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GUIDELINES FOR THE TREATMENT OF AFGHAN ASYLUM SEEKERS & REFUGEES IN EUROPE - April 2003

Introduction

1. The European Council on Refugees and Exiles (ECRE) is a network of 74 organisations throughout 31 European countries. This paper is an update of our Guidelines on Afghan asylum seekers and refugees of February 2002.¹ It takes into account the latest developments in the country, the work of the Interim Administration in Kabul and the changes to the overall situation in Afghanistan in the sixteen months since the signing of the Bonn Agreement.
2. This paper concerns the voluntary repatriation of Afghans who have refugee or complementary protection status; those with temporary protection status; and those who are in the process of applying for protection; including those who have received a negative first decision and are on appeal. It also concerns the forced return of Afghans who are failed asylum seekers; whose protection status has ceased; and whose protection status has ended after they have had effective access to the asylum system.
3. Throughout Europe the treatment of Afghans seeking international protection continues to vary considerably. In some European countries the number of negative decisions has increased, although applications continue to be considered on an individual basis. Some countries have begun to implement voluntary repatriation schemes, a number in conjunction with IOM, which provide transport costs, resettlement grants and in certain cases 'explore and prepare' visits. Tripartite agreements have been concluded with the Afghan authorities and UNHCR to encourage voluntary repatriation.²
4. Reports from NGOs and international organisations continue to underline that the country remains unsafe and that there is insecurity in a number of areas with various groups continuing to suffer persecution. ECRE urges that Afghan refugees are provided with protection in compliance with international human rights and refugee law principles. Applications from Afghan asylum seekers must be dealt with on an individual basis; we would recommend against a presumption that applications are manifestly unfounded on

¹ Guidelines for the Treatment of Afghan Asylum Seekers and Refugees in Europe, February 2002

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

the basis of the establishment of the Afghanistan Transitional Administration. Further, for people facing persecution an internal protection alternative is not a viable alternative to granting asylum, as has been suggested by some governments.

5. We would recommend that gradual voluntary return should be the focus for a European return programme to Afghanistan. We are against the promotion of voluntary repatriation as a durable solution at the present time as the conditions of “safety and dignity” cannot be upheld. Therefore voluntary repatriation should only be facilitated at present for those who have indicated a desire to return.
6. In relation to the forced return of Afghans who are not legally entitled to remain in Europe on the basis of a need for international protection we would recommend that such returns should not take place at present or until there is a basic infrastructure in place to uphold the rule of law and protect human rights in Afghanistan. For those without a legal right to remain who indicate a desire to return; return should be facilitated.
7. It is imperative that European governments should continue to fund the reconstruction process in Afghanistan regardless of humanitarian priorities that arise elsewhere; such as the unfolding humanitarian crisis in Iraq.
8. This paper should be read in conjunction with ECRE’s Positions on the Interpretation of Article 1 of the Refugee Convention and on Complementary Protection and in the light of other ECRE policy statements.³

I – THE DUTY OF PROTECTION FROM PERSECUTION

The situation on the ground

9. Despite the establishment of an Interim Administration and the beginning of reconstruction efforts by the international community the security situation in Afghanistan remains unsafe. This is confirmed by media reports, reports from the UN⁴, NGOs⁵ and information provided by governments⁶. As a recent UN report has stated “security remains the most serious challenge facing the peace process in Afghanistan. Security must be improved to allow the re-establishment of the rule of law, ensure the protection of human rights, promote the reconstruction efforts and facilitate the success of the complex political processes... Afghans in many parts of the country remain unprotected by legitimate State security structures”⁷.
10. With the government having little authority outside Kabul, it is the local military commanders and warlords, who greatly outnumber the number of Afghan soldiers, that

³ In particular, *Position on Refugee Children* (1996) and *Position on Asylum Seeking and Refugee Women* (1997)

⁴ See United Nations General Assembly/Security Council, The Situation in Afghanistan and Its Implications for International Peace and Security report of the Secretary-General, March 2003, in particular paragraphs 22-25.

⁵ See for example - Care International in Afghanistan Policy Brief, January 2003 “A New Year’s Resolution to Keep: Secure a Lasting Peace in Afghanistan”

http://www.careinternational.org.uk/news/what_do_care_think/afghanistan/afghanistan_policy_brief_jan_2003.pdf

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

<http://www.ind.homeoffice.gov.uk/default.asp?PageId=3730>

⁷ note 4, paragraph 20.

essentially have control over the rest of the country⁸. This has created an extremely unstable situation, which in turn hampers the ability of UN organisations and NGOs to provide aid and relief. As the number of returns to the area has far exceeded what was expected, aid originally intended for reconstruction has been used for emergency relief; this has greatly delayed development programmes which were stalled for most of last year⁹.

11. In Kabul, the security and human rights situation has improved to some extent mainly because of the introduction of the International Security Assistance Force (ISAF) and the heavy international presence in the capital. However the Afghan government continues to lack effective control over Kabul and there have been reports of the complete inability of the police to guarantee the protection of human rights there.¹⁰ There are also reports that the police themselves are involved in human rights violations; because of the absence of accountability structures they cannot be held to account for their actions.¹¹
12. Beyond Kabul poor security, generalized criminality, and disregard for basic human rights have remained endemic. Each of these factors has in turn negatively affected reconstruction efforts and the delivery of humanitarian assistance. Travel on many roads remains unsafe with ongoing extortion by local soldiers or criminals (often one and the same). Outside Kabul, U.N. officials have little ability to assist persons at risk of human rights abuses. Access to many non-urban communities is also difficult or impossible resulting in little or no support from NGOs in these areas. In addition to security concerns there are a number of difficulties related to land ownership and tenure which may negatively affect reintegration.¹²
13. A number of events in recent months are indications of the unstable security situation. In the first week of February 2003 a large number of relief and reconstruction operations by NGOs and UN agencies were disrupted following increasing violence in SE Afghanistan, especially around Kandahar.¹³ Following one of these attacks, the Taliban issued warnings that all staff working for the international community would be targeted. Further recent attacks, resulting in a number of deaths, have included one on a World Food Programme convoy in South-Eastern Afghanistan, an attack on a UNHCR convoy in the Nangarhar province, and an ambush of a Special Forces patrol in the Helmand province.

⁸ Aid continues to be provided to militia leaders, in 2002 less than one fifth of donor funding fell under government control. See CARE policy brief "A Little Less Talk, A Lot More Action", October 7, 2002.

⁹ Afghanistan - World Report 2002, Human Rights Watch

¹⁰ As can be illustrated by the rocket attack on the headquarters of the international peacekeeping force on the 23 of March - <http://www.afghan-web.com/aop/today.html>

¹¹ See Amnesty International Report "Afghanistan. Police reconstruction essential for the protection of human rights" at - <http://www.web.amnesty.org/ai.nsf/recent/ASA110032003!Open>

¹² UNHCR Donor Update, Afghanistan, March 2003.

¹³ Events included attacks on government forces, 18 deaths occurred after a bus blew up on a landmine (see article "UN convoy attacked in southeastern Afghanistan" - <http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/fef7358df7f4e3ac49256cde00210336?OpenDocument>) an attack on the office of an NGO Action Against Hunger, (see article "Rising Violence Hurts Afghanistan Aid Work" - <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A45487-2003Feb8¬Found=true>) and the killing of a Red Cross worker in the Kandahar province, which led to the temporary suspension of all field trips in Afghanistan by the ICRC (http://www.irinnews.org/report.asp?ReportID=33126&SelectRegion=Central_Asia&SelectCountry=AFGHANISTAN)

14. The Interim Administration is stretched beyond its capacity to try and restore order. Its efforts are generally hampered by its inability to impose its authority. Requests for an expanded ISAF to patrol the countryside and act as a deterrent to renewed fighting and human rights abuses have been blocked, despite the fact that the Afghan army is nowhere near the capacity required. The uncertain and unsafe environment outside Kabul has led to an increasing number of refugees and IDPs staying in the capital, which stretches the capacity of aid agencies and destabilises the area.

Recommendations

15. European States should give all Afghan asylum claimants the opportunity to lodge an application and have it processed with minimum delay. ECRE considers that certain categories of individuals amongst the Afghan population may have ongoing protection needs that remain unchanged despite recent political developments in Afghanistan. These groups include:
- Pashtuns, who have suffered violence and harassment in the northern provinces because of their perceived allegiance to the Taliban. Some 60,000 Pashtuns are said to be present in the southern provinces refusing to move back for fear of persecution.
 - Many former members of the former ruling communist party PDPA and the agents of the secret service KhADD still face violence, harassment and discrimination for their roles in the communist government, despite the co-operation of many with the new administration.
 - Religious minorities are at risk of persecution including Hindus, Sikhs, Shiites, Sunnis and Ismailis.¹⁴
 - Groups endangered by forced recruitment which is still being carried out by militia groups in the North, with reports of executions of those refusing recruitment.¹⁵
 - People endangered by persecution on grounds of sexual orientation.¹⁶
 - Journalists have been receiving anonymous threats; for example in Kabul and Herat.¹⁷
16. It should also be noted that position of women has changed little despite the lifting of formal legal restrictions on their movement by the Kabul government. There is frequent harassment in public places, affecting access to education, health facilities, jobs and leisure, in a number of areas women rarely go out in public.¹⁸ Domestic violence is widespread and there are no effective mechanisms to seek assistance or redress. Despite its illegality, girls as young as nine years old are married without intervention by the

¹⁴ At the end of last year 170 Ismailis were jailed for several weeks, when they tried to travel to Kabul to welcome home their leader (who fled to Uzbekistan, when the Taliban took over).

¹⁵ see United Nations Commission on Human Rights, Civil and Political Rights, Including the Question of Disappearances and Summary Executions report of the special rapporteur to Asma Jahangir, 3rd February 2003.

¹⁶ Homosexuality continues to be illegal in Afghanistan under Sharia law and is therefore subject to legal sanctions.

¹⁷ see The Committee to Protect Journalists protest letter on the assault detention and expulsion of a journalist from Herat at <http://www.cpj.org/protests/03ltrs/Afghan28mar03pl.html>

¹⁸ NGOs have also cited Kandahar and Jalalabad as areas where women are rarely seen outdoors and are always wearing burqas. According to Human Rights Watch in Herat, there have been instances of women being arrested, taken to hospital and subject to abusive gynaecological examinations if found walking in the street with a man or riding in a taxi without another passenger "WE WANT TO LIVE AS HUMANS:" Repression of Women and Girls in Western Afghanistan, Human Rights Watch, December 2002. See: <http://www.hrw.org/reports/2002/afghnwmn1202/>.

government. Returning female head of households or single females without family to return to will have no means of supporting themselves in Afghanistan.

17. ECRE urges European states to give immediate consideration to the asylum applications of persons falling within the aforementioned categories, and to consider all asylum applications from Afghans on an individual basis in order to identify and recognise their status as early as possible. This should include either refugee status in accordance with the 1951 Convention Relating to the Status of Refugees or complementary protection status for those who fear persecution but fall outside a full and inclusive interpretation of the terms of the 1951 Convention. We would recommend against a presumption that applications are deemed to be manifestly unfounded on the basis of the establishment of the Afghanistan Transitional Administration.
18. For people facing persecution an internal flight option is not a viable alternative to granting asylum, as has been suggested by some governments. Considering the unsafe situation on the roads and general lawlessness and total lack of respect for human rights in our view this does not constitute effective protection.

II – THE NEED FOR CO-ORDINATED AND STAGED RETURNS

19. The absence of law and order and basic physical infrastructure, (such as roads, schools, health clinics, effective security, or employment opportunities) the lack of functioning institutions including a military and a judiciary, limited water availability and food supply due to years of drought, high dependency on international food aid, the presence of millions of mines in homes, fields and irrigation systems, together with the problems faced by voluntary agencies due to security concerns in providing basic social services and assistance – all point to the need for an eventual careful and staged approach by European countries to returns to Afghanistan. During 2002 many of the returning Afghan refugees did not return to their original homes but were forced to reside in urban areas because of these conditions, resulting in extra strain on the city infrastructure. Last year UNHCR estimated that there were 800,000 Afghans internally displaced.¹⁹
20. European governments need to be aware that the situation on the ground differs widely from one part of the country to another, in security and political terms as well as with regard to availability of water and food supplies. The European Council's Afghanistan Return Plan²⁰ must fully take into account the instability in the country and the fact that the safety of returnees can in no way be guaranteed.
21. We would urge that gradual voluntary return should be the focus of any European return plan to Afghanistan. By definition, voluntary return involves individuals freely choosing to repatriate without pressure from the host state and with their genuine consent. The imposition of sanctions on individuals to coerce them to return, such as removal of socio-economic benefits, does not constitute voluntary return. The decision to return must be a personal one, each individual member of a returning family must agree to the decision and not only heads of households or community leaders. The right to asylum must also be

¹⁹ UNHCR, Afghanistan Humanitarian Update No. 67, Jan. 3, 2003.

²⁰ Council document on an Afghanistan return programme, doc No 12605/1/02 MIGR 87 RELEX 179, October 2002

safeguarded, such that individuals with legal protection status continue to receive protection of the host country, or in the case of asylum seekers and their families, to pursue their applications if they decide not to return.

22. For those with protection status at the present time voluntary repatriation should only be “facilitated” and should not be “promoted”.²¹ Facilitating voluntary repatriation by the host states implies supporting and enabling individuals wishing to repatriate, but not promoting the repatriation of the particular nationality or ethnic group involved. We would urge that a meaningful distinction is made between promotion and facilitation and that pressure is not exerted on refugees to return.²² Promotion of voluntary repatriation can only take place when an assessment of the situation in Afghanistan shows that the necessary conditions of return in safety and dignity including “physical, legal and material safety” exist.²³
23. ECRE recommends that the return of Afghans without the legal right to remain in Europe is facilitated; and that such persons are provided with a similar level of support as persons with legal status choosing voluntary repatriation.
24. The European Councils’ Return programme recommends that forced return should only take place “after the passage of reasonable time”.²⁴ We would recommend that the reasonable time for such returns would be when a basic infrastructure is in place in Afghanistan to uphold the rule of law and protect the human rights of Afghans, and when the country is in a stable enough position to absorb the number of people who have already returned. These conditions do not exist at present. Furthermore in order to ensure the success and sustainability of return programmes all attempts must be made to elicit the individuals consent and co-operation prior to the return process taking place.
25. The success of return programmes to Afghanistan should be linked to and measured by the sustainability of return, not the scale or numbers of people returned. The return of large numbers of people to an already unstable situation where 1.8 million refugees have recently returned²⁵ risks further exacerbating instability and might lead to further internal displacement, and to large groups being forced to leave once again. There is evidence that previous returns, in particular 261,000 from Iran and 1.5 million from Pakistan, were not in fact voluntary and that a great deal of pressure was exerted by these governments, including police harassment and the removal of socio-economic benefits.²⁶ These returns may not therefore be sustainable; in fact humanitarian organisations in Pakistan have reported that a number of repatriated refugees, who were unable to support themselves in

²¹Promotion of repatriation is defined by UNHCR as “the practical measures which can be taken to help refugees return voluntarily once the conditions for this exist” and “actively undertaking broad and wide-ranging measures to advocate refugees’ return”.

²² UNHCR defines “facilitation” as respecting the refugees right to return to their country at any time, when they have indicated a “strong desire to return voluntarily and/or have begun to do so on their own initiative”. We would endorse the UNHCR recommendation that this term should only be used when repatriation is voluntary and not driven by coercion.

²³ As stated in the Global Consultations on International Protection, fourth meeting, 25 April 2002, EC/GC/02/5, paragraph 15. These concepts are also defined in UNHCR Handbook on voluntary repatriation (1996), supra 10, paragraph 2.4.

²⁴ note 14, paragraph 8.

²⁵ UNHCR, Afghanistan Humanitarian Update No. 67, January. 3, 2003.

²⁶ See the Afghanistan Research and Evaluation Unit report, “Taking Refugees For a Ride? The Politics of Refugee Return to Afghanistan”, February 3rd, 2003

Afghanistan have been returning there, this may potentially amount to tens if not hundreds of thousands.

26. We support the statement made by Ruud Lubbers, the United Nations High Commissioner for Refugees at the 53rd session of the Executive Committee of the High Commissioner's programme where he stated that "the rehabilitation and reconstruction process must be accelerated if those who have gone home are to stay, and if more are to follow. We must therefore shift our focus now from return to reintegration".²⁷
27. It is imperative that international support for the reconstruction of Afghanistan should continue regardless of humanitarian concerns that arise elsewhere, particularly in view of the unfolding humanitarian crisis in Iraq. The international community, and in particular the EU, must play a full and active role in the reconstruction of Afghanistan. The reconstruction process can only properly begin once aid is not being used for emergency relief to support large groups of people returning to Afghanistan.
28. European states must be made aware of the impact of their returns policies on the ground in Afghanistan and on countries in the region hosting the majority of Afghan refugees (Pakistan and Iran). Appropriate planning and coordination are essential for ensuring that returns from European states do not trigger forced returns to Afghanistan from countries in the region or further destabilisation within Afghanistan.
29. Returnees should be given the necessary information to make an informed choice; this should include access to information from friends and relatives living in communities in Afghanistan whom returnees are most likely to trust. Information should cover whether or not guarantees for safe and sustainable return have been met, and also on rights guaranteed there, as well as possibilities of the right to remain in the host country. They should also be entitled to undertake "look and see" visits to Afghanistan to assess whether it is realistic to return while retaining their Convention or complementary protection status in the country of asylum. They should be given time to commit to the repatriation process and prepare to return.

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²⁷ Geneva, 30 September 2002.