



Who belongs?

The Foreigners Act 1946 and Pakistan Citizenship Act 1951

A Legislative Review



Legislative review

Who Belongs?

The Foreigners Act 1946
and Pakistan Citizenship Act 1951



Human Rights Commission of Pakistan

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Contents

Introduction	1
Foreigners vs citizens: Implications.....	1
The Pakistan Citizenship Act 1951	3
Section 4: Birthright citizenship	3
Section 10: Citizenship through marriage.....	9
Review of selected provisions of the Foreigners Act 1946.....	13
Power of the government	13
Determination of nationality	14
Burden of proof.....	15
Use of force	18
Risk of indefinite detention	19
Conclusion and recommendations	23

Introduction

Pakistan's legal framework recognizes only two distinct and broad categories of individuals concerning their relationship with the state: citizens and foreign nationals. It does not contain an adequate legal protection framework for refugees, despite Pakistan being amongst the largest hosts of Afghan refugees for almost half a century, nor does it contemplate a scenario where an individual lacks citizenship of any country and is therefore stateless.

This legislative review examines key provisions of two legislations: the Pakistan Citizenship Act 1951 and The Foreigners Act 1946. These two Acts govern citizens and foreigners respectively, and constitute largely as the current legal framework applicable to both groups. Refugees are not recognized as a distinct group from foreigners or possible citizens (through an applicable pathway to citizenship)¹ under national law. The review seeks to assess current gaps in the legal framework and its application pertaining to protection of refugees and citizenship rights, in light of Pakistan constitutional and international human rights obligations.

Foreigners vs citizens: Implications

Section 2 of the Foreigners Act 1946 (the Foreigners Act) defines a foreigner as an individual who is not recognized as a citizen of Pakistan. Therefore, according to this statutory definition, any person lacking citizenship in Pakistan is categorized as a foreigner under the provisions of this Act.

This distinction between citizens and foreigners is of paramount importance, as Chapter 1 of the Constitution of Pakistan assigns different fundamental rights to each category. While citizens enjoy all the fundamental rights enshrined in the Constitution, foreigners are entitled only to those rights specifically granted to them, as 'persons', within the Constitution. Articles 9 – 14 of the Constitution

¹ Pakistan is not a party to the 1951 Refugee Convention and there is no national legislation for the protection of refugees or determination of refugee status in the country.

contain fundamental rights that adopt the terminology of 'person' versus 'citizen' in the text itself. To provide a comparative example, Article 9 states, "No person shall be deprived of life or liberty save in accordance with law" ... while Article 15 on freedom of movement states, "every citizen shall have the right to remain in...enter and move freely throughout Pakistan and to reside and settle in any part thereof." Article 9 applies to all persons, which includes foreigners (including refugees) in Pakistan, while Article 15 is a protected right of only a citizen of Pakistan.

This differentiation has also been acknowledged by the higher courts of Pakistan in various judgments, which emphasize that certain rights delineated in the Constitution are exclusively reserved for citizens of Pakistan. For instance, rights such as freedom of movement (Art. 15), assembly (Art. 16), association (Art. 17), trade (Art. 18), and speech (Art. 19) are exclusively available to citizens. Conversely, certain fundamental rights, including the right to life (Art. 9), protection against unlawful detention (Art. 10), and the inviolability of human dignity (Art. 11), are afforded to all individuals within Pakistan's jurisdiction, irrespective of their nationality.² It is therefore the State's constitutional obligation to protect fundamental rights of refugees, as persons, guaranteed under the Constitution, even in the absence of any other law in place for protection of refugees, asylum seekers and related groups in the country.

² Umar Ahmad Ghumman v. Government of Pakistan and Others [2002] PLD 521 (Lahore); Rahil Azizi v. Federation of Pakistan WP 1666 of 2023.

The Pakistan Citizenship Act 1951

In defining the category of individuals considered as foreigners, a critical examination of the Pakistan Citizenship Act of 1951 (Pakistan Citizenship Act) is indispensable. This Act serves as the primary legislative framework governing citizenship matters in Pakistan, thus warranting a thorough analysis to discern the criteria for citizenship and foreign status in the country.

The Pakistan Citizenship Act delineates several methods through which citizenship can be acquired, including by birth within the territory, by descent, through migration under certain circumstances, by naturalization, by marriage, and by the incorporation of territory. Despite these provisions, the Act's deficiencies, coupled with judicial interpretations, have led to instances where individuals rightfully entitled to Pakistani citizenship have been unjustly denied.

It is important to discuss specific provisions of the Pakistan Citizenship Act, notably Section 4 (Citizenship by birth) and Section 10 (Married women), and implications for individuals unjustly denied Pakistani citizenship. By examining these provisions and their interpretation and application by the courts, it is possible to understand how shortcomings in the Act have resulted in the deprivation of citizenship rights for certain individuals who should rightfully be recognized as citizens of Pakistan.

Section 4: Birthright citizenship

Section 4 of the Pakistan Citizenship Act states that anyone born within Pakistan's territory automatically becomes a citizen by birth, aligning with the principle of *jus soli* (right of the soil). This principle asserts that citizenship is conferred based on place of birth within a nation's borders, irrespective of parental citizenship. The sole exceptions under Section 4 are children born to foreign diplomats or enemy aliens.

The language and intent of Section 4 is unambiguous: it extends citizenship by birth to all individuals born within Pakistan, regardless of their parents' citizenship status. The provision therefore entitles

all persons, including Afghan and other refugees (as well as stateless persons), to gain Pakistani citizenship if they were born in the country. However, despite the clarity of this provision, there exists inconsistency in how Pakistani courts have interpreted it. Different judgments of the high courts have contributed to confusion in the uniform understanding and application of this provision, especially in the context of refugees.

Recent rulings of the Islamabad High Court, in the cases of Hafiz Hamdullah Saboor v. Government of Pakistan³ and Fazal Haq v. NADRA etc.⁴ clearly recognize that citizenship by birth automatically makes a person born in Pakistan a citizen, without the need to fulfill any prerequisites.⁵ This applies equally to children of Afghan and other refugees born in Pakistan. The Court stated that:

Section 4... explicitly declares that every person born in Pakistan after commencement of the Citizenship Act shall be a citizen by birth. The scope of the exceptions is limited and restricted to only two clearly described eventualities [in proviso (a) and (b)]. Birth creates a right to become a citizen of Pakistan by operation of law. The legislature has used the expression 'shall' and thus birth in Pakistan is the sole ground to become a citizen. ... The status of such a person as a citizen is not subject to discretionary powers vested in the State as in the case of other categories e.g. citizenship by migration, naturalization etc...⁶ [I]t is not a privilege granted by the State but a right acquired by law. The onus is on the State to establish that, despite having been born

³ Hafiz Hamdullah Saboor v. Government of Pakistan WP 3748/2019 [2021] (Islamabad).

⁴ Fazal Haq v. NADRA etc. Order of 2022 WP 1254 of 2022 (Islamabad).

⁵ Hafiz Hamdullah Saboor v. Government of Pakistan WP 3748/2019 [2021] (Islamabad) para 12.

⁶ Ibid, para. 8.

in Pakistan, the person would not come within the mandate of section 4 of the Citizenship Act.⁷

The Islamabad High Court also noted that unlike other countries that have qualified their right to citizenship by birth provisions over the years, Pakistan has not made changes to Section 4 of the Pakistan Citizenship Act that make its application conditional.⁸

However, in an earlier case of Ghulam Sanai v. the Assistant Director, the Peshawar High Court rejected the claim of the petitioner, who was a son of an Afghan refugee born in Pakistan and sought the issuance of a National Identity Card of Pakistan. The Court rejected his claim for citizenship, asserting that Section 4 of the Pakistan Citizenship Act could not be interpreted in isolation but must be considered alongside other sections of the Act. Specifically, the Court emphasized that Section 4 and 5 of the Act should be read together. The joint reading led to the conclusion that anyone born in Pakistan after the Act's commencement would be a citizen by birth, subject to the conditions outlined in Section 3, which mandates that the father must be a citizen of Pakistan for the child to derive citizenship by descent.⁹

In this ruling, the Peshawar High Court linked birth in Pakistani territory (Section 4) with descent (Section 5), asserting that only individuals born to Pakistani nationals are entitled to Pakistani citizenship. Consequently, the Court dismissed the Afghan refugee's claim for citizenship through descent for a National Identity Card.

This judgment raises a concern regarding the reading of the *jus soli* principle with *jus sanguinis* (right of blood) principle for determination of citizenship. The *jus sanguinis* principle states that a person's citizenship is determined through one or both of their parent's citizenship. Conversely, the principle of *jus soli*, grants citizenship based on birth within a nation's territory. The Pakistan's

⁷ Ibid, para 12.

⁸ Ibid, para 12.

⁹ Ghulam Sanai v. Assistant Director, National Registration Office [1999] PLD 18 (Peshawar).

Citizenship Act does not explicitly state that the principle of jus soli (Section 4) needs to be read with the principle of jus sanguine (Section 5) and the Court's interpretation has led to a legal anomaly.¹⁰ By clubbing two independent provisions of the Pakistan Citizenship Act, the Court in essence eliminated the citizenship by birth provision provided in Section 4 altogether, leaving it without any legal effect.

Moreover, the Peshawar High Court further held that Afghan refugees, who had only been provided refuge temporarily and are not citizens of Pakistan, are not governed by the Pakistan Citizenship Act and fall under the purview of the Foreigners Act, 1946.

Another case concerning citizenship by birth is that of Saeed Abdi Mahmud v. National Database Registration Authority. In this case, the petitioner was born in Pakistan to Somali nationals. The petitioner had approached NADRA with his birth certificate for the issuance of CNIC, but NADRA denied issuance of CNIC to him.¹¹

In this case, the Court also emphasizes that Section 4 of the Pakistan Citizenship Act 1951 follows the principle of jus soli, which means citizenship is granted based on place of birth. The Court explained that while interpreting Section 4 of the Act, the literal rule of statutory interpretation applies. This means that the words and phrases used in the statute should be understood in their plain and obvious sense. Therefore, the Court concluded that Section 4 of the Act has only one interpretation: anyone born in Pakistan is unequivocally a citizen of Pakistan according to the law, as the language used in the section is straightforward and unambiguous.¹²

However, while the Court affirmed the principle of jus soli under Section 4, it also reiterated that citizenship by birth did not apply to Afghan refugees relying on the earlier ruling of the Peshawar High

¹⁰ S. N. Farhat. (2019). Citizenship laws of Pakistan: A critical review. *Policy Perspectives*, 16(2), 59–85.

¹¹ Saeed Abdi Mehmod v. NADRA [2018] CLC 1588 (Islamabad), Islamabad High Court.

¹² Ibid.

Court in *Ghulam Sanai v. the Assistant Director* (n. 7). The Court stated that individuals recognized as refugees by the United Nations High Commissioner for Refugees (UNHCR) in Pakistan cannot avail themselves of benefits under the Pakistan Citizenship Act, 1951 and emphasized that apart from refugees, especially Afghan refugees, anyone born in Pakistan is automatically considered a citizen under Section 4 of the Act (n. 10).

The above-mentioned judgments barring refugees from birthright citizenship carry significant implications for refugees accessing existing legal protection systems in the country, which makes the situation of Afghan refugees more precarious. There is no clear legal basis for the view that refugees or Afghan refugees in particular are barred from acquiring citizenship by birth through Section 4 of the Pakistan Citizenship Act. An examination of Section 4 of the Pakistan Citizenship Act, including provisos (a) and (b) of the section, make it clear that citizenship by birth is intended for children of foreign nationals as well, albeit with the only limited exceptions of children of alien enemies and foreign diplomats. Till date, no legal or policy document has declared Afghan refugees (or refugees as a whole) as enemy aliens, thereby attracting the narrow exception to citizenship by birth under Section 4 of the Act. It is also important to highlight here that Section 4 of the Act employs the term "shall" rather than "may," indicating its mandatory nature.¹³ This means that government authorities are obligated by law to grant citizenship and issue corresponding documentation to individuals born within Pakistan's territory. The use of "shall" underscores the compulsory nature of this provision, leaving no room for discretion among authorities.¹⁴

Moreover, an interpretation of Section 4 of the Pakistan Citizenship Act that includes children of all nationalities except Afghan refugees raises concerns of racial discrimination. The prohibition against racial

¹³ "Every person born in Pakistan after the commencement of this Act shall be a citizen of Pakistan by birth" (Pakistan Citizenship Act 1951, S. 4).

¹⁴ This view is also affirmed by the Islamabad High Court in *Hafiz Hamdullah Saboor v. Government of Pakistan* WP 3748/2019 [2021] (Islamabad).

discrimination has been recognized as *jus cogens* / a peremptory norm of international law, which creates obligations towards all / *erga omnes*, and from which no derogation is acceptable (irrespective of any treaty obligations).¹⁵ Pakistan has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination, which states in Article 1 that racial discrimination encompasses any differentiation, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin, which aims to nullify or impair the equal enjoyment of human rights and fundamental freedoms across various spheres of public life.

The Convention serves as a cornerstone for protection against discrimination and racism and any actions inconsistent with its provisions risk damaging Pakistan's reputation on the international stage. Differential treatment in denying citizenship to children of Afghan refugees while granting it to children of other nationalities under Pakistan Citizenship Act would constitute as a clear violation of Pakistan's international obligations. Additionally, Article 5 of the Convention mandates that states ensure the right to equality before the law for all individuals, without discrimination. By disregarding the Conventions mandates, particularly Article 5, which guarantees equality before the law and prohibits discrimination, Pakistan not only undermines its commitments to upholding human rights but also risks scrutiny and condemnation from the international community. Thus, upholding the principles enshrined in Pakistan's international obligations is essential not only for safeguarding the rights of the most vulnerable populations such as Afghan refugee

¹⁵ These norms reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.' Therefore, even if Pakistan has not signed a treaty imposing a specific obligation on it, Pakistan still has an absolute responsibility to not engage in acts that would constitute as a violation of peremptory norms / *jus cogens* such as torture, racial discrimination etc.; these acts are universally and without exception prohibited. See Chapter V, 'Peremptory norms of general international law (*jus cogens*)' at <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>

children but also for maintaining Pakistan's standing as a responsible member of the international community.

Section 10: Citizenship through marriage

Section 10 of the Pakistan Citizenship Act delineates the process for acquiring Pakistani citizenship through marriage, only for women married to Pakistani citizens. No such provision exists for foreign men married to Pakistani women.

Section 10 stipulates that a woman married to a Pakistani citizen, upon application to the Federal Government, may be registered as a citizen of Pakistan, subject to certain conditions such as obtaining a certificate of domicile and taking the oath of allegiance. The Rules governing this process, as outlined in the Pakistan Citizenship Rules 1952 (Rule 14) specify the procedure for such applications (Rule 15) and allow for citizenship eligibility even in the event of the husband's demise before the application is filed. While the Act does not explicitly prescribe the duration of marriage required for citizenship eligibility, the Directorate General of Immigration and Passports (DGIP) website suggests a five-year residency requirement supported by documentary evidence. Consequently, a foreign woman married to a Pakistani citizen and residing in Pakistan for five years can seek Pakistani citizenship, including widows who can provide evidence of their residency.

It is crucial to acknowledge and unpack the discrimination against Pakistani women citizens under the Pakistan Citizenship Act of 1951 and its accompanying Rules 1952, as foreign women married to Pakistani men are granted citizenship rights, while Pakistani women married to foreign nationals are not extended the same privilege. This discrepancy contravenes Article 25 of the Constitution, which guarantees equality before the law and equal protection of rights to all citizens, irrespective of gender. Moreover, this discriminatory practice runs counter to international human rights standards Pakistan is obligated to comply with, including Articles 2, 15, and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), (ratified by Pakistan), which obligates

Pakistan to eliminate gender-based discrimination in all spheres of life, including nationality rights.

Some earlier cases in Pakistani courts have upheld the discriminatory application of the law, such as in the case of *Sharifan v. Federation of Pakistan*, where the issue of citizenship denial to the foreign husband of a Pakistani woman was brought before the court and it ruled that Section 10(2) of the Pakistan Citizenship Act does not infringe upon Article 25 of the Constitution. The Court justified its decision by explaining that Section 10 was enacted with consideration to the status of women under private international law and emphasized the practical challenges associated with granting citizenship to every foreigner solely through marriage to a Pakistani woman. It argued that such a broad interpretation could potentially lead to unregulated immigration, posing difficulties in managing the influx of foreigners acquiring Pakistani citizenship in a non-discriminatory manner.¹⁶

However, since then numerous cases in Pakistani courts, where married Pakistani women have sought and are continuing to seek citizenship for their foreign husbands, have led to the higher courts of Pakistan, including the Federal Shariat Court, to reject earlier arguments of the Government of Pakistan in *Sharifan v. Federation* and hold Section 10(2) of the Pakistan Citizenship Act in direct violation of Article 25 of the Constitution of Pakistan. The Courts have reaffirmed the constitutional right to equality between citizens of Pakistan, and have directed for grant of citizenship to foreign spouses of Pakistani women in these cases.¹⁷

In 2006, the Federal Shariat Court, exercising suo moto jurisdiction, addressed the discrimination in Section 10(2) of the Pakistan Citizenship Act and determined that this contravened several constitutional and international legal principles, including Article 2-A and Article 25 of the Constitution of Pakistan, as well as Pakistan's

¹⁶ *Sharifan v. Federation of Pakistan* [1998] PLD 59 (Lahore).

¹⁷ *Mrs Rukhsana Bibi v. Government of Pakistan* (PLD 2016 Lahore 857); WP 1536-P/2023 (Peshawar High Court); *Suo Moto Case No. 1/K of 2006 (Gender Equality)* (PLD 2008 FSC 1).

international commitments. Furthermore, the Court highlighted that the provisions were in conflict with the teachings of the Quran and Sunnah.¹⁸ In its judgment, the Court called upon the President to take appropriate measures for the amendment of Section 10(2) and related provisions of the Pakistan Citizenship Act. It urged for swift action within a stipulated time frame of six months to rectify the discriminatory nature of the law. Specifically, the Court emphasized the necessity of providing a fair and equitable procedure for granting Pakistani nationality to foreign husbands of Pakistani women.¹⁹

A decade later in 2016, the Lahore High Court also addressed the issue of citizenship denial to a foreign national married to a Pakistani woman within the context of Article 25 of the Constitution. While the Court acknowledged that Article 25 permits classification of individuals, provided that those in similar circumstances are treated equally, it found that the denial of citizenship to a foreign national with a Pakistani wife lacked a rational basis and appeared arbitrary.²⁰ The Court scrutinized the classification based on marital status and concluded that it did not serve any legitimate objective, nor did it align with the principles of equality enshrined in the Constitution. Accordingly, the Court directed to grant citizenship to the husband of the petitioner as per procedure and stated that denying this right under Section 10(2) of the Citizenship Act is declared as discriminatory and in violation of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973. The judgment reiterates that the Constitution of Pakistan expressly prohibits gender discrimination, thereby nullifying any justification for differential treatment based on gender within the realm of citizenship laws.²¹

The Peshawar High Court, relying on earlier judgments against the discrimination of Section 10(2) of the Pakistan Citizenship Act, has directed for the issuance of Pakistan Origin Cards (POC) to foreign spouses (including Afghan refugees) of Pakistani women seeking

¹⁸ Suo Moto Case No. 1/K [2006] PLD 2008 FSC 1.

¹⁹ Ibid.

²⁰ Mrs Rukhsana Bibi v. Government of Pakistan [2016] PLD 857 (Lahore).

²¹ Ibid.

nationality for their husbands in multiple cases.²² However, reportedly, these directions for issuance of POC cards have not yet resulted in provision of citizenship to the foreign husbands.

Most recently in 2024, the Sindh High Court adopted a new approach towards Section 10(2), in a case of five petitions filed by Pakistani women for citizenship of their foreign spouses. The Court reiterated that section 10 (2) of the Citizenship Act, 1951 was discriminatory towards women and therefore contrary to the Constitution of Pakistan. To avoid striking down the provision, the court relied on the doctrine of reading in to extend the scope of the Section 10(2) by adding the words "or man" and "or he" to be read wherever reference is made to "woman" and "she" in Section 10(2). The Court noted that "[t]his adjustment shall not have any effect on the operability of the statute. Indeed, had the legislators been cognizant of the requirements of Article 25 at the time, they would surely have made the adjustment themselves."

In this way, the Sindh High Court aimed to limit the discriminatory language in section 10(2) having a head-on conflict with a constitutional provision, bringing it in conformity with constitutional provisions and affirming that Pakistani women have equal rights as Pakistani men in transmitting nationality to their foreign spouse. Notwithstanding court decisions affirming women's right to equality under citizenship laws in line with the Constitution of Pakistan, it is pertinent to note that in practice all concerned women in these cases have had to refer to the court to enforce their constitutional legal right, which is not effectively protected under the existing provision, processes and practices of the relevant departments.

²² <https://www.dawn.com/news/1794394/issuance-of-pakistan-origin-cards-to-afghan-spouses-of-pakistanis-ordered>. See also *Mst Amna and Another v. Federation of Pakistan etc.* WP 1536-P/2023 (Peshawar).

Review of selected provisions of the Foreigners Act 1946

The above sections revealed some of the gaps in the Pakistan Citizenship Act 1951 that prevent individuals and groups from acquiring citizenship that they should be legally entitled to under the existing legal framework. The inability to acquire citizenship, due to various barriers, transforms many individuals and possible citizens into foreigners, thereby subjecting them to provisions of the Foreigners Act 1946 and depriving them of various constitutional safeguards as citizens.

As the absence of citizenship is what defines a person in Pakistan as a foreigner, the interplay between these two legislations and the conceptual and practical distance between being a citizen and a foreigner is crucial to understand the cumulative impact of key provisions of the law on specific marginalized groups, such as refugees born in Pakistan—a large number of them still children. The broader context is also particularly relevant to assess protection of various fundamental rights guaranteed under the constitution to both citizens and foreigners. It is pertinent to emphasize that the Constitution of Pakistan protects several fundamental rights of foreigners and non-citizens (persons) that constitute both its domestic and international legal obligations.

Power of the government

The Foreigners Act grants the Federal Government in Pakistan unlimited and unrestricted "power to make orders" concerning a foreigner's presence in the country (S. 3). The government can prescribe and specify the conditions under which a foreigner can stay in the country; a wide range of restrictions, prohibitions, and regulations can be imposed. The Sindh High Court stated that Section 3 of the Foreigners Act grants authority to the Central Government to issue orders that can apply broadly to all foreigners, specific individuals, or defined groups of foreigners. These orders can regulate or restrict their entry into or departure from certain

areas, such as the Provinces and the Capital of the Federation, as well as control their presence or continued stay within those areas.²³

While all legislation is subject to constitutional limitations, including adhering to fundamental rights of all persons, this understanding is not adequately reflected or enforced in decision-making on various provisions of the Foreigners Act. The broad powers of the executive under the Act raise concerns of lack of oversight and issuance of arbitrary orders that infringe upon the rights of foreigners, especially vulnerable groups within, such as refugees and stateless persons.²⁴

Determination of nationality

Section 8 of the Foreigners Act is a critical provision that addresses the issue of determining an individual's nationality. It becomes particularly relevant in cases where a foreigner holds citizenship in more than one foreign country or when it is unclear which nationality the foreigner belongs to. In such situations, the section provides that the foreigner can be regarded as a national of the country with which they appear to have the strongest connection. The provision implies that even in cases where there is uncertainty about an individual's citizenship, the relevant authorities must assign citizenship to that individual (n. 9). Furthermore, Section 8(2) specifies that any decision regarding nationality made under section 8(1) is considered final and cannot be contested in any court.

The process of determining citizenship is of utmost importance and requires clear guidelines and procedures to avoid any errors that could have serious consequences for individuals. It is crucial to inform individuals of the basis for decisions and ensure that executive orders are based on transparent reasoning. However, wide-ranging powers and the lack of precisely outlined standards of evidence and procedural safeguards for citizenship determination poses a risk of erroneous judgments and severe repercussions, including arrest, detention and deportation, as witnessed in the case

²³ Said Muhammad Khan v. State of Pakistan [1962] PLD 595 (Karachi).

²⁴ W. Wade, J. Gosh and C. Forsyth. (2022). Wade & Forsyth's administrative law. Oxford University Press.

of Afghan refugees in Pakistan.²⁵ It is also essential to acknowledge that the current provision does not recognize stateless individuals in Pakistan, and requires every person to be attributed a nationality. This raises concerns about the executive assigning nationality arbitrarily, potentially based on physical appearance or speech patterns, as has been reportedly done. Therefore, strict standards and safeguards must be established and followed meticulously to uphold every individual's right to nationality.

Furthermore, Section 8(2) denying an individual the right to appeal against the determination of their nationality (or any order issued against them) is a violation of due process guaranteed under Article 10A of the Constitution and the principles of natural justice. The right to appeal is especially crucial for foreigners because they have a lot more at stake, including their life and liberty. Due process requires the authority to provide a fair and reasonable opportunity for a hearing to the individual whose rights or interests may be affected. The Supreme Court has also emphasized the importance of this principle, stating that due process requires that a person have the right to receive notice of any proceedings that may impact their rights and must be given a reasonable opportunity to defend themselves.²⁶

Burden of proof

Section 9 of the Foreigners Act places the burden of proving whether a person is or is not a foreigner on the individual whose nationality is in question. This poses significant challenges for individuals facing any allegations on account of being a foreigner, especially refugees, stateless persons etc. in proving their nationality or lack thereof. The lack of documentation available to these groups is a key hurdle in this regard.

The lack of adequate documentary evidence is a particularly prevalent problem in proving nationality (as well as claiming

²⁵ P. W. Hogg and A. A. Bushell. (2007). Constitutional law of Canada. Carswell.

²⁶ New Jubilee Insurance Company v. National Bank of Pakistan [2009] PLD 1126 (Supreme Court).

nationality of Pakistan) for refugees and stateless communities. In the context of stateless persons, many cases have arisen where ethnic Bengalis living in Pakistan are detained under the Foreigners Act and are subsequently tasked with providing evidence of their Pakistani citizenship to remain in the country. However, a significant hurdle faced by ethnic Bengalis (and others) in Pakistan to prove that they are Pakistani nationals is the necessity to demonstrate ancestral residency in Pakistan prior to 1978 and possession of a National Identity Card. Due to this approximately 65 percent of the 700,000 inhabitants in Machar Colony, who are ethnic Bengalis, lack Pakistani citizenship because they are unable to prove ancestral residency before the Pakistan-Bangladesh war.²⁷

It has been asserted that the obligation to produce residential proof prior to 1978 is pursuant to a notification issued by the Ministry of Interior dated 19 April 2017. The matter was discussed in 2021 by the Sindh High Court in *Abbu Hashim and Another v. Federation of Pakistan* in the context of NADRA blocking the CNIC cards of two petitioners. The Court stated that the Ministry of Interior notification was issued under Section 47 of the National Database and Registration Authority Ordinance 2000 as a mechanism for clearing blocked CNICs. It provides that if an applicant provides one or more of the documents mentioned therein, their CNIC can be unblocked,²⁸ however it does not direct for the blocking of a CNIC itself.²⁹ In the

²⁷ H. Maryam. (2021, September 19). Stateless ethnic Bengalis in Pakistan. Al Jazeera.

²⁸ As per the notification, 'Blocked CNIC will be cleared if applicant provides one or more of following documents: 1. Land record registered prior to 1978 (verified by Revenue Dept.); 2. Local/Domicile Certificate issued prior to 1978 and verified by issuing authority; 3. Pedigree (Shajra-e-Nasab) issued and verified by Revenue Dept.; 4. Government employment certificate (or of blood relative), employed before 1990; 5. Verified educational certificates (issued prior to 1978); 6. Passport issued to applicant prior to 1978.; 7. Any other document issued by Government of Pakistan prior to 1978 and verified by issuing authority (including Arm License, Driving License or Manual NIC issued prior to 1978 duly verified by record).' See *Abbu Hashim and another v. Federation of Pakistan* [2021] CP D-1761 of 2020 (Supreme Court), para 15.

²⁹ See *Abbu Hashim and Another v. Federation of Pakistan* [2021] CP D-1761 of 2020 (Supreme Court), para 17.

same case, the Court pointed out the lack of “any logic or rationale” in “how this cutoff date was chosen from the year 1978”.³⁰ With reference to the specific facts of the case, the Court further remarked:

The domicile, earlier passports even the Nikahnama of the petitioners are being rejected solely for the reason that these documents were issued after 1978 but there was no rationale or commonsensical logic as to why 1978 cutoff date has been laid down in the Ministry of Interior letter and what is the fate of those persons who were not registered prior to 1978 whether they will be treated alien in this country despite having citizenship.³¹

However, it is important to note that the approach of the courts is different in cases where a pre-existing CNIC has been blocked rather than in cases where a first time CNIC is applied for by an individual unable to provide the required documentation.

Similarly, a very large number of Afghan refugees have been born and raised in Pakistan for more than one generation, yet due to lack of documentation, they are unable to prove their right to citizenship and nationality in Pakistan. As such, they continue to be assessed with reference to the Foreigners Act; a large number of possible citizens of Pakistan from amongst the Afghan refugee population have reportedly been arrested, detained and deported to Afghanistan due to gaps in determination of nationality, in violation of constitutional protections in Pakistan. Even outside of their claims to Pakistani citizenship, mass arrests, detentions and deportations of Afghan refugees are indicative of violations of rights afforded to them as persons under the Constitution of Pakistan.

³⁰ Ibid. (para 17).

³¹ Ibid. (para 19).

Use of force

Section 11 of the Foreigners Act grants broad authority to the relevant authorities to employ force in enforcing orders or preventing breaches of the Act. Section 11(2), allows any police officer to use force that is reasonably necessary to ensure compliance with an order that is issued under this Act. Any discretion on use of force must be accompanied by clear guidelines and oversight mechanisms to prevent abuse of power. Without proper checks and balances, there is an increased risk of arbitrary and excessive use of force constituting a violation of not only Pakistan's international obligation under the Convention Against Torture (CAT)³² (and other human rights treaties) but also a violation of the fundamental right of dignity and prohibition of torture of all persons under Article 14 of the Constitution. It is also important to note that the obligations outlined in Article 4 of the CAT place a clear responsibility on Pakistan to not only prohibit torture and other cruel, inhumane and degrading treatment or punishment but also to actively prevent its occurrence. This includes condemning all such practices, providing training and resources to law enforcement and other officers to uphold human rights standards, ensuring effective oversight and complaints processes, and holding perpetrators accountable through legal mechanisms.

Subsection 2 of Section 11 of the Foreigners Act also grants sweeping powers to individuals acting under its authority, providing them with unrestricted access to any land or property. The language employed, allowing "any police officer" with access to any land or property, lacks specificity and accountability. Such ambiguity paves the way for unauthorized intrusions into private spaces, posing a substantial threat to individuals' privacy and property rights.

Article 14 of the Constitution of Pakistan recognizes the right to privacy, with a particular emphasis on the privacy of the home. While

³² Article 1(1) of the CAT defines torture as the deliberate infliction of severe physical or mental pain or suffering for various purposes, such as extracting information or confessions, punishment, intimidation, or discrimination, whether carried out by a public official or another individual acting in an official capacity.

a strict textual interpretation may limit this right solely to one's residence, the Supreme Court in *Mohtarma Benazir Bhutto vs President of Pakistan* has broadly interpreted Article 14, extending privacy protections to encompass all aspects of citizens' lives.³³ The Supreme Court stated that privacy extends beyond physical spaces and includes any realm where individuals expect privacy and security. This interpretation not only recognizes the privacy of the home but also privacy in public spaces, affirming individuals' right to control information about themselves and make choices about their personal lives without undue interference.

Therefore, Section 11(2) encroaches upon individuals' privacy rights by granting unchecked access to any land or property. In doing so, this provision fails to uphold the sanctity of privacy, which is integral to protection of dignity of a person, as guaranteed under Article 14 of the Constitution of Pakistan. Consequently, it exposes persons to potential violations of their privacy and possible citizens to their property rights, thereby undermining fundamental rights enshrined in the Constitution.

Risk of indefinite detention

Section 14 of the Foreigners Act specifies that anyone who violates this Act or any order issued under it shall be subject to imprisonment for five years and a fine. Section 14A further states that any accused person who is guilty of an offense under 14(2) cannot be released on bail unless they are considered *prima facie* innocent. Section 14B allows a foreigner who is serving a sentence under the Act to leave Pakistan with the Federal Government's consent. Section 14C further states that a foreigner who is imprisoned under the Act for not having permission to stay in Pakistan cannot be released even after the sentence expires and must remain in custody until arrangements for deportation are finalized, up to a period of three months.

While Section 14 provides different processes and procedures for deportation, return and removal of individuals from Pakistan, it does not address the issue of individuals who have no citizenship or are

³³ *Benazir Bhutto v. Federation of Pakistan* [1988] PLD 416 (Supreme Court).

unconnected to any other state. These individuals cannot be deported to another country due to their peculiar circumstances. In such situations, law enforcement agencies may assign a nationality to the person, and as a result, they may be sentenced to imprisonment, but cannot be deported. This means that these individuals are forced to remain behind bars indefinitely, as the law does not provide for their release (n. 9). This violates Article 9 of the Constitution of Pakistan, which guarantees the right to life and liberty to anyone within the territory of Pakistan. The higher courts have repeatedly held that an accused individual cannot be left at the mercy of the prosecution to remain in jail for an indefinite period. The Constitutional guarantees of the right to life and liberty are applicable to all persons, irrespective of nationality, and a fair trial is an inalienable right of every accused person.

Moreover, to forcibly send individuals to a country in which they are at risk of harm, as is the situation of refugees, is a violation of their fundamental rights guaranteed in the Constitution of Pakistan and Pakistan's international human rights obligations. The principle of non-refoulement serves as a necessary protection in international human rights, refugee, humanitarian and customary law. It prohibits Pakistan (and any State) from expelling, returning or extraditing a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture.³⁴ The prohibition on the State is absolute in nature and without exception; it applies for all persons, irrespective of their citizenship, nationality, statelessness, or migration status, and it applies wherever a State exercises jurisdiction or effective control, even when outside of that State's territory.³⁵

³⁴ The prohibition of refoulement is explicitly included in Section 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³⁵ OHCHR. (2018). The principle of non-refoulement under international human rights law.

<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

In the recent case of *Rahil Azizi v. Federation of Pakistan*, the Islamabad High Court dealt with the application of Section 14 to refugees. The Court stated that the International Covenant on Civil and Political Rights (ICCPR), in Article 9, asserts the right to liberty and security of person, emphasizing that no one should be subjected to arbitrary arrest or detention. Article 12(2) reinforces the right to freedom of movement, including the freedom to leave one's own country. Similarly, the CAT, in Article 3(1), prohibits the expulsion, return, or extradition of individuals to another state where there are substantial grounds for believing they would face torture.³⁶ These provisions directly conflict with Section 14(2) if it is interpreted as a strict liability offense. Under strict liability, the intention or circumstances are not taken into account, and individuals are held accountable irrespective of their reasons for entering or staying unlawfully. This interpretation goes against the principle of non-refoulement, as people fleeing persecution or torture may be imprisoned upon reaching Pakistan.³⁷

The Foreigners Act was enacted to regulate the entry and exit of foreigners in Pakistan. It aims to deter illegal entry. Section 14(2) penalizes illegal entry, categorizing it as a criminal offense with a penalty of imprisonment up to 10 years. The Act does not explicitly exempt refugees or consider their circumstances. A purposive interpretation of the Foreigners Act must align with international law principles, which recognize refugees' rights to safety, dignity, and asylum. Moreover, penalizing individuals under Section 14(2) solely for seeking refuge would violate these principles and constitutional guarantees of life, liberty, and dignity under Articles 9, 10, and 14 of the Constitution of Pakistan.³⁸

Under Section 14(2) of the Foreigners Act, entering Pakistan with an illegal purpose and knowingly doing so constitutes an offense. The *actus reus* is entering Pakistan illegally, while the intention to enter for an illegal purpose is the *mens rea*. However, seeking refuge to

³⁶ *Rahil Azizi v. Federation of Pakistan* WP 1666 of 2023.

³⁷ *Ibid.*

³⁸ *Ibid.*

save one's life is not an illegal purpose. If a foreigner has entered Pakistan fearing persecution in their home country and is seeking asylum to save their life, then such an action will not be considered as illegal under Section 14(2) of the Foreigners Act.³⁹

³⁹ Ibid.

Conclusion and recommendations

This review of the Foreigners Act 1946 and the Pakistan Citizenship Act 1951 reveals clear gaps in protection of refugees and citizenship rights, which merits a critical review of the current legal framework and its implementation by all relevant stakeholders. The following key recommendations are proposed as a starting point:

- Review and revise the Pakistan Citizenship Act 1951 and the Foreigners Act 1946 to align them with Pakistan's constitutional and international obligations. Both laws predate the Constitution of Pakistan 1973 as well as several of Pakistan's international human rights commitments (such as under CAT, ICCPR, CEDAW, Convention on the Rights of the Child (CRC), etc.). Therefore, they fall short in encompassing commitments to guaranteeing fundamental rights granted in the Constitution and international law. For example, the definition of a foreigner under Section 2 of the Foreigners Act 1946 is a broad one that needs revision; it currently includes refugees, leading to their persecution under this legislation.
- Ratify the 1951 Refugee Convention, its 1967 Protocol and develop a comprehensive legal protection framework for refugees and asylum seekers in Pakistan at the national level.
- Recognize and promote the understanding amongst all stakeholders that fundamental rights for all persons guaranteed in the Constitution of Pakistan 1973 are applicable to refugees, asylum seekers, stateless persons and other marginalized groups.
- Ensure all relevant stakeholders uniformly understand and apply Section 4 of the Pakistan Citizenship Act 1951, which unequivocally grants the right to nationality to anyone born in Pakistan (irrespective of origin of their parents), through capacity-building and development of effective oversight mechanisms for implementation of the birthright citizenship provision (Section 4).

- Remove discriminatory provisions in the law (Section 10 of the Pakistan Citizenship Act 1951) and practical barriers for women accessing nationality and citizenship rights as equal citizens of Pakistan as guaranteed by Article 25 of the Constitution. Ensure that Pakistani women are legally and in practice able to transmit citizenship to their foreign spouses and children equally as Pakistani men.
- Develop oversight mechanisms to prevent arbitrary use of powers and force against those deemed non-citizens, especially refugees, asylum seekers and stateless persons under wide powers granted through various provisions of the Foreigners Act 1946 (i.e. Section 3, 8, 11, amongst others).
- Guarantee the effective protection of Article 9, 10 and 14 of the Constitution for refugees, asylum seekers, stateless persons etc. through adequate monitoring and accountability of violations.
- Uphold the fundamental international human rights law principle of non-refoulement and the prohibition of collective expulsion by developing appropriate mechanisms and allocating resources that ensure an individual assessment of protection needs of refugees, asylum seekers and stateless persons with due process.
- Strengthen partnerships and cooperation between relevant government departments and entities to improve cohesive and rights-based implementation of the Pakistan Citizenship Act 1951 and the Foreigners Act 1946 considering constitutional protections and Pakistan's international obligations.