

CHRI 2020

# GUIDE

## on Defending Asylum Seeking/ Refugee Children in Deprivation of Liberty in India



**CHRI**

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

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## GUIDE ON

# Defending Asylum Seeking/Refugee Children in Deprivation of Liberty in India

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# Contents

<b>Abbreviations</b>	<b>4</b>
<b>Preface</b>	<b>5</b>
<b>A Note for Users</b>	<b>6</b>
<b>Section 1: Key Terms &amp; Concepts</b>	<b>7</b>
1.1 Refugee	7
1.2 Asylum Seeker	8
1.3 Migrant	8
1.4 Child	10
<b>Section 2: The Child Refugee in India</b>	<b>11</b>
<b>Section 3: Basic International Human Rights Standards and Protections for the Refugees</b>	<b>14</b>
3.1 The Relevance & Use of International Human Rights Law	14
3.2 The Principle of Non-Refoulement	15
3.3 The Right To seek Asylum	16
3.4 Principles from the Convention on the Rights of the Child	17
3.4.1 The Principle of Best Interests	20
<b>Section 4: Defending Refugee Children In Detention</b>	<b>22</b>
4.1 Ensuring that cases and children are transferred to the Juvenile Justice Boards & Places of Confinement	22
4.2 Securing bail for children and ensuring their release pending proceedings	24
4.2.1 Where the parents/guardians of the child are available	25
4.2.2 Where the parents of the child are not available	26
4.3 Completing the proceedings before the JJB and the post-completion steps	26
4.3.1 The nature of the final orders to be passed by the Boards	27
4.3.2 Dealing with cases where the child's parents are not traced/not in a position to take care of the child.	29
4.4 Applying for asylum and recognition as a refugee	33
4.5 Acquisition of Citizenship	36
4.6 Preventing Summary Deportations	37
<b>Annexure 1: Offices/Locations For Registration As Asylum Seeker/Refugee</b>	<b>39</b>
<b>Annexure 2: Model Application For Basic Registration</b>	<b>40</b>
<b>CHRI Programmes</b>	<b>42</b>

# Abbreviations

AIR	: All India Reporter
CCL	: Child/Children in Conflict with Law
CNCP	: Child/ Children in need of Care and Protection
CrPC	: Code of Criminal Procedure
CWC	: Child Welfare Committee
IPC	: Indian Penal Code
JJ Act	: Juvenile Justice (Care and Protection of Children) Act, 2015
JJ Rules	: Juvenile Justice (Care and Protection of Children) Model Rules, 2016
JJB	: Juvenile Justice Board
NGO	: Non-Governmental Organization
Refugee Convention	: Convention Relating to the Status of Refugees, 1951
SBR	: Social Background Report
SC	: Supreme Court
SCC	: Supreme Court Cases
SIR	: Social Investigation Report
UNCRC	: United Nations Convention on the Rights of the Child
UNHCR	: United Nations High Commissioner for Refugees
WP	: Writ Petition

# Preface

Despite the lack of a formal refugee law, India has always kept its arms open to refugees from all over the world, particularly from South Asia. However, there are gaps in the protections that are offered. Most important of these lacunas are the chances that a refugee, who arrives in India without travel document, may be subjected to prolonged periods of detention. Unfortunately, even children are not immune from this. The slow pace at which our wheels of justice turn means that children may spend prolonged periods of time in detention, separated from their families, something that everyone acknowledges to be militating against the “best interests” of the child. While scholars and activists of international law and human rights assert that detention of asylum seekers and refugees are contrary to international law, state practice unfortunately does not lend enough support to that argument.

Amidst this sea of uncertainties, the Juvenile Justice Law and System in India provides hope to the child refugees. The Juvenile Justice Act, 2015 provides a framework for more humane and considerate treatment of all children without discrimination, thus enabling the refugee children to be taken out of detention and restored or reunited with their families or community. The basic argument that this handbook follows is to bring all refugee children in detention within the ambit of the Juvenile Justice System, without discrimination, and extend to them all the protections that that the law lays down for children who are in need of care and protection. The other accompanying issues, such as recognition of the child’s status as a refugee, preventing summary deportations, removing children from detention and ensuring long-term care and protection, are all dealt with along this central line of thinking.

The primary intended audience of this handbook are the lawyers and human rights defenders who work at the grassroots—our unsung heroes, whom we never hear of. Every effort has been taken to identify the common set of issues that arise and to provide answers to them. The comments and suggestions from Ms. Ragini Trakroo Zutshi, Associate Protection Officer, UNHCR, India and from Dr. Bipasha Roy, Ex-member Juvenile Justice Board & Child Rights Activist, have gone a long way to ensuring that the handbook is comprehensive and free of mistakes and their contributions are acknowledged with gratitude. It goes without saying that if there are gaps and mistakes that remain, the blame rests entirely on my shoulders. Finally, I also express my gratitude to CHRI for initiating me into working on this issue and thinking about potential solutions within the law as it stands.

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## **A NOTE FOR USERS**

The basic framework for protection of the child refugee is found in the Juvenile Justice Act, 2015, which is a central Act. Operationalizing this law on ground requires frequent reference to the Statutory Rules, which are framed by the states. This means that each state has its own set of rules. Referring to the rules in each state would lie beyond the scope of this handbook. For this reason, this handbook makes a reference to the Model Juvenile Justice Rules, framed by the Ministry of Women & Child Development. If it is any consolation; the State Rules are more or less similar to the Model Rules. However, it is not without differences, especially when it comes to numbering of the provisions. Users of this guide are hence encouraged to refer to the Juvenile Justice rules of the state in which the proceedings take place and use them in the course of legal proceedings.

## SECTION 1: Key Terms & Concepts

Thousands of people, adults and children, move across country borders looking for a world of opportunities and a better life or to escape the threats to their lives and safety. Many are able to migrate through legal channels and make a voluntary choice to do so. The less privileged ones are forced to move, to save their lives or to escape massive violations of human rights. In every day parlance, a variety of terms are used to describe these individuals. They are often interchangeably called “migrants”, “refugees”, “illegal entrants” or “asylum seekers”. To a common person it appears as the same thing—an outsider, a different national who is on the move and has reached “our” country.

While the common man can mix or use them interchangeably to meet their convenience, in law, each of these terms are fairly well-defined. They carry a purposive meaning and a determination that a person falls into one of these categories will immediately result in certain rights being made available to them. So, first, let us clarify what these terms mean and what is meant when they are used in this handbook.



### 1.1 Refugee

Article 1 of the Convention Relating to the Status of Refugees, 1951 defined a refugee to be a person who

*“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.*

To break this down, into its elements, a refugee is a person who:



Since this definition had some limitations, a “Protocol Relating to the Status of Refugees” was adopted in 1967 to address them.<sup>1</sup> Further, the United Nations High Commissioner for Refugees, in 2011, adopted a still broader formulation, that refugees are those “*who are outside their country of nationality or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.*”<sup>2</sup>

While we do not have any Indian Statute that defines who a refugee is, the definitions referred to above are widely accepted by international bodies (such as the United Nations and its agencies such as the UN Global Compact), courts from around the world and scholars of law. In its essence, each of these definitions points towards a person who had to flee from their country of origin as they were at risk of harm, serious human rights violations and persecution. The dangers were so serious that they were left with no choice but to leave their country of origin and seek “refuge” elsewhere.

Certain sections of people are excluded from the ambit of this expression. The exclusions are to prevent those who commit serious crimes to pass themselves off as refugees and avoid prosecution. Thus, perpetrators of war crimes or crimes against humanity; and persons who have committed a serious non-political crime outside the country of refuge prior to his/her admission to that country as a refugee; or those persons who are guilty of acts contrary to the purpose of the UN are not given the protections that are otherwise available to refugees.<sup>3</sup>



## 1.2 Asylum Seeker

If a person makes a claim of being a refugee, the authorities of the state have to examine that claim, meaning that they will have to determine whether he/she falls within the definition of a “refugee”. This can be a time-consuming process as it would involve the collection of evidence and an examination of claims. Till the time the application for refuge is finally decided, the applicant is called an “asylum seeker”. Thus, an asylum seeker is simply a person who claims to be a refugee and the claim is being evaluated.

Article 14 of the Universal Declaration of Human Rights states, “*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*” As soon as someone makes a claim of being a refugee, he/she becomes an asylum seeker and remains to be so till the application is decided. If the application is accepted, he/she becomes a refugee and if denied, the person becomes an “illegal migrant” – who may be deported.



## 1.3 Migrant

While there isn’t any precise definition available for this term, it is understood as someone who is on the move, typically motivated by better economic opportunities, standards of living or to be with their family. They are distinct from refugees as their movement

<sup>1</sup> Article 1.2, Protocol Relating to the Status of Refugees, 1967.

<sup>2</sup> United Nations High Commissioner for Refugees, Resettlement Handbook, p. 19, Accessible at: <[www.unhcr.org/46f7c0ee2.pdf](http://www.unhcr.org/46f7c0ee2.pdf)>.

<sup>3</sup> Article 1(F), The Convention Relating to the Status of Refugees, 1951.

is not on account of a fear of persecution in their homelands. Where someone moves to a country without adequate travel documents, work permits or other necessary permissions, he/she is called an “illegal migrant” or an “illegal entrant.” What separates these individuals from a refugee is the absence of fear or a possibility that they may be subjected to serious harm or human rights abuses in their home country. They are thus enterprising individuals who have chosen to explore a world of better opportunities, either legally or illegally.

International law provides for a right to be recognized as a refugee and there is a legal principle that they are not to be penalized for irregular movement.<sup>4</sup> Indian statutory law unfortunately does not make any distinction between an asylum seeker, refugee or an illegal migrant. According to the Citizenship Act, 1955, any foreigner (i.e. a person who is not an Indian citizen)<sup>5</sup> who has entered into India “...without a valid passport or other travel documents.” or stays in India beyond the permitted period of time is an “illegal migrant”.<sup>6</sup> Any illegal migrant in India can be arrested, charged and punished for violating the provisions of the Foreigners Act, 1946,<sup>7</sup> The Foreigners Order, 1948<sup>8</sup> and the Passport (Entry into India) Act, 1920. These legislations cumulatively prohibit entry into India without a formal travel document (a passport and a visa) and also provide for their detention and deportation from India, even without a hearing or the assignment of any reasons.<sup>9</sup> However, some categories of persons have been excluded from the provisions of the Foreigners Act, 1946 and the Passport (Entry into India) Act, 1920. These groups are “Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who arrived in India on or before December 31, 2014”.<sup>10</sup> This implies that

<sup>4</sup> See: Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees :Non-penalization, Detention and Protection*, A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, (UNHCR, 2001), Available at: <<https://www.refworld.org/pdfid/3bf9123d4.pdf>>.

<sup>5</sup> S. 2(a), Foreigners Act.

<sup>6</sup> S. 2(b), Citizenship Act, 1955.

<sup>7</sup> The charges are laid under Section 14 of the Foreigners Act, 1946, which reads:

14. Penalty for contravention of provisions of the Act, etc. — Whoever. —
- (a) remains in any area in India for a period exceeding the period for which the visa was issued to him;
  - (b) does any act in violation of the conditions of the valid visa issued to him for his entry and stay in India or any part thereunder;
  - (c) contravenes the provisions of this Act or of any order made thereunder or any direction given in pursuance of this Act or such order for which no specific punishment is provided under this Act, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid by him.

**Explanation.** For the purposes of this section, the expression “visa” shall have the same meaning as assigned to it under the Passport (Entry into India) Rules, 1950 made under the Passport (entry into India) Act, 1920 (34 of 1920).

<sup>8</sup> Paragraph 3(1) of the Foreigners Order, 1948, states that “..no foreigner shall enter India:

- (a) otherwise than at such port or other place of entry on the borders of India as a Registration Officer having Jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or any specified class or description of foreigners, or
- (b) without leave of the civil authorities having jurisdiction at such port or place.”

<sup>9</sup> Ss.8 &11, Foreigners Act, 1946; S. 5, Passports (Entry Into India) Act, 1920; S. 30, Passport Act, 1920 & Rule 6A, Passport Rule 6A, Passport Rules, 1950. In terms of S. 13 of the Indian Passport Act 1967, if “illegal migrants” are detected at the border, they are detained and the case is transferred to the local police for investigation- who then registers an FIR and takes custody of the person.

<sup>10</sup> G.S.R. 685 (E) and G.S.R. 686 (E), Gazette of India, September 7, 2015; G.S.R. 702(E) and G.S.R. 703(E), Gazette of India, July 18, 2016.

these groups of persons will not be deported or imprisoned for being in India without valid documents.

The bottom line is that most refugees who enter India (as they cross borders illegally, without travel documents) are considered as “illegal migrants” who can be detained, charged under the criminal law, punished and deported or just merely deported. This is because in India there is no statutory recognition of a “refugee” or an “asylum seeker” who can enter into Indian territory without any valid travel document.



#### 1.4 Child

Indian law does not provide any uniform definition for who a child is. Depending on the context (such as for labour, consensual sexual relations or marriage), the expression is defined in different manners. The Convention on the Rights of the Child leans in favour of treating everyone below 18 years of age as a child.<sup>11</sup> For our purposes, it is safe to say that every person who is below 18 years of age is a child. This is because, all the key Indian enactments that are relevant to a child refugee considers persons below 18 as children.

The most important of these enactments is the Juvenile Justice Act, 2015.<sup>12</sup> This law overrides all other Indian laws when it comes to all matters concerning children who are accused of having committed crimes or those who require care and protection.<sup>13</sup> It explicitly says that it will cover all issues concerning<sup>14</sup>:

- (a) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law; and
- (b) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.

The Citizenship Act does not state who a child is, but it employs the notion of a “minor”, without defining what it means. We thus need to read this in conjunction with S. 3(2) of the Indian Majority Act, 1875, which states, “Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years”. The other law that’s relevant to us-The Foreigners Act, 1946-does not mention or define the word “child”. However, since the breach of its provisions results in a criminal trial, the JJ Act once again comes into the picture as the trial of these offences are to be conducted only before Juvenile Justice Boards.<sup>15</sup> Thus, for the purposes of this handbook, the expression “child” refers to a person who has not completed 18 years of age.

<sup>11</sup> Article 1, Convention on the Rights of the Child, 1989.

<sup>12</sup> S. 2 (12) of the JJ Act, 2015 defines a child to be person who has not completed 18 years of age.

<sup>13</sup> S. 1(4), Juvenile Justice Act, 2015.

<sup>14</sup> S. 1(4), Juvenile Justice Act, 2015.

<sup>15</sup> S. 8, Juvenile Justice Act, 2015.

## SECTION 2: The Child Refugee in India

The UNHCR has registered and provides support to over two lakh persons as refugees and asylum seekers.<sup>16</sup> In past, India has accepted and continues to provide asylum to refugees from Tibet, the Former East Pakistan and Sri Lanka. In recent times, majority of the refugees and asylum seekers are the Rohingyas from Myanmar and the Afghan refugees. By the end of 2019, the UNHCR had registered about 27,700 refugees and 12,300 asylum-seekers, 60% of whom were the Myanmar-Rohingya refugees and 27% of them were from Afghanistan. Approximately, half of all refugees from Afghanistan (about 2.7 million) and Myanmar (1.1 million) are estimated to be children<sup>17</sup> and many of them came to India. Of these, majority of the refugees from Myanmar enter into India irregularly (or as Indian law calls them, as “illegal migrants”) -i.e. without any valid travel documents. Most of them enter into India by land (and some of them even by sea)- mostly through the long and porous eastern borders of the country.<sup>18</sup>

Refugee children are found in a variety of conditions in India, with or without the support of parents, and each of them begs for a different type of response. For the purposes of suitable responses, we can classify them into the following categories:



**(a) Unaccompanied/Separated Children:** These are the children who have reached India without any guardians (either parents or any close family members) accompanying them. Such categories of children may have been trafficked into India. Parents often send these children unaccompanied as a last-ditch effort to save them from persecution in their home countries. In some cases, the families along with the children manage to escape to another country. From there, these children are separated and may be trafficked into a third country. For illustration, a Rohingya family manages to escape from Myanmar to Bangladesh, and from there the child alone is trafficked into Indian territory. Such children are considered most vulnerable and they require a great amount of care and attention. The strategies required to take care of them will also have to be different. For instance, in the latter case, where the parents are in a safe-third country, efforts must be made to re-unite the child with the family or community within the country of asylum (in India in this case). However, in the former, where the parents continue to reside in a country where they

<sup>16</sup> 'India | Global Focus' (Reporting.unhcr.org, 2020) <<https://reporting.unhcr.org/node/10314?y=2019#year>> accessed 1 November 2020.

<sup>17</sup> 'Child Displacement - UNICEF Data' (UNICEF DATA, 2020) <<https://data.unicef.org/topic/child-migration-and-displacement/displacement/>> accessed 16 November 2020.

<sup>18</sup> Mixed Migration Centre, Rohingya Migration to India: Patterns, drivers and experiences (Briefing Paper, April 2019), (Available at: [http://www.mixedmigration.org/wp-content/uploads/2019/04/063\\_briefing-paper-Rohingya\\_India.pdf](http://www.mixedmigration.org/wp-content/uploads/2019/04/063_briefing-paper-Rohingya_India.pdf)).

may face persecution, the child will have to be cared for within India as a child in need of care and protection (CNCP),<sup>19</sup> within the Juvenile Justice System.



**(b) Children who have fled with their families:** These are the children who reach India along with their families and continue to be with them, even in detention. An example of this would be really small children, aged below 6 years, who are permitted to be with their mothers, even in prison or correctional facilities.<sup>20</sup> In such cases, the interventions needed are with respect to ensuring that they are able to make applications for asylum and refuge. Where these children cross the age limit for which they can be with their mothers in adult prisons (i.e., till they are 6), they will have to be produced before a Child Welfare Committee (CWC) as “children in need of care and protection”.<sup>21</sup> In such instances, the interventions required are (apart from assistance with the asylum applications) to ensure that they are taken out of detention and that the child is reunited with his/her family or guardian or community at the earliest possible opportunity.

### Supreme Court Directions on Dealing with Children whose Parents are in Prisons



In *R.D. Upadhyay vs State Of A.P. & Ors*, AIR 2006 SC 1946, the Supreme Court has issued the following directions with respect to children whose parents are detained in prisons.



Woman prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.



No woman prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the woman prisoner or shall be sent to a suitable institution run by the social welfare department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimize undue hardships on both mother and child due to physical distance.



Such children shall be kept in protective custody till their mothers are released or the children attain such age as to earn his/her own livelihood.

<sup>19</sup> The meaning of the expression CNCP has been covered in detail in section 4.3.2, page 31.

<sup>20</sup> In *R.D. Upadhyay vs State of A.P* (AIR 2006 SC 1946) the Supreme Court has held that female prisoners are allowed to keep their children with them, in jail, till they attain the age of six years.

<sup>21</sup> See *R.D. Upadhyay vs State of A.P* (AIR 2006 SC 1946) (See box above). These directions must however be read along with the provisions of the JJ Act, 2015. Thus, while sending a child to a suitable institution run by the Social Welfare Department, it needs to be born in mind that the Suitable institutions in such cases can only be the children's home under the JJ Act and no child can be admitted to such a home except on the orders of the CWC. Such children can also be brought within the scope of the expression “child in need of care and protection”, as defined by S. 2 (14) of the JJ Act.



Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet the mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the superintendent of prisons.



When a woman prisoner dies and leaves behind a child, the superintendent shall inform the district magistrate concerned and he shall arrange for the proper care of the child. Should the concerned relative(s) be unwilling to support the child, the district magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand over the child to a responsible person for care and maintenance



**(c) Children who have fled with their families, but are separated:** Perhaps this category forms the bulk of the cases and the focus of this handbook. In most cases, asylum seekers/refugees are caught when they try to cross borders and at times, even after that. In such cases, the child ends up being separated from the family: border guards apprehend them and thereafter, the police initiate a prosecution for violation of the provisions of the Foreigners Act (and other laws), consequent to which they are detained. In such situations, the men and women are separated. Children below 6 years of age are entitled to reside with their mothers in correctional facilities and beyond that age, they will have to be either handed over to a surrogate identified by the mother, or transferred to a children's home run by the Social Welfare Department of the state.<sup>22</sup> At times adolescents end up getting mixed up with adults and are incarcerated in prisons. If that does not happen, they are produced before a Juvenile Justice Board and housed in an Observation Home. In all such instances, the child becomes separated from the family. The focus of the efforts in such cases must be both, to ensure that they are able to apply for asylum, that they are freed from detention and also that they are reunited with their families/communities at the earliest.

This handbook makes a general discussion on the rights, procedures and institutional mechanisms that are available for the protection and support of refugee children. While pursuing the options outlined in this book, it is crucial to identify and assess the needs of the refugee children and pursue an option that satisfies their individual "best interest".<sup>23</sup>

<sup>22</sup> *Ibid.*

<sup>23</sup> For a discussion of "best interests" see section 3.4.1, page 22.

## SECTION 3: International Human Rights Standards and Protections for the Refugees



### 3.1 The Relevance and Use of International Human Rights Law

While India has been a country of refuge for numerous persons where they are received as well as protected, there is no formal overarching legislation that governs the process. The result of this is two-fold: Firstly, that a right to seek refuge is not explicitly recognized in the form of a statute; and secondly, that the available rights and the procedures to enforce these rights are spread across numerous legislations.

It is in this context that a set of fundamental principles recognized in International Human Rights and Refugee law are relevant. These principles are found in a number of treaties and they lay down basic set of protections that a refugee, including a child asylum seeker/refugee is entitled to.

These basic principles are a part of Indian law by two means: Firstly, there are some statutes that recognize these rights in broad terms and we can look at international law to understand the ambit of these rights and give it meaning and specificity. Secondly, by virtue of certain judgments of the Supreme Court, international law can be used in domestic proceedings too. In *Visakha & Ors. VS State of Rajasthan*,<sup>24</sup> the Court observed that

*“Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”; and that*

*“It is now an accepted rule of judicial construction that regard must be had to international conventions and norms from construing domestic law when there is no inconsistency between them and there is a void in the domestic law.”*

In *Gramophone Company of India Limited v. Birendra Pandey*,<sup>25</sup> the court observed:

*“There can be no question that nations must march with the inter-national community and the municipal law must respect rules of international law just*

<sup>24</sup> (1997) 6 SCC 241.

<sup>25</sup> AIR 1984 SC 677.

*as nations respect international conventions. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament.”*

Similarly, in *In Vellore Citizens' Welfare Forum v. Union of India*,<sup>26</sup> a bench of three judges of the Supreme Court had observed that

*“Since these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of 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 of Law.”*

In *Justice K.S. Puttaswamy (Retd) and Anr. v. UOI*, it was observed that

*“Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation”.*<sup>27</sup>

A number of principles that protect refugees and children are found in International Human Rights Treaties that India is a party to. Some of the principles are also regarded as being a part of customary international law. The observations of the Supreme Court, discussed above, thus provide us with ample opportunities to avail or apply these principles to amplify, expand and give colour to the rights of the refugee children in domestic legal proceedings.



### 3.2 The Principle of Non-Refoulement

Perhaps the most important of the fundamental principles is the principle of non-refoulement (pronounced as “*non-refolmaa*”). This principle states broadly that no refugee must be returned or forced in any manner to go back to a country where they are at risk of being persecuted or subjected to harm. Article 33 of the Refugee Convention codifies this principle. Though India is not a party to that Convention, the principle of non-refoulement is considered to be a part of Customary International Law.<sup>28</sup> Further, India is also a signatory to the ‘Bangkok Principles On Status And Treatment Of Refugees’, which maintains that “[a refugee] cannot be expelled if there is a possibility that he might be exposed to some danger on account of race, religion, nationality, ethnic

<sup>26</sup> (1996) 5 SCC 647.

<sup>27</sup> (2017) 10 SCC 1, see paras: 29, 61, 91, 129, 131 & 133.

<sup>28</sup> UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany (available at: <http://www.unhcr.org/home/RSDLEGAL/437b6db64.html>); UNHCR, *Note on the Principle of Non-Refoulement* (available at: <http://www.unhcr.org/home/RSDLEGAL/438c6d972.html>). The New Zealand Court of Appeal has held that “The prohibition on refoulement, contained in art 33.1 of the Refugee Convention, is generally thought to be part of customary international law: See *Zaoui v. Attorney General*, 30 September 2004, (No 2) [2005] 1 NZLR 690, para. 34.

origin, membership of a particular social group or political opinion.<sup>29</sup> The Committee on the Rights of the Child holds the view that “in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child”.<sup>30</sup>

Courts in India have also recognized and given effect to this principle. The Gujarat High Court has held that “The principle of ‘non-refoulement’ is encompassed in Article 21 of the Constitution of India and the protection is available, so long as the presence of the refugee is not prejudicial to the national security”.<sup>31</sup> The Court has, on a different occasion, held that the rights under Article 21 are available to refugees too<sup>32</sup> and that the state has a duty to prevent their forcible eviction by any private entity.<sup>33</sup> Recently, the Delhi High Court stated in more explicit terms that:

*“The principle of “non-refoulement”, which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as “non-refoulement” affects/protects the life and liberty of a human being, irrespective of his nationality”.*<sup>34</sup>



### 3.3 The Right to Seek Asylum

Article 14 of the 1948 Universal Declaration of Human Rights states, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” India being a signatory to the UDHR has led courts in India to often rely on its provisions and treat it as a part of fundamental rights, especially Article 21.<sup>35</sup> The Supreme Court observed in *Khudiram Chakma v. State of Arunachal Pradesh*<sup>36</sup> that:

*“Article 14 of the Universal Declaration of Human Rights, which speaks of the right to enjoy asylum, has to be interpreted in the light of the instrument as a whole, and must be taken to mean something. It implies that although an asylum seeker has no right to be granted admission to a foreign state, equally a state that had granted him asylum must not later return him to the country he came from. Moreover, the article carries considerable moral authority and embodies the legal prerequisite of regional declarations and instruments.”*

<sup>29</sup> Article III, Asian African Legal Consultative Organization, *Bangkok Principles on Status and Treatment of Refugees*, as Adopted on 24 June 2001 at The AALCO’s 40th Session, New Delhi (available at: <http://www.aalco.int/Final%20text%20of%20Bangkok%20Principles.pdf>).

<sup>30</sup> Committee on the Rights of the Child, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin (available at: <https://www.refworld.org/docid/42dd174b4.html>), paragraph 27.

<sup>31</sup> *Ktaer Abbas Habib Al Qutaifi v. Union of India & Ors.*, 1999 Cri.L.J. 919.

<sup>32</sup> *Khudiram Chakma v. State of Arunachal Pradesh*, 1994 Supp (1) SCC 615.

<sup>33</sup> *NHRC v. State of Arunachal Pradesh*, 1996 (1) SCC 742.

<sup>34</sup> *Dongh Lian Kham & Anr. vs Union of India*, 226(2016) DLT 208.

<sup>35</sup> *Satwant Singh Sawhney v. Asst. Passport Officer, Government of India*, AIR 1967 SC 1836; *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461; *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535; *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746; *S.P. Mittal v. Union of India*, AIR 1982 SC 149; *People’s Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473; *Jolly George Verghese v. Bank of Cochin*, AIR 1980 SC 47.

<sup>36</sup> (1994) Supp (1) SCC 615.

Though there is no formal legislation that provides any right to seek asylum, Courts have held that Article 14 of the UDHR captures a fundamental principle in Human Rights Law and it should be treated as a part of our constitutional scheme.<sup>37</sup> In numerous instances the High Courts have recognized the right to seek asylum and have provided opportunities to asylum seekers to approach the UNHCR for that purpose.<sup>38</sup>



### 3.4 Principles from the Convention on the Rights of the Child

India is a party to the Convention on the Rights of the Child (CRC) and has ratified it, thereby agreeing that it is bound by its provisions. Article 22 of the Convention mandates the states parties to

*“ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties”*

Thus, the CRC makes it an obligation to protect refugee children, provide them humanitarian assistance and also abide by the rights recognized in the Convention. There are a number of convention provisions and principles that have a direct bearing on the rights of refugee children and some of these are already a part of Indian statutory law. The basic rights are:



That there shall be no discrimination of any sort on the basis of race, colour, sex, language, religion, political or other opinions, national-ethnic or social origins, disabilities, birth or other status (Article 3)



That every child has a right to life (Article 2)



That every child has a right to survival (i.e. to live) and development (i.e. to grow up in good physical and mental health, get educated etc.) (Article 6)



That the child has the right to participate and be heard in all matters affecting them and their views must be given due weightage in any decision that is taken, in accordance with the age and maturity of that child (Article 12)

<sup>37</sup> *State of Arunachal Pradesh v. Khudiram Chakma*, AIR 1994 SC 1461.

<sup>38</sup> For a discussion and supporting case law see Section 4.4.



The right to have a family, to live with parents (unless that be in the best interests of the child) (Article 9) and a recognition that parents have the primary responsibility for upbringing of the child (Article 18).



A right for children separated from their parents to reunite with their parents and a duty on part of the state to consider application from children or parents from other countries for family reunification in a “positive, humane and expeditious manner” (Article 10).



A duty on the part of the government to assist and support a child “to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family” (Article 22.2)



In cases where the parents of a child cannot be traced or found, the child must be treated like any other child who is deprived of his family environment (Article 22.2)



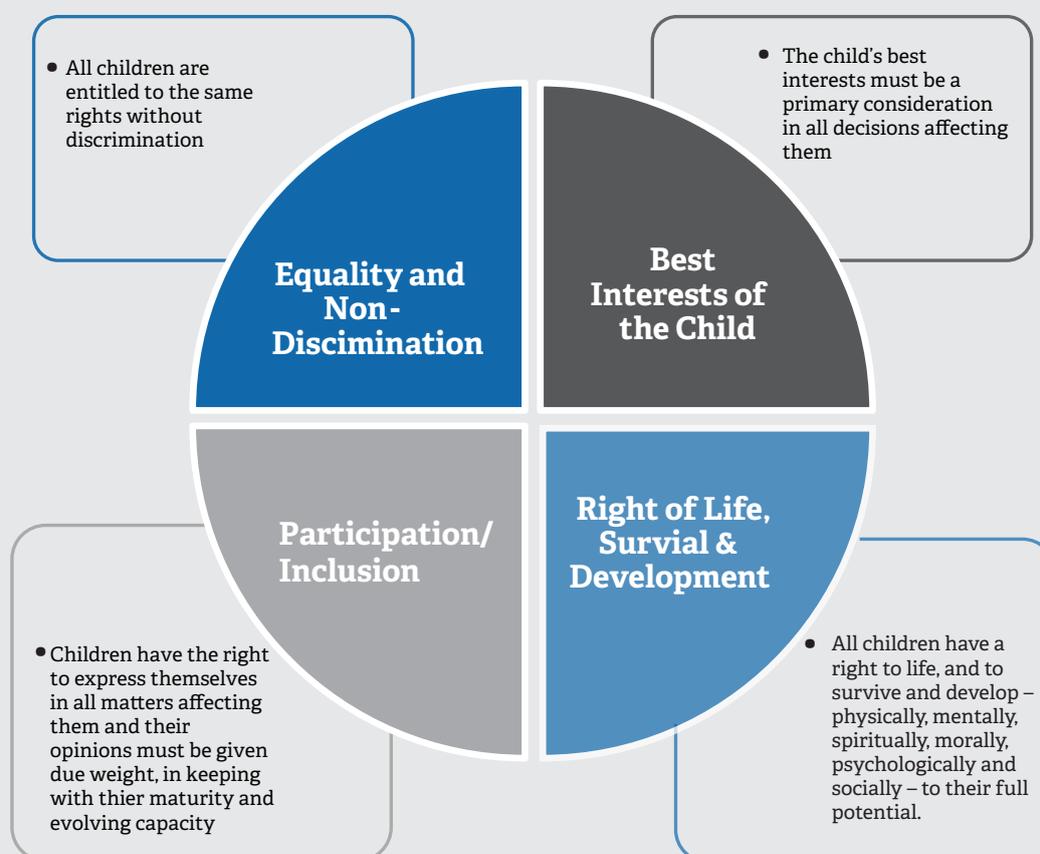
In all matters affecting children and for all decisions to be taken regarding a child by any institutions, including courts and administrative authorities and legislative bodies a primary consideration shall be ensuring best interests of the child (Article 3).

Apart from these specific set of rights, four basic principles form the bedrock of the convention (see box on next page). These principles provide an overarching framework for protection of all children, including the child refugees, who are within the territory of India. According to these principles, the refugee children have a right to be treated without discrimination, they have a right of survival and development and their views are to be taken into account when making decisions concerning them. The principle of best interests is of particular significance (details in sub-section below) as it mandates that all decisions taken by any authority, with respect to a child refugee, must be so as to advance their best interests.

In addition to the above, the Committee on the Rights of the Child, an expert body established under Article 43 of the UNCRC, which has a mandate to enunciate principles and provide authoritative interpretations of the convention, has also provided some guidance regarding the treatment of refugee children, especially when it comes to the question of detaining them. In General Comment No. 6, the committee observed, “Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof”.<sup>39</sup> It was also stated, “Children should not be criminalized or subjected to punitive measures because of their or their parents’ migration status. The detention of children because of their

<sup>39</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005 (CRC/GC/2005/6), paragraph 61.

## Four Guiding Principles of the Convention on Rights of the Child



or their parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, states should expeditiously and completely cease the detention of children on the basis of their immigration status.”<sup>40</sup> While these observations are not binding international law, they nevertheless provide us with authoritative guidance in understanding the obligations placed by the Child Rights Convention, which India is a party to.

Many of these rights and principles are already covered in the Indian Constitution, especially under Article 21 of the Constitution which guarantees the right to a meaningful and dignified life, survival and development and Article 14 which guarantees equality before law, equal protection of laws and consequently, non-discrimination.<sup>41</sup> The right to be heard is considered an aspect of Article 21, especially since courts have held that it encompasses a “due process” guarantee.<sup>42</sup> Further, Article 51 (c) of the Constitution directs the state to endeavour to foster respect for international law and treaty obligations.

<sup>40</sup> UN Committee on the Rights of the Child (CRC), *Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration*, 28 September, 2012, available at: < Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration > paragraph 78.

<sup>41</sup> *Kharak Singh vs The State of U. P. & Others*, AIR 1963 SC1295; *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nandkarni*, AIR 1983 SC 109.

<sup>42</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

The JJ Act, 2015 is another law that recognizes many of these principles. This Act identifies a set of principles that are to guide all agencies, including the central and state governments the JJBs, the CWCs or any other agency, while implementing the provisions of that Act.<sup>43</sup> It then goes on to recognize “best interests”,<sup>44</sup> the right to be heard,<sup>45</sup> the right of participation,<sup>46</sup> of safety,<sup>47</sup> non-discrimination,<sup>48</sup> the right to be with family,<sup>49</sup> and equality<sup>50</sup> to be these principles. It is critical to note here that the JJ Act applies to citizens and foreigners alike, thus making these principles available for the protection of refugee children too.<sup>51</sup> The JJ Act thus recognizes a number of protections and rights that are available to refugee children and it is mandated that these principles are applied in the course of undertaking any proceedings under that Act.



### 3.4.1 The Principle of Best Interests

The principle of best interests is a seminal and overarching one, giving layers of protection to the child. The principle advances the idea that the well-being of a child must be the central concern while taking any decisions concerning the child. The JJ Act defines “best interests” to mean “basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.”<sup>52</sup> The Committee on the Rights of the Child states, “[the best interests principle] aim[s] at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child”.<sup>53</sup>

<sup>43</sup> S.3, JJ Act, 2015.

<sup>44</sup> S.3(iv), JJ Act. The provision reads “All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential”.

<sup>45</sup> S.3(xvi), JJ Act, 2015, which states that “basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.

<sup>46</sup> S.3(iii), JJ Act. The provision reads “Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child’s views shall be taken into consideration with due regard to the age and maturity of the child.”

<sup>47</sup> S.3(iv), JJ Act, which states that “All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter”.

<sup>48</sup> S.3(ii), JJ Act, 2015. The Provision reads “All human beings shall be treated with equal dignity and rights.”

<sup>49</sup> These are covered by two provisions : S. 3 (xii), which says that “A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry”; and s. 3 (xiii), which says “Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.”

<sup>50</sup> Section 3(x). The provisions read as follows: “There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.”

<sup>51</sup> Section 2 (12) of the JJ Act, 2015. defines a child to be any person who has not completed 18 years of age and makes no reference to nationality. Thus, all children are entitled to the rights and protections available under the JJ Act, 2015 especially in light of the principle of equality non-discrimination, guaranteed by Section 3 (x) of that Act.

<sup>52</sup> S.2(9), JJ Act, 2015.

<sup>53</sup> Committee on the Rights of the Child, General Comment No.14: on the right of the child to have his or her best interests taken as primary consideration, paragraph 4 (available at: <https://www.refworld.org/docid/51a84b5e4.html>).

## Child Rights Committee - General Comment No. 14: The Key elements to be considered while determining best interests



Gender, Sex, Sexual Orientation, nationality, religion and culture



Personality of the child



Family environment, availability of family and whether the child is in contact with family



The protection and safety of the child and the child's developmental needs (education, physical and mental health, emotional and material needs and well-being etc.)



The views of the child – which is to be given due weight in accordance with the age and maturity of the child



Any vulnerability factors

This means that any assessment of best interests has to be tailored to meet the circumstances of each individual child. Several factors, such as age, gender, how mature the child is, the risks that the child may have to face, the condition of the family of the child, the chances that the child may be subjected to harm, are all to be taken into account when taking any decisions about the child in question. Further, the CRC makes it explicit that best interest is a relevant consideration when making decisions concerning where to place the child (i.e. whether the child must be detained/confined in an institution, given in adoption or foster care, repatriated or released to the parents).

Specifically within the context of refugee children, the best interest principle will have to guide a number of specific decisions that will have to be taken (such as whether to temporarily release the child with parents or to institutionalise the child for care; whether or not to restore a child to the family; what is the best course of action for a child whose parents cannot be traced, etc.) at different stages of the proceedings, in different forums (the JJB or the CWC). This will be discussed in more detail in the subsequent sections of this handbook.

## SECTION 4: Defending Refugee Children who are in Detention

As we saw in Section 3, the Juvenile Justice Act, 2015 provides a framework of rights and protections for children who are in detention/confinement which equally applies to refugees, asylum seekers or children of migrants. The first focus of efforts must be hence to bring all such children in detention within the framework of the Juvenile Justice Act, especially since Section 1(4) of the Act mandates that it overrides all other laws.<sup>54</sup>



### 4.1 Ensuring that cases and the children are transferred to the Juvenile Justice Boards

As we saw in Section 2, most often children are in detention/confinement as they are charged with offences under the Foreigners Act, and as with the case of all crimes, they are to be tried only by the Juvenile Justice Boards.<sup>55</sup> Thus, if one comes across a child detained in an adult prison or held in a case in a regular criminal court, immediate steps are to be taken to get the case transferred to the JJB.

A “child in conflict with law” (“CCL”) according to S. 2(13) of the JJ Act means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. The Juvenile Justice Boards (“JJB”) has the exclusive jurisdiction over the adjudication of the cases against these children.

<sup>54</sup> Section 1(4) reads as follows “Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including —(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration, and restoration of children in need of care and protection.

<sup>55</sup> Section 8(1), JJ Act, 2015. Further, Rule 12 (2) of Juvenile Justice (Care and Protection of Children) Model Rules, 2016 mandates the Board to make periodic visits to the Correctional Homes/ Jails and transfer any children found there to the Boards.

What is material here is only whether the person was a child when the offence was committed. Thus, even if a person is, at present, over 18 years of age, if it can be shown that he/she was a child when the offence was committed, the case must be transferred to a JJ Board<sup>56</sup> and even if the person turns 18 during the pendency of the proceedings, it is only the board that continues to hear the case.<sup>57</sup>

Where the proceedings are pending before a regular criminal court, an application can be made before that court for transferring the case to the JJB and the court can transfer the proceedings once it is satisfied that the person is a child or was a child when the offence was committed.<sup>58</sup> For this purpose, an inquiry will be conducted and evidence can be taken. The contentious issue in such cases is determining the age of the person. Section 94 of the JJ Act deals with age determination. It provides for a number of options for this purpose:



Where by appearance it can be made out that the person is a child, an approximate age can be recorded and based on this, further steps can be taken – without waiting for further confirmation of age



Where there is a doubt whether the person is a child, it can exercise one of these options:



Rely on a date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board.



Where no such certificate is available, rely on the birth certificate given by a corporation or a municipal authority or a panchayat.



Where none of the former are unavailable, rely on the results of a bone ossification test or any other medical test.

<sup>56</sup> Section 6, JJ Act, 2015.

<sup>57</sup> Section 5, JJ Act, 2015.

<sup>58</sup> Section 9, JJ Act, 2015. This power can also be exercised *suo motto* by the concerned judge.

### **Bone ossification test**

A bone ossification test gives an approximate idea of the age of a person by examining the degree of bone formations. It is performed by taking X-ray images of the bones and the teeth and then a panel of doctors i.e., the medical board provides its opinion. It is impossible to provide an exact age with this test and only an age range (plus or minus 2 years from a figure) can be provided accurately. The Supreme Court has accepted the results of this test as admissible, but not conclusive. The court has stated that the range can be accepted and, in such cases, where it is on the margin of 18, the benefit of doubt needs to be given to the child and the lower figure is to be accepted as the age.<sup>59</sup>

It is easy to imagine that refugee children may not have documents to prove their age. Thus, it is important to convince the judges to resort to age determination by appearance (wherever that is possible) or by resorting to medical tests. Once it can be shown that the person in question is probably a child, then the transfer can take place. Transfer of a case to the JJ Board also entails transfer of the detained person to the board. Thus, the child has to be removed from the adult prison and thereafter transferred to an observation home, which is done only on the orders of the board. If the person has already crossed 18 years of age, he/she cannot be detained at an observation home, but is kept in a “place of safety”.<sup>60</sup>

### **Place of Safety**

Place of safety means any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may be.

The person in charge of such an institution must be willing to receive and take care of the CCL. The CCL can be kept there during the course of inquiry by the board or during the course or rehabilitation, after he/she is found guilty.

The state government notifies the place(s) of safety in the respective state.



## **4.2 Securing bail for children and ensuring their release pending proceedings**

The CCLs in detention are housed in an institution named the “Observation Home”. By design, they are meant only for short periods of stay, not exceeding a couple of days or at best a few weeks with the idea that CCLs are to be released on bail as a matter of rule and are detained only as an exception-. The result of this is that prolonged period of stay at the observation homes can be a terrible experience for children. This

<sup>59</sup> *Mukarrab Etc. VS State of U.P.*, (2017) 2 SCC 210.

<sup>60</sup> Section 6(2), JJ Act, 2015.

is because the children in those homes have limited avenues for socialization (most of the other residents live there only for a short duration). The other issue is that there is nothing much to do in an observation home to spend time with very limited avenues for education, entertainment, recreation and even the freedom to move around. The result of all of this is that the children suffer from loneliness, depression and frustration, eventually culminating into mental health problems. It is thus important to ensure that they are removed from observation homes at the earliest.

The basic philosophy of the JJ Act is to ensure that children are released on bail and that they are not detained. Section 12 of the JJ Act directs that a child be released on bail (with or without sureties) in all cases at the earliest and that bail can be denied only if “if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person’s release would defeat the ends of justice”.<sup>61</sup> In other words, bail is to be refused only if that can be shown to be in the best interests of the child. It is to be reiterated here that the JJ Act makes no distinction between citizens and non-citizens and hence, the same principle applies to refugees, asylum seekers or “illegal migrants”.

There are, however, several scenarios present here, depending on whether or not there are parents/guardians who can take the child out on bail and each of them require a different set of responses.



#### 4.2.1 Where the parents/guardians of the child are available

The JJ Act and the CRC operate on the basic philosophy that parents and family are the safest place for a child to be with. Thus, in cases where the parents of the child in detention are known<sup>62</sup> and they are in a position to take the child on bail, the child must be sent out on bail with them. The principle of family responsibility enshrined in Section 3(v) of the JJ Act supports this proposition.<sup>63</sup>

The key issue here is whether the parents are in a position to take the child out on bail and provide him/her adequate care and protection. There can be a number of reasons why they are unable to do so, the most common one being that they are detained in adult prisons. Even if they are not in detention, they may not be in a position to take care of the child (such as that they do not have a place to live or enough food to eat, or they are suffering from diseases or incapacities that makes it impossible for them to take care of the child).<sup>64</sup> In such instances, it may be not in the child’s best interests to release them to parents. A “best interests” assessment has to be done here, considering

<sup>61</sup> Section 12, JJ Act.

<sup>62</sup> The Board has to be satisfied that they are indeed the parents of the child (typically some form of identity documents or some official verification is required for this). The Social Investigation Report and/or the Social Background Report [See page 24 for an explanation of what these are] and/or a verification by the police, which is usually done on the orders of the Board can help establish or confirm identity.

<sup>63</sup> Section 3(v) reads as follows: “The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.”

<sup>64</sup> See the discussion on Social Investigation Report and Social Background Report in page 24 below. These reports are the key to assessing the capacity of the parents to take custody of children on bail.

the age and maturity of the child, taking into account the child's views and making an assessment of the overall ability of the parents to ensure that the child is protected and taken care of.

It is also important to note that it is not just the biological parents who can take the children on bail. Even adoptive parents or any legal guardian can take the child out on bail. Though not in the context of bail, the judgment of the Kerala High Court in *Selvi Michel v. Child Welfare Committee*<sup>65</sup> can be relied on for this purpose.



#### 4.2.2 Where the parents of the child are not available

Where there are no parents/legal guardians available, the JJ Act contemplates that the child can be released under the care of any “fit person”. A fit person is anyone who is “prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognized as fit for the said purpose, by the Committee or, as the case maybe, the Board, to receive and take care of the child”.<sup>66</sup> Typically, a fit person is someone who is in charge of a children's home, run by the state government or an NGO, registered under the JJ Act. Any individual can be considered a “fit person” so long as the JJ Board, after an inquiry, is satisfied that the individual in question is capable and prepared to “own the responsibility of the child”. The Board may either maintain a panel of fit persons or on a case-to-case basis identify a “fit person” who can take the responsibility of the child.<sup>67</sup> Often in the case of refugee children, their parents may be hard to trace or they may not even be present in India, or they may be in detention in prisons. However, some close relatives or refugees from the same community may be easier to trace. In such instances, it is possible to recognize such a relative or a community member as a “fit person” and release children in their custody. Such an approach would enable the child to grow up outside an institution, which is generally in their best interests and it's also in line with the principle that institutionalization must be considered a measure of last resort.<sup>68</sup> This also advances the right to be re-united with their family at the earliest and to be restored to the cultural environment that they are from.<sup>69</sup> It goes without saying that in such cases, a thorough assessment of the suitability and capacity of such relative/community member to take care of the child needs to be made. Resorting to this can enable children to be taken out of an observation home and be housed outside of an institution, which offers the child better possibilities.



#### 4.3 Completing the proceedings before the JJB and post-completion steps

As discussed earlier, most often, the refugee-children are charged under the provisions of the Foreigners Act for entering and staying in India without a travel document. The

<sup>65</sup> Judgment dated 28.3.2019 in RPJJ No.2 of 2019 (available at: <https://indiankanoon.org/doc/50088598/>).

<sup>66</sup> S. 2(28), JJ Act, 2015.

<sup>67</sup> Rule 28, Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

<sup>68</sup> Section 3 (xii), JJ Act, 2015.

<sup>69</sup> Section 3 (xiii), JJ Act, 2015.

Foreigners Act contemplates a reverse burden of proof, meaning that the accused will have to demonstrate that he/she is a citizen or that he had the valid travel documents.<sup>70</sup> This often means that defending such cases by way of a full proceedings may not yield adequate results and it is often better to try and adopt strategies that aim to complete the proceedings before the JJB at the earliest, especially when the children continue to remain in detention/confinement (as bail has not been granted), all the more so when the detention is in an observation home.

Where it is seen that the child in question is a victim of trafficking, the Boards can be impressed upon to take into account the same and facilitate a withdrawal of prosecution or a discharge. An advisory issued by the central government states, *“If the investigation reveals that she did not come to India or did not indulge in crime out of her own free will, the State Government / UT Administration may not file a chargesheet against the victim. If the chargesheet has already been filed under the Foreigners Act and other relevant laws of the land, steps may be taken to withdraw the case from prosecution so far as the victim is concerned.”*<sup>71</sup> This may be brought to the attention of the JJ Board and steps may be taken to withdraw the prosecution and production of the child before the CWC so that the person is treated as a “child in need of care and protection (CNCP)”.



#### 4.3.1 The nature of the final orders to be passed by the Boards

A conviction from the JJ Board cannot result in a sentence of imprisonment. In fact, Section 18 of the Juvenile Justice Act does not contemplate any punishment. It only contemplates a set of final dispositional orders that are aimed towards rehabilitating the child.<sup>72</sup> When passing a final order, the primary consideration is the welfare and rehabilitation of the child and the aim is not to punish the child. The rehabilitative nature that the final order must be is further emphasized by the legal requirement that every final order must be accompanied by an Individual Care Plan.<sup>73</sup> A bare perusal of the model Individual Care Plan<sup>74</sup> will demonstrate that the aim of that process is to identify and monitor the implementation of a rehabilitative plan for the child. The JJ Board upon completion of enquiry can pass one of these orders, considering the “nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child”:<sup>75</sup>

- Allow the child to go home (i.e. with parents or guardians) after advice or admonition
- Direct the child to participate in any group counselling
- Order the child to perform community service

<sup>70</sup> S. 9, Foreigners Act, 1946.

<sup>71</sup> Ministry of Home Affairs, *Advisory on preventing and combating human trafficking in India -dealing with foreign nationals* (No. 14051/14/2011-EVI, dated 1.5.2012), paragraph (iv).

<sup>72</sup> The statement and objects of the JJ Act states that it is a law to “consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation”.

<sup>73</sup> Rule 7 (3), Model JJ Rules, 2016.

<sup>74</sup> Form 7, Model JJ Rules, 2016.

<sup>75</sup> Section 18, JJ Act.

- Order the child or parents to pay fine.
- Direct that the child be released on probation of good conduct and placed under the care and supervision of a fit facility for ensuring the good behaviour and the child's well-being for a period not exceeding three years.
- Direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years.
- Direct the child to be sent to a special home or a fit facility, for such period, not exceeding three years, as it thinks fit, for providing reformative services, including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home or fit facility.

The law mandates that when passing a final order, the JJ Board has to consider all the sets of factors that lead to the child committing the offence. Most often, in cases involving a child refugee, the charges relate to entering India or continuing to stay in India without valid travel documents. It is hence important to ensure that the background facts that lead to the child crossing the border are available and placed before the Board. Two sets of documents are of importance here: the Social Background Report prepared by the Police in Form 1 appended to the JJ Rules<sup>76</sup> and the Social Investigation Report prepared by a probation officer or a social worker in Form 5 appended to the JJ Rules.<sup>77</sup> A bare perusal of these forms will tell us that there is ample opportunity therein to bring the background facts that the child is an asylum seeker/refugee who crossed the borders to save his/her life on record will subsequently go a long way in ensuring that the child receives appropriate treatment at the hands of the system. Further, enquiries conducted in the course of preparation of these reports can also help towards tracing the parents of the child, if at all they can be traced. It is also within the powers of the Board to specifically direct the police to trace or find out the parents of the child, as much as that is possible.

In normal circumstances, persons accused of having committed offences under the Foreigners Act are deported back to their home countries (or repatriated). However, in case of a refugee, this cannot be done in light of the principle of non-refoulement, which courts have held to be a part of Article 21.<sup>78</sup> Thus, the Boards needs to be apprised of the fact that any order of "sending a refugee back" to a country where he/she may face persecution would be an illegal order. It is also to approach the Writ Courts under Article 226/227 to challenge any such orders that are passed and prevent any deportation being carried out.

Thus, an appropriate final order can range from admonition to release on probation or a release under supervision. There is an option for the child to be sent to a special home or a place of safety for up to three years, but this is only for providing "*reformative services including education, skill development, counselling, behaviour modification therapy,*

<sup>76</sup> Rule 8, Model JJ Rules, 2016.

<sup>77</sup> S.8, JJ Act, 2015 & Rule 10(2), Model JJ Rules, 2016.

<sup>78</sup> See: Section 3.2.

and psychiatric support”.<sup>79</sup> This is an option to be pursued only where it is necessary in the best interests of the child that he/she is not to be released and this is in no way a punishment for any offence that was committed.<sup>80</sup> Since the JJ Act contemplates that parents are primarily responsible for the care and protection of children and that each child has a right to be reunited with family,<sup>81</sup> it is essential that the child be restored to parents, wherever they are in a position to take care of the child. A separation from family is permitted only where it can be shown that the same is in the best interests of the child.



### 4.3.2 Dealing with cases where the child's parents are not traced/not in a position to take care of the child.

Where the parents of the child cannot be traced or they are not in a position to take custody and care of the child, the JJ Act steps in to consider these children as “Children in Need of Care and Protection” (“CNCP”), i.e. children who require protective assistance of the State. Section 2 (14) of the Act identifies about 13 categories of such children. An asylum seeker/refugee child may fit into one or more of these categories, making them eligible to protective assistance from the State. Some of the specific categories that are often most relevant are:



Those found without any home or settled place of abode and without any ostensible means of subsistence<sup>82</sup>



Those who have a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child<sup>83</sup>



Those who do not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered the child<sup>84</sup>



A missing or a run-away child, or whose parents cannot be found after making reasonable inquiry<sup>85</sup>



Those who are victims of or are affected by any armed conflict, civil unrest or natural calamity<sup>86</sup>

<sup>79</sup> Section 18, JJ Act, 2015.

<sup>80</sup> In the words of the Delhi High Court, “The principle of best interest of the juvenile or juvenile in conflict with law or child shall mean for instance that the traditional objectives of criminal justice, retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice.” *X, a minor VS State*, Judgment dated 17.4.2012 in Cr. Rev. Petition No. 356 of 2012 (available at : <https://indiankanoon.org/doc/163663432/>).

<sup>81</sup> Section 3(xiii), JJ Act, 2015.

<sup>82</sup> S.2 (14) (i), JJ Act, 2015.

<sup>83</sup> S.2 (14) (v), JJ Act, 2015.

<sup>84</sup> S.2 (14) (vi), JJ Act, 2015.

<sup>85</sup> S.2 (14) (vii), JJ Act, 2015.

<sup>86</sup> S.2 (14) (xi), JJ Act, 2015.

Further, the Supreme Court has held that these categories are not to be taken as exhaustive (and just illustrative) and that all children who require care and protection are to be treated as children in need of care and protection.<sup>87</sup>

A “child in conflict with law” and a “child in need of care and protection” are not mutually exclusive categories. As long as the child concerned satisfies the definitions of these, he/she can fall into both of these categories at the same time.

If the child falls in to the category of “CNCP”, he/she must be produced before the Child Welfare Committee (“CWC”), the body that has exclusive jurisdiction to deal with these children.<sup>88</sup> While section 31 of the JJ Act identifies a specific set of persons who can produce a child before a CWC, it is possible for the Juvenile Justice Board to direct one of the functionaries that assist the Boards (the police, the DCPU or any NGO) to produce the child before the CWC. The person or officer producing the child before the Board needs to make a report in Form 17 of the Model JJ Rules, stating the particulars of the child as well as the circumstances in which the child was received or found.<sup>89</sup> This will help the Committee to be aware of the background to the case and, the circumstances in which the child was produced and any previous efforts taken to trace the parents or guardians of the child.

### Persons who can produce a child before a CWC

- Police/CWPO
- Any officer of the DCPU
- Any Public Servant
- Childline or any NGO
- Any public spirited person
- Any medical professional
- Any inspector under the Labour Law
- A child can produce himself

On production of a child, the CWC shall conduct an inquiry into whether the child is a CNCP and examines what is the nature of protection or support that the individual child needs. For conducting this inquiry, the CWC can take the assistance of police, the District Child Protection Unit or any recognized Non-Governmental Organization.<sup>90</sup>

A Social Investigation Report<sup>91</sup> (“SIR”) is to be called for by the CWC and that document provides the avenue to enquire into the background facts concerning the child and

<sup>87</sup> Judgment of the Supreme Court of India dated 05.05.2017 in Re: *Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India*, W.P. (Cri) No. 102/2007.

<sup>88</sup> Ss 27(1), 29 & 30, JJ Act, 2015.

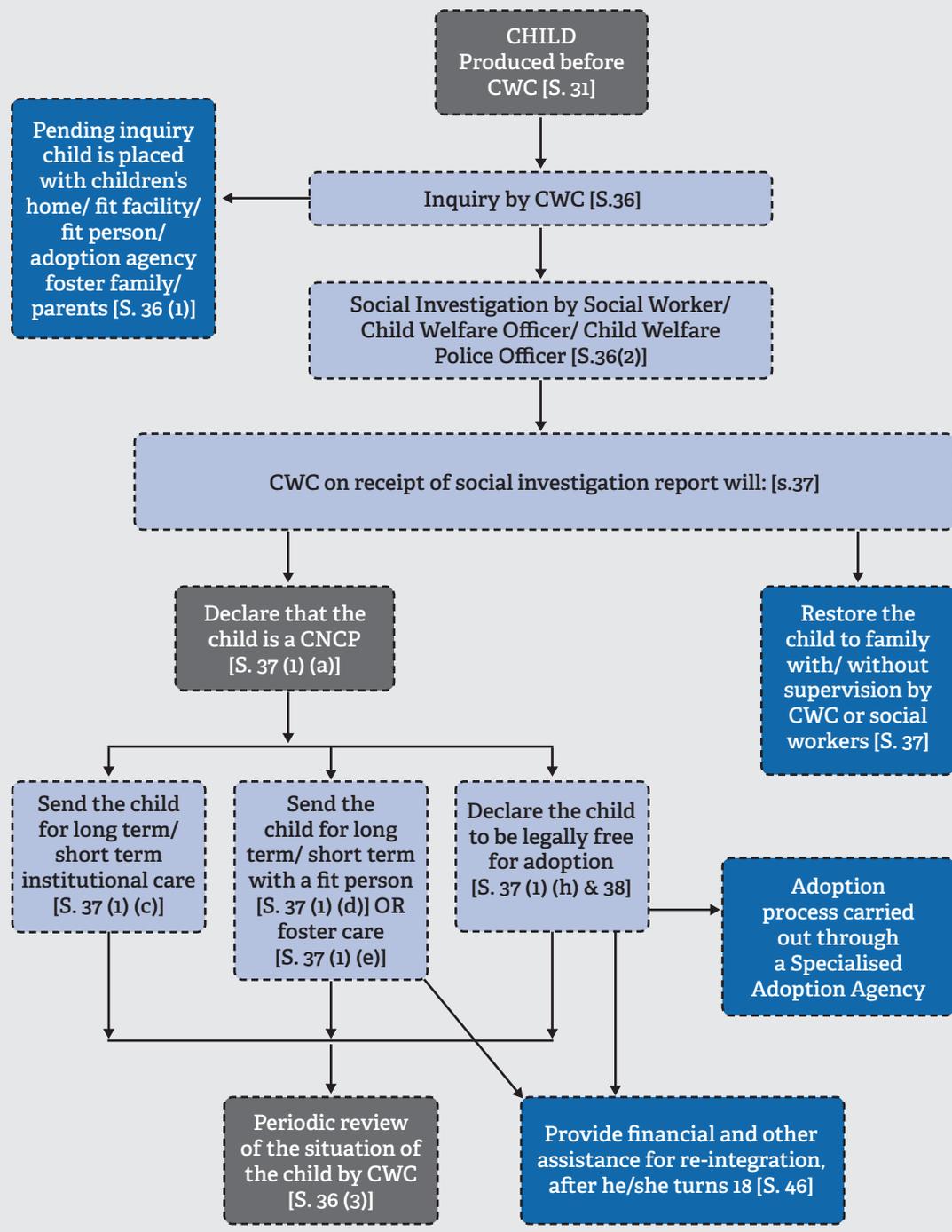
<sup>89</sup> Rule 18 (2), Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

<sup>90</sup> S. 30, JJ Act, 2015. Further, Section 27(9) of the JJ Act provides that the CWC functions as a Bench and shall have the powers available to a Judicial Magistrate of the First Class under the Code of Criminal Procedure, 1973.

<sup>91</sup> A Social Investigation Report Contains detailed information pertaining to the circumstances of the child, the situation of the child on economic, social, psycho-social and other relevant factors, and the recommendation thereon. (Rule 2(xvii), JJ Model Rules). The Report is prepared in Form 22, JJ Model Rules [Rule 19(8)].

bring on record that the person is a refugee child. Enquiries conducted for preparing the SIR can also help trace the parents/guardians or relatives, if they are not already traced, and assess whether the parents are in a position to take custody of the child and ensure his/her care and protection. The process of the inquiry is summarized as a flowchart below (Figure 1). As is discernible from the flowchart the purpose of the intervention is to ensure that the child is rehabilitated and put through a process that enables him to join the mainstream.

**Figure 1: Process of Inquiry by the CWC (The Relevant provisions of the JJ Act, 2015 are indicated in brackets)**



The CWC has a number of options available for the purpose of rehabilitating the child and ensuring care and protection. The broad options available are outlined in the table below :

Pending Inquiry	The child is placed in an institution (Children's Home/ Fit Facility) or with a fit person or in foster care or placed in the process of adoption (in a SAA)
<b>After Completion of Inquiry</b>	
Family Care	The child is placed with his/her family with or without support in the form of sponsorship
Non-Institutional care	The child is placed into one of the following: <ul style="list-style-type: none"> <li>• foster care</li> <li>• with a fit person</li> <li>• Give the child in adoption</li> </ul>
Institutional care (treated as the last option)	The child is placed in an institution (children's home/ fit facility) for long-term care. The situations of such children are reviewed regularly and on reaching 18 years of age, they are released with financial help so that they can integrate into the mainstream

A suitable option is chosen from these after considering the “best interests” of the child. Once again, where the family of the child is available and they are in a position to take care of the child, the CWC has to restore the child to the parents as that is always considered to be in the best interests of children.<sup>92</sup> Often in the case of refugee children, their parents may be hard to trace or they may not even be present in India, or they may be in detention in prisons. But some close relatives or refugees from the same community may be easier to trace. In such instances, it is possible to recognize such a relative or a community member as a “fit person”<sup>93</sup> and release the children in their custody or place these children in foster care with them.<sup>94</sup> Such an approach would enable the child to grow up outside an institution, which is generally in their best interests and it's also in line with the principle that institutionalization must be considered a measure of last resort<sup>95</sup> and also advances the right to be re-united with their family at the earliest and to be restored to the cultural environment that they are from.<sup>96</sup> It goes without saying that such a course can be adopted only after the CWC is satisfied that the relative or community member is capable of taking care of the child and is a suitable home for the child to be in.

<sup>92</sup> Section 3(xiii), JJ Act, 2015.

<sup>93</sup> Section 2 (28) of the JJ Act 2015 identifies a fit person to be any person “prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognized as fit for the said purpose, by the Committee or, as the case maybe, the Board, to receive and take care of the child.”

<sup>94</sup> Section 44 of the JJ Act, 2015 states that “the selection of the foster family shall be based on family's ability, intent capacity and prior experience of taking care of children.”

<sup>95</sup> Section 3 (xii), JJ Act, 2015.

<sup>96</sup> Section 3 (xiii), JJ Act, 2015.

Where a child has to be institutionalised, it is not considered a permanent arrangement and at any point in time, the CWC can review its earlier decision and restore the child back to the parents. Thus, in those cases where the parents have not been traced yet, or where they are traced, but they are not in a position to take care of the child, the CWC can make suitable temporary arrangements to ensure that the child receives care and protection till the time he/she can be restored to his/her parents. Further, where the parents or guardians may require additional financial support to take care of children, the CWC can also ensure adequate support by way of providing sponsorship, i.e. provide support money. The law also provides for post follow up by the CWC which can be an avenue for assessing whether these children are safe, secure and whether any additional rehabilitative measures or assistance is required.<sup>97</sup> In case of placement in foster care or with a fit person, periodic follow up mandatory and it is a continuous process.<sup>98</sup>



#### 4.4 Applying for asylum and recognition as a refugee

As such the statutory law permits an illegal migrant to be summarily deported even without a hearing and the courts have also given a certain degree of approval for this.<sup>99</sup> This means that refugees and asylum seekers who do not have some form of formal recognition, of such status will be treated as a “foreigner” who can be deported. For this reason, perhaps the most important steps to undertake, which needs to be done as early as possible, is to *apply for recognition as a refugee*. Once the application is made, the child then receives the status of an “asylum seeker” and if it is favorably decided, it results in the confirmation of the status of a refugee. While the refugee status is being determined, the child can also receive an “Under Consideration Certificate” to show their request for asylum has been made and is under process. Making this application is thus essential for ensuring that these persons are not deported to another country or sent back to a place where they may face persecution.

As we had pointed out earlier, India lacks a formal law that provides ‘rights’, lays down standards or even the procedure for recognition of status as a refugee. At present, the whole process is built on a mechanism whereby the United Nations High Commissioner for Refugees (UNHCR) makes a determination whether the person satisfies the criteria to be a recognized as a refugee. The UNHCR operates in India on the basis of an agreement that it has with the Government of India and the determination made by it lacks any formal basis in statutory law, and the legal value of the outcome remains unclear. However, practice as such has been that persons whom the UNHCR determines to be refugees are considered to be as such and they are not detained for violations of Foreigners Act or deported. The determination by the UNHCR generally results in a condition where these individuals are comparatively free to move around and are not subjected to police action like arrests or detentions. The courts have also relied on the services of the UNHCR for management of refugees, such as by giving them permission

<sup>97</sup> Rule 19 (18), Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

<sup>98</sup> Section 36(3), JJ Act, 2015.

<sup>99</sup> We see a number of instances when the Supreme Court has been willing to uphold deportation orders that has been passed even without a hearing. See: *Hans Muller v. Superintendent*, AIR 1955 SC 367; *Louis De Raedt v. Union of India*, 1991) 3 SCC 554 and *Sarbananda Sonowal v. Union of India & Ors.*, (2005) 5 SCC 665.

and mandating them to assess the voluntariness of the refugees to go back to Sri Lanka, and to permit those who did not wish to return to continue their stay in the refugee camps.<sup>100</sup>

*Khy-Htoon VS State of Manipur*<sup>101</sup>: The Gauhati High Court stayed the execution of deportation order issued against Myanmar nationals, including children. The said individuals were also released on bail on personal bonds as it would have been nearly impossible for them to find sureties. The court even permitted them to go to New Delhi to apply for asylum and refugee status with the UNHCR

*Dr Malavika Karlekar VS Union of India*<sup>102</sup>: The Supreme Court stayed the execution deportation order on the grounds that their applications for refugee status were pending with the UNHCR.

In the absence of a refugee law, it is thus the UNHCR that plays a primary role in identification and certification of refugees. Asylum seekers have to go through a process, called the Refugee Status Determination (RSD) conducted by the UNHCR for this purpose. One of the earliest steps to be undertaken is informing the UNHCR and making an application for conducting the RSD. The basic processes involved in application and what follows after application are captured in the flowchart in figure 2.

Information concerning registration as asylum seekers/refugees (process, procedure and contact details) are available on the UNHCR Website: <https://help.unhcr.org/india/applying-for-asylum-india/>

The first step in this process is the “registration”. Ordinarily, registrations can be only in-person at the offices of the UNHCR in New Delhi or in Chennai or through one of their partner organizations. The addresses of these offices and organizations are provided in Annexure 1. Generally, the applications have to be made in-person and is followed by an interview by the UNHCR or one of its partner organizations. The registration will also involve collection of personal information that enables identification (such as fingerprints and photographs). From the time the RSD interviews are conducted, it takes about 300 days for the applicants to be notified of the first instance decisions.<sup>103</sup>

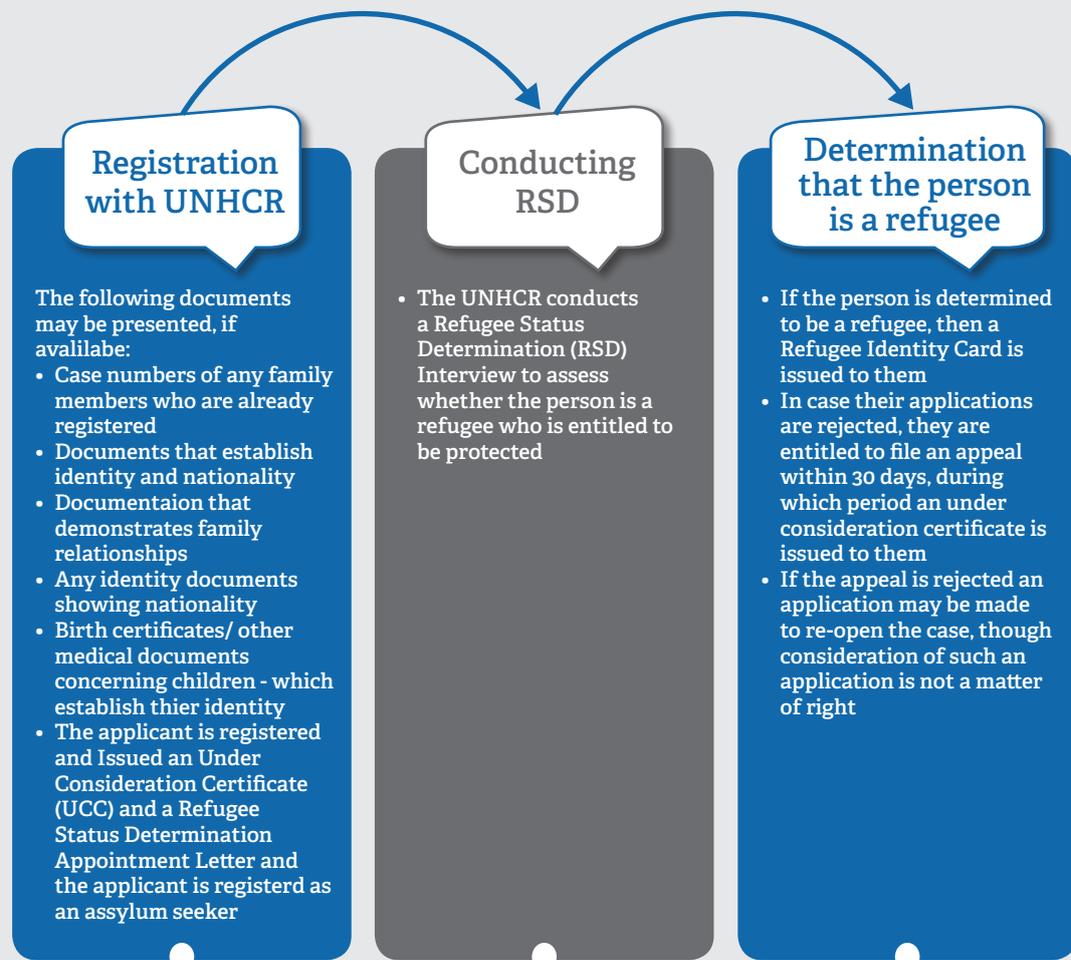
<sup>100</sup> *P. Nedumaran and Anr v. The Union of India and Anr*, order dated 27.08.1992 in W.M.P.NOS.17372, 17424, 18985 and 18086/92 in W.P.NOS, 12298 of 1992 and 12343 of 1992. (unreported).

<sup>101</sup> Order of the Guwahati High Court dated 15.11.1990 in W.P. No.515 of 1990 (available at : [https://www.refworld.org/cases,IND\\_HC,3ae6b6f31c.html](https://www.refworld.org/cases,IND_HC,3ae6b6f31c.html)).

<sup>102</sup> Order of the Supreme Court of India dated 25.10.1992 in Writ Petition (Criminal No) 583 of 1992 (available at: [https://www.refworld.org/cases,IND\\_SC,3f4b8d334.html](https://www.refworld.org/cases,IND_SC,3f4b8d334.html)).

<sup>103</sup> India | Global Focus' (*Reporting.unhcr.org*, 2020) <<https://reporting.unhcr.org/node/10314?y=2019#year>> accessed 1 November 2020.

**Figure 2: Application for recognition as a refugee and subsequent steps**



While there is no formal legal basis to the “refugee card” issued by UNHCR, the practice is that such individuals are not deported or prosecuted for violating the provisions of the Foreigners Act. For instance, in *Syed Ata Mohammadi vs Union of India and Ors*,<sup>104</sup> a deportation order was challenged and pending the writ petition, he was recognized by the UNHCR to be a refugee. The Central Government took a formal position in court that the person will no longer be deported on account of his determination of status as a refugee.

In case of children who are under detention/confinement, the application can be prepared by any individual or official who is involved in the process of ensuring care and protection of these children, such lawyers, NGO workers or any official in the JJ System. The UNHCR also permits applications to be made in-absentia where the individuals are in confinement. Thus, either the Board or the CWC may pass an order, directing any official in the JJ system to undertake steps to enable a registration with the UNHCR. Such an order may be passed *suo motto* or on an application made on behalf of the child. The police or any other officer involved in the proceedings before the Board or

<sup>104</sup> Criminal writ petition no.7504/at the Bombay High Court, 1994.

the custodian of the child can be authorized to produce the child before the UNHCR for facilitating the process of registration and conduct of RSD. Where representatives of the UNHCR wish to meet the child in detention, it can be allowed with the permission of the Board or the CWC as the case may be. All of these are orders that can be passed by the Board or the CWC within the framework of “best interests”.

A determination from the UNHCR that a person is a refugee additionally enables the child to apply for visa (i.e. the permission to remain in India legally). Despite the lack of a specific legal framework for protection of refugees, the Indian government has broadly followed the policy of allowing asylum seekers and refugees to remain in India and enable a legal stay by having a visa for that purpose. Thus, a Refugee card from the UNHCR is a valuable document for the child refugee, something that can enable a transition into a legal stay in India.



#### 4.5 Acquisition of Citizenship

Citizenship in India is primarily based on the concept of *jus sanguinis* (citizenship of the parents). The Citizenship Act, 1955 is the primary legislation that deals with acquisition of citizenship and it contemplates the acquisition of citizenship by birth, registration or naturalization. However, an “illegal migrant” and their children are excluded from obtaining citizenship by any of these means.<sup>105</sup> But, “Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who arrived in India on or before December 31, 2014” are excluded from the scope of the expression “illegal migrant”.<sup>106</sup>

Since India does not follow the rule of *jus soli* (place of birth) for citizenship, there is no automatic conferment of citizenship for refugee children who were born in India. The relevant law at this point of time is that a person is entitled to citizenship by birth, if:

- A person born in India on or after July 1, 1987, but before December 3, 2004, and either of the parents were citizens of India at the time of birth.<sup>107</sup>
- A person born in India on or after December 3, 2004, is considered citizen of India by birth only “if both the parents are citizens of India or one of the parents is a citizen of India and the other is not an illegal migrant at the time of his birth.

Thus, the children of illegal migrants cannot acquire citizenship by birth if they were born on or after December 3, 2004.<sup>108</sup>

A foreigner can obtain citizenship by way of naturalization after they complete 12 years of residence in India (throughout the period of twelve months immediately preceding the

<sup>105</sup> S. 2 (1) (b) defines an illegal migrant as 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.

<sup>106</sup> S. 2(1) (b), Citizenship Act, 1955. This exemption was created in 2019 by way of the Citizenship Amendment Act, 2019 and the same is under challenge before the Supreme Court.

<sup>107</sup> Section 3(b), Citizenship Act, 1955.

<sup>108</sup> Section 3(c), Citizenship Act, 1955.

date of application and for eleven years in the aggregate in the fourteen years preceding the twelve months). However, illegal migrants are excluded from the ambit of this.<sup>109</sup> Another option is to obtain citizenship by registration. However, illegal migrants are excluded from this too.<sup>110</sup> What all of this implies is that it is practically impossible for a refugee child to obtain citizenship in India if he/she had entered India as an “illegal migrant”.



#### 4.6 Preventing Summary Deportations

It was pointed out earlier that as such Indian law permits deportations of foreigners, even without a hearing and as such, even the Supreme Court has upheld this power. However, in a series of cases, the higher judiciary has prevented summary deportations by ordering a “stay” on deportations when refugees have approached the courts by way of writ petitions challenging these orders.<sup>111</sup> The courts have taken a stance in such cases that to send these individuals to their countries of origin would expose them to danger to their lives and liberties and hence they cannot be summarily deported. Courts have also facilitated the process of asylum seeking by allowing persons to visit Delhi for that purpose<sup>112</sup> or allowing the UNHCR officials to visit prisons for conducting the RSD interviews.

Chances of summary deportations can be prevented by making an application to the UNHCR as early as it can be done and approaching the High Court under Article 226 challenging the deportation orders and asking for a “stay” on the execution of these orders till the time the UNHCR makes a determination.

<sup>109</sup> Section 3(c), Citizenship Act, 1955.

<sup>110</sup> Section 5, Citizenship Act, 1955.

<sup>111</sup> *Gurunathan & Ors v. Government of India*, WP No.s 6708 and 7916 of 1992 (Madras High Court); *Gurinder Singh & Ors v. Union of India*, CrI. W. P. 871 of 1994. (Gurinder Singh & Ors Punjab and Haryana High Court); Criminal Writ Petition No. 658 of 1997 (Madras High Court); ; *Ktaer Abbas Habib Al Qutaifi and Another v. Union of India and Others*, 1999 CRI.L.J. 919 (Delhi High Court).

<sup>112</sup> Order of the Guwahati High Court dated 15.11.1990 in *KhyHtoon v. State of Manipur*, W.P. No.515 of 1990 (available at : [https://www.refworld.org/cases,IND\\_HC,3ae6b6f31c.html](https://www.refworld.org/cases,IND_HC,3ae6b6f31c.html)).

### **While Defending Refugee Children**

- Make all efforts to take the child out of the adult-justice system and place them in the Juvenile Justice System.
- Remember that all children are entitled to free legal aid in terms of Section 12(c) read with Section 13 of the Legal Services Authorities Act, 1987.
- The focus of efforts must be to reunite the child with the family, relatives or the community as far as it is possible. The other options (institutionalization) are to be pursued only when those are in the best interests of the child.
- Listen to children and give “due weightage” to their views and opinions, considering their age and maturity. Where the child is mature enough to understand the nature of proceedings, take his/her consent before taking steps such as applying for asylum.
- Ensure that children are able to communicate with their parents if the whereabouts of the parents are known, ensure that the child is able to communicate with them on regular basis. Where the parents are able to meet the child physically, obtain orders from the JJB/CWC to facilitate their periodic interaction at the place in which they are housed. Where they are not able to be present physically, obtain orders from the Board/CWC to facilitate period interactions over phone or other audio-visual means.
- In case there are language barriers in communicating with the child, you can get in touch with the District Child Protection Unit, which is expected to maintain a panel of translators. If they prove to be of no help, one can get in touch with the UNHCR to help with translations.
- Refugee children typically suffer from trauma or post-traumatic stress disorders. As lawyers, ensure that the Board or the CWC makes mental health services available to them. There are counsellors attached to the DCPU, but often these children would require more help in the form of psychiatric support. In such cases, ensure that they receive them by way of orders of the Boards to produce these children before mental health experts. Talk to the counsellor and the home staff to understand whether the child requires this support and bring it to the notice of the Board or the Committee, if that is needed.
- In case children have to be taken to Delhi for completing procedures at UNHCR, the same can be undertaken by coordinating actions with a CWC in Delhi. This will enable a smooth travel, stay and return from Delhi.
- Where the parents of the child are in a different state, it is advisable to get the matter and child transferred to that State. This will make it easier for the parents to communicate and visit the child. When making such transfers, it is essential to identify the jurisdictional CWC and order a transfer to that place.

## **ANNEXURE 1:**

### **Offices/ Locations For Registration As Asylum Seeker/ Refugee**

#### **New Delhi**

- UNHCR Registration Centre,  
C-543A, Vikaspuri, New Delhi 110018.  
Phone: 011-24379855, 011-24374501  
Email: indne@unhcr.org
- Socio-Legal Information Centre (SLIC)  
576, Bhogal, Jangpura, New Delhi – 110014  
Phone: 011-24374501, 011-24374502  
Email: contact@hrln.org

#### **Hyderabad**

Save the Children India (SCI)  
Bal Raksha Bharat, House No 9-53, Plot No -3,  
Opposite Megacity Grammar High School,  
New Gayathri Nagar, Jillelguda, Hyderabad  
Phone: 9948876491, 9100319411  
Email: rrhelpdesk@savethechildren.in

#### **Chennai**

UNHCR, No.11, 17th Cross Street,  
Besant Nagar, Chennai – 600090  
Email: indch@unhcr.org

#### **Jammu**

Save the Children India (SCI)  
Bal Raksha Bharat, C/o Mr. Danood Ahmad,  
Lodhi Lane No. 3, Vidhata Nagar, Jammu – 180001  
Phone: 0191-2493550  
Email: donorsupport@savethechildren.in

#### **Pune**

Gandhi National Memorial Society (GNMS)  
Aga Khan Palace, Nagar Road, Pune – 411006  
Phone: 020-26699460  
Email: gnmspune@gmail.com

## ANNEXURE 2: Model Application for Basic Registration

### Basic Bio Data for Applicants in Detention

1. Date of Arrival :
2. Estimated Date of Arrival : Yes/No :
3. Full Name :
4. Other name :
5. Family name :
6. Father's name :
7. Mother's name :
8. Sex :
9. Country and place of birth :
10. Date of birth :
11. Estimated Date of Birth: Yes/No :
12. Country of Origin :
13. Citizenship :
14. Close family members (Parents, Siblings, Wife and Children) including Missing/  
Deceased :

Name	Relation	DOB/ Age	Country of Residence	Country of Birth	Place of Birth	Marital Status	Status in Country (PRS/ ASY/ Refugee/ Citizen/ OTH)

15. Address of last place of residence in the home country:
16. Marital Status :
17. In a polygamous relationship: Yes/No :
18. Religion :
19. Ethnicity :
20. Level of education :
21. Occupation :
22. Name of detention center :
23. Duration in Detention:
24. Undertrial/Undergoing Sentence/Sentence Completed (please tick as applicable)
25. Specific Needs :
26. Contact Information :

27. For ASR and refugee status kindly note the registration No.

Where	Date of registration	Status Obtain	Remarks

28. Names of family members in detention (if any):

29. Documents – list them :

30. Time Spent in any other country prior to entering India : Yes/No, Name of country :

31. Comments (if any) :

32. Date of form filling:

Undertaking to be signed/thumb print

Name of the Registration Officer and signature

# CHRI Programmes

CHRI seeks to hold the Commonwealth and its member countries to high of human rights, transparent democracies and Sustainable Development Goals (SDGs). CHRI specifically works on strategic initiatives and advocacy on human rights, Access to Justice and Access to Information. Its research, publications, workshops, analysis, mobilisation, dissemination and advocacy, informs the following principal programmes:

## 1. Access to Justice (ATJ)

**Police Reforms:** In 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 reform so that the police act as upholders of the rule of law rather than as enforcers of a regime. CHRI's programme in India and South Asia aims at mobilising public support for police reforms and works to strengthen civil society engagement on the issues. In Tanzania and Ghana, CHRI examines police accountability and its connect to citizenry.

**Prison Reforms:** CHRI's work in prisons looks at increasing transparency of a traditionally closed system and exposing malpractices. Apart from highlighting systematic failures that result in overcrowding and unacceptably long pre-trial detention and prison overstay, it engages in interventions and advocacy for legal aid. Changes in these areas can spark improvements in the administration of prisons and conditions of justice.

## 2. Access to Information

**Right to Information:** CHRI's expertise on the promotion of Access to Information is widely acknowledged. It encourages countries to pass and implement effective Right to Information (RTI) laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh, Ghana and Kenya. In Ghana, CHRI as the Secretariat for the RTI civil society coalition, mobilised the efforts to pass the law; success came in 2019 after a long struggle. CHRI regularly critiques new legislation and intervenes to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. It has experience of working in hostile environments as well as culturally varied jurisdictions, enabling CHRI bring valuable insights into countries seeking to evolve new RTI laws.

**Freedom of Expression and Opinion:** South Asia Media Defenders Network (SAMDEN): CHRI has developed a regional network of media professionals to address the issue of increasing attacks on media workers and pressure on freedom of speech and expression in South Asia. This network, the South Asia Media Defenders Network (SAMDEN) recognises that such freedoms are indivisible and know no political boundaries. Anchored by a core group of media professionals who have experienced

discrimination and intimidation, SAMDEN has developed approaches to highlight pressures on media, issues of shrinking media space and press freedom. It is also working to mobilise media so that strength grows through collaboration and numbers. A key area of synergy lies in linking SAMDEN with RTI movements and activists.

### **3. International Advocacy and Programming**

Through its flagship Report, *Easier Said Than Done*, CHRI monitors the compliance of Commonwealth member states with human rights obligations. It advocates around human rights challenges and strategically engages with regional and international bodies including the UNHRC, Commonwealth Secretariat, Commonwealth Ministerial Action Group and the African Commission for Human and People's Rights. Ongoing strategic initiatives include advocating for SDG 16 goals, SDG 8.7 (see below), monitoring and holding the Commonwealth members to account and the Universal Periodic Review. We advocate and mobilise for the protection of human rights defenders and civil society spaces.

### **4. SDG 8.7: Contemporary Forms of Slavery**

Since 2016, CHRI has pressed the Commonwealth to commit itself towards achieving the United Nations Sustainable Development Goal (SDG) Target 8.7, to 'take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.' In July 2019 CHRI launched the Commonwealth 8.7 Network, which facilitates partnerships between grassroots NGOs that share a common vision to eradicate contemporary forms of slavery in Commonwealth countries. With a membership of approximately 60 NGOs from all five regions, the network serves as a knowledge-sharing platform for country-specific and thematic issues and good practice, and to strengthen collective advocacy.







# CHRI

Commonwealth Human Rights Initiative

working for the practical realisation of human rights in  
the countries of the Commonwealth