the Competent Authority referred to in sub-clause (2) of the schedule to the Citizenship (Registration of Citizens and Issue of National Identity Cards), Rules 2003 makes it abundantly clear that the Tribunals established under the Foreigners (Tribunals) Order, 1964, have absolute power to

determine a person's nationality when a case is brought before them. "The Central Government or the State Government or the Union Territory Administration or the District Collector or the District Magistrate may" by order refer a question as to whether a person is not a foreigner within the meaning of the Foreigners Act, 1946, to the Tribunal constituted for the purpose, according to Order 2(a) of the said Foreigners (Tribunals) Order, 1964. The Tribunal must determine the nationality of the said person after following the method outlined in Rule 3 of the said ruling. The power of the Tribunals is further explained in Rule 4, which states that while trying the suit under the Code of Civil Procedure for the purpose of determining the nationality of a particular individual, the Tribunal shall have the powers of the Civil Court. The Tribunal's constitution is further outlined in Rule 2.

Therefore, it is clear that the Tribunals are the competent authority in order to determine the nationality of a person. In this context, it is worth to refer a decision of the Hon'ble Apex Court in between **Abdul Kuddus v. Union of India and Others**<sup>4</sup>, wherein the Hon'ble Apex Court has made an observation that -

"The Competent Authority referred to in Para 3(2) of the schedule to Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, can be without a doubt, the Tribunal constituted under the Foreigners Act i.e., the 1964 Order." Apart from stating the procedure to be followed by the Tribunal and how the proceedings have to be conducted etc., the Hon'ble Apex Court has observed at paragraphs 21 and 22 in the following manner:

"Referring to the above amended provisions, it is urged on behalf of the appellants that an order of the Foreigners Tribunal is an executive order which renders an opinion and therefore, it cannot be equated with a Judgment, Summary opinion of the Foreigners Tribunal. It is submitted, is not a detailed order and hence, is not a decision or Judgment. Based on the said

---

<sup>4</sup> (2019) 6 SCC 604

submission, it is argued that the opinion formed by the Foreigners Tribunal is not an order of the Competent Authority for the purposes of sub-para (2) to Para 3 of the Schedule to the 2003 Rules. Further, the opinion formed by the Foreigners Tribunal being an executive order would not operate as res-judicata. It is highlighted that in some cases, persons who have been declared to be a Foreigner under the *Foreigners Act* have been included in the draft National Register of Citizens for the State of Assam, while in others siblings and close blood relations of such persons have been named in the draft National Register of Citizens. It is averred that in these cases of contradictions, an aggrieved person should be entitled to take recourse to Para 8 of the schedule to the 2003 Rules.

We have examined the contentions and have no hesitation in holding that they have no force. *The Foreigners Act* and the *Citizenship Act* including the Rules framed under the two Acts have to be read harmoniously as both the Acts are inter-related and sister enactments. Pertinently, the Rules framed under the *Citizenship Act* are subordinate legislation. The expression Competent Authority used in sub-para (2) to Para 3 of the Schedule to the 2003 Rules would obviously and without a doubt has reference to the duly constituted authority under the *Foreigners Act*. Indeed, the learned counsel for the appellants did not make any attempt to point out and highlight that there could be any other authority covered by the expression 'Competent Authority' or which would qualify and can be treated as a Competent Authority referred to in sub-para (2) to Para 3 of the Schedule, albeit in a different context as a Competent Authority that makes reference to the Tribunal in terms of Para 3. On receipt of such reference, the Tribunal has to submit its opinion/decision, which opinion/decision in terms of the Explanation to *Section 6-A* of the Citizenship Act is final and binding. Decisions of the Tribunal have been given primacy. Thus, the Competent Authority referred to in sub-para (2) to Para 3 of the schedule would be, without a doubt, the Tribunal constituted under the *Foreigners Act* i.e., the 1964 Order."

If the preceding two paragraphs are taken seriously in light of the Citizenship Act and the Foreigners Act of 1946, it is

apparent that the Tribunal's decisions must take precedence. The term "competent authority" as used in subparagraphs (2) and (3) of the Schedule to the 2003 Rules clearly and unmistakably refers to the duly constituted authority (Tribunal) under the Foreigners Act, and no other authority is competent to decide this specific issue of determining a person's nationality. As a result, it is apparent that the Competent Authority has complete authority over a person's nationality. The phrase "competent authority" is solely used in the enactments mentioned above to refer to the tribunal in paragraph 3 and the only authority with the competence to determine a person's nationality. As a result, the Supreme Court has said unequivocally that the Tribunal's opinion is final and binding, and that the Tribunal's decision must take precedence over all other processes, if any. The Tribunal established under the Foreigners Act of 1964 is the last authority for determining a person's nationality.

In Sarbananda ***Sonowal and Union of India***<sup>5</sup>, it was observed that when a judicial or quasi-judicial tribunal makes a decision on law or fact, it cannot be overturned in a second round of appeals, and its conclusions are final until reversed in an appeal or through writ proceedings. A judicial act or judgement has the property of binding others, whether correct or wrong. Thus, any error made by such bodies, whether in fact or law, cannot be challenged by an appeal or a writ unless the erroneous finding is related to that body's jurisdictional concern. In the current setting, the Act and the constitutional courts' judicial review jurisdiction provide adequate safeguards.

Under the above said provisions of law, the determination of the nationality of a person has to be decided by the Competent Authority i.e., the duly Constituted Tribunals only, and the same is binding on the parties unless the same is set aside or reviewed by competent constitutional court or Central Government.

---

<sup>5</sup> (2007) 1 SCC 174

### **Procedure during Investigation, Inquiry and Trial**

How it should be done when detecting and identifying a foreign national and the crime he has committed, as well as determining his nationality, has been mentioned in the first point. Apart from the offences under the Passports Act or the Foreigners Act, the Competent Authority under various enactments as noted above and the Police/Vigilance department who are empowered may find that such illegal migrants have also committed various offences under various provisions of Indian penal laws. It goes without saying that if a foreign national who is not an Indian citizen violates not just the terms of the Foreigners Act, but also any of the country's penal laws, he or she will be handled equally to other defendants. In terms of procedural considerations, the authorities must follow the same procedure when it comes to registration, investigation, inquiry, and trial before the appropriate courts of law. The Foreigners Act of 1946, in addition to the Registration of Foreigners Act of 1939, the Indian Passports Act of 1920, and other enactments now in force, governs foreign nationals. Apart from the acts committed under the Foreigners Act, all other enactments are also applicable, particularly the Passports Act and other enactments that are applicable to foreigners in order to detect the offence committed by them. In reality, after carefully analysing the Foreigners Act of 1946 and other enactments mentioned above, and there is no provision for the courts to use a separate approach when dealing with offenders who have broken the Foreigners Act and other criminal laws of the country. As a result, unless a separate procedure is contemplated or the application of general law, such as the Code of Criminal Procedure, is barred, the common Code of Criminal Procedure, 1973, is equally applicable for the purpose of dealing with such offenders by investigating agencies and criminal courts. "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force." As a result, it goes without saying that if there is a unique statute, such as the

Foreigners Act, it must have a special mechanism for conducting investigations, inquiries, and trials. The Code of Criminal Procedure is applicable in this situation.

It's also worth noting that none of the aforementioned special enactments, including the Foreigners Act of 1946, prohibit courts from using their authority under Chapter 33 of the Cr.P.C., specifically Sections 436 to 439 of the Cr.P.C. In the absence of any exception in the special statute, the abovementioned requirements apply equally to foreign nationals in terms of bail conditions. While a case is filed, it is stated that the bail provisions apply, however the question arises as to what procedure should be followed when granting or refusing bail to such individuals under the provisions of Sections 436 to 439 of the Cr.P.C. It is only logical that foreigners who have broken the requirements of the Foreigners Act, 1946, are not allowed to roam the country freely as if they were citizens, even if bail is given to them. The bail cannot be regarded as an authorisation or licence to travel around the country by the competent authorities as if it were a legal instrument. As a result, the courts cannot give such bail to such a person without hearing the Competent Authorities and the State, and without imposing required conditions, as he is believed to be an illegal migrant. As a result, it goes without saying that an under-trial prisoner should be given free rein to roam wherever he wants during the investigation, inquiry, and trial, or his movements must be restricted, or he must be imprisoned somewhere else is the matter that the Courts must examine. In Section 9 of the Foreigners Act 'Burden of Proof' will come into play, which raises a presumption that if in any case not falling under section 8, any question arises with reference to this Act or any Order made or direction given thereunder whether any person is or is not a foreigner of a particular class or description as the case may be, shall notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person to show to the authorities or Court, that he is not a foreign national i.e., he was authorized to remain in Indian territory.

In this Context section 3 of the Foreigners Act 1946 also play a dominant role, which entrusted certain powers to the competent authorities. The said provision reads as follows.

“3. Power to make orders.--

(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into [India] or their departure there from or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner--

(a) shall not enter [India] or shall enter [India] only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed.

(b) shall not depart from [India], or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in [India] or in any prescribed area as therein;

[(cc) shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;]

(d) shall remove himself to, and remain in, such area in [India] as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified--

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;

(iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified;

(v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified;

(vi) prohibiting him from association with persons of a prescribed or specified description;

(vii) prohibiting him from engaging in activities of a prescribed or specified description;

(viii) prohibiting him from using or possessing prescribed or specified articles;

(ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;

(g) shall be arrested and detained or confined; and may make provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

(3) Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (e) or clause (f) of sub-section (2).

3A. Power to exempt citizens of Commonwealth Countries and other persons from application of Act in certain cases.--

(1) The Central Government may, by order, declare that all or any of the provisions of this Act or of any order made there under shall not apply, or shall apply only in such circumstances

or with such exceptions or modifications or subject to such conditions as may be specified in the order, to or in relation to-

(a) the citizens of any such Commonwealth Country as may be so specified; or

(b) any other individual foreigner or class or description of foreigner.

(2) A copy of every order made under this section shall be placed on the table of both Houses of Parliament as soon as may be after it is made.”

Now we know that a foreigner suspected of being an illegal migrant cannot stay in India, wander, or move around freely unless and until he is authorised or permitted to stay in India by the Competent Authorities, subject to certain conditions governing his conduct, as set out in Section 3 (2) (a) to (g) of the Foreigners Act. This provision allows competent authorities to use their powers under section 3(2) (a) to (e) to restrict a foreigner's movements with conditions for any valid reason. In that situation, Such person shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions; as noted at sub clause 3(2)(a) to (f) (e). In fact, section 3(2)(g) empowers the competent authority to arrest, detain, or confine such persons if no licence or permission is granted under sections 3(a) to (e), and to make provisions for any matter that is to be or may be prescribed, as well as for such incidental and supplementary matters as may be expedient or necessary, in the opinion of the Central Government, for giving effect to this Act.

As a result, the court must consider whether the said person needs to be detained somewhere other than regular jails when granting or refusing bail. It goes without saying that after filing a criminal complaint, the accused persons have the right to apply for bail at any time during the investigation, inquiry, or trial. If the court determines that the accused is entitled to be released on bail based on the facts and circumstances of the

case, the court must determine whether the accused must be held in any detention centres during the pendency of the investigation, inquiry, or trial, even after acquittal or conviction of the accused. As previously stated, granting bail does not imply ratifying or legalising their illegal presence in the country. As a result, the courts must only issue an order after hearing from the Competent Authorities (State), who are empowered to issue appropriate orders under Section 3 (2) of the Foreigners Act, to determine whether the competent authority has any reason to hold the accused persons somewhere other than jails until the investigation, inquiry, or trial is completed. Furthermore, the Competent Authorities can impose any conditions on them, and they can be released on bail after posting a bond with or without surety to ensure that the conditions are followed. If the accused persons must be released on bail, the Central Government or the State Government, as the case may be, must make the necessary arrangements to hold them in separate detention centres until they are deported to their respective countries. This is not to say that the courts do not have the authority to imprison those individuals. Everything is determined by the facts and circumstances of each case.

If the offences are committed apart from the Foreigners Act and Passports Act, and under any other penal laws currently in force, where serious allegations are made, and if the court, after considering the gravity of the offence, the nature of the allegations made against them, and in light of that, comes to the conclusion that even for such serious offences, apart from the Foreigners Act and Passports Act, if the court incline If an offence is committed under the Passports Act or the Foreigners Act, and it is prima facie determined that they are foreign nationals, they should be treated as foreign nationals and should not be detained in prison until they are deported. If bail is granted, the court must direct them to be detained in a separate Detention Centre. If they are not eligible for bail for any reason, they may be held in regular jails. If the court finds that the Competent Authorities did not comply with the legal requirements when filing the charge sheet, or if the court cannot

take cognizance of any offence alleged by the competent authorities under the various enactments for any reason, the Competent Authorities still have the power to refer the question of such person's nationality for determination as per the procedure noted above. If they are determined to be foreign nationals, the appropriate governments must take action to deport them.

The proceedings before a criminal court or any other court where proceedings are initiated against a foreign national under the Foreigners Act or any other penal laws that raise the question of nationality are quashed by a competent court like the High Court or Supreme Court u/s.482 of Cr.P.C. for any reason. Even in this case, as noted above, the Competent Authorities can still refer the question of whether a person is a foreigner within the meaning of the Foreigners Act, 1946, to a Tribunal constituted for that purpose under the Foreigners (Tribunals) Order, 1964. If the courts are unwilling to grant bail for any reason, even if the charges are only under the Foreigners Act or the Passports Act, and the determination of his nationality is pending or is to be considered by such court, the court can order that they be held in regular jails. Whether the accused is released on bail, held in jail, or detained in the Detention Center, he is entitled to a fair trial in a court of law for the alleged crimes he committed. Furthermore, the court discharges or releases the accused and closes or drops the proceedings for any technical reasons, and if the Competent Authorities who filed the charge sheet to the concerned court are of the opinion that the accused person is still a foreign national and not an Indian citizen, they can also invoke the provision of section 3 of the Foreigners (Tribunals) Order, 1964 for referring the said question to the concerned court. The competent authorities are not barred from taking such action. The Foreigners Act of 1946, Section 3A, also allows the Central Government to exempt any person from the Act's provisions and declare their legal status in the country. As a result, authorities taking action against such a person under the Foreigners Act must consider the above provisions and determine whether they

fall into the category defined in Section 3A of the Foreigners (Tribunals) Order, 1964.

### **Procedure after Trial**

If the accused is acquitted or convicted after the trial, what procedure should be followed until his nationality is decided, if it is pending, or if he was convicted for the offence punishable under Section 14, 14A, or 14B of the Foreigners Act for having found that he is an illegal migrant? It goes without saying that if the court convicts an accused holding that he is a foreign national and not entitled to remain in India, the deportation process. However, until he is deported or ordered to be released from jail for any other reason, he will be held in detention centres rather than regular jails to serve the sentence imposed on him.

There is a Government of India, Ministry of Home Affairs (Foreigners Division) order No.25022/19/2014.F1 dated 29.04.2014 addressed to the Principal Secretary (Home) of all State Governments/Union Territory/ Administrations regarding Consolidated instructions regarding procedure to be followed for deportation/repatriation of a foreign national where the Central Government has delegated its power to State Governments and other competent authorities u/s Under the said powers, a directive is issued to Competent Authorities such as the Police and the Foreigner Regional Registration Officer (FRRO)/FRO to examine a foreigner's valid travel document to determine whether he is an illegal migrant and to take appropriate action to prosecute him and deport him from the country as soon as possible. In the said letter, it is directed that all state governments and competent authorities ensure that such a process must be initiated from the date of registration of a case itself, and that if the accused is on trial and is convicted, action should be taken much before the actual date of completion of the sentence so that the foreigner's travel document is made available by the Embassy/High Commission concerned well before the actual date of completion of the sentence. The letter also directs that, upon completion of their jail terms, the concerned authorities may impose restrictions on the

foreigners, restricting their movements or keeping them in a Detention Center/Holding Centre/Camp to ensure their availability for expedited deportation or repatriation to their country. The said letter also directs that all foreign nationals who have completed their sentence but whose deportation or repatriation is pending due to non-confirmation of nationality, non-issuance of travel documents, and/or delay in arranging air tickets by the foreigner concerned or by the Mission of the country concerned for deportation may be released from jail but must be kept at appropriate p Many such detention centres must be established, each with basic facilities such as water, electricity, a clean environment, and adequate security.

Another letter No. 25022/45/2019-F.1 from the Government of India, Ministry of Home Affairs, dated 1.7.2019, was addressed to the Principal Secretaries (Home) of all State Governments/Union Territory Administrations, as well as DGPs of all States and FRROs. Requesting that this process be initiated immediately upon the arrest of the foreigner or the filing of a FIR, so that the process of nationality verification is completed by that time, and the foreigner's travel document is made available by the Embassy/High Commission concerned, so that the said person can be deported immediately after the trial and serving any sentence if applicable. As a result, it goes without saying that, as soon as the case is registered, if the Competent Authorities discover or suspect that the person involved in the case is a foreign national who, according to them, has no right to be in India or to remain in India except for the purposes of the proceedings against him before a court of law or Tribunal, all necessary steps must be taken, subject to the orders of the competent court, to detain the foreign national.

The letter dated 09.01.2019 in No.25022/32/2014- F.I. (VOL.II) of Government of India, Ministry of Home Affairs addressed to the Additional Chief Secretary (Home) and Principal Secretary (Home) of all the State Governments/Union Territory Administrations, with reference to establishment of Model Detention Center/Holding Centre/Camp Manual. The document reveal that, the Central Government, has drafted detention centers manual, as directed by the Hon'ble Apex

Court in their orders dated 12.9.2018 and 20.9.2018 in IA No.105821/2018 in ***Collaborative Network for Research and Capacity Building, Guwahati case***<sup>6</sup>, for the purpose of setting up of a Detention Center/Holding Centre/Camps in various States and Union Territories and to prepare a manual for Detention Centers. The Central Government has also prepared a draught Model Detention Centre for the purpose of detaining illegal migrants or accused persons in connection with the aforementioned enactments, according to the letter. As a result of the above-mentioned directives, Detention Centers must be established for the purpose of holding accused persons in such Detention Centers until their deportation from India.

The Model Detention Centre/Holding Centre/Manual, 2019 reveals that, it contained all the details in four chapters: The Chapter 1 contains Legal provisions with regard to deportation and detention of a foreign national; The Chapter 2 contains Instructions issued by the Ministry of Home Affairs with regard to Detention Centers; The Chapter 3 contains Categories of persons who may be detained in a Detention Centre/Holding Centre/Camp is explained; and the Chapter 4 contains Amenities to be provided in the Detention Centers/Holding Centers/Camps. According to the manual, the Central Government's powers under Sections 3(2)(c) and 3(2)(e) of the Foreigners Act, 1946, have been delegated to state governments and union territory administrations for the establishment of detention centres, as well as how the detention centres should be designed and what amenities should be provided.

### **Conclusion and Suggestion**

Whether the accused is released on bail or acquitted, or his nationality is questioned and not yet determined, the Competent Authorities must decide whether he should be kept in the Detention Centre or released by taking a bond with or without sureties specifying the conditions for his stay in any particular place, as per Section 3(2)(a) to (f) of the Foreigners Act. If the accused person is detained in jail by the court, the

---

<sup>6</sup> WP (Civil) No.406/2013.

court must consider whether he should be kept in jail or in the Detention Centre, based on the facts and circumstances of each case and the heinous nature of the offence committed by him other than the offences under the Foreigners Act and Passports Act, and if the persons are acquitted, the Competent Authorities must consider whether they should be kept in jail or in the Detention Centre. Furthermore, if the accused is ordered to be held in a regular jail for refusing bail or is convicted and sentenced to serve time in prison, the appropriate government must take or initiate action from the date of the FIR registration and keep the deportation papers ready to deport the said person as soon as the sentence is completed and deport such person to their mother country. The Central Government has directed state governments and union territories to provide all necessary facilities for inmates to maintain humane living standards, including all basic amenities such as electricity, drinking water (including water coolers), hygiene, accommodation with beds, sufficient toilets/baths with running water, communication facilities, and kitchen provisions. Drainage and sewage facilities should be in place. All accommodations should meet the minimum requirements for a healthy lifestyle. Apart from providing all other basic necessities, it is also directed that CC TV cameras be installed at various centres to monitor detainee movements. As soon as an offence under the Foreigners Act or other laws is detected, and there is strong prima facie evidence that the detected person is a foreign national, and if he does not have a passport or visa, or if his visa has expired, and he has no right to stay in Indian territory, proceedings to deport him to his country shall be initiated without undue delay, starting from the date of filing the FIR against him. The jurisdictional police must take immediate steps to notify the concerned competent authorities, who must then initiate proceedings to deport such a foreign national to his mother country, while also sharing the details of such a person with other competent authorities and the concerned jurisdictional court. If a court refuses to grant bail to those people (foreign nationals) in a criminal case, that person will be held in a regular jail until the case is resolved. If the Court grants bail, including anticipatory bail, in any criminal case where the offender is a foreign national and the

offences are under the Foreigners Act and/or any other Laws currently in force, and their Visa has been cancelled or lapsed, or they have no passport, or they are illegal migrants, the Courts shall specifically order that they be held in detention centres, unless the competent authority has passed an order under section 3(2)(a) to (f) of Foreigners Act, 1946, or till further orders of the court or till they are deported to their mother country. If the foreign nationals are convicted in the case filed against them, they will be held in a regular state prison until they complete their sentence, and then they will be held in detention centres until they are deported to their home country. Unless they have any right or otherwise entitled to remain in India, or the competent authority has passed any orders under section 3(2)(a) to (e) of the Foreigners Act 1946, the acquittal, discharge, or release of the accused is no bar for the consignment to detention centres until they are deported to their country.

## Contours of Asylum and Refugee Law: An Analytical Study

Gurjinder Kaur<sup>1</sup> & Sandhya<sup>2</sup>

---

---

### Abstract

*"No one puts their children in a boat unless the water is safer than the land" — Warsan Shire*

*According to the United Nations High Commissioner for Refugees (UNHCR), almost 66 million people have been displaced from their homes due to conflict, violence, and persecution, with around a third of them fleeing across borders as refugees. A level comparable to the mid-1990s, when the Cold War's end produced similar upheaval. The prevalence, scale, and duration of today's wars, as well as the international community's incapacity to establish the unity of purpose required to settle them, are directly linked to the volume and complexity of forced displacement today. More than 80% of those fleeing their nations as refugees seek sanctuary in neighboring countries, whose people and governments are typically trying to deal with the aftermath of a nearby conflict as well as their own development challenges. An asylum seeker is a person or a group of people whose application for refugee status has yet to be processed. These individuals are referred to as "prima facie refugees". Due to a lack of uniform policies in countries and the nature of their vulnerable and helpless situation, asylum seekers encounter numerous obstacles. To sustain society's essential human rights rules, these persons must be protected and safeguarded. The most important safety is to give high-quality legal assistance. Worldwide organisations, such as the UNHCR, have been created to handle such challenges. The UNHCR's objective is to provide international refugee protection and to discover*

---

<sup>1</sup> Assistant Professor, Department of Laws, Guru Nanak Dev University, Amritsar.

<sup>2</sup> B.A. LL.B., Department of Laws, Guru Nanak Dev University, Amritsar.

*solutions to refugee issues. Several international organisations are also dedicated to ensuring the protection of asylum seekers. However, these organisations can only carry out their objectives with an assistance and the actions of individual sovereign states. This research paper examines the national legislative enactments that apply to the refugees and further expand the study on India's need for a separate refugee law that would protect the human rights grounds of the refugees of a war-ridden country. It also emphasises on the existing legal difficulties, as well as the current global state of affairs and international conventions in the lives of asylum seekers.*

*Key words: Asylum, Conventions, Global trends, National, International law, UDHR, Rights, UNHCR, Current scenario.*

---

## **Introduction**

In the twenty-first century, no continent is immune to the problem of forced displacement. People rely on the rule of law to ensure protection in other countries when their own country fails. According to the UNHCR's annual Global Trends report, forced displacement now impacts more than 1% of humankind (1 in every 97 people), with fewer and fewer of those who escape being able to return home. There are 26.4 million refugees worldwide, with over half of them under the age of 18. A total of 82.4 million people is displaced over the world. This includes not only refugees, but also asylum seekers and those who have been forced to flee their homes.<sup>3</sup>

The 1951 Convention contains the international legal definition of the term refugee, it is a person who has fled his or her home country and is unable or unwilling to return because his or her life or freedom is in jeopardy.<sup>4</sup> They are entitled to protection

---

<sup>3</sup>RELIEFWEB, <https://reliefweb.int/sites/reliefweb.int/files/resources/BB88AF556426A41CC1256DB8005E9B4C-hcr-criteria-92.pdf> (last visited on April 7, 2022).

<sup>4</sup> Indian Bar Association, <https://www.indianbarassociation.org/indias-refugee-policy/> (last visited on April

from forcible return to their home country, as well as other rights and responsibilities outlined in the 1951 Convention. Whereas political refugees are those individuals who are being prosecuted by their own government. On the other hand, "Asylum-seeker" refers to a person who has sought for refugee status but has not yet received a final decision. Not every asylum seeker will be accepted as a refugee in the end as asylum refers to the provision of shelter and active protection to a political refugee from another country by a state that accepts him upon his request.

The term is defined by the Institute of International Law as "the protection which a state offers to a person who comes to seek it on its territory or in some of its places under the jurisdiction of certain of its organs". It is made up of two components:

- a. a shelter that is more than a makeshift shelter
- b. a level of active protection on the part of authorities in charge of the asylum territory

While everyone has the right to seek refuge, only those who have been granted it have the right to enjoy it. The refugee dilemma is one of India's oldest crises, dating back to the country's independence. However, no significant impact on the problem has been achieved to date. Refugees, internally displaced persons, and migrants have all been assigned to be managed by related existing legislation, but their legal demands have yet to be acknowledged. Despite current legislation and judicial involvement have addressed the matter to some extent, there are still serious hurdles in resolving the bigger issue at hand.

### **National Perspective of Asylum and Refugee Law**

India, as a country, has taken an active role in upholding the International Human Rights Law's duties. The spirit of the Universal Declaration of Human Rights, in particular, has been viewed as a key feature of the Indian Constitution. Though Indian Constitution's main goal is to promote and safeguard people's interests while also prioritising the requirements of

---

7, 2022).

both citizens and foreigners, India has failed to build an adequate legal framework for recognising and adjudicating refugee situations under the UN's human rights paradigm.

India has been reluctant to ratify the 1951 Refugee Convention or its 1967 Protocol, partly due to the Convention's Eurocentric slant and partly due to its neutrality in Cold War politics at the time. Another thorn in New Delhi's side has been its failure to account for national security concerns. Despite the lack of international commitment to the United Nations Refugee Convention, still India accommodates a diverse set of refugees, including Syrians, Sri Lankans, Tibetan, Myanmar and Afghans, among others, considering humanitarian obligation.<sup>5</sup>

### **Legal Status of India**

Article 17 of the Indian Constitution grants foreigners the right to work or practise their profession; article 26 grants them the right to reside and move freely; article 21 grants them the right to housing; article 15 grants them the right to form an association; and article 13 grants them the right to property. The Directive Principles of State Policy, as stated in Article 51 of the Constitution, demonstrate the attitude with which India handles her international interactions and commitments. The Indian Constitution's Seventh Schedule has been used to pass and issue a slew of legislations. In the post-independence era, the following legislations were passed for refugees, evacuees, and displaced individuals:

- East Punjab Evacuees (Administration of Property) Act, 1947
- UP Land Acquisition (Rehabilitation of Refugees) Act, 1948
- East Punjab Refugees (Registration of Land Claims) Act, 1948
- Mysore Administration of Evacuee Property (Emergency) Act, 1949

---

<sup>5</sup>World Legal Information Institute, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html>, (last visited on April 8, 2022).

- Mysore Administration of Evacuee Property (Second Emergency) Act, 1949
- Immigrants (Expulsion from Assam) Act, 1950
- Administration of Evacuee Property Act, 1950
- Evacuee Interest (Separation) Act, 1951
- Displaced Persons (Debts Adjustment) Act, 1951
- Influx from Pakistan (Control) Repelling Act, 1952
- Displaced Persons (Claims) Supplementary Act, 1954
- Displaced Persons (Compensation & Rehabilitation) Act, 1954
- Transfer of Evacuee Deposits Act, 1954
- Foreigners Law (Application & Amendment) Act, 1962
- Goa, Daman & Diu Administration of Evacuee Property Act, 1969
- Refugee Relief Taxes (Abolition) Act, 1973

India's first twenty-five years after independence were spent embracing the responsibility for 20 million refugees. This was owing to India's and Pakistan's division. The Indian government has taken a number of initiatives to address the refugee crisis. The Rehabilitation Financial Administration Act of 1948, which defined the legal status of displaced persons, was the most crucial action taken by the government. It was discovered that the situation of displaced people and refugees was very similar. When the Dalai Lama and his followers fled to India for political asylum in 1959, India faced a refugee surge. Another refugee wave that our country had to deal with was in 1971, when ten million East Pakistanis fled to India. India was compelled to provide asylum to the refugees due to its humanitarian obligations. In 1983 and 1986, after a little respite, India was once again impacted by the influx of refugees from Sri Lanka and Bangladesh. However, the abovementioned various legislations have lost their significance today. <sup>6</sup>

---

<sup>6</sup> *IPLEADERS INTELLIGENT LEGAL SOLUTIONS*, <https://blog.ipleaders.in/legal-status-refugees-india/> (last visited on April 10, 2022).

Currently, India only offers the Foreigners Act of 1946, the Passport Act of 1967, the Extradition Act of 1962, and the Illegal Migrant (Determination by Tribunals) Act of 1983, all of which can be considered refugee laws. Refugees are treated as foreigners under all of these refugee legislations. And the Citizenship Act of 1955 (as revised in 2019), and the Illegal Migrant (Determination by Tribunals) Act of 1983 are the legislations against foreigners. They can be imprisoned and deported under these regulations, even if they are refugees fleeing their home nations in fear of death.<sup>7</sup>

#### **Citizenship Amendment Act, 2019**

The Citizenship Act of 2019 was recently amended to provide a broader perspective on the subject; however, it solely addresses it in terms of religion. However, today's geopolitical realities have changed dramatically, and the Citizenship Amendment Act of 2019 has signaled a significant shift. As a result, relying on the Foreigners Act or the CAA would not serve the refugees' interests and will only continue to deprive them of a sufficient standard of living, particularly for those who have been victims of war or genocide in their own country.

#### **Asylum Bill, 2021**

After so many years, finally, to avoid a huge influx and repetition of history of refugee crises, India has re-examined and made pre-emptive arrangements to deal with refugees and mass migration crises. Shashi Tharoor, a former minister of state for external affairs, recently proposed a bill in the Lok Sabha that seeks to develop an efficient legal framework to safeguard refugees and asylum seekers. According to the bill, India is home to more than two lakh refugees from neighbouring countries such as Tibet, Bangladesh, Sri Lanka, Afghanistan, Myanmar, and Nepal. The Asylum Bill of 2021 proposes to create a legal framework for determining asylum requests, as well as rights and obligations arising from such status and

---

<sup>7</sup> MINT, <https://www.livemint.com/opinion/online-views/refugee-protection-in-india-calls-for-the-adoption-of-a-specific-law-11635353951190.html>, (last visited on April 10, 2022).

topics related to it. While balancing humanitarian concerns and the State's security interests, the proposed bill aims to include the current policy on refugees, Constitutional principles, and India's international obligations.<sup>8</sup>

### **Judicial Approach**

Indian judiciary has been rising up to protect refugees from deportation, expulsion, and forced repatriation on a regular basis. India's Constitution protects the rights of all those living inside its borders, whether citizens or non-citizens. As a result, Indian courts have expanded the scope of constitutional rights in light of India's international human rights commitments. Article 14 guarantees protection from discrimination and arbitrary action, whereas Article 21 guarantees the right to life and liberty.

The Supreme Court has repeatedly recognised and acknowledged the predicament of deported refugees. In judgments like *Malavika Karlekar vs. Union of India*, *Luis De Raedt vs. Union of India*, and *State of Arunachal Pradesh vs. Khudiram Chakma*, the Supreme Court has underlined that no refugee shall be treated in a manner that deprives them of their right to life or liberty without due process of law.

The Indian Constitution includes various safeguards for foreigners, including the right to life, which is guaranteed to both foreigners and Indian citizens under Article 21 of the Indian Constitution. The Supreme Court of India has handed down several landmark decisions on refugee deportation, including *Maiwand's Trust of Afghan Human Freedom vs. State of Punjab* and *ND Pancholi vs. State of Punjab & Others*.

Nonetheless, the Supreme Court's decision in 2021 to allow the repatriation of over 170 jailed Rohingya refugees from India was a step in the wrong direction. It was based on the government's

---

<sup>8</sup> *The Hindu*, <https://www.thehindu.com/opinion/lead/india-needs-a-refugee-and-asylum-law/article65063388.ece>, (last visited on April 12, 2022).

---

assertion that they were a threat to the country's internal security.

### **International Perspective on Asylum and Refugee Law**

Refugee law and international human rights law have a lot in common in terms of content, yet they serve different purposes. The major distinction between their functions is that international refugee law takes state sovereignty into account, but international human rights law does not. Non-refoulement is one of the most important tenets of international refugee law, which states that a government cannot send a person back to their place of origin if they may face danger there. In this instance, a country's sovereignty is eroded to some extent. This fundamental right of non-refoulement clashes with a sovereign state's fundamental right to deport any unauthorised aliens. Customary law, peremptory standards, and international legal instruments all fall under the umbrella of international refugee law.<sup>9</sup>

The principle of non-refoulement under human rights law declares prohibits refoulement in international refugee law and guarantees universal human rights that all refugees should be aware of:

- Admission of asylum-seekers and refugees to the territories of States;
- Asylum-seekers' and refugees' access to fair and effective processes for determining their status and protection needs;
- Asylum-seekers' and refugees' rapid, unhindered, and safe access to UNHCR;
- The treatment of asylum-seekers and refugees in accordance with applicable human rights and refugee law standards;

---

<sup>9</sup>*Duke Law Scholarship Repository*, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djil> (last visited on 13 April 2022).

- The responsibility of host states to protect the civilian, peaceful, and humanitarian nature of asylum; and
- The responsibility of refugees and asylum-seekers to respect and abide by host state laws.

The 1951 Refugee Convention and its 1967 Protocol: the key legal documents

The United Nations High Commissioner for Refugees (UNHCR) is the 'custodian' of the 1951 Convention and its 1967 Protocol. States are expected to work and to ensure that the rights of refugees are respected and protected, according to the law.

Article 33(1) 1951 Refugee Convention, expulsion or return of refugees and asylum seekers is prohibited if their lives or freedom are threatened as a result of their race, religion, social group membership, political opinion, or nationality.

As refugee crises arose around the world in the 1950s and early 1960s, it became evident that the 1951 Convention's temporal and geographical scope needed to be expanded. This was accomplished through the adoption of the 1967 Protocol to the Convention. The 1967 Protocol exists independently of the 1951 Convention, albeit it is inextricably linked to it. The Protocol eliminates the Convention's time and geographic limitations. States undertake to apply the fundamental content of the 1951 Convention (Articles 2–34) to all persons covered by the Protocol's refugee definition, without regard to time or place, by signing the Protocol. States can sign both the Convention and the Protocol, but they must do so separately. The majority of states have chosen to ratify both the Convention and the Protocol, as both accords are essential to the international refugee protection system. The Convention has been ratified by 145 countries, while the Protocol has been ratified by 146 countries. The 1951 Convention and 1967 Protocol are the current manifestations of the age-old institution of asylum. Their strength stems from their universal and non-discriminatory nature, as well as the basic ideals they represent.

### **The Universal Declaration of Human Rights (UDHR)**

Article 14 of the Universal Declaration of Human Rights provides an individual with the right to seek asylum in any country to avoid persecution. As stated in clause 2 of Article 14, anyone with a criminal record that is incompatible with UN principles is not eligible for refuge, and asylum might be denied for non-political reasons. It is regarded as the most important law. India, on the other hand, is not a party to it.

### ***Other Regional Declarations for Asylum Seekers and Refugees***

States in many regions of the world have adopted regional laws and norms to supplement the international refugee protection regime in order to adapt to regional specificities.

### ***New York Declaration for Refugees and Migrants***

The New York Declaration for Refugees and Migrants deals with the problems that refugees and migrants' encounter. There are strong obligations for both refugees and migrants (on issues such as racism, xenophobia, and human trafficking), as well as specific commitments for refugees and migrants. In addition, the New York Declaration establishes the framework for future action to improve the status of refugees and migrants by establishing a mechanism for the establishment of two "global compacts," one for refugees and the other for safe, orderly, and regular migration. The 'right to seek asylum' and an individual's freedom to leave or return to their country were also reaffirmed by the UN General Assembly in 2016.

### ***The European Union's Charter of Fundamental Rights***

The Charter is based on the European Convention on Human Rights (ECHR), the European Social Charter, and other human rights conventions, as well as EU Member States' constitutional traditions and case law. Article 18 of the European Union's Charter of Fundamental Rights further states that the right to asylum is guaranteed under the Geneva Convention (28 July 1951) and its 1967 Protocol.

# Understanding Immigration Laws: Global Issues & Challenges

Edited by

**Dr. Katiyani Juneja Sharma**

Assistant Professor,  
ICFAI Law School, IFHE, Hyderabad

---

ALT Publications, Hyderabad

## **Understanding Immigration Laws: Global Issues & Challenges**

© 2022 The Icfai Foundation for Higher Education (IFHE). All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means – electronic, mechanical, photocopying or otherwise – without prior permission in writing from the IFHE University.

While every care has been taken to avoid errors and omissions, the information given in the book is merely for reference and must not be taken as having authority of or being binding in any way on the authors, editors, publishers or sellers.

Other than the publisher, no individual or organization is permitted to export this book from India.

The ideas, concepts and contents discussed or originated from the authors only. Neither the editor nor the publisher takes any responsibility for mis-interpretation, misrepresentation of the rules, acts and provisions of the legislations.

**Edition: 2022**

Printed in India

**ISBN: 978-93-92347-24-5**

Published by

**ICFAI Law School**

**The Icfai Foundation for Higher Education (IFHE)**

**(“Deemed-to-be-University” under Section 3 of the UGC Act, 1956)**

Donthanapalli (Vill), Shankarpalli, Hyderabad, R.R. Dist – 501504 (A.P)

**Phone:** 08417-236817-18, **Fax:** 08417-236083. **Website:** [www.ifheindia.org/foi](http://www.ifheindia.org/foi)

**Email:** [facultyoflaw@ifheindia.org](mailto:facultyoflaw@ifheindia.org).

---

*The views and content of this book are solely of the author(s)/editor(s). The author(s)/editor(s) of the book has/have taken all reasonable care to ensure that the contents of the book do not violate any existing copyright or other intellectual property rights of any person in any manner whatsoever. In the event the author(s)/editor(s) has/have been unable to track any source and if any copyright has been inadvertently infringed, please notify the publisher in writing for corrective action.*