

CHRI 2018

A BASIC GUIDE

DEFENDING ASYLUM SEEKERS IN DETENTION



CHRI

Commonwealth Human Rights Initiative
working for the *practical* realisation of human rights in
the Commonwealth

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A Basic Guide

What is the difference between an asylum seeker and a refugee?

The 1951 *United Nations Convention Relating to the Status of Refugees* (hereinafter referred to as the Refugee Convention) defines a refugee as a person who, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his/her country of origin and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of his/her country of origin.

Thus, an asylum seeker is a person who has sought protection as a refugee, but whose claim for refugee status has **not yet been assessed**. When a person flees his/her country for fear of persecution and seeks sanctuary in another country, he/she applies for asylum.

International refugee law regards the asylum-seeker as a '*presumptive refugee*'. A *bona fide* asylum seeker is to be given the benefit of doubt and afforded all the rights of a refugee until his refugee claim is conclusively rejected by a competent authority.

Is there a criterion for being categorised as a refugee?

In order to be categorised as a refugee, a person must fulfil the following criteria:

- i. There must exist a fear of persecution or human rights violations against the person in his/her country of origin.
- ii. The fear of persecution must be well-founded, i.e., it must have an objective and subjective basis.
- iii. The persecution must be for reasons of
 - (a) Race,
 - (b) Religion,
 - (c) Nationality,
 - (d) Membership of a particular social group, or
 - (e) Political opinion.
- iv. The person must be outside his/her country of origin or habitual residence.
- v. The person is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of his/her country of origin.

Are asylum seekers 'illegal'?

According to Article 14 of the Universal Declaration of Human Rights (1948), everyone has the right to seek asylum and the Refugee Convention further prohibits states from imposing penalties on those entering 'illegally' who come directly from a territory where their life or freedom is threatened.

Thus, if your client is a refugee or an asylum seeker, they should not be arrested, tried or convicted for merely having entered without valid travel documents, without first getting the opportunity to approach the appropriate authorities and have the merit of their requests *prima facie* evaluated by such authority.

What difference does it make if my client is a refugee or an asylum-seeker and not an economic migrant?

Refugees and asylum seekers cannot be treated on the same footing as economic migrants. Refugees are persons fleeing an armed conflict or from regime of grave human rights violations or persecution. Their situation is often so perilous and intolerable that they cross national borders to seek safety from other States, through UNHCR, and other humanitarian organizations.

Migrants choose to move not because of a direct threat of persecution or death, but to improve their lives by finding employment, education, health facilities, family reunion, or other reasons and therefore they do not fall within the criteria for refugee status. Thus, they are not entitled to international protection including prevention of *refoulement*; assistance in the processing of asylum seekers; providing legal counsel and aid; promoting arrangements for the physical safety of refugees; promoting and assisting voluntary repatriation; and helping refugees to resettle as provided under Article 31 and 33 of the Refugee Convention and Article 8 of the Statute of the Office of the UNHCR. If they wish to return home, they would continue to receive the protection of their government.

Article 31 of the Refugee Convention forbids the imposition of penalties on refugees, on account of their illegal entry or presence. The rationale behind this provision is that a refugee may have good cause for illegal entry especially since he apprehends serious threats in his home country. Often, on account of the persecution faced by them in their country of origin refugees and asylum seekers are unable to obtain genuine identity and travel documents which renders it impossible for them to travel to another country legally.

Article 33 of the Refugee Convention puts forward what has become known as the principle of *non-refoulement*. It forbids the State from expelling or returning a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

How can I tell if my client is a refugee or an asylum-seeker and not an economic migrant?

Communicate with your client well in advance. If your client is a foreign national who is being tried under the Foreigners Act, you should never assume that the client is an economic migrant unless they tell you so. It is imperative to quiz your client as to why they left their country and whether they are willing and able to return.

Does the Refugee Convention apply to India?

India is not a signatory to Refugee Convention or its 1967 Protocol and therefore the Convention itself is not legally binding on India. Over the period of time, certain provisions of the Refugee Convention has attained customary status under Customary International Law which is binding on India. In absence of any specific legal regime, refugees are still governed by the Foreigners Act, 1946.

The Foreigners Act does not distinguish between refugees and illegal immigrants, nor does it define refugees as a specific category needing humanitarian protection. This does not imply that India has no policy on refugees. In the absence of any legislation on the subject, refugee policy is based on ad hoc and undefined administrative measures.

Despite not being a signatory to the Refugee Convention, India continues to host a large population of refugees. The Government of India allows UNHCR recognised refugees to apply for visas. Refugees and asylum seekers have also been provided access to basic government services such as health care and education as well as to law-enforcement and justice systems. India has also been a member of the executive committee (ExCom) of the UNHCR since 1995.

Thus, the general principles of refugee protection are very much applicable to India.

Who is the Competent Authority for granting refugee status in India?

In India there is no specific legal regime for refugees. The Central Government grants asylum and provides assistance in case of certain refugee populations (such as Tibetans and Sri Lankans). In all other cases, United Nations High Commissioner for Refugees (UNHCR) conducts registration and Refugee Status Determination (RSD). The Government of India also has policies in place for granting stay visas to refugees recognised by UNHCR.

UNHCR was established on December 14, 1950 by the UN General Assembly. UNHCR's core mandate is to lead and co-ordinate international action to protect refugees and asylum seekers and resolve refugee problems worldwide in consonance with the Refugee Convention.

UNHCR has no formal status in the country and continues to operate under the auspices of the United Nations Development Programme (UNDP). In practice, UNHCR operations are restricted by the government, which generally only permits UNHCR to provide assistance to asylum-seekers and refugees from non-contiguous states. UNHCR is permitted to maintain an office in New Delhi (styled a Mission rather than, as one might expect, a Branch Office) and a small Field Office in Chennai in Tamil Nadu state. The office in New Delhi is permitted to conduct refugee status determination (RSD) pursuant to the terms of the UNHCR statute for those asylum-seekers who are able to reach New Delhi.

In the absence of any specific legal framework, what protection is available to refugees in India?

India is a signatory to multiple international instruments which contain obligations regarding refugee protection. This includes the *Universal Declaration of Human Rights*, the *UN Declaration of Territorial Asylum*, the *International Covenant on Civil and Political Rights* (ICCPR), the *International Convention on Economic, Social and Cultural Rights* (ICESCR), the *UN Convention on the Rights of the Child*, *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *Bangkok Principles, 1966* among others.

Article 14 (1) of the *Universal Declaration of Human Rights* states that everyone has the right to seek and to enjoy in other countries asylum from persecution.

An important principle that has become a part of numerous international human rights treaties and is also adhered to as per customary international law is the principle of *non-refoulement*. For example, an explicit *non-refoulement* provision is contained in Article 3 of the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

Article 22 of the *United Nations Convention on the Rights of the Child* provides that children have the right to special protection and help if they are refugees.

Refugee protection must be seen in the broader context of protection of human rights. Human rights are universal and egalitarian and hence they are applicable to refugees and asylum seekers as well. Asylum seekers and refugees are entitled to all the rights and fundamental freedoms that are spelled out in international human rights instruments, such as the right to life, protection from torture and ill-treatment, protection from unlawful detention, freedom of religion, etc.

The Supreme Court of India and the various High Courts in India have on many occasions afforded protection to refugees and stayed their forcible repatriation. This has been done by virtue of certain orders wherein the Fundamental Rights enshrined under the Indian Constitution have been made available to both citizens and non-citizens alike.

For instance, in *Anwar v. State of Jammu & Kashmir* [1971 (3) SCC 104] it was held that the rights under Articles 20, 21 and 22 are available not only to "citizens" but to "persons" which would include "non-citizens".

In *Chairman Railway Board & Ors. v. Chandrima Das & Ors.* [2000(2) SCC 465], the Supreme Court relied

upon *Anwar v State of JK* and affirmed that that Article 14 is also available to non-citizens. The state is under an obligation to protect the life of non-citizens just as it does for citizens. Thus, in view of the applicability of Articles 14, 20, 21 and 22 of the Indian Constitution the rules of natural justice are equally applicable in India, even to refugees.

In *NHRC v. State of Arunachal Pradesh*, [AIR 1996 SC 1234], the Supreme Court held that prima facie a threat existed to the life of Chakma refugees and stated that Article 21 was applicable to them. The Government of Arunachal Pradesh was directed to secure the life and liberty of Chakma refugees living in the state. In *State of Arunachal Pradesh v. Khudiram Chakma*, [1994 Supp. (1) SCC 615] the Supreme Court dealt with the issue of citizenship.

In *Ktaer Abbas Habib Al Qutaifi v. Union of India* [1999 CrLJ 919], the Gujrat High Court dealt with the principle of *non-refoulement* as well as other principles of international refugee law. The High Court passed an order directing the Government to consider an asylum seekers prayer for asylum and stayed their deportation until then.

Are Indian courts bound by international refugee law?

India is considered to be following a dualist approach for the implementation of international law at the domestic level. International treaties do not automatically become part of national or regional law in India. Appropriate legislation is required under our Constitution to make International law binding.

However, through judicial activism, the Indian courts have played a very proactive role in implementing India's international obligations under international treaties, especially in the field of human rights, including refugee rights. The Supreme Court and the High Courts have repeatedly interpreted India's obligations under international law into the domestic law, which are binding on subordinate courts and also coordinate benches of the same High Court.

In *Kesavananda Bharati v. State of Kerala*, [1973 (4) SCC 225] it was observed that in view of Article 51 of the Constitution, the Court must interpret language of the Constitution, if not intractable, in the light of international law.

In *Vellore Citizens Welfare Forum v. Union of India* [1996 (5) SCC 647], it was held that customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the courts.

In *Vishaka & Ors. v. State of Rajasthan & Ors.* [1997 (6) SCC 241], the Court was of the view that in the absence of domestic law, International Conventions and norms may be referred to.

In *Apparel Export Promotion Council v. A. K. Chopra* [1999 (1) SCC 759], it was pointed out that domestic courts are under an obligation to give due regard to the international conventions.

The Supreme Court took similar views in *Githa Hariharan v. Reserve Bank of India & Anr.* [1999 (2) SCC 228], *R. D. Upadhyay v. State of Andhra Pradesh & Ors.* [2007 (15) SCC 337] and various other judgments including *People's Union for Civil Liberties v. Union of India & Anr.* [2005 (2) SCC 436] where it held that the courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations.

In *National Legal Services Authority v. Union of India and Ors.* [2014 (5) SCC 43], the Supreme Court held that in the absence of a contrary legislation, municipal courts in India should respect the rules of international law.

India is yet to enact a coherent, uniform and a consolidated law addressing the issue of asylum. The Foreigners Act, 1946 also fails to address the lacunae as it is an old and outdated legislation which has not been amended adequately or replaced to meet present international standards and requirements. The presently applicable laws, as such, fail to distinguish between a refugee and other foreigners. In such circumstances, international refugee law ought to be referred to when there is adjudication of issues relating to refugee rights by the competent forum of law.

Are there any duties of refugees?

As per Article 2 of the Refugee Convention every refugee has a duty to conform to the laws and regulations of the country in which he finds himself/herself.

What documents do refugees and asylum seekers carry?

Due to the circumstances in which they are forced to leave their country of origin, refugees and asylum seekers are more likely than other foreigners to not have any identity or travel documents. Moreover, while other foreigners can turn to the authorities of their country of origin for help in obtaining documents, refugees may not have this option. They could, therefore, be completely dependent upon Indian authorities and UNHCR for assistance in this regard.

Asylum seekers who have completed their registration formalities with UNHCR are granted asylum seeker certificates that state that their refugee claim is under process. When recognized, refugees are granted refugee cards by UNHCR. Some refugees also have been granted Residence Permits/Registration Certificates and Stay Visas by the Foreigners Regional Registration Offices in India on the basis of UNHCR's recognition of refugee status.

If your client, is a refugee or an asylum seeker, you may also contact UNHCR (with your client's express consent) to ask for additional supporting documentation that may be useful for your case. The Government of India also has policies in place to grant stay visas to refugees recognized by UNHCR.

Factual arguments to be made in defence of refugees and asylum seekers:

- Explain the well-founded fear of persecution that your client is facing in the country of origin due to race, religion, political opinion or ethnicity. Establish that a violation of human rights has occurred, or is likely to occur, in the country of origin. The fact that the concerned person fulfils the criteria of being classified as a refugee must be explained.
- Clarify that your client intends to live peacefully without threatening the harmony and security of the country until the situation in their country of origin improves.
- Underline the fact that they intend to return as soon as it is safe to do so.
- It is imperative to differentiate the case from those of other immigrants who enter the country for purely economic reasons.

Arguments on law that can be made in defence of refugees and asylum seekers:

- Explain the obligations imposed by various international instruments upon India to afford protection to refugees and asylum seekers especially the Right to non-refoulement.
- Refer to relevant Indian case laws on grant of asylum
- Emphasise on the right of asylum seekers to be given an opportunity to apply for asylum prior to being prosecuted
- Where there is delay in ascertaining application for asylum, seek a directive from the court to set a deadline on the concerned authority.

✓ Dos

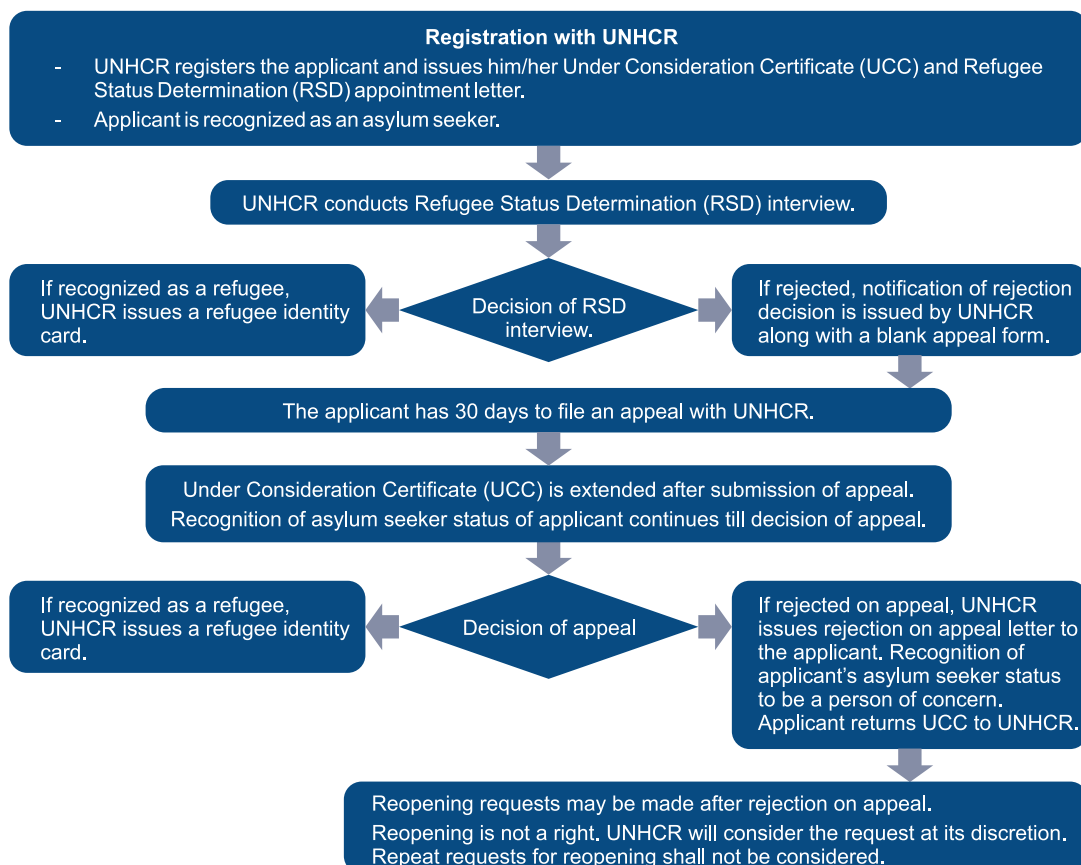
- ✓ Communicate with your client well in advance. Ask your client why they left their country and if they are willing to return to their country.
- ✓ Ask your client if they have any identity documents or travel documents.

- ✓ Listen to your client; act only as per their wishes and with their consent.
- ✓ Keep your client informed about the day to day progress of their case. Inform your client of the options available to them at all stages.
- ✓ Inform your client about UNHCR and advise them on asylum seeking procedures.
- ✓ If your client is not registered with UNHCR, assist your client to make an application for asylum, including providing research material to prepare for any subsequent interviews.
- ✓ Keep UNHCR informed about the case and if required, request UNHCR for supporting documentation or other technical assistance.
- ✓ Apply for bail at the earliest. If bail is not granted, persistently keep applying. Advise your client to approach higher forums, if feasible.
- ✓ Aim to get your client discharged from the proceedings started against them, or if the matter has already gone into trial, try and get them acquitted. In case of a conviction, advise your client to prefer an appeal before the higher forum of law.

× Donts

- × Do not persuade your client to misrepresent their nationality or hide your client's asylum seeker or refugee status before the Court.
- × Never persuade your client to plead guilty if you are convinced that your client is a genuine asylum seeker and not an economic migrant.
- × Do not assume that the client is an economic migrant unless they tell you so.

Procedure for seeking asylum through UNHCR office in New Delhi



CHRI Programmes

The Commonwealth Human Rights Initiative (CHRI) promotes human rights, genuine democracy and development, in an association of 52 former British Colonies, through international advocacy on human rights, access to justice and access to information. This is done by research, publications, workshops, information dissemination and advocacy. There are three principal programmes:

1. Access to Justice

Police Reforms: In far too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reforms and accountability so that the police act as upholders of the rule of law. In India, CHRI's programme disseminates information and views, based on ground realities and supporting police reform. In South Asia, CHRI works to strengthen civil society engagement on those reforms. In East Africa and Ghana, CHRI is examining police accountability issues and political interference.

Prison Reforms: CHRI works on increasing transparency of a traditionally closed system and exposing malpractices. A major area highlights the failures of the legal system that result in massive overcrowding, long pre-trial detention and prison overstay. We look at reviving oversight systems and believe that focus on these areas can bring improvements to the corrective system and have an effect on the administration of justice.

2. Access to Information

CHRI is acknowledged as one of the main organisations promoting Access to Information across the Commonwealth. It encourages countries to pass and implement effective Right to Information (RTI) laws. It assists in the development of legislation and has been successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh and Ghana. In Ghana, CHRI is the Secretariat for the RTI Civil Society Coalition. We critique new legislation and intervene to bring best practices into the knowledge of governments and civil societies, when laws are being drafted and also at the time of first implementation. The experience of working in hostile environments, as well as culturally varied jurisdictions, allows CHRI to bring insights.

3. International Advocacy and Programming

CHRI monitors Commonwealth member states' compliance with human rights obligations and advocates around human rights exigencies. We engage with regional and international bodies including the Commonwealth Ministerial Action Group, the United Nations and the African Commission for Human and People's Rights. Ongoing initiatives include reviewing human rights promises made by Commonwealth members at the United Nations Human Rights Council and the Universal Periodic Review. In addition, we advocate for the protection of human rights defenders, free media and civil society space as well as monitoring the performance of National Human Rights Institutions while pressing for their strengthening.



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