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ON REFUGEES AND EXILES

CONSEIL EUROPEEN
SUR LES REFUGIES
ET LES EXILES

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**GUIDELINES FOR THE TREATMENT OF AFGHAN
ASYLUM SEEKERS & REFUGEES IN EUROPE
May 2004**

Introduction

1. The European Council on Refugees and Exiles (ECRE) is a network of 76 organisations in 30 European countries. This paper is an update of our Guidelines on the treatment of Afghan asylum seekers and refugees in Europe of April 2003¹. It takes into account the latest developments in the country, the work of the Afghan Transitional Administration in Kabul and the changes to the overall situation in Afghanistan in the twenty-nine months since the signing of the Bonn Agreement.
2. This paper concerns the voluntary repatriation of Afghans who have refugee or complementary protection status, those with temporary protection status and those who are in the process of applying for protection, including those who have received a negative first decision and have appealed. It also concerns the mandatory return of Afghans whose application has failed, and those whose protection status has ceased or ended after they have had effective access to the asylum system.
3. Throughout Europe the treatment of Afghans seeking international protection continues to vary considerably. In some European countries the number of negative decisions has increased, although applications continue to be considered on an individual basis. Some countries have begun to implement voluntary repatriation schemes, a number in conjunction with IOM, which provide transport costs, resettlement grants and in certain cases 'explore and prepare' visits. Tripartite agreements have been concluded with the Afghan authorities and UNHCR to encourage voluntary repatriation².
4. Reports from NGOs and international organisations continue to emphasise that the country remains unsafe and that there is insecurity in large areas of the country with various groups continuing to suffer persecution. ECRE urges that Afghan refugees be provided with protection in compliance with international human rights and refugee law

¹ *Guidelines for the Treatment of Afghan Asylum Seekers and Refugees in Europe, April 2003*. See also *Guidelines for the Treatment of Afghan Asylum Seekers and Refugees in Europe, February 2002*

² For example the Tripartite Agreements between: Afghanistan, Iran and UNHCR, April 2002; Afghanistan, France and UNHCR, October 2002; Afghanistan, UK and UNHCR, October 2002; Afghanistan, Pakistan and UNHCR, March 2003; and Afghanistan, the Netherlands and UNHCR, March 2003

principles. Host governments should also provide Afghan refugees with accurate information about conditions in their home areas³. Applications from Afghan asylum seekers must be dealt with on an individual basis. We would recommend against a presumption that applications are manifestly unfounded on the basis of the establishment of the Afghan Transitional Administration, the ratification of the new Afghan Constitution, or the formation of internal human rights bodies. The rule of law and the protection of basic human rights is still lacking in Afghanistan⁴.

5. We would recommend that gradual voluntary return should be the focus for a European return programme to Afghanistan. We are against the promotion of voluntary repatriation as a durable solution at the present time as the conditions of “safety and dignity” cannot be upheld. Therefore voluntary repatriation should only be facilitated at present for those who have indicated a desire to return.
6. Afghans who fail to be granted refugee or a form of complementary status cannot be returned at present or until there is a basic infrastructure in place to uphold the rule of law and protect human rights in Afghanistan, and should be granted a legal status which affords them their human rights and a dignified standard of living in the host country. For those without a legal right to remain who indicate a desire to return, return should be facilitated.
7. Appropriate planning and coordination are essential for ensuring that returns from European states do not trigger forced returns to Afghanistan from countries in the region or further destabilisation within Afghanistan.
8. It is imperative that European governments should continue to fund the reconstruction process in Afghanistan regardless of humanitarian priorities that arise elsewhere.
9. This paper should be read in conjunction with ECRE’s Positions on Return, on the Interpretation of Article 1 of the Refugee Convention, and on Complementary Protection, and in light of other ECRE policy statements⁵.

I – THE DUTY OF PROTECTION FROM PERSECUTION

The situation on the ground

10. Despite the establishment of an Afghan Transitional Administration, the ratification of a new constitution and the beginning of reconstruction efforts by the international community, the security situation in Afghanistan remains extremely serious. This is confirmed by media reports, information provided by governments⁶, and reports from the

³ As Human Rights Watch reports, “Afghanistan is still too unsafe for many refugees, and many have signed up to return without an accurate picture of conditions in their homeland”, in “Afghanistan: Security Must Precede Repatriation”, 8 August 2003

⁴ Outgoing Special Representative of the UN Secretary General, Lakhdar Brahimi, warned in his closing address to the Loya Jirga on 4th January of “the insecurity that we don’t see much of in the press: the fear that is in the heart of practically every Afghan because there is no rule of law yet in this country”, as quoted in “Afghanistan: Monthly Review, December 2003”, British Agencies Afghanistan Group (BAAG) <http://www.baag.org.uk/>

⁵ In particular, *Position on Refugee Children* (1996) and *Position on Asylum Seeking and Refugee Women* (1997)

⁶ See for example “Operational Guidance note - Afghanistan Version 2 - February 2003” (UK Home Office)

UN⁷ and NGOs⁸. With the government having little authority outside Kabul or even within the capital, it is the local power holders, who greatly outnumber the Afghan soldiers, who essentially have control over the country⁹. This fragmented power holding situation has produced factional fighting, activities associated with the illegal narcotics trade and unchecked criminality, compounded by an orchestrated campaign by the Taliban and other radical elements to use terrorist activity to undermine what is seen as a US-led state-building process. In a pattern that is also evident in Iraq, individuals engaged in the reconstruction process have been targeted, including aid workers, construction workers and members of the new Afghan National Army and police.

11. A number of events in recent months are indications of the unstable security situation. In the third week of November 2003 the UN dramatically scaled back its operations¹⁰ and a large number of other relief and reconstruction operations were put on hold following the assassination of a UNHCR staff member in Ghazni. In March 2004, Afghan aviation minister Mirwais Sadiq was killed during factional fighting in Herat, where his father is governor. Others killed in targeted assassinations include four members of the Danish NGO DACAAR, four staff of a demining NGO (OMAR) and five employees of a development NGO (Sanayee Development Foundation)¹¹. The extremely unstable situation in Afghanistan hampers the ability of UN organisations and NGOs to provide development aid and humanitarian relief. Travel on many roads remains unsafe with ongoing extortion by local militia or criminals (often one and the same). Humanitarian and development agencies can no longer operate in much of southern Afghanistan to support the reconstruction efforts of returning refugees.
12. In Kabul, the security and human rights situation has been, to a limited degree, alleviated by the presence of the International Security Assistance Force (ISAF) and by the significant international presence in the capital. However, the Afghan government continues to lack effective control over Kabul, and efforts to create a new national army and police force and to reform the judicial system throughout the country remain at an embryonic stage. It is clear from human rights and other reports that the militia, which carry out the primary policing function in the capital, offer the population no protection from human rights abuses¹². Beyond Kabul, the absence of an effective system of law and order means that the various power holders can act with impunity. The population at

⁷ See report of the Secretary-General to the United Nations General Assembly and the Security Council, "The Situation in Afghanistan and Its Implications for International Peace and Security", 30 December 2003, in particular paragraphs 5-11

⁸ See for example the Human Rights Watch report *Killing You is a Very Easy Thing For Us: Human Rights Abuses in Southeast Afghanistan*, July 2003

⁹ In 2002, less than one fifth of donor funding fell under government control. Aid continues to be provided to militia leaders. See CARE policy brief *A Little Less Talk, A Lot More Action*, October 7, 2002

¹⁰ including the temporary suspension of repatriation assistance to refugees returning from Pakistan

¹¹ Other incidents include an attack on Afghan Red Crescent workers in Ghazni and on Mercy Corps staff in Helmand, and a rocket attack on a UNHCR office in Eastern Afghanistan that led to the suspension of operations in Kunar Province and stricter security guidelines for UNHCR staff in southern and south-eastern provinces, "Afghanistan, Humanitarian Update No. 68", UNHCR, 15 August 2003

¹² This is illustrated by the belated agreement, on 3rd December 2003, of Northern Alliance military leader and Defense Minister General Muhammad Fahim to remove his militia and heavy arms from Kabul, as called for under the Bonn Agreement. As the British Agencies Afghanistan Group (BAAG) states, "His failure to do so, to date, has been a major cause for concern and Human Rights Watch and others have commented on the climate of impunity that has existed in Kabul, as elsewhere in the country", in "Afghanistan: Monthly Review, December 2003"

large is thus subject to the arbitrary use of power and the government is not in a position to accord protection from abuses of such power. Allegations continue that communities are often deprived of their basic rights and are victims of serious human rights abuses, sometimes by the police themselves¹³.

13. Continuing efforts are being made by the international community to help build a new Afghan National Army and police, yet the Afghan Transitional Administration has very little capacity to seriously address the prevailing insecurity or to impose its authority. Requests for an expansion of the International Security Assistance Force (ISAF) beyond Kabul have resulted in an amended mandate from the UN but it will take time for NATO, which oversees ISAF, to find sufficient resources for more than a gradual expansion.
14. Although some progress has been made since the Bonn Agreement to help rebuild the Afghan state, the infrastructure remains at an extremely basic level. Education expansion, while encouraging, is far from adequate. Health services are extremely limited, and few signs of major investment in the economy make a boost in employment unlikely. The illegal economy, based partly on opium production, threatens to undermine the stability of the government, as does the Taliban threat from the south. Serious problems persist with regard to limited water availability and food supply due to years of drought, high dependency on international food aid, and the presence of millions of mines in homes, fields and irrigation systems. Progress on the developmental front has been greatly hindered by the need to address the effects of the serious drought of 1999-2002.
15. It should also be noted that the position of women has changed little despite the lifting of formal legal restrictions on their movement by the Kabul government or the provisions of the new Constitution. They suffer frequent harassment in public places, affecting access to education, health facilities, jobs and leisure. In a number of areas women rarely go out in public¹⁴. Domestic violence is widespread and there are no effective mechanisms to seek assistance or redress. Despite its illegality, girls as young as nine years old are married without intervention by the government. Returning female head of households or single females without family to return to will have no means of supporting themselves in Afghanistan.

Recommendations

16. ECRE urges European states to give immediate consideration to all asylum applications from Afghans and to consider these on an individual basis in order to identify and recognise their status as early as possible. This should include either refugee status in accordance with the 1951 Convention Relating to the Status of Refugees or a complementary protection status for those who fear persecution but fall outside a full and inclusive interpretation of the terms of the 1951 Convention. Afghans who despite all of

¹³ Due to the absence of accountability structures, many police are not held to account for their actions. See the Human Rights Watch Report *Killing You is a Very Easy Thing For Us: Human Rights Abuses in Southeast Afghanistan*, in particular "Section III: Abuses Against Civilians by Police, Military Forces, and Former Fighters", July 2003

¹⁴ See *Afghanistan: 'No One Listens To Us and No One Treats Us As Human Beings': Justice Denied to Women*, Amnesty International, October 2003. According to Human Rights Watch in Herat, there have been instances of women being arrested, taken to hospital and subject to abusive gynaecological examinations if found walking in the street with men or riding in a taxi without another passenger, *We Want To Live As Humans: Repression of Women and Girls in Western Afghanistan*, Human Rights Watch, December 2002

these factors fail to be granted refugee or a form of complementary status cannot be returned and should be granted a legal status which affords them their human rights and a dignified standard of living in the host country. We would recommend against a presumption that applications are deemed to be manifestly unfounded on the basis of the establishment of the Afghan Transitional Administration or the ratification of the new Afghan Constitution.

17. ECRE considers that certain categories of individuals amongst the Afghan population may have ongoing protection needs that remain unchanged despite recent political developments in Afghanistan. These groups include:

- Pushtuns, who have suffered violence and harassment in the northern provinces because of their perceived allegiance to the Taliban. Some 60,000 Pushtuns are said to be present in the southern provinces refusing to move back for fear of persecution.
- Many former members of the former ruling communist party PDPA and the agents of the secret service KhADD who still fear violence, harassment and discrimination for their roles in the communist government, despite the co-operation of many with the new administration.
- Former members of the Taliban, many of whom will have been forcibly recruited, who may be at risk from the Northern Alliance.
- Religious groups in areas where they constitute minorities at risk of persecution including Hindus, Sikhs, Shiites, Sunnis and Ismailis.¹⁵
- Groups at risk of forced recruitment, which is still being carried out by militia groups in the North, with reports of executions of those refusing recruitment.¹⁶
- People at risk of persecution on grounds of sexual orientation.¹⁷
- Journalists who have been receiving anonymous threats, for example in Kabul and Herat.¹⁸
- Others who fear that they would be victims of violence, in a situation in which there is no law or order, on the basis of a settling of old scores.
- Women and girls who suffer gender-based persecution such as forced marriages.

18. For people facing persecution an internal protection option is not a viable alternative to granting asylum, as has been suggested by some governments, and would not provide effective protection. It should be stressed that the individual cannot settle somewhere without family protection. After twenty years of conflict and a continuing climate of fear, there is intense suspicion of strangers that would put a new arrival at risk. In the prevailing climate of impunity, those taking the law into their own hands would have no fear that they would be held to account.

¹⁵ At the end of 2002, 170 Ismailis were jailed for several weeks, when they tried to travel to Kabul to welcome home their leader (who fled to Uzbekistan, when the Taliban took over)

¹⁶ see United Nations Commission on Human Rights, Civil and Political Rights, Including the Question of Disappearances and Summary Executions report of the special rapid to Asma Jahangir, 3rd February 2003

¹⁷ Homosexuality continues to be illegal in Afghanistan under Sharia law and is therefore subject to legal sanctions.

¹⁸ See The Committee to Protect Journalists protest letter on the assault, detention and expulsion of a journalist from Herat. See also "Sharp Rise in Press Attacks in Afghanistan: Security Forces Threatening and Arresting Journalists", Human Rights Watch press release, May 2003

II – THE NEED FOR CO-ORDINATED AND STAGED RETURNS

19. European governments need to be aware that the situation in Afghanistan remains highly volatile and unpredictable. Although there are differences from one part of the country to another, in security and political terms as well as with regard to economic survival, the overall situation is far from being conducive to the safe and dignified return of refugees. The implementation of the Council of the European Union's Afghanistan Return Plan¹⁹ must fully take into account the instability in the country and the fact that the safety of returnees can in no way be guaranteed. Everything points to the need for a careful and staged approach to returns by European countries.²⁰
20. The continued pressures from Pakistan and Iran on Afghan refugees to return place a further strain on a fragile infrastructure and have required a substantial allocation from scarce reconstruction funding. During 2002 and 2003, many of the returning Afghan refugees returned again to Pakistan and Iran because the conditions within Afghanistan were not conducive to their survival in safety and dignity. The difficult economic environment has led to an increasing number of refugees and internally displaced persons opting to live in the capital, placing a significant strain on the service infrastructure. Many have faced difficulties related to land ownership and tenure²¹. As of August 2003, UNHCR estimated that there were 210,000 Afghans internally displaced²².
21. In addition, UNHCR is not in a strong position to monitor what happens to returning refugees or to ensure the protection of those who have good reason to fear human rights abuses or who have suffered such abuses²³. The law and order infrastructure remains too weak to facilitate effective intervention and there are large areas of the country where insecurity makes access for protection staff virtually impossible.

Recommendations

22. ECRE would urge that gradual voluntary return should be the focus of any European return plan to Afghanistan. By definition, voluntary return involves individuals freely choosing to repatriate without pressure from the host state and with their genuine consent. The imposition of sanctions on individuals to coerce them to return, such as the removal of socio-economic benefits, does not constitute voluntary return. The decision to return must be a personal one, each individual member of a returning family must agree to the decision and not only heads of households or community leaders. The right to asylum must also be safeguarded, such that individuals with legal protection status continue to receive the protection of the host country, or in the case of asylum seekers and their families, to pursue their applications if they decide not to return.

¹⁹ Council document on an Afghanistan return plan, doc No 14654/02 MIGR 124 RELEX 248, December 2002

²⁰ As Medecins Sans Frontieres - Holland reports in its letter to the Dutch government, "The absorption capacity of Afghanistan's infrastructure - which remains largely devastated by 23 years of war - has been surpassed, and enforcing further returns would only worsen the humanitarian situation and foster instability", 29 March 2004

²¹ UNHCR Donor Update, Afghanistan, March 2003. See also "UN calls for countries to reconsider forced repatriation to Afghanistan", 30 November 2003

²² UNHCR, Afghanistan Humanitarian Update No. 68, August 15, 2003

²³ As UNHCR spokeswoman Maki Shinohara reports, "We appeal to asylum countries to consider seriously our reduced capacity to monitor situations in many provinces in the country", in "UN calls for countries to reconsider forced repatriation to Afghanistan", 30 November 2003

23. For those with protection status at the present time, voluntary repatriation should only be “facilitated” and should not be “promoted”²⁴. Facilitating voluntary repatriation by the host states implies supporting and enabling individuals wishing to repatriate, but not promoting the repatriation of the particular nationality or ethnic group involved. We would urge that a meaningful distinction is made between promotion and facilitation and that pressure is not exerted on refugees to return²⁵. Promotion of voluntary repatriation can only take place when an assessment of the situation in Afghanistan shows that the necessary conditions of return in safety and dignity including “physical, legal and material safety” exist²⁶.
24. ECRE recommends that the voluntary return of Afghans who fail to be granted refugee or a form of complementary status is only facilitated and that such persons are provided with a similar level of support as persons with legal status choosing voluntary repatriation.
25. The Council of the European Union’s Return Plan recommends that forced return should only take place “after the passage of reasonable time”²⁷. We would recommend that the reasonable time for such returns would be when a basic infrastructure is in place in Afghanistan to uphold the rule of law and protect the human rights of Afghans and when the country is in a stable enough position to absorb the number of people who have already returned. These conditions do not exist at present. Furthermore in order to ensure the success and sustainability of return programmes all attempts must be made to elicit the individual’s consent and co-operation prior to the return process taking place.
26. The success of return programmes to Afghanistan should be linked to and measured by the sustainability of return, not the scale or numbers of people returned. The return of large numbers of people to an already unstable situation where more than 3 million Afghan refugees and internally displaced persons have returned over the past three years²⁸ risks further exacerbating instability and might lead to further internal displacement and to large groups being forced to leave once again. There is evidence that previous returns, in particular 261,000 from Iran and 1.5 million from Pakistan, were not in fact voluntary and that a great deal of pressure was exerted by these governments, including police harassment and the removal of socio-economic benefits²⁹. These returns may not therefore be sustainable; in fact humanitarian organisations in Pakistan have reported that a number of repatriated refugees who were unable to support themselves in Afghanistan have been returning. This may potentially amount to tens if not hundreds of thousands.

²⁴ Promotion of repatriation is defined by UNHCR as “the practical measures which can be taken to help refugees return voluntarily once the conditions for this exist” and “actively undertaking broad and wide-ranging measures to advocate refugees’ return”.

²⁵ UNHCR defines “facilitation” as respecting the refugee’s right to return to their country at any time, when they have indicated a “strong desire to return voluntarily and/or have begun to do so on their own initiative”.

²⁶ As stated in the Global Consultations on International Protection, fourth meeting, 25 April 2002, EC/GC/02/5, paragraph 15. These concepts are also defined in UNHCR Handbook on voluntary repatriation (1996), supra 10, paragraph 2.4

²⁷ See note 24, paragraph 11, Council document on an Afghanistan return plan, doc No 14654/02 MIGR 124 RELEX 248, December 2002

²⁸ UNHCR, “Kabul Press Briefing: 8 April 2004”

²⁹ See the Afghanistan Research and Evaluation Unit report, *Taking Refugees For a Ride? The Politics of Refugee Return to Afghanistan*, 3 February 2003

27. ECRE supports the statement made by Ruud Lubbers, the United Nations High Commissioner for Refugees at the 54th session of the Executive Committee of the High Commissioner's programme where he stated that, "The key now is to speed up rehabilitation and reconstruction efforts. This is vital for the stability of the country and it will largely determine the pace of future returns. The international community must stay engaged if the return and reintegration process is to succeed in the long term"³⁰.
28. It is imperative that international support for the reconstruction of Afghanistan should continue regardless of humanitarian concerns that arise elsewhere. The international community, and in particular the EU, must play a full and active role in the reconstruction of Afghanistan. The reconstruction process can only properly begin once aid is not being used for emergency relief to support large groups of people returning to Afghanistan.
29. European states must be made aware of the impact of their returns policies on the ground in Afghanistan and on countries in the region hosting the majority of Afghan refugees (Pakistan and Iran). Appropriate planning and coordination are essential for ensuring that returns from European states do not trigger forced returns to Afghanistan from countries in the region or further destabilisation within Afghanistan.
30. Returnees should be given the necessary information to make an informed choice, which should include access to information from friends and relatives living in communities in Afghanistan whom returnees are most likely to trust. Information should cover whether or not guarantees for safe and sustainable return have been met and also the rights guaranteed there, as well as possibilities regarding the right to remain in the host country. Returnees should also be entitled to undertake "explore and prepare" visits to Afghanistan to assess whether it is realistic to return, while retaining their Convention or complementary protection status in the country of asylum. They should be given time to commit to the repatriation process and prepare to return.

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For further information contact the European Council on Refugees and Exiles (ECRE) at:

**103 Worship Street
London EC2A 2DF
United Kingdom
Tel +44 (0) 20 7377 7556
Fax +44 (0) 20 7377 7586
e-mail ecre@ecre.org**

**205 rue Belliard
Box 14
1040 Brussels
Belgium
Tel +32 (0)2 514 59 39
Fax +32 (0)2 514 59 22
e-mail eucre@ecre.be**

<http://www.ecre.org>

³⁰ Geneva, 29 September 2003