

Refugee recognition challenges in India

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India has repeatedly signalled its continued commitment to refugee protection and yet its dual system of refugee recognition presents a complex protection picture.

In a rare dual system, refugee status determination (RSD) in India is divided between the government and UNHCR. Asylum seekers arriving from non-neighbouring countries, plus Myanmar, are required to approach UNHCR for the determination of their status and for documentation. UNHCR in India conducts RSD for them in line with the 1951 Refugee Convention (to which India is not a signatory) and its own internal guidelines, sharing the list of asylum seekers and refugees it has recognised with the Ministry of Home Affairs (MHA). However, the fact that UNHCR is not permitted to set up registration centres at the borders places the onus on arriving asylum seekers to find out about the asylum process and travel to New Delhi – the location of UNHCR India's only office that conducts RSD and provides protection services – to make a claim.

Those from neighbouring South Asian countries, with whom the State has sensitive relations, are required to approach the MHA directly. The procedure for doing so and the decision criteria adopted by the MHA in such cases are not publicly available. In the past, refugees arriving in significant numbers, such as Tibetans and Sri Lankans (from 1955 and 1984, respectively), were offered temporary protection by the government in camps and settlements, and India has been internationally lauded for its treatment of these refugees. However, for more recent arrivals there are no clear policy guidelines from the government, other than sporadic internal directives for MHA officials.

Legislative framework

In the absence of a defined legal framework, refugee protection in India has traditionally been based on arbitrary executive policies, complementary legislation and judicial pronouncements. Until very recently, the

only legislation relevant to international migration was the Foreigners Act of 1946 and the Passports Act of 1967, which govern the entry, stay and exit of foreigners (defined as non-citizens). Unfortunately, these laws give wide powers to detain and deport foreigners for illegal entry and stay, and accord no differential treatment for refugees, thereby making them, too, vulnerable to detention and deportation.

In the absence of dedicated legislation, Indian courts have in certain instances allowed detainees with a *prima facie* asylum claim to approach UNHCR for RSD. This, however, is the exception rather than the rule, and such interventions are not governed by any set criteria but made on a case-by-case basis. Moreover, this process is further complicated when the asylum seeker is from one of the countries where asylum claims fall under the mandate of the Indian government, since UNHCR has no designated authority to adjudicate on such asylum claims. As a result, asylum seekers from this group of countries may be even more likely to remain in detention, given the lack of avenues for them to make an asylum claim.

Those who are recognised as refugees by UNHCR are issued with an identity card, but these are not widely recognised by State authorities (in contrast with the widely recognised documentation issued by the government to refugees who fall under its mandate). Having UNHCR-awarded refugee status therefore does not provide refugees with sufficient protection because a lack of recognition of their documentation means they cannot always access health care, education or other basic rights. Because of widespread lack of awareness of UNHCR or its role in India, those with UNHCR-issued documentation are often still seen by authorities as illegal residents.

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Notably, Indian courts have over the years stepped in and recognised refugees as a distinct class of ‘foreigners’, and have extended basic constitutional protection to them. For example, in a landmark case the Supreme Court of India extended the right to life and equality to refugees, albeit to a limited extent.¹ Courts have also instructed immigration authorities to strictly adhere to due process principles in deportation cases and have sought intervention from UNHCR to conduct RSD and determine the detainee’s asylum claim.² And, by invoking complementary legislations such as the Right to Education Act, which allows all children (regardless of legal status) to be enrolled in government schools, refugees have been allowed access to essential socio-economic rights.³ However, most judicial pronouncements of this kind have come from lower courts and do not have the same value as a precedent set by a Supreme Court ruling; furthermore, most are case-specific and cannot be applied as a general principle. A law on refugee management would go further than a court judgement in meaningfully extending legal protection to refugees, particularly the most vulnerable.⁴

India and the GCR

India’s fairly uninhibited endorsement of the 2018 Global Compact on Refugees (GCR) was, against this background, a welcome commitment. Although not a legally binding instrument (which may of course have played a considerable role in its being accepted by many countries, including India), the GCR does provide some kind of ‘wish list’ for refugee protection, against which governments may be called

to account. While it does not contain any specific provision for RSD, the GCR does explicitly mention the need to have mechanisms in place for identification and registration of refugees and for the fair and efficient determination of individual asylum claims. More concretely, it led to UNHCR



Refugee children from Myanmar learning English and Hindi at a UNHCR daycare centre, New Delhi, India. Why are their eyes pixelated? See FMR photo policy www.fmreview.org/photo-policy

establishing an Asylum Capacity Support Group to provide technical expertise to those States that request it, in order to help their asylum system to achieve fairness, efficiency, adaptability and integrity. This is a clear statement of UNHCR’s oft-repeated position that RSD is part of the State’s exercise of its sovereign power and that UNHCR’s objective is to facilitate national asylum determination systems wherever possible.

So far, however, the Indian government has expressed no known intention of taking over those RSD functions that are currently undertaken by UNHCR, and allows UNHCR to conduct its processes under the terms of the Memorandum of Understanding that exists between the two parties. In fact, given the general neglect of refugee issues at a political level and among

the general public, the Deportation Order issued in August 2017 – which called for the mass deportation of all Rohingyas within India – came without warning.⁵ It made no mention of their access, as people coming from Myanmar, to UNHCR refugee status, nor did it distinguish between refugees who had already been recognised and those who had not yet been issued documentation by UNHCR. It also demonstrated that the Indian government attaches little legal value to the refugee status awarded by UNHCR.

Refugee issues recently came to the fore in the realm of public discourse in the wake of amendments made in December 2019 to India's citizenship laws, which sparked nationwide citizen-led protests.⁶ The new law allows all religious minority groups except Muslims from Afghanistan, Bangladesh and Pakistan to apply for citizenship, affecting both government-mandate and UNHCR-mandate refugees. Ironically, this is India's first legislation seeking to extend protection to refugees. However, the amendments did not also clarify the criteria for the granting of refugee status and, as a result, asylum management and RSD processes remain shrouded in ambiguity.

The erosion of the legitimacy accorded by the government to the UNHCR-mandate RSD process is also in evidence in the general deterioration in protection conditions. Where previously UNHCR-mandate refugees could find employment in India's vast informal economy, in recent years this has become increasingly difficult due to the restrictions placed by the government on employing persons without government-issued documentation; similarly, even simple economic activities like renting a house or buying a SIM card have become virtually impossible. While in 2012 the government allowed UNHCR-mandate refugees to apply for a special category visa called the Long Term Visa,⁷ which allows the holder to access tertiary education and be employed in the private sector, its issuance is arbitrary and severely restricted, and there has been no move by the government to allow refugees to access other forms of documentation that would simplify their day-to-day lives.

These events, which have played out over the last three years or so, have also coincided with what, according to our experience and analysis of RSD trends, seems to be a more cautious approach to RSD on the part of the New Delhi UNHCR office whose recognition rates have steadily decreased and case-processing timelines become far longer, without any proportionate increase in refugee arrivals.

Against this backdrop, the COVID-19 pandemic has brought RSD to a grinding halt in India. With infections rising at an alarming rate at time of writing, there currently seems to be little possibility of resuming registration and RSD activities at pre-pandemic levels any time soon. This will leave many refugees without access to even the basic protection against detention and deportation that is offered by UNHCR-mandate documentation. In the interim, the real need is for both domestic and international advocacy with the Indian government to ensure that it lives up to its GCR commitments and humanitarian obligations.

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India www.migrationandasylumproject.org

1. *National Human Rights Commission v State of Arunachal Pradesh and Anr*, 9 January 1996, 1996 SCC (1) 742

2. *Ktaer Abbas Habib Al Qutaifi and Ors v Union Of India (Uoi) and Ors*, 12 October 1998

3. *Gulsher v Govt of NCT of Delhi and Anr*, 17 October 2019 W.P.(C) 10833/2019 & CM No.44817/2019

4. M.A.P has been closely involved in the only draft bill yet to be introduced, The Asylum Bill, 2015. As a Private Member's bill introduced by a member of the opposition party this is, however, unlikely to be adopted.
<http://164.100.47.4/billtexts/lbills/lbills/asintroduced/3088LS.pdf>

5. Ministry of Home Affairs, Government of India 'Identification of illegal migrants and monitoring thereof – regarding', 8 August 2017. bit.ly/Gov-India-illegal-migrants-2017. Litigation against this order remains pending in the country's Supreme Court.

6. Ministry of Law and Justice (2019) 'The Citizenship (Amendment) Act, 2019'
<http://egazette.nic.in/WriteReadData/2019/214646.pdf>

7. Ministry of Home Affairs (2017) 'Long Term Visa Policy & 2011 Standard Operating Procedure'
https://mha.gov.in/PDF_Other/AnnexVI_01022018.pdf