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Udlændingestyrelsen
AsylafdelingenFlygtningenævnet

Dansk Flygtningehjælp

Asiatisk Plads 2
DK-1448 København K
Tel. +45 33 92 00 00
Fax +45 32 54 05 33
E-mail: um@um.dk
Telex 31292 ETR DK
Telegr. adr. Etrangeres
Girokonto 300-1806Bilag
1Journalnummer
17.Rusland.1.aKontor
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Afghanske flygtninge i Rusland. UNHCR-undersøgelse.

Udenrigsministeriet fremsender vedlagt til underretning kopi af en rapport om afghanske statsborgere, der opholder sig som de facto flygtninge i Rusland. Rapporten er udarbejdet på foranledning af UNHCRs kontor i Moskva. Rapporten er modtaget uden de opregnede annexer.

Ifølge UNHCR er der tale om afghanske statsborgere, der som børn kom til den daværende Sovjetunion i 1984 for at studere. De pågældende har ikke kunnet vende hjem og befinder sig således i en særlig sårbar situation.

P.M.V
E.B.

Torben Edsberg

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES (UNHCR)



УПРАВЛЕНИЕ ВЕРХОВНОГО
КОМИССАРА ООН ПО ДЕЛАМ
БЕЖЕНЦЕВ (УВКБ ООН)

Obukha Pereulok, 6. Moscow, 103064
Tel.: (7-503) 232-3011/12/13/14/15
Fax.: (7-503) 232-3016
E-mail: RUSMO@UNHCR.CH

Пер. Обуха, д.6, Москва, 103064
Тел.: (7-503) 232-3011/12
Факс.: (7-503) 232-3017
E-mail: RUSMO@UNHCR.CH

RUSMO/MS/1174

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15 June 2001

The Office of the United Nations High Commissioner for Refugees in the Russian Federation is pleased to forward to your attention a sample of a Study on the situation of Afghan orphans in the Russian Federation, which was commissioned by UNHCR to three independent Russian researchers. The objective of this Study is to review the situation and legal status of the so-called "Afghan orphans" in the Russian Federation, using data and information which are often spread throughout several institutions, organisations and locations – like the Afghan orphans themselves – as well as identify concrete ways to legalise their situation, in the framework of Russian legislation and international instruments applicable.

It is the hope of this Office that this Study will contribute to resolving the situation of this group of persons – who are in a refugee-like and/or, sometimes, in a statelessness situation – on a case-by-case basis, by offering them a durable solution in Russia, which country hosted them for the last 15 years. In this respect, UNHCR would welcome any comment or information from your side, including actions or decisions taken with regard to Afghan orphans by your institution/organisation, with the aim to legalising their situation.

My Office shall be pleased to forward additional copy to you upon your request.

Thank you for your attention to this matter.

Yours sincerely,



Jozsef Gyorke
Deputy Regional Representative

EMBASSY OF DENMARK
IN THE RUSSIAN FEDERATION

**A SURVEY OF AFGHAN ORPHANS
ON THE TERRITORY OF THE RUSSIAN FEDERATION**

A survey commissioned by UNHCR, Moscow

Moscow, November 2000

Abstract

Under the bilateral Agreement between the USSR and the Democratic Republic of Afghanistan on the Dispatch and Reception of Afghan Orphans for Studies at Boarding Schools in USSR, of 18 October 1984, some 1,800 pupils came to study to the various USSR republics, where they were accommodated and educated. A few hundreds of them are still living in the Russian Federation.

Following the dissolution of the USSR in December 1991, and the establishment of the Russian Federation, the Afghan "orphans"¹ present on the Russian territory were allowed to continue their studies. However, after finalising their studies in Russia, and consequently to the fall, in April 1992, of the communist regime in Afghanistan, they were not in a position to return to their country of origin. They became refugees "sur place" and, not being able to address themselves to the new diplomatic representation of Afghanistan in Russia, for the issuance or renewal of identity documents or passports, they found themselves de facto stateless.

While few of them were recognised as refugees or acquired Russian citizenship (in Moscow, Volgograd and St Petersburg), the vast majority remain without any proper legal status. So far, no guidance or measure was issued by the Federal Government of the Russian Federation on how to address the legal status of this group in a comprehensive manner.

The Afghan orphans having been brought to the USSR without their individual consent, they were, as juvenile, under the legal custody of the USSR Government and later on of the Russian Government. Hence, as a successor state to the USSR, the Russian Federation has a moral – if not legal – obligation to find a positive solution to the question of the legal status of the Afghan orphans.

Under the applicable Russian legislation, the legal situation of the Afghan orphans can be resolved by granting them Russian citizenship (to those who wish to acquire it), or refugee status and registration at their place of permanent residence.

1. Historical Background

1.a. Agreement between the Government of the USSR and the Government of the DRA on the Dispatch and Reception of Afghans Orphans for Studies at Boarding Schools in the USSR, of 18 October 1984

In 1984, the Government of the Republic of Afghanistan emphatically called on the Government of the USSR to help Afghan orphans² gets enrolled in Soviet schools, and to cover the expenses incurred. The reason behind their going to the USSR was to train them ideologically to be able to follow political careers in the future. The Afghanistan Government's request was accepted, and an "Agreement between the Government of the USSR and the Government of the Democratic Republic of Afghanistan on the Dispatch and Reception of Afghan Orphans for Studies at Boarding Schools in the USSR" was signed in Kabul on 18 October 1984.

¹ See clarification on the terminology on page 3.

² The overwhelming majority of the Afghan orphans arriving in the USSR were children of top-ranking military and security officers (HAD, the Committee for State Security).

Under the Agreement, the Afghan teachers and children in the USSR were guaranteed the rights and liberties as envisaged in the Soviet laws. They were guaranteed respect for their ethnic and religious customs, to the extent that these were not in contradiction with the Soviet legislation³.

The Afghan orphans were to receive eight or nine years of schooling at Soviet boarding schools free of charge⁴. Subsequently, they were entitled to enrol at secondary specialised schools *hors concours*.

Their training was to be based on the standard USSR curricula, programs and manuals, with due account for the Afghan ethnic customs and traditions. Upon leaving boarding schools or other education facilities, they were to be awarded the appropriate certificates or diplomas.

Under the Agreement, the Soviet Government paid for all expenses related to the presence and studies of the Afghan students in the USSR. The students were provided, as necessary, with free medical assistance and treatments at health care institutions⁵.

Afghan teachers were sent to help with their upbringing at Soviet boarding schools in the preparatory period. The Soviet Government paid for the Afghan teachers' fare, free accommodation, remuneration, and one-off loans⁶.

1.b Number, locations and accommodation terms of the Afghan orphans in the USSR

On 4 November 1984, the USSR Council of Ministers approved a "Decision on the Training of Afghan Orphans at Soviet General Boarding Schools" whereby 1,740 children were to be educated at 12 boarding schools. In total, 1,802 children arrived and studied in the USSR under this scheme.⁷

As was envisaged in the Agreement and based upon information available, most of the Afghan children who came to USSR were between seven and nine years old, with about one hundred being aged 14 or 15 years. Some teenagers studying in Turkmenistan were aged 17, 18 and even 19 years.

Terminology: Of their total number, 257 were orphans in the true sense of the word. The others had lost one parent and/or came from families with many children. For the purpose of this survey, the terminology will be used in reference to the official designation of the caseload in the above-mentioned Agreement. Hence, the term "Afghan orphan" will be applied to all the children and teenagers who were brought

³ Cf. article 3 of the Agreement.

⁴ Article 4, *ibid*.

⁵ Article 6 of the Agreement between the Government of the union of the Soviet Socialist Republics and the Government of the Democratic Republic of Afghanistan on Accommodation of Afghan Orphaned Children at Boarding Schools in the USSR.

⁶ Article 8, *ibid*.

⁷ Of all the Afghan orphans arriving in the USSR, 75% were boys and 25% girls representing different ethnic groups (70% Tajiks, 24% Pushtus, 2.4% Beluchis, 2.4% Uzbeks, and 1.2% Hazaris).

and educated in USSR under the Agreement, independently from their exact family status.

From 27 October to 5 November 1984, 872 boys and girls and 35 teachers came to the USSR (two children arrived in excess of the quota and were not on the list provided by the Afghan authorities).

The orphans were accommodated in the following republics of the USSR:

1. The RSFSR: 101 children at boarding schools in Slavyansk-na-Kubani, 100 in Anapa, and 250 at Volgograd, #9;
2. Tadjikistan: 400 children at Shakhrinauskaya Boarding School;
3. Kazakhstan: 200 children at Turkestanskaya #7 and 200 at Karautskaya Boarding School;
4. Turkmenistan: 40 children at Boarding School #4 in Bairam-Ali;
5. Uzbekistan: 100 children at sports boarding schools, 100 at schools specialising in physics and mathematics, 100 at Russian Language School #111, and 100 at School #98 in Tashkent; and,
6. Kirgizstan: 100 children at Kirshelkski Children's Home.

There was a high incidence of infectious diseases among the Afghan children arriving in the USSR, especially those who were accommodated in Krasnodar Krai (RSFSR) and Uzbekistan. Their state of health was serious and urgent actions were taken to prevent the spread of the infections⁸.

In addition to physical frailty, there were cases of mental retardation. Forty children showed visible signs of mental backwardness. They were placed in special schools for mentally retarded children.

Summer vacations were used to the utmost to help improve the Afghan children's state of health. They were sent to some of the best health and holiday centres for children. The Afghans would spend their summer holidays together with Soviet pupils, making friends among them and thereby quickly integrating into the Soviet childhood environment.

During their first year, the focus was on Russian language learning and health improvement. The USSR Ministry of Public Education developed regulations concerning the content and methodology of training for the Afghan students, and tentative curricula for different age groups. The USSR State Committee for Book Publishing, the Prosveshchenie Publishers and the Russki Yazyk Publishers produced additional schoolbooks on the Russian language for the Afghan children. In all, 53 titles of manuals and other books were provided to the boarding schools concerned⁹.

⁸ Some cases were so far-gone that for all their efforts the doctors were unable to rescue several lives. One child arriving at a boarding school in Anapa died from heart deficiency and anemia. He was taken to hospital three days after arrival because his condition had deteriorated dramatically. When he died, he was buried in Krasnodar with the consent of the Afghanistan authorities. There were also deaths caused by cancer, hepatitis, and internal diseases.

⁹ A total of 33,000 copies of manuals and other books were printed.

The training was based on advanced methods of spoken language studies. The Alexander Pushkin Institute of the Russian Language provided much assistance to the teachers.

2. Legal status of the Afghan orphans in the territory of the Russian Federation

When the Agreement was signed, it was assumed that after their studies, the children would return home. As was noted earlier, they were to become the future elite of Afghanistan. However, when the Soviet forces pulled out and the Najibulla regime collapsed in 1992, their return became impossible for obvious safety reasons. Being children of highly placed officials of the fallen regime and fearful of persecution at the hands of the new authorities, they were forced to remain in Russia.

The Afghan orphans arrived to study in USSR, as citizens of Najibulla's Afghanistan. After completing their studies, in the early and mid 90's, USSR had ceased to exist and so did the Najibulla's regime. Russia, as a successor state to the USSR, allowed the Afghan orphans to finalise their studies on the territory of the Russian Federation. However, the collective visa under which the Afghan orphans came and resided in USSR to study was directly linked to the purpose of their stay. For most of them, it was not renewed after the completion of their studies. Not being in a position to return to their country of origin, they were considered as illegal aliens in the Russian Federation. Furthermore, not being able to address themselves to the new diplomatic representation of Afghanistan in Russia, to obtain the issuance of an Afghan passport, they became de facto stateless persons.

2.a. The state of the Afghan orphans under the Russian Federation Law on Refugees, #4528-1 of February 19, 1993 (as amended by #95-FZ of June 28, 1997, and #117-FZ of July 21, 1998).

The Afghan orphans, refugees "sur place"

The status determination procedure and refugee rights are defined in the Russian Federation Law on Refugees, #4528-1, which entered into force on February 19, 1993 (as amended by #95-FZ of June 28, 1997), and in the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol, which Russia ratified in 1993.

Article 1 of the Russian Federation Law on Refugees, #95-FZ of June 28, 1997, reads: "A refugee is a person who is not a national of the Russian Federation 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."

The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for

recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country but who becomes a refugee at a later date, is called a refugee "sur place." A person becomes a refugee "sur place" due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognised as refugees.

As a consequence, a person may be recognised as a refugee if he/she has just arrived in the country of refuge, or if circumstances have occurred in the country of origin, while he/she is already on the territory of the Russian Federation. Accordingly, the Afghan orphans who were in Russia when the political system in Afghanistan changed may be considered "sur place" refugees.

In the case *Mohammad Shoaib Abdul Hakim v. Perm RMS* (decision of 19 November 1996), the migration service was arguing that "the applicant had not been subject to violence and persecution in Afghanistan prior to his departure (...)". The court, after reminding the definition of refugee under article 1 of the Russian refugee law, examined the profile, former position and activities of the applicant, and concluded to the existence of threats of persecution in case of return to the country of origin.

The Afghan orphans and the temporary asylum regime

The question that arises is why the Afghan orphans have not been recognised as refugees by the competent Russian authorities? It must be noted that the key problem faced by this group of persons is that of gaining access to the status determination procedure. Several Afghan orphans contacted in the course of this survey explained that the migration services refused to register their application, stating that their status would be ruled at a later stage, once the temporary asylum regime provided for under article 12 of the refugee law enters into force.

Some officials of the migration services contacted by the authors of this survey tend to believe that addressing the problem of the Afghan orphans stretches their competence and requires intervention from the superior federal authorities. Their opinion could be supported if the status determination procedure was applied to them collectively, not individually. And even if the government decided to take this course of action, it would be just an alternative that should not deprive them of the right to undergo an individual asylum determination procedure, and therefore their applications should be accepted for examination.

Article 12 of the Russian Federation Law on Refugees provides for a subsidiary form of protection under the form of temporary asylum. Article 12.2(2) stipulates that "Temporary asylum may be provided to a foreign national or stateless person if they have no grounds to be recognised as refugees due to circumstances indicated in the present Federal Law but cannot be expelled from the territory of the Russian Federation for humanitarian reasons". However, the procedure for the determination and granting of temporary asylum, referred to under paragraph 1 of article 12, has not yet been established by the Government of the Russian Federation. As a consequence, asylum seekers who may qualify for temporary asylum under the definition of article 12, have not been able to enjoy such protection.

Similar subsidiary forms of protection do exist in other European refugee legislation, such as in Germany, Sweden or Denmark. Usually, such mechanisms are meant to address the protection needs of persons fleeing their country due to generalised violence or aggression. They are designed to answer situations of mass-influx of asylum seekers, where the asylum countries may not have the means to undertake individual refugee status determination procedures.

Other countries, whose refugee legislation does not foresee temporary asylum, may resort to other protection mechanisms. This is the case of France, who rejected refugee applications of most Lebanese citizens in the 1980's who were fleeing their country because of the civil war, on the grounds that they did not encounter individual fear of persecution, but who extended their visa and/or granted them residence permits, with the understanding that they could not be returned to their country of origin, for humanitarian reasons.

While most Afghan asylum seekers in the Russian Federation may fall under the definition of article 12 of the Russian Federation Law on Refugees, it can be argued whether the Afghan orphans do not, in addition, qualify for refugee status under article 1 of the said refugee law. Because of their social origin, education and profile, it is very likely that they would be persecuted in case of return to Afghanistan. Hence, while the Russian legislature might have had in mind the thousands of Afghan asylum seekers present in Russia, when it drafted the article 12 provision, this does not undermine the fact that some among them might have an individual valid claim under article 1.

This assumption is confirmed, first of all, by the fact that some 567 Afghan asylum seekers were recognised as refugees under article 1¹⁰. According to information available to UNHCR, the large majority of Afghan recognised refugees in Russia are former high level officials of the Democratic Republic of Afghanistan. In other words, they belong to the same social group as the Afghan orphans.

Secondly, the court practice in the Russian Federation has confirmed the subsidiarity of article 12 of the refugee law, i.e. unless an asylum seeker expressly requests temporary asylum, only wishing to stay temporarily in the Russian Federation (as article 12.2(1) provides for), his refugee application should first of all be examined in light of the criteria laid in article 1 and, in case he does not meet the said criteria, his application should be assessed under article 12¹¹.

The requirement of material evidence or proof

Another obstacle is that the few Afghans orphans who have secured access to the refugee determination procedure have confronted situations in which the migration service makes excessive demands on them in terms of presenting documented proof of fear of being persecuted. It should be noted that there are no grounds to demand documented proof of persecution since a refugee seeker must only submit all the facts

¹⁰ Official statistics of the Federal Migration Service, as at 30 June 2000.

¹¹ Cf. *Alam Gul Vassel v. Krasnodar Migration Service*, decision of 1 April 1998, Pervomaiski District Court of Krasnodar Krai.

known to him that support his fear of being persecuted. Though, as a rule, the applicant must bear the burden of proof, it is equally the responsibility of the interviewer since he must take into account the particular circumstances that forced the person to flee his country for fear of being persecuted. Furthermore, the Law on Refugees does not specify that an applicant must present documented proof of being persecuted. The migration service's arguments that the applicant must provide objective proof of the threat of persecution cannot be found in the refugee law and has not been endorsed by the courts' practice.

Under the article 3.3 of the Russian refugee law, the decision to issue an asylum seeker's certificate, to recognise someone as a refugee or to deny substantive examination of the claim, shall be taken after completion of a questionnaire on the basis of an individual interview as well as on the basis of examining the credibility of the data obtained about the person and about his or her family members.

There have been several decisions by the RMS on the denial of a refugee claim under art.3.3. on the ground that the applicant did not present an evidence proving that he/she had a well founded fear of being persecuted in case of return to his/her country of origin. Courts usually do not support this ground for rejection of a refugee claim, and maintain that there is not such requirement under the law, for the applicant to prove that he has a well founded fear of being persecuted in case of return to his country of origin.

For example, in the case *Hashmatulloh Muhammad v. Perm RMS* (Oct. 15, 1996), the Perm regional court stated that under art. 3.3 of the refugee law, the applicant is obliged to provide the information that is necessary to recognise a person as a refugee. A contrario, the court reminds that "it does not follow from the meaning of the law that the applicant must provide proof of a real danger of being subjected to violence or persecution". The refugee status determination procedure includes credibility assessment of the information provided by the applicant, which assessment is the duty of eligibility migration service officers¹².

In addition to article 3.3 of the RF refugee law, courts sometimes also cite paragraph 3 of the "Methodological instructions on the procedure for working with foreign nationals and stateless persons applying for recognition as refugees in the territory of the RF" (approved by Order 110/ of the Government of the RF dated 15 July 1993). The Instructions provide that the refugee status determination procedure must include the assessment of the credibility by migration service officials of the information provided by the applicant, and does not require the submission of material evidence.

For example, in the decision on a case *Jamal Naser Mohammad v. Rostov RMS* of 12 July 1999, the Pervomiaski district court of Rostov referred, besides article 3.3 of a refugee law, to the above-said methodological instructions to confirm that the applicant is not obliged by law to present material evidence in order to establish his fear of persecution. Paragraph 3 of the Instructions in particular states that the refugee status determination procedure includes an assessment of the credibility of the information provided by the applicant. The court found that in this case the migration

¹² In the case *Alam Gul Vassel v. Krasnodar RMS* (1 April 1998), the Pervomiaski district court of the Krasnodar Krai followed the same reasoning and cancelled the migration service's decision.

service did not make such credibility assessment. The court subsequently declared the decision illegal and sent back the case to the migration service for reconsideration¹³.

Yet rare cases of Afghan orphans have been granted refugee status. The UNHCR has information that persons of this group were recognised as refugees in Moscow, St Petersburg and in Volgograd in the first quarter of 2000. Given the homogeneity of the group, the recognition of one person as a refugee should presumably entail the same treatment for the others.

The principle of non-refoulement

There is no need to describe all the consequences resulting from the lack of legal status. It would be enough to mention a few. Afghan orphans live in constant fear of being forcibly deported from Russia to Afghanistan. At first glance, such fears may appear groundless especially since none of these people has ever been deported from the Russian Federation.

The Russian authorities are fully aware of the complicated situation in Afghanistan and the risk to life and freedom that this group would face if they returned to their home country. However, a government's commitment to the principle of non-refoulement has little meaning if it is not properly guaranteed owing to the absence of the appropriate legal status.

Non-refoulement is one of the fundamental forms of human rights protection, and it is written as a principle into several international instruments, including the 1951 Geneva Convention Relating to the Status of Refugees. Article 33.1 of the Geneva Convention reads: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The same principle is recorded in Article 10.1 of the Russian Federation Law on Refugees.

There is a potential obstacle that may confront Afghans orphans arriving in Russia through the territories of other countries, mostly Central Asian countries. This is particularly true of the children who arrived in the Russian Federation following the completion of their studies in one of the Central Asian countries. Having experienced very serious safety problems (e.g. deportation, detention, etc.), they would look to Russia as a safe haven. However, owing to the misinterpreted meaning of "a third safe country" it is quite likely that their applications for refugee status would be treated as patently groundless and turned down without being considered on the merits.

¹³ Regarding the burden of proof, see also court decision of 30 June 1999 of Basmany Inter-Municipal People's District Court of Moscow City, Case Nr. 2-2522/9, "*as the content of the law suggests, the person must simply provide the information required for recognising him/her as a refugee. The law contains no indication that the person is obliged to provide proof that his/her departure from his/her permanent place of residence was caused by violence against him/her or persecution in other forms, or a real danger of being subjected to persecution or other violations on grounds of national origin*". In addition, this court decision refers to the Methodological Instructions on the Procedure for Working with Foreign Nationals and Stateless Persons Applying for Recognition as Refugees on the Territory of the Russian Federation, which does not require asylum seekers to provide proof of persecution.

Experience indicates that when they examine a refugee application, the migration services do not always perform due diligence analysis of the attitude to, and treatment of, the asylum seekers in the Central Asian countries. It should be noted that some of those countries do not even have appropriate refugee legislation, and there are no national mechanisms relating to the submission and examination of asylum applications.

"Safe third country" restrictions on asylum applications should according to international principles be imposed only if certain conditions are met¹⁴. If an application is not accepted based on this factor alone, the following minimal requirements must be present:

- An asylum seeker has the right to appeal against the migration service's refusal to examine his application on the merits;
- He has been guaranteed access to the status determination procedure in the "third country" concerned and has the right to remain on this territory while having a pending asylum application;
- Ratification and guarantees of compliance of the state with international and regional human rights instruments and that the asylum seeker will be treated in conformity with these basic humanitarian standards (non-refoulement and subsistence support, including aid from the international community); and,
- States' willingness and consent to accept returned asylum seekers and refugees and to consider their asylum application in a fair and efficient manner.

On the other hand, taking into account the interests of the countries concerned, UNHCR supports their efforts to return such persons to the countries which they crossed without the appropriate permission both owing to the risk of "orbital situations" and based on the principle of international solidarity and division of responsibility.

It should be noted that quite a few Afghan orphans had to arrive in Russia from other CIS countries because they faced a real threat of being deported to Afghanistan. This should be taken into account when their applications are processed.

2.b. Status of the Afghan orphans under the Russian Federation Law on Citizenship, #1948-1 of November 28, 1991 (as amended by the Russian Federation Law #5206-1 of June 17, 1993, and #13-FZ of February 6, 1995).

Although they were Afghan citizens when they arrived to USSR, the Afghan orphans, when they reached their majority, were not in a position to obtain, from their diplomatic representation in Russia, the necessary document(s) establishing their citizenship. Not being in possession of valid document establishing their current citizenship, the Afghan orphans find themselves in a situation of statelessness.

¹⁴ On December 1, 1992 the European Community immigration ministers meeting in London approved a Resolution on the Comprehensive Approach to the Determination of a Third Country of Refuge. In this context, the UNHCR Executive Committee passed two resolutions: EXCOM Conclusion Nr #15 relating to refugees without a country of refuge, and #58 relating to refugees and asylum seekers moving irregularly from the country in which they have already found protection.

Because they are not able to enjoy the protection of the authorities of their country of origin, the acquisition by the Afghan orphans of the Russian citizenship might represent an adequate way to secure their fundamental rights as well as to legally fix their situation on the territory of the Russian Federation. This option may be considered especially in view of the already high level of integration of the Afghan orphans in the Russian Federation.

The acquisition of Russian nationality is regulated in the Russian Federation Law on Citizenship, #1948-1 of November 28, 1991 (as amended by the Russian Federation Law #5206-1 of June 17, 1993, and #13-FZ of February 6, 1995), the *Regulations on the Procedure of Examination of Issues Relating to the Nationality of the Russian Federation* approved by the Decree of the President of the Russian Federation, #386 of April 10, 1992 (as amended by the Decree of the President of the Russian Federation, #2299 of December 27, 1993). Article 9 of the Law states that when nationality issues are examined, the relevant international treaties to which the Russian Federation is a party must be applied, along with the said Law. If an international treaty envisages rules that differ from those envisaged in the Law, the rules of the treaty will be applied¹⁵.

A person with legal capacity who has attained the age of 18 years may file an application for admission to the citizenship of the Russian Federation, irrespective of origin, social status, race or nationality, sex, education, language, status vis-à-vis religion, and political or other convictions¹⁶.

Further, article 19 of the Citizenship Law states that "the usual condition of admission to the nationality of the Russian Federation is five years of permanent residence by foreign nationals and stateless persons in the territory of the Russian Federation, or three continual years prior to applying."¹⁷

The Afghan orphans' period of residence in the Russian Federation is more than five years. However, problems arise over the interpretation of the definition "permanent residence" in the territory of the Russian Federation. In accordance with article 5 of the USSR "Law on the Legal Status of Foreign Nationals in the USSR", #5152-x of June 24, 1981 (as amended by the Federal Laws, #82-FZ of 19 May 1995 and #114-FZ of 15 August 1996), foreign nationals permanently residing in the Russian Federation include persons who have the appropriate *permits* and *residence rights* issued by bodies of internal affairs (the granting of such permits and residence rights is examined in detail in the next section). Because this group of people does not have the permits and residence rights, they have been prevented to apply for Russian citizenship.

The reason why the Afghan orphans do not have registration at their place of stay or residence is because of their absence of legal status (e.g. the absence of temporary asylum or refugee status). Hence, the Afghan orphans are victims of an administrative "snow ball" effect: not having been granted temporary asylum or refugee status, they

¹⁵ Article 15, Russian Constitution

¹⁶ Article 19.1 of the Citizenship Law

¹⁷ A period of residence in the Russian Federation is considered continual if the person has been outside the Russian Federation for not more than three months during one year.

could not be registered as legally residing in the Russian Federation by the competent bodies of interior; not being registered, they cannot apply for Russian citizenship.

When the situation of Afghan orphans is examined in light of this law, the specific nature of their presence in the Russian Federation should be taken into account. First and foremost, they lawfully arrived in Russia under an intergovernmental agreement and have physically lived in Russia for as long as 15 years. Further, for at least ten years, they were educated and/or trained as envisaged in the intergovernmental agreement. This fact alone indicates that they have lived in the Russian Federation lawfully.

That being so, it would be wrong to impugn the legality of their presence in the Russian Federation. The fact that their residence in the Russian Federation has not been properly documented by the competent government authorities should not give cause to refuse their application for acquisition of Russian citizenship.

Article 19.3 of the Citizenship Law lists circumstances that alleviate admission to Russian nationality. Concerning this group of persons, one such circumstance is the asylum accorded to them in the territory of the Russian Federation.

2.c. Status of the Afghan orphans under the "Law on the Legal Status of Foreign Nationals in the USSR", #5152-x of 24 June 1981 (as amended by the Federal Laws #82-FZ of 19 May 1995 and #114-FZ of 15 August 1996).

The status of the Afghans, like any other foreigner in the Russian Federation, is regulated by the USSR "Law on the Legal Status of Foreign Nationals in the USSR", #5152-x of 24 June 1981 (as amended by the Federal Laws #82-FZ of 19 May 1995 and #114-FZ of 15 August 1996) and the 1991 Cabinet of Ministers "Decision on the Procedure Governing the Sojourn of Foreign Nationals and Stateless Persons in the USSR".

These laws envisage that foreign nationals enjoy the same rights and freedoms, and bear the same obligations, as USSR citizens do. Foreign nationals who reside permanently have the right to be employed at enterprises, institutions and organisations and be involved in other labour practices.

"Foreign nationals have the right to leisure, health protection, medical assistance, social security, education, housing, use of cultural values, freedom of conscience, marriage and family, inviolability of the person and home, movement across the country's territory, and selection of their places of residence on general terms that apply to USSR citizens"¹⁸. In other words, they are under the national regime. Their actual situation, however, is different. Problems have arisen even over determining the Afghans' status.

¹⁸ Law of the Legal Status of foreign Nationals in the USSR, articles 3, 7-23.

Article 5 of the Law stipulates that foreign nationals have the right to permanent living in the country if they hold the permits and residence rights.¹⁹ There is no doubt that according to this article, this group of persons could have received residence rights. However, the Afghan orphans came to Russia without individual passports but under a collective visa. After graduating from school (by that time the pro-Soviet regime in Afghanistan had fallen and the situation in that country had become dangerous for the persons concerned), the Afghan orphans became victims of dual circumstances: first of all, the 1993 Russian Federation Law on Refugees had not yet been adopted; secondly the country in which they had studied – USSR – had ceased to exist and the institutions of the new Russian Federation were being established. Clearly, the legalisation of these few hundreds of persons, at a time when millions of former USSR citizens and/or ethnic Russians were forced to leave their place of permanent residence to establish themselves in new countries, including Russia, was not a priority.

It must be acknowledged that Russia allowed the Afghan orphans to finalise their studies in the respective institutions that hosted them. Similarly, the Russian authorities never undertook step to return or expel the Afghan orphans. At the same time, the bodies of interior, in charge of controlling the legality of the sojourn of foreigners in the Russian Federation, never received cleared instructions from the federal power on how to handle the case of the former Afghan students. The latter became illegal aliens against their will and the former lacked guidance on how to apply the legislation to them.

The now adult “Afghan orphans” are currently residing in the Russian Federation, but find themselves in a social and legal limbo, and owing to their uncertain legal status, they are daily facing the danger of being fined or detained.

3. Actual Situation of the Afghan orphans in the various regions of the Russian Federation

By the end of June 2000, territorial agencies of the Federal Migration Service had granted refugee status to 567 Afghans. There are over 1,000 asylum seekers from Afghanistan. However, many more Afghans are living in the Russian Federation.

Most Afghans, including the Afghan orphans, are in Moscow and Moscow region, St. Petersburg, Krasnodar territory, Volgograd region, Rostov region, Perm region, Tver region, and Stavropol territory. The prime reason is that there are large Afghan

¹⁹Foreign nationals are issued permanent residence permits and residence rights based on the *Rules of Presence of Foreign Nationals in the USSR* approved by the Decision of the USSR Cabinet of Ministers, #212 of April 26, 1991 (as amended in the Decisions of the Committee for the Operational Management of the USSR Economy, #43 of November 4, 1991). *Permanent residence permits and residence rights are issued to foreign nationals by bodies of internal affairs. Applications for permanent residence permits and residence rights are submitted by foreign nationals who sojourn in the country to the body of internal affairs at their place of living.*

Residence rights are issued to foreign nationals 16 years of age by the bodies of internal affairs at their places of permanent residence for the validity term of their foreign passports but not more than for five years, and to foreign nationals 45 years old, for the entire validity terms of their foreign passports. Foreign nationals who permanently reside in the country must be registered at their places of permanent residence.

communities in these cities and regions. Besides, larger cities offer the best chance of finding a job.

UNHCR has managed to locate some 207 Afghan orphans, still living in the Russian Federation (their name, address and contact number is available with UNHCR). In the absence of official statistics, there is no way to establish their true numbers.

As was said, this group of persons is faced with various problems, regardless of the Russian region where they live. These are related to refugee status determination, acquisition of Russian citizenship, registration, as well as access to education, health care and employment.

They are refused to be registered because the interior authorities refer to the absence of entry marks when they crossed the border into the Russian Federation, and therefore they are said to be present in its territory unlawfully. The authorities tend to overlook the fact that the Afghan orphans arrived in Russia on legal grounds, in conformity with an intergovernmental agreement, and their collective visa must be available in the Ministry of Interior's archives.

Article 2.3 of the Russian Federation Law on the Right of Citizens of the Russian Federation to Freedom of Movement and a Free Choice of Their Place of Sojourn and Residence within the Russian Federation, #5242-1 of June 25, 1993 states that "persons who do not hold the nationality of the Russian Federation and who are lawfully present in its territory have the right to enjoy freedom of movement and a free choice of their place of sojourn and residence within the Russian Federation in accordance with the Constitution, laws and international treaties of the Russian Federation."

It must be taken into account that a person has the obligation, not just the right, to notify the registration authority of his place of sojourn or residence in conformity with the law. The said persons find themselves in a predicament because on the one hand they are obligated to undertake the registration procedure and on the other hand registration officials refuse to grant it.

Sometimes, Afghans have had difficulty registering their marriage. For a marriage with a foreign national to be registered, the concerned person must present proof of his lawful presence in Russia.

There have also been problems with obtaining birth certificates for newborn babies. Birth registration is provided either at the birthplace of the child or at the place of residence of one of the parents. Nonetheless, registry officials sometimes refuse to issue a birth certificate on the grounds that the parents do not have place of residence registration. The legality of such refusal can be argued since neither the Family Code of the Russian Federation, nor the Instruction on the Civil Registry Procedures envisage residence registration as a pre-condition to register the birth of a child.

There have been difficulties with receiving medical assistance and obtaining health care insurance policies. The issuance of insurance policies is regulated by local regulations. To receive one, a person must be registered at his place of sojourn for a term of at least one year, or at his place of residence. Urgent medical assistance must

be provided to everyone who needs it and when he needs it. A person must be taken to hospital regardless of the presence of whatever documents since Article 41 of the Constitution of the Russian Federation states that "everyone has the right to health protection and medical assistance". Unfortunately, registration-related problems are not confined to this list alone.

It must be noted, however, that the situation has improved in some regions of Russia, including Krasnodar territory. Some local authorities have taken all the necessary measures to help legalise the presence of the Afghan orphans. Most of the 20 Afghans who studied at the boarding schools in Anapa and Slavinsk-na-Kubani have been granted residence rights and some, Russian citizenship.

In St Petersburg, some 12 Afghan orphans were granted refugee status in the first half of 2000 and one of them has already acquired Russian citizenship. Other applications for acquisition of Russian citizenship are being considered by the authorities.

A positive trend has also outlined itself in Volgograd region. Eleven of the former students of Boarding School #9 are reported to be still living in Volgograd region. Three of them are studying at the Volgograd Medical Academy. The Volgograd Passport and Visa Office is examining residence rights applications from two Afghans, members of this group of persons. Hopefully, similar trends will occur in other regions of the country.

On the other hand, there is information that there are 15 Afghan orphans in Krasnodar who studied at boarding schools in Tadjikistan and Uzbekistan. They later came to the Russian Federation where they continued their education. Unfortunately, their legalisation remains an open issue for the simple reason that they arrived from third countries. This appears to be due to, as has been developed in section 2.a to misinterpretation of what constitutes a "safe country of asylum". An alternative policy to be applied to all Afghan orphans living in Krasnodar territory concerning the legalisation of their presence would be preferable.

4. The situation of Afghan orphans in other CIS countries

The position of the Afghan orphans throughout the ex-USSR remains quite complicated and does not differ substantially, but for a few exceptions. The Afghan orphans living in Central Asian republics are in a plight. Many Afghans in Tadjikistan have had to complete their education at the peak of a civil war.

On the other hand, there have been some positive developments in terms of accommodation and refugee status determination for this group of persons in some CIS countries. Byelorussia has demonstrated one such positive example of accommodation and refugee status determination for the Afghan orphans.

Although the Republic of Belarus has not yet acceded to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, the authorities had granted refugee status to 41 Afghan orphans by June 1998, in conformity with the *Law of the Republic of Belarus on Refugees*, #3605-XII of February 22, 1995. In addition to according the Afghans with refugee status, they decided to help with their accommodation by providing them with dormitory rooms and jobs at the Minsk Tractor Factory.

Fifteen more persons were granted refugee status in 1999. On July 7, 1999 the Minsk Executive Committee passed a decision, *68C on the Integration of the Refugees*, as part of the 1998-2000 State Migration Program that had been approved by the Council of Ministers of the Republic of Belarus, #560 of April 8, 1998. Its aim is to assist foreign nationals recognised as refugees by the Migration Committee under the Ministry of Labour as part of a refugee integration project financed by the UNHCR. The 15 Afghan orphans were accommodated and registered at the dormitories of the Gorizont Production Association and OAO Minsk Watch Factory.

By December 1999, 203 Afghan had been accorded refugee status in Byelorussia. There are 438 asylum applications under examination at the moment. And this despite the fact that many Afghans (including orphans) arrived in Belarus from Russia, which has joined the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, and whose asylum applications could have been rejected under article 8.5 of the Law of the Republic of Belarus, #3605-XII of February 22, 1995 (as amended by the Law, #286-Z of June 16, 1999).

However, the Belorussian authorities have not applied article 8.5 of the Law in order to reject the Afghan orphans, and have, regarding this group of persons, been acting in accordance with international law and principles relating to the protection of refugees. The Belorussian experience can serve as an example for other CIS countries concerning the legalisation of this group of persons.

Also worth of mentioning is the case of Kazakhstan, where Afghan students who were sent to Kazakhstan to study in the 80s and are now "stranded" without the ability to return and often without any contact with their family, so far, have been recognised as refugees.

5. Conclusions and Recommendations

The scope and complexity of involuntary population movements in the CIS, including the Russian Federation, require enormous efforts to be taken by these countries in order to ensure and protect the rights and fundamental freedoms of the concerned persons. These problems cannot be resolved by the efforts of the CIS countries alone without support from the international community, given their limited resources and experience.

The Russian Federation has taken all the appropriate measures to develop a legislative framework and administrative structures to address the situation of different groups of persons in need of protection. These initiatives were confirmed by the leading role assumed by Russia in launching the CISCONF Plan of Action, in 1996. A vivid example of Russia's commitment to ensuring long-term solutions in favour of persons in need of protection can also be found with the integration of forced migrants in its territory.

Under this survey, a number of options have been identified in order to legalise, in line with the current legislation of the Russian Federation, the situation of the Afghan orphans. These options, which are recapitulated below, require both commitment from the Government as well as individual initiative on the side of the Afghan orphans.

Option 1: Acquisition of Russian citizenship

The Russian Government could consider that the Afghan orphans are entitled to apply for Russian citizenship under article 19 of the 1992 Law on Citizenship, on the basis of their permanent living on the territory of the Russian Federation.

While the permanent nature of their residence in Russia cannot be argued, its legal nature after the end of their studies may not always be documented. However, this is primarily the result of a failure of the administration to legalise the concerned persons (either through granting asylum or issuing registration). However, it is a well established principle of customary law that a person cannot be held responsible for a violation of the legislation, if that violation originates from the administration's own failure to apply the law.

Moreover, by its instruction of 30 June 1998, the Presidential Commission of the Russian Citizenship ruled that applications for acquisition of Russian citizenship could be accepted from refugees who have registration at the place of stay ("temporary" registration).

Option 2: Refugee status

As elucidated above, the Afghan orphans currently residing in the Russian Federation do have well-founded fear of persecution in case of return to their country of origin, under the meaning of article 1 of the RF Law on Refugees. Refugee status was granted to few of them in the Russian Federation, and to larger numbers, on a more systematic basis, in some other CIS countries (Belarus and Kazakhstan).

For reason of consistency within Russia, and taking example on the solution-oriented attitude of other CIS countries, it is recommended that refugee status be granted by the competent authorities, to those Afghan orphans who submit an application to that effect. In the case of those applicants who were denied access to the asylum procedure on the basis of the non-availability of the temporary asylum regime provided for under article 12 of the RF Law on Refugees, it is suggested that their claim be reconsidered on the merits, under article 1 of the law.

Option 3: Issuance of registration at the place of residence

On the basis of the Law on the Legal Status of Foreign Citizens in the USSR, of 24 June 1981, the Russian Government may decide to legalise the status of the Afghan orphans by ordering the issuance to the concerned persons of registration at their place of residence, taking into consideration their lawful entry and stay in the Russian Federation under the terms of the bilateral Agreement with Afghanistan, as well as the continuous stay of the concerned persons on the territory of the Russian Federation since then.

Obviously, the three options are not exclusive from one another. The issuance of "permanent" registration (option 3), can be effected alone or subsequently to the granting of refugee status (option 1). And both the obtention of refugee status and the possession of registration at the place of residence may allow the concerned persons to apply for acquisition of Russian Citizenship.

Conclusion:

Russia, as a successor state to the USSR has - if not a legal - a moral obligation to protect and integrate the citizens of states previously under its influence or quasi administration and whose citizens have fought or served for its interests²⁰. Officials of the Russian government have indeed shown a political will, during discussions with UNHCR in this matter, to find a decent and durable solution to the fate of the Afghan orphans.

As was noted in this survey, the legal basis in the current Russian legislative corpus does exist for the finding of appropriate solutions for legalising the situation of the Afghan orphans while, preserving the interests of the Russian State. In the regions (Moscow, Krasnodar, and Volgograd), political will combined with reference to existing legislation, has offered concrete examples of solving satisfactorily the solutions of several cases. Finally, such efforts may not be exerted in isolation, and the international (including UNHCR) should remain present to assist the Russian government with the economic and social integration of the concerned persons.

Having resolved the question of the legalisation of the Afghan orphans, in the respect of their human dignity, Russia will have demonstrated, once again, its commitment to human rights principles, and may be referred to as an example by other countries in the region.

²⁰ Such precedent exists in the XXth century, e.g. when the French Republic granted citizenship to Algerian and Indochinese nationals who co-operated with France under the colonial regime or during the de-colonisation wars.

Annexes

1. Agreement between the Government of the USSR and the Government of the DRA on the Dispatch and Reception of Afghans Orphans for Studies at Boarding Schools in the USSR, of 18 October 1984
2. Minutes of a meeting of the Presidential Commission on Citizenship, of 25 January 1998, including recommendation to the Federal Ministry of Interior to issue to Afghan orphans, on an individual basis, registration at their place of permanent residence.
3. Letter from the Presidential Commission on Citizenship, dated 5 June 2000, addressed to a State Duma Deputy, informing on the initiatives undertaken by the Presidential Commission to call upon the Federal Government to resolve the legal status of Afghan orphans.
4. Name-list of Afghan orphans who were accommodated and studied in the Volgograd orphanage # 9.
5. Name-list of Afghan orphans who were accommodated and studied in the Slavyansk-na-Kubani orphanage, Krasnodar Krai.
6. Name-list of Afghan orphans who were accommodated and studied in the Anapa orphanage, Krasnodar Krai.
7. Name-list of Afghan orphans still present on the territory of the Russian Federation.
8. Decision of the Committee for Migration of the Ministry of Labour of the Republic of Belarus, of 19 January 2000.
9. Decision of the Minsk Mayor's Office, of 7 July 1999, to accommodate and register in their dormitory 15 Afghan orphans recognised as refugees in Belarus.

