

THE JDMC: DEPORTING PEOPLE TO THE WORLD'S LEAST PEACEFUL COUNTRY

ECRE'S ANALYSIS OF THE JOINT DECLARATION ON MIGRATION COOPERATION (JDMC) BETWEEN THE EU AND AFGHANISTAN

I. INTRODUCTION

The Joint Declaration on Migration Cooperation (JDMC) between the European Union (EU) and Afghanistan has been finalised. The title is something of a misnomer because instead of reflecting a holistic approach, covering all relevant aspects of migration and mobility between Afghanistan and the EU, the agreement focuses on supporting and increasing deportations to Afghanistan. It also fails to consider the dynamics of forced displacement and migration in Afghanistan and neighbouring countries.

The JDMC is the successor to the Joint Way Forward (JWF) on migration issues between the EU and Afghanistan, which was signed on 6 October 2016 during the Brussels donor conference on Afghanistan. Its key objective is to facilitate and increase deportations of people who came to Europe to seek protection, which should occur via charter flights coordinated by Frontex, the EU's border and coast guard agency. Compared to the JWF, the JDMC further reduces safeguards for individuals, particularly vulnerable groups, and introduces a set of measures aimed at making it easier for Member States (MS) to deport people to Afghanistan.

The Policy Note provides an overview of the context in which returns and deportations to Afghanistan take place, before analysing the JDMC and in particular differences compared to the JWF. It presents ECRE's analysis of new elements in the JDMC and includes recommendations to the EU and its MS.

II. ANALYSIS

SECURITY SITUATION IN AFGHANISTAN

In 2020, the Global Peace Index ranked Afghanistan as the least peaceful country in the world for the second year in a row. According to an annual report from the United Nations Assistance Mission in Afghanistan (UNAMA) the total number of civilian casualties in 2020 was 8,820, of which 3,035 civilians were killed and 5,785 injured. Despite the ongoing peace negotiations between the Afghan government and the Taliban in Doha, Qatar, UNAMA recorded the deadliest November for civilians since it began systematic documentation in 2009.

According to the information in European Asylum Support Office (EASO) country of origin information, during the first quarter of 2020, the conflict in Afghanistan continued to be one of the deadliest in the world for civilians. The UN Office on Humanitarian Affairs (OCHA) in its annual 2021 overview estimated that almost half of the country's population (18.4 million of 40.4 million) is in need of humanitarian assistance, a figure which doubled from 9.4 million in January 2020, representing a dramatic and rapid deterioration of the situation. The US watchdog, The Special Inspector General for Afghanistan Reconstruction (SIGAR), reports that attacks are on the rise in the capital of Kabul, with targeted killings of government officials, civil society leaders and journalists.

ECRE believes that Afghanistan cannot be considered safe for deportations until there are significant changes in the security situation of the country. There are well-documented reports which demonstrate that deportees face tremendous risks and challenges upon arrival in Afghanistan. A study by Friederike Stahlmann on the situation of Afghans deported from Germany to Afghanistan, published in September 2019, indicates that 90% of the interviewed Afghans who remained in the country for more than two months after re-admission experienced violence. The study further reports that a majority of the deported Afghans re-migrated within a short period of time as they were not able to provide for themselves. A recent expert opinion by Eva-Catherina Schworer on health-care, the housing market, living conditions, and the economic and security situations illustrates the severe impact of the Covid-19 pandemic on the health system and economy of Afghanistan. The study confirms Stahlmann's findings and argues that even before the Covid-19 pandemic it was difficult for Afghan deportees to make a living in the country. Taking note of this expert opinion, an administrative court in Germany ruled recently that there should be no deportations of young, single and healthy men without a family network to Afghanistan, due to the dire situation. Higher courts in Finland and Austria have also underlined the change in the security situation in recent years, as well as the need for an individualised and holistic approach that does not solely rely on information on the general situation in the country. The majority of deportees including from Europe become internally displaced people (IDPs) in Afghanistan as they cannot go back to their place of origin due to conflict and violence. A recent media report provided documentation that IDPs were selling their body organs in Herat province due to the high levels of poverty.

ECRE has repeatedly raised its concerns over deportations to Afghanistan due to the overall situation in the country and risks of human rights violations, as well as the ongoing "asylum lottery" for Afghans in Europe, which means that many of those entitled to protection do not receive it. For example, the current protection rate for Afghans varies greatly from one MS to another. According to ECRE's AIDA database, in 2019 the recognition rate at first instance for Afghans varied from 92% in Italy to 6% in Bulgaria, calling into question the fairness of asylum systems. The highly divergent approach taken by MS has prompted preliminary questions from The Netherlands and Germany to the Court of Justice of the EU (CJEU) which seek clarification on the correct assessment of the existence of serious harm under EU law. ECRE argues that there should be no deportations to Afghanistan unless there are significant changes in the country, fair and consistent asylum decision making in Europe, dignified return procedures, and a partnership with that is transparent and respects fundamental rights.

SCOPE OF THE JDMC

Since the title of the agreement is the Joint Declaration on Migration Cooperation, the agreement should have included elements reflecting the interests of the Afghan government as highlighted in a 2016 joint European Commission-EEAS non-paper. These include creating legal channels for migration of Afghans to Europe (labour migration, student visas, vocational training, etc) and increasing resettlement places for Afghan refugees who are in a protracted situation of displacement in the countries neighbouring Afghanistan. Furthermore, the agreement does not address the regional dimension of migration despite the fact that 92% of Afghan refugees live in neighbouring countries, if Turkey is included, and that the situation in these countries determines whether people are safe and can stay or have to move onwards. If the cooperation between the EU and Afghanistan focuses exclusively on return, the opportunity to work together on other asylum and migration policies is lost.

In the European Commission's (EC) own assessment communicated to MS it reported that the EU managed to push through all MS requests during the negotiations and that these have been included in the new agreement. However, it is unclear whether those of the Afghan side were considered during the negotiations, which in turn raises doubts as to how mutual the agreement is.

VULNERABLE GROUPS

The JDMC explicitly expands the possibility for MS to deport vulnerable people, achieved by narrowing the concept of the family unit to parents with minor children below the age of 18 and by limiting the definition of seriously ill people to those with a serious disease that cannot be treated in Afghanistan.

ECRE is concerned that the narrower family definition might lead to family separation and deportation of people who do not fall within the definition but who are nonetheless dependent on family members; the needs of family members requiring continuous support and care may not be taken into account. Where issues of dependency dictate a broader consideration of the definition of family unity, vulnerable individuals should not be separated by return policies solely on account of the definition contained in the JDMC. The [Federal Administrative Court of Germany](#) previously precluded the separate return of an Afghan father on account of the principle of family unity and the consideration that the single mother and children in Germany would be in need of care and support.

Moreover, limiting the category of seriously sick people to those who have serious diseases which cannot be treated to Afghanistan is highly concerning. Reports indicate that Afghanistan has a poor and underfunded medical system and that many Afghans often have to travel to neighbouring countries for medical treatment. This means that even if an illness could theoretically be treated in Afghanistan, the practical access to medical care is not guaranteed.

Regarding unaccompanied children, ECRE welcomes the fact that the principle of the best interest of the child should be considered. However, sufficient guarantees and child-specific considerations should also form the basis of return policies regarding families with children. Recently, the [Austrian Constitutional Court](#) ruled in a case concerning the return of an Afghan family that the security situation should be assessed taking into account the situation of the minors: it is not sufficient to refer to the protection and care of the parents without assessing family support in the country and without consulting information on the experiences of returned minors in corresponding security situations.

The JDMC also does not pay attention to the situation of Afghans who were born or grew up outside Afghanistan and does not include them under the vulnerable category. Conversely, EASO's [recent country guidance on Afghanistan](#) did exclude the consideration of the Internal Protection Alternative (IPA) for people who were born or grew up outside Afghanistan and who have no family links in the country.

FACILITATING THE RETURN PROCESS

The JDMC clarifies that MS can participate in joint return operations with non-scheduled flights under the JDMC regardless of whether or not they have a bilateral readmission agreement or arrangement with Afghanistan. In contrast to the JWF, the JDMC clarifies the relationship between the JDMC and bilateral agreements, giving priority to the latter. The agreement allows the deportation of a maximum of 50 deportees per flight and a maximum number of 500 deportees per month in total from all MS, both of which can be increased after prior consultations with the government of Afghanistan. The agreement states that all Afghan returnees should be readmitted upon arrival.

ECRE is concerned that the Afghan government would be obliged to readmit all deportees without due consideration of their vulnerabilities or family unity considerations. Under the JWF, the Afghan government refused to readmit some deportees on the basis of their health conditions.

In the cases of returnees who are deported to Afghanistan on the false assumption that they are Afghan nationals, they should be taken back by the MS concerned or transferred to their country of origin from Afghanistan. This poses a risk to the principle of *non-refoulement* as some might have well-founded fear of persecution or direct threats to their lives in their countries of origin. It also undermines procedural standards as there is no provision for a new judicial review or appeal.

Under the JDMC, the EU escort staff and other accompanying staff will not need to carry a valid Afghan visa, unless they plan to enter the territory of Afghanistan. In that case, the Afghan mission should issue a one-year multi-entry visa within five working days and free of charge for holders of service passports.

RETURN PROGRAMMES AND REINTEGRATION

In the JWF, it was clearly stated that return programmes and reintegration assistance are separate from development assistance and thus related funding is in addition to development funding provided to Afghanistan. The JDMC provides no clarity on how return programmes will be funded. This raises the concern that EU development assistance to Afghanistan, including the recent financial pledge of EUR 1.2 billion made in November at the Geneva donor conference, could be used to fund return programmes instead of its main focus on development and human rights issues.

A similar issue arises in relation to agreements at the EU-level on migration control conditionality, namely making the provision of development assistance subject to cooperation of third country governments on readmission which has been introduced in the Neighbourhood, Development and International Cooperation Instrument (NDICI), the framework for the bulk of funding to Afghanistan. In addition, the EC presented its first

factual assessment on returns and readmission cooperation with third countries under the Visa Code and in support of the proposals in the Pact on Migration and Asylum whereby the EU aims to increase the rate of returns to third countries by using all the available tools, such as visa policy, development cooperation, trade and investment.

JOINT WORKING GROUP

Similar to the JWF, the JDMC also requires the setting up of a working group at technical level consisting of representatives from relevant Afghan ministries and, on the EU side, representatives of the EEAS and DG INTPA (former DG DEVCO), led by DG Home. It should meet regularly and at least once a year. However, under the JWF, the working group had to monitor the application of the declaration and report to the EU-Afghanistan high-level dialogue on migration, a senior officials meeting which includes representative of MS and the Afghan government. In the JDMC, there is no reference to the EU-Afghanistan high-level dialogue in which migration was discussed alongside other pertinent issues, such as human rights. It allowed for cooperation on return and readmission to be contextualised within broader EU-Afghanistan relations and to consider the impact of returns on the overall situation relating to migration, thus going beyond a merely technical exchange.

LACK OF PARLIAMENTARY OVERSIGHT

Similar to the JWF, the JDMC is not intended to create legal rights or obligations under international or domestic law but rather to function like a readmission agreement. However, neither the JWF nor the JDMC went through the normal procedure for adopting an EU readmission agreement which requires the consent of the European Parliament (EP). Furthermore, the EC does not report on implementation of the agreement and its impact on deportees to the EP. The JWF was criticised by Members of the European Parliament (MEPs) due to lack of EP oversight, which persists in the JDMC.

DURATION OF THE AGREEMENT

The JWF was signed originally for a two-year period and expired in October 2020 after a two-year extension. In contrast, the JDMC provides the framework for cooperation for an indefinite period. Each party may cease the cooperation under this agreement each year on the date of the anniversary of the signature of the declaration and following a consultation.

III. RECOMMENDATIONS

- » MS should halt deportations to Afghanistan due to the security situations in the country and the challenges that deportees face upon deportation to Afghanistan.
- » Vulnerable groups and Afghans who were born or grew up outside Afghanistan should not be deported under any circumstances.
- » Divergence in recognition rates should be tackled through improving asylum decision-making and supporting the better functioning of asylum systems in Europe. The focus should be on compliance with EU and international law, rather than a roll-out of the Internal Protection Alternative.
- » MS should take back those who are deported to Afghanistan on the false assumption of being Afghan nationals and should not transfer them to their countries of origin from Afghanistan.
- » The EU should expand migration cooperation with Afghanistan beyond return and readmission in support of the EU's commitment toward the implementation of the Global Compact on Refugees (GCR) by opening legal channels for migration of Afghans to Europe and increasing resettlement places for Afghans from neighbouring countries.
- » The impact of the JDMC should be monitored openly and transparently including the implementation by MS, Afghanistan, communities and individuals, and its impact on fundamental rights. An independent monitoring mechanism should be established to monitor the situation of deportees.
- » The EP should be regularly informed and updated on the development, negotiations and implementation of all formal and informal readmission agreements.
- » The EP should be informed about how the return programmes and integration assistance to Afghanistan is funded and on the effectiveness of the funding.
- » The EP should be regularly updated on the implementation of the JDMC and on the outcomes of the joint working group.
- » The EC should publish the report on the implementation of the JWF over the past four years and make reports on implementation of the JDMC publicly available.