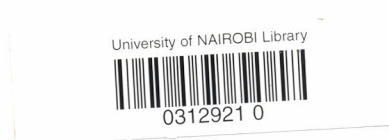


**THE DAWN OF A NEW 'ERROR'? A REVIEW OF KENYA'S
LEGAL FRAMEWORK FOR REFUGEE STATUS
DETERMINATION**

**A DISSERTATION SUBMITTED TO THE FACULTY OF LAW OF
THE UNIVERSITY OF NAIROBI IN PARTIAL FULFILMENT OF
THE UNIVERSITY OF NAIROBI REGULATIONS FOR THE
AWARD OF MASTERS OF LAW (LLM)**

BY

**STEVEN NDORI CHOKA
G62/76919/2009**



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DECLARATION

I **STEVEN NDORI CHOKA** do hereby declare that this is my original work which has not been submitted nor intended to be submitted for a degree in any other university.

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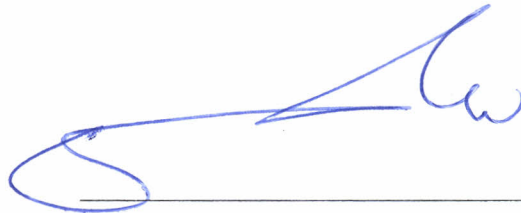
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ACKNOWLEDGMENT

First and foremost I wish to acknowledge the Almighty God who through his immense love and grace has granted me the opportunity to complete this dissertation.

I am also greatly indebted to my supervisor and reader Dr. Celestine Musembi and Dr. Edwin Abuya for their meticulous review and invaluable critique. I benefited immensely from their guidance.

My sincere gratitude goes to Susan Munene and Josephine Githige who took their time to review several drafts of this work and to my colleagues at RefugePoint for their support and incisive comments. I also wish to thank my fellow humanitarian workers for their thoughts, encouragement and direction on where to access relevant information.

Finally, I wish to thank my family members for their support and encouragement.

DEDICATION

This dissertation is dedicated to my parents Mr. and Mrs. John Mano Choka.

Thank you for bequeathing to me an inheritance that can never be extinguished; respect for God, concern for my fellow human beings and the pursuit of excellence in all endeavours.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ARA	Aliens Restriction Act
CAT	Convention against Torture
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
DRA	Department of Refugee Affairs
EC	Eligibility Committee
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECRE	European Council on Refugees and Exiles
ELENA	European Legal Network on Asylum
EXCOM	Executive Committee
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
IJRL	International Journal of Refugee Law
IRB	Immigration and Refugee Board
JRS	Jesuit Refugee Service
NALEAP	National Legal Aid and Awareness Programme
NEC	National Eligibility Committee
NGO	Non-Governmental Organisation
NRB	National Registration Bureau
NSIS	National Security Intelligence Service
OAU	Organisation of Africa Unity
OPM	Office of the Prime Minister
RAB	Refugee Appeal Board
RAC	Refugee Affairs Committee
RCK	Refugee Consortium of Kenya
REC	Refugee Eligibility Committee
RLP	Refugee Law Project

RPD	Refugee Protection Division
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
USCIS	United States Citizenship and Immigration Services

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CHAPTER ONE

INTRODUCTION

1.0 Background

Kenya is signatory to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees as well as the 1969 OAU Convention Relating to Specific Aspects of Refugee Problems in Africa.¹ These legal instruments require that Kenya protects refugees within her borders. In order to do so, Kenya needs to identify who within its borders meets the refugee definition.

The process of deciding who qualifies as a refugee is what is referred to as Refugee Status Determination (RSD).² 'The determination of refugee status refers to the legal act by which the particular conditions giving rise to an individual's flight are examined with the aim to determine whether or not the individual is deserving of international protection.'³ Refugee Status Determination performs a dual function. First, it assists nations to identify those to whom it owes obligations under the 1951 Convention. Second, if conducted efficiently, it is a tool of refugee protection as it identifies those who would be harmed if returned to their countries of origin thus preventing forceful return of refugees by states.⁴

¹ Kenya acceded to the 1951 Convention and the OAU Refugee Convention on 16 May 1966 and 13 November 1981 respectively. See, Reservations and Declarations to the 1951 Refugee Convention, available at: <http://www.unhcr.org/cgi-bin/txis/vtx/search?page=search&docid=3d9abe177&query=ratification%201951%20%20refugee%20conventions> [accessed 15 May 2010].

² Refugee status determination is a purely declaratory process. The acquisition of refugee status under international law is not based on formal status recognition by a state or agency but rather follows simply and automatically from the fact of substantive satisfaction of the refugee definition. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, (Re-Edited January 2002) Para. 28.

³ Claire Reid, 'International Law and Legal Instruments', Forced Migration Research Guide, March 2005, available at: <http://www.forcedmigration.org/guides/fmo038/fmo038.pdf> [accessed 15 May 2010].

⁴ Refugee Consortium of Kenya (RCK), 'RSD as an Effective Protection Tool', Presentation by Refugee Consortium of Kenya CCR Refugee Rights Conference 1-19 June, Toronto, Canada, available at: www.ccrweb.ca/presentations/jwakahiursd.pdf [accessed 15 May 2010].

RSD is not an entirely new concept in Kenya's refugee sector. Prior to 1991, Kenya conducted RSD without a legal framework that specifically governs refugees.⁵ Asylum seekers⁶ were interviewed by an Eligibility Committee made up of representatives from the Ministry of Home Affairs, the Immigration Department and United Nations High Commissioner for Refugees (UNHCR) Observers. The Committee heard individual cases and applied the refugee definition as provided for in the Class M entry permit category under the Immigration Act.⁷ The Eligibility Committee developed its own procedures to process asylum claims on an individual basis as there were no formal procedures for determining refugee status.⁸

In 1990, conflicts in Uganda⁹, Somalia¹⁰, Sudan¹¹ and Ethiopia¹² saw a dramatic increase of refugees in Kenya. Kenya hosted 14,400 refugees in 1990 but as a result of these conflicts the number had risen to 120,000 by 1991.¹³ A year later, in 1992, 401,000 refugees were living in Kenya.¹⁴ These numbers were too large for the Eligibility Committee to conduct status determination. Consequently, the Kenyan Government formally requested UNHCR to conduct RSD on its behalf.¹⁵

⁵ Human Rights Watch, *Hidden in Plain View: Refugees Living without Protection in Nairobi and Kampala*, 21 November 2002, 2815, available at: <http://www.unhcr.org/refworld/docid/3e314172e.html> [accessed 15 May 2010] at 55.

⁶ An asylum seeker is a person who seeks safety from persecution or serious harm in a country other than her or his own. Not every asylum seeker is a refugee but every refugee was initially an asylum seeker. See UNHCR, 'UNHCR and International Protection; A Protection Induction Programme', (UNHCR 2006), Glossary of terms at 84.

⁷ *Supra* note 5 at 57.

⁸ *Ibid.*

⁹ In the late 1980s and early 1990s conflict erupted following successive regime changes. Conflict later ensued between President's Museveni's government forces and a rebellion in Northern Uganda led by Alice Lakwena. This armed group later evolved to the Lord's Resistance Army currently led by Joseph Kony. For additional details on this conflict see the country folder on <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>.

¹⁰ Civil war against the Si'ad Barre regime was ongoing in Somalia at the time. For additional details on this conflict see the country folder on <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>.

¹¹ There was civil war in Sudan pitting the African Christian/animist south against the Arab Muslim North. For additional details on this conflict see the country folder on <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>.

¹² The refugee outflow followed the overthrow of the Mengistu Regime by a conglomeration of armed groups led by the Tigray Peoples' Liberation Front (TPLF). For additional details on this conflict see the country folder on <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>.

¹³ *Supra* note 5 at 57.

¹⁴ *Ibid.*

UNHCR's initial act of taking up RSD was laudable as it averted a humanitarian crisis in the country. However, criticism abounds on the organization's failure to meet its own as well as international standards for carrying out RSD.¹⁶ There are complaints regarding the length of the process, refugee ignorance on RSD procedures, lack of reasoned decisions in the camps, limited opportunities for legal aid and representation, limited access to claimants' information held by the organization and insufficient procedural safeguards in the appeal process amongst others.¹⁷

In November 2006, Parliament passed the Refugee Act which called for an inter-ministerial Refugee Status Determination Committee to adjudicate asylum applications under a Commissioner for Refugee Affairs. Various actors in the refugee sector hailed the passage of the Refugee Act and acknowledged it as a positive development in the protection of refugees in Kenya.¹⁸

There is a real risk that the procedures in the Refugee Act may have adopted unfair and inefficient practices from UNHCR given the organization's prominent role in drafting Kenya's refugee legislation. It is also possible that the government disregarded due process standards in favour of other state interests. There is therefore need for a study on

¹⁵ *Ibid.*

¹⁶ See the following works for criticisms of UNHCR RSD activities: Edwin Odhiambo-Abuya, 'United Nations High Commissioner for Refugees and Status Determination *Imtaxaan* in Kenya: An Empirical Survey', *Journal of African Law*, 48, 2 (2004), 187-206; Michael Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination', *International Journal of Refugee Law*, Vol. 18:1 (2006) 1-29; Michael Kagan, 'Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office', *Forced Migration and Refugee Studies Working Paper No. 1*, 2001-2002, available at: <http://www.aucegypt.edu/ResearchatAUC/rc/cmrs/reports/Documents/RSDReport.pdf> [accessed May 15 2010] Michael Alexander, 'Refugee Status Determination Conducted by UNHCR', *International Journal of Refugee Law*, Vol. 11 No 2 (1999) 251- 289; Edwin Odhiambo-Abuya and George Mukundi Wachira, 'Assessing Asylum Claims in Africa: Missing or Meeting Standards?' *Netherlands International Law Review* LIII (2006) 171-204.

¹⁷ *Ibid.*

¹⁸ See Eva Ayiera, 'Bold Advocacy Finally Strengthens Refugee Protection in Kenya', available at: www.fmreview.org/FMRpdfs/FMR28/14.pdf [accessed 15 May 2010]; Refugee Consortium of Kenya (RCK) and Department of Refugee Affairs (DRA), 'Improving Security and the State of Migration in Kenya: The Refugee Bill 2006', available at: <http://www.rckkenya.org/RCK's%20Refugee%20Bill%20Lobby%20Document.pdf> [accessed 18 July 2010]; People's Daily Online, 'UN Welcomes Enactment Of Refugee Bill in Kenya' People's Daily (01 December 2006), available at: http://english.peopledaily.com.cn/200612/01/eng20061201_327119.html [accessed 15 May 2010].

the compliance of the RSD procedures in the Refugee Act with international standards for fair hearing.

1.1 Statement of the Problem

The 1951 Convention on the Status of Refugees sets no specific requirements for national refugee status determination procedures.¹⁹ Therefore, it is left to each contracting State to establish the procedure that it considers most appropriate and in conformity with its particular constitutional and administrative structure.²⁰ It is on this basis that Kenya has set out its national status determination procedures in the Refugee Act 2006. However, the international scope of the 1951 Convention calls for certain common basic requirements which should be met by the determination procedure in each Contracting State.²¹

This study examines the proposed refugee status determination procedures as set out in the Refugee Act 2006 and evaluates the extent to which they comply with international standards for fair hearing. The study examines the strengths and weaknesses of the RSD procedures in the Act and proposes reforms that would reinforce the overall legal framework for refugee protection in Kenya.

1.2 Hypotheses

This study is premised on the hypotheses that;

- a) The refugee status determination procedures will reinforce overall refugee protection in Kenya.
- b) The legal and institutional framework for refugee status determination under the Refugees Act 2006 is inadequate and fails to meet international standards.
- c) Kenya stands to suffer by failing to provide for the UNHCR participation in its RSD procedures.

¹⁹ Goodwin-Gill G S and McAdam J, *The Refugee in International Law*, (Oxford: Oxford University Press 2007) at 54.

²⁰ *Ibid* at 533.

²¹ UN High Commissioner for Refugees, *Note on Determination of Refugee Status under International Instruments*, 24 August 1977, EC/SCP/5, available at: <http://www.unhcr.org/refworld/docid/3ae68cc04.html> [accessed 15 May 2010] at para. 15.

1.3 Literature Review

The norm of fair hearing has been the subject of significant study though literature linking RSD to fair hearing is not widely available. Literature on RSD and the norm of fair hearing has focused on UNHCR led RSD procedures. This study seeks to add to the depth of literature available. It differs from the available literature as it specifically assesses the right to fair hearing to national refugee status determination procedures. A detailed account of the existing literature on various components of the right to fair hearing follows.

The prohibition of *refoulement* and access to territory and procedures has been widely discussed by international refugee law scholars. On his part, James Hathaway²² draws a clear distinction between *non-refoulement* and the right to seek asylum arguing that the duty of *non-refoulement* does not affirmatively establish a duty on the part of states to receive refugees and states may therefore deny entry to refugees so long as there is no real chance that their refusal results in the return of the refugee to face the risk of being persecuted.²³ He however concedes that prohibition of *refoulement* amounts to a de facto duty to admit the refugee since admission is normally the only means of ‘avoiding the alternative, impermissible consequence of exposure to risk’.²⁴

Hathaway describes the right to remain in the state’s territory until one’s refugee claim has been assessed as ‘one of the most basic rights for asylum seekers’ and cautions against penalising asylum seekers for seeking protection²⁵ He links the concept of lawful presence with refugee status determination noting, ‘there can be little doubt that a refugee claimant admitted to a status determination procedure and authorized to remain pending assessment of his or her case is lawfully present.’²⁶ He concludes that a state which wishes to protect itself from non-genuine claimants must establish a procedure to verify

²² James C. Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press 2005).

²³ *Ibid* at 301.

²⁴ *Ibid*.

²⁵ *Ibid* at 279.

²⁶ *Ibid* at 184.

those who seek its protection.²⁷ Hathaway cautions that denial of access to procedures and weakness in the operation of domestic asylum systems can lead to *refoulement*.²⁸ His work also inadvertently addresses the issue of access to information when he acknowledges that asylum seekers face, ‘linguistic, cultural and informational difficulties’ in the country of asylum and thus cautions against rigid application of timelines in asylum procedures.²⁹ The author’s examination of the guarantees to accessing territory, procedures and information is considered under the principle of *non-refoulement* and not fair hearing as is the focus of this study. Hathaway’s comments propositions are also largely theoretical and restricted to the international plane. He does not examine how these concepts at the international level are internalised and represented at the national level. This study examines the prohibition of *refoulement* and fair hearing at both the international and national contexts.

Access to territory has also been the subject of study by Vladislava Stoyanova. The author agrees with Hathaway’s comments above but more boldly asserts linkages between access to territory and procedures with *non-refoulement* and fair RSD procedures.³⁰ He states that *non-refoulement* cannot be guaranteed without access to state territory and insists that fair and effective refugee status determination procedure is possible only within the state’s territory.³¹ Unlike Hathaway who asserts that denying asylum seekers does not necessarily lead to *refoulement*, Stoyanova posits that *non-refoulement* cannot be guaranteed without granting asylum seekers access to state territory. He then asserts that denial of access to state territory equates to a denial of fair refugee status determination procedures.³² This study is however restricted to the conduct of states when asylum seekers are outside its mainland as he examines access to territory in light of the situation of stowaways, asylum seekers rescued at sea and interception at the high seas. The author also assumes that access to territory automatically leads to an RSD process that guarantees fair hearing. This study shows that

²⁷ *Ibid*.

²⁸ *Ibid* at 285.

²⁹ *Ibid* at 392.

³⁰ Vladislava Stoyanova, The Principle of Non-Refoulement and the Right of Asylum Seekers to Enter State Territory, *Interdisciplinary Journal of Human Rights Law* 2008-2009 3:1, 1- 11.

³¹ *Ibid* 1-2.

access to territory is only one aspect of the RSD process and that there are other components necessary for a fair RSD framework.

Sharon Oakley's moves past the principle of non-refoulement and focuses her work on the issue of access to procedures.³³ Her research is on the fairness of accelerated procedures carried out at Harmondsworth Immigration Removal Centre in the United Kingdom. The author's findings indicated that the fast-track procedures in the United Kingdom posed a severe limitation on applicant's rights to: adequate information on the process and their rights, adequate time for preparation for a hearing, access to legal aid and exercising the right to appeal³⁴ which in turn led to 'confusion, bewilderment, frustration and stress' for asylum seekers.³⁵ In her estimation, 'fairness had been sacrificed for efficiency.'³⁶ The author asserts that speedier decision-making needs to be balanced against States' obligations under international human rights and refugee law.³⁷ She makes several recommendations but the most important related to refocusing accelerated procedures from removing manifestly unfounded claims to assessing claims of well-founded cases.³⁸ This article provides important lessons on how to balance efficiency and fairness in accelerated procedures and at the same time to prevent abuse of asylum procedures. However, this work is limited to accelerated procedures in a developed country fashioned exclusively towards preventing abuse of the asylum process. This work examines the benefits of expedited proceeding in enhancing access to procedures for vulnerable groups of asylum seekers.

In addition to accessing territory, procedures and information, this study examines the fair hearing requirement for independent, impartial and competent tribunals to examine

³² *Ibid* at 11.

³³ Sharon Oakley, 'Accelerated Procedures for Asylum in the European Union: Fairness Versus Efficiency,' April 2007, Sussex Migration Working Paper no. 43, Sussex Centre for Migration Research, available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5689 [accessed 16 December 2010].

³⁴ *Ibid* at 17.

³⁵ *Ibid*.

³⁶ *Ibid* at 21.

³⁷ *Ibid* at 17.

³⁸ *Ibid* at 23.

asylum claims. Gerald Heckman³⁹ argues that this fair hearing requirement has achieved the customary international law status and strongly differs with pronouncements of the European Court of Human Rights and the Human Rights Committee on the application of this standard applies to refugee status determination proceedings.⁴⁰ He supports the application of this guarantee to asylum procedures basing his arguments on the legislative history of the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) and the long standing application of this standard to RSD procedures.⁴¹ Heckman acknowledges that the fullest extent of this norm can only be guaranteed to judicial bodies but asserts that 'suitable modifications' may be required for administrative bodies exercising judicial functions.⁴² Drawing from the European Human rights court, he offers three clarifications on the application of this right to administrative bodies that: the fact of executive appointment or the provision of guidelines for performance of functions does not limit independence as long as officers are not instructed on the adjudicatory roles;⁴³ a decision making process may employ first instance decision makers who do not satisfy the independence as long as a tribunal, with sufficient jurisdiction, meeting this requirement eventually reviews the dispute; disputes involving fundamental human rights adjudicated at first instance by non-independent decision makers will require more intense review by independent tribunals with jurisdiction over questions of fact and law.⁴⁴

Heckman's work focuses only on one component of the right to fair hearing. His appraisal of Canada's RSD process is limited to the requirement for independence. He neither discusses aspects of impartiality and competence that are elements of the independence requirement nor other components of the right to fair hearing such as oral hearing, appeal or expeditious hearing. This study examines Kenya's RSD framework against several components of the right to fair.

³⁹ Gerald P. Heckman, 'Canada's Refugee Status Determination System and the International Norm of Independence,' *Refugee* (2008) 25:2, 79-102.

⁴⁰ *Ibid* at 83

⁴¹ *Ibid* at 85.

⁴² *Ibid*.

⁴³ *Ibid* at 86.

⁴⁴ *Ibid* at 87.

Another component the right to fair hearing, the right to oral hearing has been examined in depth by New Zealand's refugee appellate body.⁴⁵ The judges acknowledge the importance of an oral hearing in assessing inconsistencies and issues of credibility. They recognise the right to an oral hearing as an important component for fair hearing but assert that absence of an oral hearing is not 'inconsistent with fundamental justice.'⁴⁶ Their rationale for limiting access to an oral hearing related to the high level of abuse in New Zealand's asylum processes.⁴⁷ The appeal judges encourage examining the legislative context of the particular proceedings when assessing when to grant an oral hearing and where statute grants discretion on whether to conduct an oral interview or not, the 'demands of fairness in the particular circumstances of the individual case' should guide the exercise of that discretion.⁴⁸ The judges are alert to the risks of harm to an asylum seeker in situations of erroneous decision-making and recommend interviewing asylum seekers as a matter of course given the high standard of fairness required in asylum proceedings in New Zealand. They however recommend denying an oral hearing where the application is prima facie manifestly unfounded or clearly abusive applications.⁴⁹ The judges seem to suggest that the requirement for an oral hearing is an end in itself as they fail to assess considerations such as the quality of the oral hearing which affect an asylum applicant's ability to fully articulate his claim during the personal interview. This study examines this right more comprehensively noting that an oral hearing is essential but highlights issues such as the conduct of the interviewing officer and the length of the period of the interview in guarantying a fair hearing.

Australian judges fail to examine further guarantees required under the right to competent interpretation though they offer an in-depth analysis. In Perera v Minister for Immigration & Multicultural Affairs⁵⁰ the judges examined the importance, role and competency of interpretation. The judges agreed that 'the right to competent

⁴⁵ Refugee Appeal No. 70951/98, New Zealand: Refugee Status Appeals Authority, 5 August 1998 available at: <http://www.unhcr.org/refworld/docid/3ae6b73ec.html> [accessed 5 December 2010].

⁴⁶ *Ibid* at 'the Duty to Interview'.

⁴⁷ *Ibid* at 'Abuse of the Refugee Appeal System'.

⁴⁸ *Ibid* at 'Factors affecting the Discretion to Interview'.

⁴⁹ *Ibid* at 'General Conclusions'.

⁵⁰ [1999], FCA 507, Australia: Federal Court, 28 April 1999, available at: <http://www.unhcr.org/refworld/docid/3ae6b75c0.html> [accessed 5 December 2010].

interpretation is linked with the right to provide evidence and that a tribunal lacks jurisdiction to continue a hearing when it fails to afford a non-English speaking applicant a competent interpreter.⁵¹ In their examination of the role and competence of an interpreter, they concur with previous judgments noting, ‘the right to a hearing is a vain thing if the [applicant for refugee status] is not understood.’⁵² The goal of the interpreter, they proclaim, ‘is to place the non-English speaker as nearly as possible in the same position as an English speaker.’⁵³ On competent interpretation they note that perfect interpretations do not exist as no interpretation will convey precisely the same meaning as the original testimony.⁵⁴ They however assert, ‘To speak of the competence of an interpretation invites reference to criteria such ... as accuracy, qualifications, accreditation or experience.’⁵⁵ The judges make sound remarks on the right to competent interpretation but fail to clearly articulate the qualities of competent interpretation. They also fail to examine the evolution of this right to include the requirement of same sex interpreters for applicants as a further guarantee of fairness. This study provides a more complete picture as it not only covers the issue of same sex interpreters but also the impact of interpretation to positive asylum decisions as well as the provision of regular training of interpreters to ensure competence.

The right to legal representation is a component of the right of fair hearing which Michael Kagan examines.⁵⁶ In the article, the author assigns legal aid the role of combating errors made by the applicant at first instance and the decision maker at appeal. According to him, legal advisers at first instance prevent applicant errors by helping clients recount their experiences coherently and at appeal prevent decision-making errors by providing research and analysis of the facts, and presenting legal theories that support a client’s case.⁵⁷

⁵¹ *Ibid* at para 21.

⁵² *Ibid* at para 24.

⁵³ *Ibid*.

⁵⁴ *Ibid* at para 26.

⁵⁵ *Ibid* at para 31.

⁵⁶ Michael Kagan, ‘Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt’, *Journal of Refugee Studies* 19:1 (2006) 45-68.

⁵⁷ *Ibid* at 60.

Kagan argues that the right to counsel and the right to advise are essential to fair and effective RSD. He supports his assertions with research findings indicating that obtaining legal assistance doubled the chance of an asylum seeker winning refugee recognition at UNHCR-Cairo.⁵⁸ He concludes that legal aid is essential for an effective right to seek asylum in countries where UNHCR conducts RSD.⁵⁹ Kagan makes important contributions on the role of lawyers and legal aid in the RSD process but limits his findings to UNHCR led RSD. Unlike this study, he does not discuss the impact of legal aid in government led RSD systems.

In terms of designing appropriate legal aid programs, Stephan Anagnost⁶⁰ recommends utilizing university law students.⁶¹ He proposes the use of refugee law clinics as a cost effective way of providing high quality legal aid to asylum seekers and refugees. Stephan draws inspiration from North American universities where law students study domestic and international refugee law and apply this theory through protection work as a legal aid assistant/extern under the supervision of an attorney or lawyer working with asylum seekers and refugees.⁶² The author warns that a poorly funded overcrowded national legal aid structure threatens the quality of decisions and increases the costs of running legal aid programs.⁶³ He establishes a nexus between low quality legal aid and poor decision-taking and cautions that this may in turn lead to *refoulement*.⁶⁴ Anagnost further proposes that UNHCR monitor the national legal aid structure in order to guarantee high quality, low cost legal aid.⁶⁵ The article offers important lessons for a developing country like Kenya which may not be able to fully fund a legal aid program. Though, the author uses a developed country's realities in proposing his 'cost effective' solution. He ignores the fact that developing countries like Kenya may not have academic capacity in international refugee law and an ensuing gap in the numbers of law students who may

⁵⁸ *Ibid* at 54-55.

⁵⁹ *Ibid* at 65.

⁶⁰ Stephan Anagnost, 'The Challenge of Providing High Quality, Low Cost Legal Aid for Asylum Seekers and Refugees,' *International Journal of Refugee Law* (2000) 12 (4), 577-588.

⁶¹ *Ibid* at 579.

⁶² *Ibid* at 582.

⁶³ *Ibid* at 584.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at 585.

staff law clinics. This study adopts a more realistic recommendation for Kenya in ensuring provision of legal representation in the RSD process.

The right to disclosure is a vital component of procedural fairness in administrative proceedings and originates in the principle *audi alteram partem*.⁶⁶ Andrew Pinto and Niiti Simmonds emphasize that ‘disclosure provides an affected party with the opportunity to participate meaningfully in the decision-making process, reduces the element of surprise in administrative proceedings and enables a party to review the alleged facts, respond to such facts with rebutting evidence, and prepare submissions explaining how they should be weighed and analysed. They acknowledge that the bar for disclosure is set very high right to disclosure in criminal and civil proceedings and that in administrative proceedings the right to disclosure is not as high but is slightly more flexible.’⁶⁷ The article states that the level of disclosure in administrative proceedings is determined by common law or legislation such that where statute is silent on the level of disclosure required case law will be relied upon to provide guidance. The authors encourage applications for disclosure during the course of the proceedings and seeking written confirmation that you have been provided with all relevant materials and or all material that will be put before the administrative tribunal.⁶⁸ They conclude that for a fair proceeding parties are entitled not to all information but to adequate information.’⁶⁹ Pinto and Simmonds paper focuses primarily on disclosure in administrative law while this study examines international requirements for disclosure under various bodies of law including administrative, refugee and human rights laws. This study’s premise is that requirements for fair hearing such as the right to disclosure are dictated by internationally recognised standards and ought to be respected nationally.

⁶⁶ Andrew Pinto and Niiti Simmonds, ‘Disclosure Issues in Administrative Proceedings’, available at: <http://www.pintowrayjames.com/pdf/Disclosure-Issues-Administrative-Proceedings.pdf> [accessed July 23 2010].

⁶⁷ *Ibid* at 2-3.

⁶⁸ *Ibid* at 11.

⁶⁹ *Ibid* at 16.

The right to disclosure in asylum proceedings has also been the subject of study in a review of UNHCR's policy and practice.⁷⁰ Asylum Access considers disclosure, 'one of the most critical of all protections, essential to the function of other parts of the RSD process.'⁷¹ They explain their assertion describing the adverse impact of limited disclosure to adjudicators and legal representatives. Asylum access encourages disclosure of documents include transcripts of applicant's own interview at UNHCR and in some cases medical reports solicited by UNHCR, Statement of their witnesses or experts and country of origin information.⁷² The writers also warn that UNHCR's failure to disclose information has the potential implication of the refugee agency hiding its errors and the paternalistic attitude of determining which refugee and under what situation an asylum seeker is entitled to information. Asylum Access urges UNHCR make clear distinctions between disclosure to third parties and disclosure to applicants themselves⁷³ and that disclosure should be the general rule and not non-disclosure as is evidenced in UNHCR Procedural standards.⁷⁴ They avow, 'non-disclosure exceptions should be rare and narrowly defined. They should not swallow the rule.'⁷⁵ The writers also caution against using lack of resources as a justification of non-disclosure and characterise an RSD procedure that fails to guarantee disclosure as risky and unfair RSD procedures.⁷⁶ As the title of this article suggests, Asylum Access' work is solely focused on UNHCR's RSD Procedures. This study discusses disclosure in government conducted RSD.

A compelling elucidation of procedural fairness guarantees relating to reasoned decisions is provided in an article titled, 'Assessing Asylum Claims in Africa: Missing or Meeting Standards.'⁷⁷ According to the authors an objective asylum adjudication process needs to aim at meeting standards set out in the international human rights framework and refugee

⁷⁰ Asylum Access, 'Disclosure of Evidence in UNHCR's Refugee Status Determination procedures: Critique and Recommendations for Reform,' June 20, 2008, available at <http://rsdwatch.files.wordpress.com/2010/03/disclosure-of-evidence-in-unhcr-rsd.pdf> [accessed 15 June 2010].

⁷¹ *Ibid* at 6.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* at 10.

⁷⁶ *Ibid* at 8.

⁷⁷ Edwin Odhiambo-Abuya and George Mukundi Wachira, 'Assessing Asylum Claims in Africa: Missing or Meeting Standards?' *Netherlands International Law Review* LIII (2006) 171-204.

treaties as well as customary international law.⁷⁸ The authors, Abuya and Wachira, appraise the asylum process in Africa against international standards using Kenya and Egypt as case studies. They examine several procedural guarantees and make astute comments on the need for reasoned outcomes. Abuya and Wachira state that reasoned outcomes demonstrate an adjudicator's independence ... show that a decision has been arrived at strictly on its merits free from political, social, diplomatic, or any other external influences or pressures.⁷⁹ They link the right to reasoned outcomes with the appeal process as a reasoned decision allows an asylum seeker to appreciate the decision⁸⁰ and enable him or her to 'rebut the reasons given for rejection in order to exercise any appeal or review rights.'⁸¹ The authors conclude that the requirement for reasoned outcomes is ignored by UNHCR in both Kenyan and Egyptian contexts.⁸² These authors based their findings on RSD conducted by UNHCR when there was no national legal framework for refugee status determination in Kenya. Moreover, UNHCR practices have since evolved and the practice discussed is no longer accurate. Kenya has also passed refugee legislation envisages the Kenya government's conduct of RSD. There is therefore a need, before the full implementation of this Act, to evaluate whether the procedures therein provide for fair handling of RSD.

On the right to appeal or review, Goodwin-Gill⁸³ attributes restriction of this right worldwide to failure of the Executive Committee (Excom) to employ specific terms on the appeal or review process.⁸⁴ Excom, he notes, 'left open both the identity and composition of the re-examining body, and the administrative or judicial nature of the process.' As a result states worldwide have abolished appeals, reduced the level of appeals or confined review only to legal issues.⁸⁵ He notes, while the initial decision maker may be best placed to judge certain issues such as the personal credibility of the claimant, restricting later review to a narrow category of legal issues may not be the most

⁷⁸ *Ibid* at 173.

⁷⁹ *Ibid* at 196.

⁸⁰ *Ibid* at 197.

⁸¹ *Ibid* at 198.

⁸² *Ibid*.

⁸³ Goodwin-Gill G S and McAdam *supra* note 19.

⁸⁴ *Ibid* at 535.

⁸⁵ *Ibid* at 536.

effective way to address the problem and ensure that international obligations are satisfied.⁸⁶ He concludes that international law favours a second effective look at asylum claims going both to facts and to legality.⁸⁷ This, he says, ‘may offer the best chance of correcting error and ensuring consistency.’⁸⁸ Goodwin’s examination of this right focuses largely on the law and practice of developed countries namely Ireland, New Zealand and the United Kingdom. He makes no mention of a developing country. He also does not examine issues relating to time lines for appeals, suspensive effect of appeal submissions and the requirement of oral hearings at appeal. This study covers these additional standards in its examination of the right to appeal.

The right to an expeditious hearing or speedy trials has been discussed by Basil Ugochukwu⁸⁹ and Jennifer Nellie Beckley.⁹⁰ Ugochukwu examines the right to an expeditious hearing as expressed in the African and European human rights instruments while Jennifer Nellie relies on the Convention on the Rights of the Child (CRC) in assessing the application of the right to former child soldiers in Sierra Leone.⁹¹ Both authors agree that human rights instruments do not provide a strict rule on what length of time is reasonable or unreasonable but highlight a three way test set out by the European Court to determine unreasonable delay.⁹² Ugochukwu observes that the right applies in both criminal and civil proceedings in Europe but only in criminal suits in Africa.⁹³ Jennifer Beckley on the other hand highlights Article 40(2)(b)(iii) of the CRC and concludes that for children the right to a speedy hearing is linked to the presumption of innocence.⁹⁴ Ugochukwu and Beckley’s papers examine the application of this human right standard in so far as criminal and civil proceedings are concerned. They both fail to

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at 537.

⁸⁸ *Ibid.*

⁸⁹ Basil Ugochukwu, ‘Comparative Fair Trial: Between the African and European Human Rights Systems’, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579844 [accessed 17 August 2010].

⁹⁰ Jennifer Beckley, *Towards the Realisation of the Right to a Fair Hearing of Child Offenders in Post-Conflict Sierra Leone*, (LLM Thesis, University of Pretoria, 27 October 2006).

⁹¹ *Ibid* at 40; Basil Ugochukwu *supra* note 89 at 40.

⁹² Basil Ugochukwu *supra* note 89 at 41 and Jennifer Beckley *supra* note 90 at 40.

⁹³ *Ibid* at 40.

⁹⁴ Jennifer Beckley *supra* note 90 at 41.

mention the applicability of this fair hearing requirement to other proceedings such as RSD. This study seeks to fill this gap by examining its application to RSD proceedings.

1.4 Justification

Kenya is gradually assuming its responsibilities over refugees in the country; a role it had previously abdicated to UNHCR. The responsibility that ranks highly among those the country is resuming is that of refugee status determination. The Refugee Act provides a framework for the conduct of these functions yet no study exists to assess whether it will be conducted fairly and efficiently and in compliance with international standards. The available information in this area is limited to conduct of RSD by UNHCR and was conducted before the passing of the Refugee Act. This study therefore provides a timely and relevant analysis of the extent to which the RSD framework meets international standards for fair hearing.

Finally, there is a dearth of regional and local literature in this area of law. The limited information available relates to conduct of RSD by UNHCR and not governments. This study adds to this body of literature.

1.5 Conceptual Framework

International Human Rights Law entitles each individual to a fair hearing by an independent and impartial tribunal in determination of his or her rights and obligations. This right is expressly guaranteed in several declarations and conventions including the Universal Declaration of Human Rights (UDHR),⁹⁵ ICCPR,⁹⁶ ECHR,⁹⁷ American Convention on Human Rights (IACHR)⁹⁸ and the African Charter on Human and Peoples' Rights (ACHPR).⁹⁹

These legal instruments however are couched at a broad level and do not fully define the concept of fair hearing. As a result various scholars have sought to fill this lacuna. There

⁹⁵ Art. 11 UDHR.

⁹⁶ Art. 14 (1) ICCPR.

⁹⁷ Art. 6 (1) ECHR.

⁹⁸ Articles 8 and 25, ACHR.

are two main approaches in the available literature outlining this concept. The first is the constitutive approach which involves a discourse on the components of a fair hearing while the second approach discusses the concept by interrogating the concept of fairness.

Australia's Human Rights Law Resource Centre examines the concept of fair hearing using the constitutive approach. The centre notes that the concept of fair hearing contains many elements and that the standards against which a hearing is to be assessed in terms of fairness are interconnected. According to the centre, at the very least the minimum basic elements of the right to a fair hearing can be said to consist of: equal access to, and equality before the courts; right to legal advice and representation; affordable litigation; right to procedural fairness; positive duties to self-represented litigants; right to an expeditious hearing; right to a competent, independent and impartial tribunal established by law; right to a public hearing and the right to have the free assistance of an interpreter when necessary.¹⁰⁰

The African Commission on Human and People's Rights also approaches the concept of a fair hearing also by enumerating its components.¹⁰¹ The commission restates the essential elements of a fair hearing provided by the Australian Human Rights Centre above but adds elements such as: equality of access by women and men to judicial bodies and equality before the law in any legal proceedings; respect for the inherent dignity of the human person, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused; adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence; an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body; an entitlement to a

⁹⁹ Art. 7 ACHPR.

¹⁰⁰ Human Rights Law Resource Centre, 'The Right to a Fair Hearing and Access to Justice: Australia's Obligations, Submission to the Senate Legal Constitutional Affairs Committee Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice,' 6 March 2009, available at www.hrlrc.org.au/files/hrlrc-submission-access-to-justice-inquiry.pdf [Accessed 17 August 2010] pp. 10-36.

¹⁰¹ See African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,' DOC/OS (XXX) 247, available at: http://www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf [Accessed 17 August 2010].

determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and an entitlement to an appeal to a higher judicial body.¹⁰²

The question that then remains unanswered is whether this concept applies to RSD proceedings. There seems to be no clear position on the applicability of the concept of fair hearing to refugee status determination proceedings.¹⁰³ Heckman argues for the application of this concept to RSD. He notes that refugee status determination proceedings involve the application of legal criteria to a factual matrix particular to each individual claimant.¹⁰⁴ Such determinations he argues are specific and judicial in nature and have a significant impact on fundamental individual interests and are thus clearly of a kind normally subject to judicial supervision and control and should on this basis attract ICCPR's Article 14 (1) guarantees.¹⁰⁵

Indeed UNHCR and the European Council on Refugees and Exiles (ECRE) seem to rely on the constitutive approach to the concept of a fair hearing in expounding their notion of 'fair and efficient RSD procedures.' The two organizations' minimum standards for a fair and efficient RSD procedure bear several similarities with the components of the concept provided above. A fair and efficient RSD system according to UNHCR guidelines must include; admissibility procedures; information on the procedures to be followed; a competent body to examine and determine applications; availability of a competent

¹⁰² *Ibid* at 2.

¹⁰³ There are varying views on whether this principle should be applied to refugee status determination proceedings. The Human Rights Committee, in 2007 excluded the application of art. 14 of the ICCPR to status determination proceedings while broad interpretations of the ACHR and ECHR support the application of this concept to status determination. See UNHCR, *Human Rights and Refugee Protection, Self Study* Module 5, Volume 2 at 114-118.

¹⁰⁴ Gerald P. Heckman, *supra* note 39 at 83.

¹⁰⁵ To guarantee the right to fair hearing, Article 14 (1) ICCPR provides that 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.'

interpreter; issuance of documentation upon declaration of refugee status; appeal procedures for negative decisions with a right to remain in the country until appeal is addressed.¹⁰⁶ ECRE reiterates the standards proposed by UNHCR.¹⁰⁷

Other scholars approach the concept of a fair hearing by first analyzing the concept of fairness. Patrick Robinson notes the importance of defining the concept of fairness before embarking on examining this concept of fair hearing.¹⁰⁸ He avers that fairness does not require perfection and that ‘perfection is something more for the province of gods, than for us human beings.’ He quotes Lord Diplock, stating that, ‘the fundamental human right is not to a legal system that is infallible, but to one that is fair.’¹⁰⁹ He also quotes Lord Shahabudeen, who in a matter before him stated, ‘the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had fair chance of dealing with the allegations against him.’¹¹⁰ Robinson then examines the nature of fairness assessing whether it is a relative or absolute standard. He concludes that the character of fairness should be the same in both international and domestic tribunals. Fairness, to him, is a relative concept as it must be examined in reference to the particular context.

¹⁰⁶ UN High Commissioner for Refugees, ‘Note on Determination of Refugee Status under International Instruments’, 24 August 1977, EC/SCP/5, available at: <http://www.unhcr.org/refworld/docid/3ae68cc04.html> [accessed May 15 2010].

¹⁰⁷ ECRE puts forward a range of recommendations on access to asylum procedures, admissibility procedures, the determination of state responsibility, the asylum procedure, appeals, the implementation of asylum procedures, including training of officials, legal representation, data protection, information and transparency, and the suspension of asylum procedures. These guidelines aim to set the standard for the reassessment of national asylum procedures. See ECRE, ‘Guidelines on Fair and Efficient Procedures for Determining Refugee Status’, available at: http://www.ecre.org/resources/Policy_papers/233 [accessed May 15 2010].

¹⁰⁸ Patrick Robinson, ‘The Right to a Fair Trial in International Law, Specific Reference to the Work of the ICTY,’ available at: <http://bjil.typepad.com/publicist/2010/01/the-right-to-a-fair-trial-in-international-law-with-specific-reference-to-the-work-of-the-icty.html> [accessed 17 August 2010] at 3.

¹⁰⁹ Maharaj v. Attorney-General of Trinidad and Tobago, Privy Council, (1979) AC 385; (1978) 2 AER 670; (1978) 2 WLR 902 as quoted in Patrick Robinson, *The Right to Fair Trial...ibid.*

¹¹⁰ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 73.4, *Separate Opinion of Judge Mohammed Shahabuddeen Appended to the Appeals Chamber Decision on Admissibility of Evidence-in-Chief in the form of Written Statements*, 16 (Sept. 30, 2003) available at: http://www.icty.org/x/cases/slobodan_milosevic/acdec/en/031031-so.htm [accessed May 22 2011].

Similarly, in discussing the right to fair trial, Basil Ugochukwu relies on the works of various scholars¹¹¹ who also examine the concept of a fair trial from the issue of fairness. To MacCarrick central to the concept of fairness is the relationship of power exercised by the court vis-à-vis the individual and that as a general claim, a judicial system must not be characterized by random outcomes or disparate results for similarly situated parties or a class thereof.¹¹² She argues that fair trial helps to clarify fairness at four levels: fairness and equality, fairness and morality, fairness and objectivity and fairness and impartiality.¹¹³

Treschel on the other hand describes fairness as the idea of doing what is best. He seems to read from the same script as Justices Robinson, Diplock and Shahabudeen above when he notes, that, '[fairness] may not be perfect, but it is the good and decent thing to do. It all requires being level-headed, uniform and regular ... Fairness requires depth and breadth. Not only does the outcome have to be fair, but so does everything along the line such as evidence gathering and presentation.'¹¹⁴ Mathias commences by acknowledging the elusive nature of a definition for fairness but provides a description of its essential nature as 'one where the law is applied accurately and without bias in accordance with rules of fairness.' He cautions against seeking a more precise definition and like Justice Robinson argues that it depends on the context and circumstances of the case.¹¹⁵

The concept of fair hearing as analyzed through the concept of 'fairness' has also been the subject of discussion in refugee status determination. David Matas uses the term fairness, natural justice, fundamental justice and due process interchangeably

¹¹¹ See Ugochukwu *supra* note 89. He relies on the works of Patrick Grim, 'The "Right" to a Fair Trial,' available at http://www.americanrevival.org/articles/pdfs/fair_trial.pdf and Stefan Trechsel, 'Why Must Trials be Fair?' *Israel Law Review*, 31 *Isr. L. & Rev.* 94 (1997) available at: http://heinonline.org/HOL/Page?handle=hein.journals/israel31&div=10&g_sent=1&collection=journals [accessed 19 August 2010].

¹¹² Gwynn MacCarrick, 'The Right to a Fair Trial in International Criminal Law, (Rules of Procedure and Evidence in Transition from Nuremberg to East Timor),' available at: <http://www.isrcl.org/Papers/2005/MacCarrick.pdf> [accessed 19 August 2010] at 3.

¹¹³ *Ibid* at 3, 5.

¹¹⁴ As quoted in Basil Ugochukwu, *supra* note 89 at 5.

¹¹⁵ *Ibid*.

characterizing them as common sense notions.¹¹⁶ He proposes twelve standards of fairness a refugee system must meet in order to be considered generally fair. According to him, the system must have; structural impartiality; safeguards for denying cases as manifestly unfounded; access to counsel; opportunities for response to objections to claim for status; an oral hearing; room for the principle of benefit of doubt; individual consideration of each case; an independent deciding authority; a qualified examiner and decision maker; provisions for appeal or review; reasoned negative decisions and systemic impartiality.¹¹⁷

This study is guided by the above approaches to this concept of fair hearing in evaluating whether the procedures provided under the Refugee Act comply with international standards.

1.6 Research Objectives

The overall objective of this paper is to evaluate Kenya's RSD law for degree of compliance with international standards. The specific objectives of this paper are to;

1. Analyze international standards governing the conduct of refugee status determination, pointing out gaps and inadequacies; ,
2. Critically examine the proposed framework for refugee status determination in Kenya's Refugee Act (2006); ,
3. Highlight the level of compliance of the proposed framework with international standards; ,
4. Make proposals for the improvement of the proposed structure.

1.7 Research Questions

This research addresses the following research questions:

1. Are there clear international standards for RSD?
2. What are the procedures for refugee status determination under the Refugee Act 2006?

¹¹⁶ David Matas, 'Fairness in Refugee Status Determination,' available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:207 [accessed 17 August 2010] at 10.

¹¹⁷ *Ibid* at 11-16.

3. Does Kenya's legal framework for RSD meet international standards outlined under the concept of fair hearing?
4. What proposals can be made to improve the legal framework?

1.8 Methodology

In conducting this study, reliance has been placed on primary and secondary sources of information.

Primary sources such as the Refugee Act and preparatory documents have also been analyzed. This study also entailed an element of field research conducted between 14 February 2011 and 8 March 2011. The research methodology involved administering questionnaires to 30 randomly selected refugees and asylum seekers residing in Nairobi, Kenya. Interviews and correspondence with refugee practitioners in institutions such as UNHCR, Refugee Consortium of Kenya (RCK), the Ministry of Immigration and Registration of Persons' Department of Refugee Affairs (DRA), Kituo Cha Sheria and the Refugee Law Project (RLP) also formed part of this study's source of information.

The study's secondary sources of information included refugee law text books, journal articles, essays, and research papers.

1.9 Chapter Breakdown

The chapters that form the body of this study are indicated below.

Chapter One – Introduction

This chapter provides a brief background of past and current practice in refugee status determination in Kenya and describes the statement of the problem. The chapter also includes hypotheses, literature review, justification, conceptual framework, research objectives and questions, and the methodology.

Chapter Two –Fair Hearing: Flight to Entry

This chapter defines the term ‘refugee’, introduces the right to fair hearing and outlines seven components of this right relevant to refugee status determination procedures. The chapter then discusses two components namely, access to asylum, territory, information and establishment of a competent RSD body to examine asylum claims.

Chapter Three – Fair Hearing: Interview to final decision

The chapter continues the analysis commenced in chapter 2 with an examination of due process guarantees related to personal interview, competent interpretation, legal aid and representation, right to evidence, written and reasoned decision, the right to appeal and expeditious hearing.

Chapter Four – Concluding Remarks and Recommendations

This chapter makes concluding remarks on the degree of compliance of Kenya’s procedures for refugee status determination to international standards of fair hearing and proposes recommendations regarding its improvement.

CHAPTER TWO

FLIGHT TO ENTRY

Introduction

The previous chapter provided a background of refugee status determination in Kenya and highlighted the lack of explicit international standards outlining ideal RSD procedures. This chapter highlights and adopts the international human rights norm of fair hearing as a suitable guide for states in designing national status determination legislation. This chapter commences with an examination of the refugee definition as provided in various international, regional and national instruments and introduces seven components of the right to fair hearing that ought to form the minimum guarantees in any RSD framework. The chapter examines access to territory, procedures and information as well as the examination of claims by a competent, independent and impartial body established by law. Chapter three examines the remaining four elements.

2.1 Refugee definition

The 1951 Convention¹ remains the foundation of international refugee law, and its refugee definition is the principal basis for establishing a person's refugee status.² Article 1A (2) of the convention defines as a refugee any person who;

As a result of events occurring before 1 January 1951 and 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 [or her] nationality and is unable, or owing to such fear, is unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³

¹ Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS p.137 (entered into force 22 April 1954).

² See UN High Commissioner for Refugees, *Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee*, 1 September 2005, available at: <http://www.unhcr.org/refworld/docid/43141f5d4.html> [accessed 10 July 2010] at 5.

³ The definition has been restated without amendment in the following instruments; Article 1 (1) of the Arab Convention on Regulating Status of Refugees in the Arab Countries, adopted by the Arab League in 1994; Article 1 (1) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; Cartagena Declaration and Article 1 (1) of the Final Text of the Revised AALCO 1966 Bangkok Principles on Status and Treatment of Refugees, Adopted on 24 June 2001 at the AALCO's 40th session, New Delhi.

The temporal limitation, “as a result of events occurring before 1 January 1951”, was formally removed by the 1967 Protocol⁴ while the geographical restriction “events occurring in Europe” was withdrawn by the vast majority of States which are party to the two instruments, thus giving a universal dimension to the Convention’s provisions.⁵

The refugee definition of the 1951 Convention is complemented by regional refugee instruments. The 1969 OAU Convention⁶ is the most notable. The Convention reiterates the 1951 Convention definition but also provides in Article I (2) that ‘the term “refugee” shall also apply to every person who;

owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his [or her] country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality.

This definition developed out of the experience of the wars of liberation and decolonization which erupted in the African continent during the late 1950s and early 1960s.⁷

The OAU Convention’s definition has been replicated in other regions.⁸ The Cartagena Declaration⁹ provides a similar definition to the term refugee. Its definition was, like

⁴ Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS p.267 (entered into force 4 October 1967).

⁵ UNHCR *supra* note 2 at 5.

⁶ African Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the Assembly of Heads of State and Government at its sixth Ordinary Session (Addis Ababa, 10 September 1969) (entered into force 20 June 1974).

⁷ Okoth Obbo disputes this contention stating, ‘the definition was expanded to deal specifically with the situation of refugees from territories still under colonial or minority racist rule. And, in the context of that concern, the predominant issue was neither the civil war character of freedom fighters nor the question of numbers’ See George Okoth-Obbo, ‘Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing The Specific Aspects of Refugee Problems in Africa,’ *Refugee Survey Quarterly*, (2001) 20 (1): 80-138 at 112.

⁸ This definition has been restated in various regional instruments with slight variations in Article III(3) of the 1984 Cartagena Declaration on Refugees; Article 1 (2) of the Arab Convention on Regulating Status of Refugees in the Arab Countries, adopted by the Arab League in 1994 and the Final Text of the Revised AALCO 1966 Bangkok Principles on Status and Treatment of Refugees, Adopted on 24 June 2001 at the AALCO’s 40th session, New Delhi. For full texts of these instruments see UNHCR, *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, (Published by the United Nations High Commissioner for Refugees (UNHCR) Geneva, Switzerland, the International Training Centre of the ILO (ITCILO) June 2007.

Africa's, inspired by mass human displacement caused by wars, civil conflicts, violence and political upheaval in a number of States in Central America in the late 1970s/early 1980s.¹⁰ It is necessary to note that while the OAU Convention definition is binding on states which ratify and domesticate it, the Cartagena Declaration is not. Latin American countries have, however, incorporated its principles, including its refugee definition, into their national legislation and practice.¹¹

A refugee definition is also provided in the 1950 UNHCR Statute.¹² The definition is nearly identical to that adopted by the drafters of the 1951 Convention.¹³ The 1950 Statute however does not provide for "membership of a particular social group" as a ground for persecution and from the outset did not have temporal or geographical restrictions. These differences, however, are no longer significant. Generally, those considered refugees under the 1951 Convention are also refugees within the competence of UNHCR.¹⁴ The 1950 UNHCR Statute's definition has been extended by resolutions of the General Assembly and the UN Economic and Social Council (ECOSOC) to include persons who are affected by the 'indiscriminate effects of armed conflict or other "man-made disasters", including, for example, foreign domination, intervention, occupation or colonialism.'¹⁵

While a state may adopt a refugee definition that is wider than that required under its international obligations, it should not provide a narrower definition.¹⁶ Kenya's Refugee Act provides two refugee definitions which to a large extent mirror definitions provided in the 1951 Convention and the 1969 OAU Convention.¹⁷ The first definition provided in

⁹ Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984, OAS Document OEA/Ser.L/V/II.66/doc.10, rev. 1, pp. 190-93 (1984-85).

¹⁰ UNHCR *supra* note 2 at 6.

¹¹ *Ibid.*

¹² Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428 (V) of 14 December 1950, UN Document A/1775 (1950).

¹³ See Paragraph 6A (ii) and Paragraph 6B of UNHCR Statute.

¹⁴ UNHCR *supra* note 2 at 8, See also Goodwin-Gill G S and McAdam J, *The Refugee in International Law*, (Oxford: Oxford University Press 2007) at 52.

¹⁵ *Ibid.*

¹⁶ UNHCR *supra* note 2 at 7. See also Goodwin-Gill *supra* note 14 at 35.

¹⁷ See Section 3 (1) (a), b and 3 (2).

Section 3 (1) (a) is slightly wider than the 1951 Convention definition as it includes “sex” as an additional ground upon which one can make a claim for refugee status. Parliamentary debate is silent on the rationale behind the inclusion of this ground in the legislation. It is presumed that Kenya’s parliament sought to offer greater protection to female applicants considering gender was omitted as a ground in Article 1A of the 1951 Convention.¹⁸

It is important to note that broadening the universally accepted definition of a refugee is not specific to Kenya as sex and gender have also been included as grounds for refugee status in Uganda’s Refugee Act.¹⁹ South Africa’s refugee legislation also expands the 1951 Convention to include tribe and gender as grounds upon which refugee status can be recognised.²⁰ Countries like Tanzania, Zambia and Malawi restate the refugee definitions in the 1951 and 1969 OAU refugee conventions in their national legislations.²¹

2.2 RSD Procedures and Fair Hearing

As indicated above, the refugee definition is explicitly provided in international and regional refugee instruments and restated in national refugee legislations. However, as noted earlier (Chapter 1), international refugee law does not provide guidance for states on how to establish efficient national status determination procedures or provide an essential set of standards pursuant to which the process of refugee status determination could be devised.²² There is need therefore to move out of this specific area of law to examine international human rights which ‘focus[es] on the impact of state action on the fundamental rights of individuals rather than their status as aliens or citizens. They entitle non-citizens to a fair hearing before independent and impartial tribunals in proceedings that determine their rights and obligations to equality before the law, and in particular access to courts and to an effective remedy to vindicate their substantive rights under

¹⁸ It remains to be seen whether this ground will offer more guarantees to female applicants as is practice in practice female applicants have been covered under the membership of a particular social group. Goodwin-Gill *supra* note 14 at 81.

¹⁹ Section 4 (a), (d), Refugee Act, 2006.

²⁰ Section 4 (a) Refugee Amendment Act [South Africa], 2008, Act No 33, 2008.

²¹ Section 4 (1) (a), (b) Refugee Act [Tanzania] 1998, Section 2, Refugees (Control) (Declaration of Refugees) (No. 2) Order 1971[Zambia] and Section 2 (1) (a), (b), *Refugee Act* [Malawi], 8 May 1989.

²² Paraphrase Okoth Obbo *supra* note 7 at 100.

international conventions.’²³ International human rights law is a sufficient basis upon which to interpret international refugee law.²⁴

Article 14 of the ICCPR which guarantees all persons the right to a fair hearing provides a starting point from which to commence this study. Article 14 provides;

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The article provides several guarantees to persons. A number of the guarantees provided apply to accused persons but this study proceeds with guarantees applicable to persons whose ‘rights and obligations are being determined.’ The study adopts seven guarantees provided in article 14 and argues that they form the core minimum standards applicable to refugee status determination. The standards adopted by this study include; access to territory, access to procedures, access to information, examination of claims by a competent, independent and impartial tribunal established by law; access to a personal interview; availability and access to a competent interpreter; availability and access to legal aid and representation; right to evidence; written and reasoned decisions; room for review or appeal and expeditious hearing.²⁵

2.3 Access to Territory, Procedures and Information

In order for an asylum seeker to have his claim heard he ought to be given access to a state’s territory, its refugee determination procedures as well as information regarding the entire process. These three elements are important components of the right to be heard and are discussed separately below.

²³ Gerald Heckman, ‘Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?’ *International Journal of Refugee Law* (2003) 15 (2): 212-253, at 1.

²⁴ James Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press 2005) at 9.

²⁵ These guarantees are drawn from the right to fair hearing/trial stipulated in Article 14 ICCPR.

2.3.1 Access to territory

‘The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted.²⁶ Accessing territory guarantees an asylum seeker the right to be heard, an important due process requirement.²⁷ However, there is no universally binding international instrument that obligates states to allow refugees to access their territories in order to lodge asylum claims. The UDHR²⁸ sought to recognise this right by referring to the right to seek and to enjoy in other countries asylum from persecution.²⁹ This provision was however not included in the ICCPR. The Declaration on Territorial Asylum³⁰ similarly failed as states were unwilling to be bound to admit asylum seekers.

Article 33 of the 1951 Convention comes close to guaranteeing asylum seekers admission into the territory of a state. The Article provides,

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.

Hathaway argues that *non-refoulement* does not necessarily promote the right to asylum and entry into territory of a particular state, but acknowledges that Article 33 amounts to ‘a *de facto* duty to admit the refugee since admission is the only means of avoiding the alternative, impermissible consequence of exposure to risk.’³¹ States who have domesticated the 1951 Convention are therefore prohibited from returning refugees to

²⁶ Hathaway *supra* note 24 at 279.

²⁷ Edwin Odhiambo-Abuya and George M. Wachira, ‘Assessing Asylum Claims in Africa: Missing or Meeting Standards?’ *Netherlands International Law Review* (2006) 53 (2):171-204 at 178.

²⁸ Universal Declaration of Human Rights (UDHR) adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948, UN Document A/810, p. 71 (1948).

²⁹ Compare with Article XXVII of the American Declaration of the Rights and Duties of Man which provides that, ‘Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.’

³⁰ UN General Assembly, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), adopted at the 1631st plenary meeting, 14 Dec. 1967; In: Resolutions adopted by the General Assembly during its 22nd session, volume I, 19 September-19 December 1967 - A/6716. p. 81(GAOR, 22nd sess., Suppl. no. 16) available at: <http://www.unhcr.org/refworld/docid/3b00f05a2c.html> [accessed 3 April 2011].

³¹ Hathaway *supra* note 24 at 302.

their country of origin or a country where they would face harm. In many instances this determination can only be made after the person has been admitted into a state's territory.

Kenya adopted its national refugee legislation in 2006 but has from independence generally allowed refugees easy access to her territory. This was confirmed by respondents of the field study who confirmed that they easily accessed Kenya's territory through border points in Northern Kenya (Moyale border) and Western Kenya (Busia border). 28 of the 30 respondents accessed Kenya illegally while the remaining 2 legally entered the country.³² In recent times Kenya has closed its borders with Somalia preventing asylum seekers from accessing the country and in some instances deported asylum seekers back to their country of origin.³³ This conduct is in direct contravention with Section 18 of the Refugee Act which restates Article 33 of the 1951 Convention prohibiting *refoulement*. Section 18, Kenya's *non-refoulement* provision, also extends the prohibition of forceful return to persons recognised as refugees under Section 3 (2) of the Act.³⁴

In the region, Uganda has been hailed as one of the most welcoming states guaranteeing refugees access to its territory.³⁵ In South Africa, the government also protected asylum seekers from *refoulement* but refugee advocacy organizations charged that police and immigration officials forcefully repatriated some asylum seekers, particularly

³² Interviews carried out with 30 refugees and asylum seekers in Nairobi, Kenya between 14 February 2011 and 8 March 2011.

³³ For further information see Human Rights Watch, *Kenya: Stop Deporting Somalis Fleeing Conflict*, 31 March 2011, available at: <http://www.unhcr.org/refworld/docid/4d9572871e.html> [accessed 25 April 2011]. See also United States Committee for Refugees and Immigrants, *U.S. Committee for Refugees and Immigrants World Refugee Survey 2007 - Kenya*, 11 July 2007, available at: <http://www.unhcr.org/refworld/docid/46963885c.html> [accessed 20 May 2010].

³⁴ Section 3 (2) provides for *prima facie* refugee status.

³⁵ UN High Commissioner for Refugees, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Uganda*, 1 March 2011, available at: <http://www.unhcr.org/refworld/docid/4d806bc112f.html> [accessed 8 June 2011] p. 1.

Zimbabweans in 2009 though there were no similar reports in 2010.³⁶ The government of Malawi similarly guaranteed asylum seekers access to her territory.³⁷

2.3.2 Access to Procedures

It is not sufficient to be admitted into a country's territory. Asylum seekers must have access to procedures that determine their refugee status. The duty of *non-refoulement* can be infringed by the refusal to consider a claim to refugee status knowing that such refusal leaves the refugee exposed to removal on general immigration grounds.³⁸ Therefore, an effective RSD framework requires that asylum-seekers have access to the procedures to apply for refugee status, and be allowed to remain in the country while their cases are examined.

It follows that the first step in guaranteeing access to procedures is to ensure that a national body mandated to receive and adjudicate claims is established because when a state fails to provide status determination procedures it is precluded from declaring the asylum applicant as unlawfully present.³⁹ Sections 9 to 11 and Regulations 3 to 30 establish a national status determination framework thus ensuring Kenya's compliance with this preliminary requirement.

There are additional provisions in Kenya's refugee law that further guarantee asylum seekers access to RSD procedures. Section 12 of the Act entitles an asylum seeker to reside in Kenya until his or her case has been determined while Section 13 suspends the application of the Immigration Act and the Aliens Restriction Act to asylum seekers while their cases are being determined. In effect, Section 13 ensures that asylum seekers are not prosecuted for illegal entry into Kenya as long as they have lodged an asylum request which is in line with provisions of the 1951 Convention which obliges states not

³⁶ United States Department of State, *2010 Country Reports on Human Rights Practices - South Africa*, 8 April 2011, available at: <http://www.unhcr.org/refworld/docid/4da56d889b.html> [accessed 8 June 2011], See Part d.

³⁷ United States Department of State, *2010 Country Reports on Human Rights Practices - Malawi*, 8 April 2011, available at: <http://www.unhcr.org/refworld/docid/4da56daca9.html> [accessed 8 June 2011], See Part d.

³⁸ Hathaway *supra* note 24 at 302.

³⁹ *Ibid* at 184.

to impose penalties ‘on refugees on account of their illegal entry or presence provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’⁴⁰

In order to benefit from the guarantees in Section 12 and 13, the Refugee Act requires refugees to register as asylum seekers immediately upon arrival or within thirty days of entry.⁴¹ Those who fail to register within this period may suffer a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding six months, or both.⁴² In practice however it has proved difficult for immigration prosecutors to prove that an asylum seeker has been in the country longer than thirty days.⁴³ The courts, in many instances, release persons charged with contravening section 11 (1) of the Refugee Act to UNHCR for status determination.⁴⁴

UNHCR recognises that rigid time limits may deny asylum seekers access to RSD procedures and therefore admits refugees to its mandate RSD procedures whenever they report to their offices in Nairobi, Kakuma or Dadaab. As it does in Kenya, UNHCR promotes the consideration of asylum claims even where the application was not lodged within the formal time limit.⁴⁵ UNHCR cautions states against excluding from consideration asylum requests submitted outside a certain time limit noting that ‘automatic and mechanical application of time limits for submitting applications has been deemed to be at variance with international protection principles.’⁴⁶

It is important to note that the Refugee Act does not employ any other admissibility requirements other than the 30 day limit for registration noted above.⁴⁷ The Refugee Act

⁴⁰ See Article 31, 1951 Convention.

⁴¹ Section 11 (1), Refugee Act 2006.

⁴² Section 11 (3), Refugee Act 2006.

⁴³ Interview with Solomon Wasia, Program Coordinator, Forced Migration Program, Kituo Cha Sheria, (Nairobi, 25 February 2011).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Other admissibility requirements such as first country of asylum concept and safe third country notion also determine access to RSD procedures ‘First country of asylum’ refers to denial of a person access to asylum on their territory if s/he has already found protection in another country. “safe third country” notion

also does not provide for accelerated procedures targeted towards weeding out manifestly unfounded claims which would otherwise overwhelm the RSD process and delay processing of otherwise genuine claims. In 2007 UNHCR employed accelerated procedures in Kakuma Refugee Camp to weed out otherwise manifestly unfounded claims lodged by South Sudanese Refugees.⁴⁸

The drafters however recognised the importance of guaranteeing ease of access to certain categories of asylum seekers. The procedures for status determination under the Act provide for accelerated processing for unaccompanied and separated children, those in confinement or awaiting deportation orders, pregnant women, elderly persons, mentally or physically disabled women and children and persons with medical emergencies.⁴⁹ This provision of the Refugee Act guarantees the right to be heard for this category of asylum seekers who would otherwise find it difficult to access procedures and embodies international standards.⁵⁰

Several challenges with regard to access RSD procedures in Kenya became apparent during the field research and interviews with practitioners. Currently, refugees are required to approach the Government's Department of Refugee Affairs (DRA) and UNHCR in order to access refugee status determination procedures offered by the latter. The DRA and UNHCR maintain presence in Nairobi and refugee camps in Kakuma and Daadab where refugees can lodge their applications for asylum. Despite their point of

presumes that the applicant could and should already have requested asylum if s/he passed through a safe country en route to the country where asylum is being requested. An asylum seeker from a country indicated as a safe country may be automatically barred from accessing the asylum procedure. See UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html> [accessed 14 July 2010] pp 3-5.

⁴⁸ UN High Commissioner for Refugees, *2007 Annual Protection Report Kenya* at 31 (on file with the author).

⁴⁹ See Regulations 2 and 30, Refugees (Reception, Registration and Adjudication) Regulations, 2009.

⁵⁰ The UN Committee on Rights of the Child encouraged states to give priority to refugee status applications filed by unaccompanied and separated children and every effort should be made to render a decision promptly and fairly. See UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html> [accessed 6 May 2011], Section VI para. 70.

entry, refugees are required to travel to Nairobi or the refugee camps in Kakuma or Dadaab in order to access the asylum procedures. One respondent noted;

I was told to choose between Kakuma and Daadab Refugee Camps. I was fearful because I was new to the country. I refused to go to the camp. I had no bus fare and was not even informed how one gets to the refugee camps. It is not possible to travel in a foreign country without fear.⁵¹

Other Respondents complained that they required money to travel to UNHCR's offices in Westlands, Nairobi or to the refugee camps. In many instances they lacked funds to meet their basic needs and could not afford travelling to UNHCR for registration. An Ethiopian male refugee noted, 'holding a job was difficult as one has to absent himself from work regularly in order to go to UNHCR offices. This caused difficulties with employers.'⁵² A Congolese minor who was going through the RSD process also complained at the costs she and her sister incurred travelling to UNHCR. 'We spend our limited resources about 200 and 350 shillings to go to UNHCR...we could have spent this amount on better things like food...'⁵³ Yet another respondent expressed his frustration with UNHCR during the registration process. He stated, 'the office (UNHCR) is inconsiderate because of the challenge of going to the [UNHCR] office daily and providing for oneself at the same time.'⁵⁴

Solomon Wasia described UNHCR's location as a disincentive to registration.⁵⁵ He noted that asylum seekers chose not to immediately register with UNHCR once they have accessed the country because they risked exposing themselves to police harassment and arrest by travelling [significant distances] to UNHCR offices. Refugees' failure to immediately register partly contributed to the second issue limiting access to RSD procedures in the country. In their interviews, Simon Konzolo and Solomon Wasia decried the pervasive nature of arbitrary arrests and detention of asylum seekers and refugees in the country. Simon Konzolo argued that arbitrary arrest and detention have a direct impact on RSD procedures as asylum seekers are denied the opportunity to lodge

⁵¹ Interview with Kedir, Refugee Respondent, (Nairobi, 24 February 2011).

⁵² Interview with Ahmed, Refugee Respondent, (Nairobi, 24 February 2011).

⁵³ Interview with Abdi, Refugee Respondent, (Nairobi, 03 March 2011).

⁵⁴ Interview with Jeanne, Refugee Respondent, (Nairobi, 24 February 2011).

⁵⁵ Interview with Solomon Wasia, *supra* note 43.

asylum claims by virtue of being in police custody charged with unlawful presence under section 11 of the Refugee Act.⁵⁶ They both agreed however that many asylum seekers charged with unlawful presence are usually released to UNHCR.

Respondents' inability to receive material assistance also limited access to RSD procedures in Nairobi. Unlike camp based refugees, majority of refugees in Nairobi are not provided with material assistance by UNHCR or the government. Asylum seekers are therefore required to fend for themselves. Accessing UNHCR and Government offices as noted above requires money. Refugees cannot travel from their locations (such as Eastleigh) to UNHCR Offices (in Westlands) without money. In some instances, asylum seekers prioritise putting food on the table to waiting for registration at UNHCR Offices. For those with employment protracted, registration procedures with UNHCR or long queues at UNHCR put their livelihoods at risk as most of their employers would not condone long periods of absence from work.

Section 16 (2) of the Refugee Act may however resolve some challenges relating to accessing procedures as it provides for the establishment of transit centres for 'purposes of accommodating persons who have applied for recognition as refugees or members of the refugee's family while their applications for refugee status are being processed.' Transit centres are important in so far as they safeguard vulnerable refugees from harm, ease provision of services to refugees who cannot secure livelihoods especially those in urban centres and guarantee access to procedures for those asylum seekers who lack resources to finance travel from the border points to RSD centres. Prolonged residence in transit centres will however need to be avoided. The proposed establishment of transit centres is not an entirely novel concept to Kenya as prior to 1991 a transit centre managed by UNHCR had been set up in Thika.⁵⁷

⁵⁶ Interview with Simon Konzolo, Senior Program and Advocacy Officer, Refugee Consortium of Kenya, (Nairobi, 25 February 2011).

⁵⁷ Edwin Odhiambo-Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective,' *International Journal of Refugee Law* (2007) 19 (1): 51-95 at 65-66.

2.3.3 Access to Information

Article 14 of the ICCPR provides several guarantees for accused persons with regard to information. Under this Human Rights Covenant, in order to guarantee a fair trial, an accused person has the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. In my view, while this provision is not directly applicable to asylum procedures, it underscores the importance of providing information to a person whose rights are being determined.

International refugee agencies like UNHCR and the European Council on Refugees and Exiles (ECRE) have made comments on this issue.⁵⁸ ECRE encourages states to provide asylum seekers information relating to the asylum procedures including an explanation of their rights and duties and how to exercise them. ECRE further proposes that asylum seekers be kept well-informed throughout the whole asylum procedure.⁵⁹ The organisation further notes,

The possible outcomes of the asylum procedure and their consequences should be carefully and fully explained. As a minimum, information should always be provided in writing in the host State's language, and orally in a language which the asylum seeker fully understands.⁶⁰

UNHCR makes similar proposals to ECRE. UNHCR advises states to issue asylum seekers information relating to: the nature of the proceedings; the applicant's rights and obligations during the procedure; possibility of contacting UNHCR; right to legal advice and representation where free legal assistance is available access to it.⁶¹ UNHCR also advocates for asylum seekers to be informed of their rights to a qualified and competent interpreter.⁶²

UNHCR's RSD procedures however fail to meet some of the standards they recommend to states. The field study carried out disclosed several gaps in information dissemination

⁵⁸ See UNHCR *supra* note 2 at 117 and European Council of Refugees and Exiles (ECRE), 'Guidelines on Fair and Efficient Procedures for Determining Refugee Status,' September 1999, available at <http://www.ecre.org/files/guides.pdf> [accessed 10 August 2010].

⁵⁹ *Ibid*, ECRE, para 70 p. 22.

⁶⁰ *Ibid*.

⁶¹ See UNHCR *supra* note 2 at 117.

⁶² *Ibid*.

by UNHCR at various stages of the RSD process namely pre-registration, registration, adjudication and decision notification stage. (See figure 1 below for graphical representation of the findings). A majority of respondents relied on informal and sometimes misguided sources of information as a result of the poor information dissemination accorded to asylum seekers. At the pre-registration stage 100 percent of the respondents (30 individuals) did not receive information of the refugee registration process from UNHCR staff or UNHCR published material. Majority of the respondents (24 individuals – 80 percent) relied on fellow refugees and locals (Kenyan nationals) for information regarding registration with UNHCR.

A further 87 percent of the respondents (26 out of 30) did not receive information about the registration, interview and adjudication process to follow after registering with UNHCR. Information dissemination improved at the interview and adjudication stage as 50 percent (15 individuals) of the respondents were informed of the RSD process by RSD Officers prior to conducting their interviews. The asylum seekers were briefed on their rights and duties during the process and the possible results of the interview. A significant number, 43 percent, were however not informed of the procedures at this stage. The situation did not improve at the decision notification stage, as 20 out of the 30 respondents (67 percent) did not comprehend the decision issued. The decisions were not explained to them by the issuing authority. (Figure one plots information dissemination by UNHCR to the respondents at the various stages of the RSD process namely pre-registration, registration, interview and adjudication, and decision notification).

As expected, the information provided was not always accurate thus creating confusion and bewilderment amongst asylum seekers and refugees. In one case, an Ethiopian family did not register with UNHCR four years after their arrival. They stayed inside a house owned by an Ethiopian national who warned them that they would be arrested if they ever ventured outside the house. The family barely left their host's house as they feared arrest. They only realised four years later that the situation was not as grim as had been described and approached UNHCR for registration.⁶³ Josephine, a Rwandese refugee,

⁶³ Interview with Meseret, Refugee Respondent, (Nairobi, 2 March 2011).

expressed frustration with UNHCR noting, ‘what makes refugees angry with UNHCR is because there is no communication [between the organization and refugees].⁶⁴

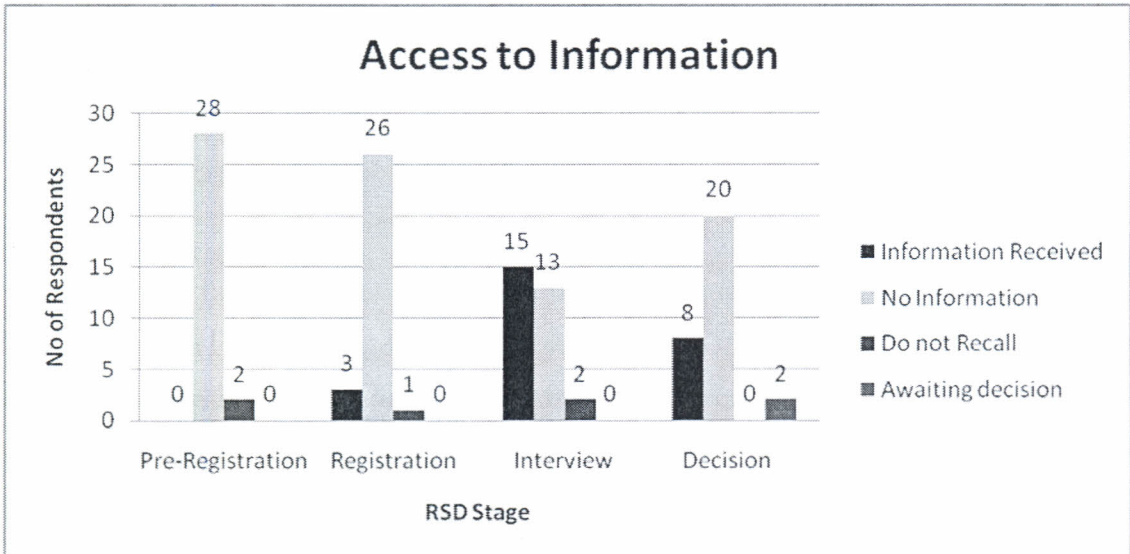


Figure 1: Access to Information

In an effort to remedy this lacuna in information dissemination, UNHCR published an information booklet which describes the RSD process and provides asylum seekers and refugees a list of refugee agencies in Nairobi.⁶⁵ The booklet is an important first step in filling this lacuna but it fails to provide asylum seekers and refugees a detailed description of the RSD process and their rights during the process. Moreover, it is only available in English and Swahili thus limiting access to asylum seekers who do not comprehend these languages. Furthermore, this booklet will only be useful to literate refugees. Effort needs to be made at reaching the illiterate or barely literate refugee population.

It seems the drafters of the Refugee Act and Refugee Regulations sought to reduce the challenges faced by asylum seekers and refugees in accessing information outlined above by setting out several provisions obliging refugee officers to disseminate information to asylum seekers and refugees at various stages of the RSD process. At the registration

⁶⁴ Interview with Josephine, Refugee Respondent, (Nairobi, 2 March 2011).

⁶⁵ UNHCR, *Information for Refugees and Asylum Seekers in Nairobi*, October 2010.

stage, Regulation 10 (1) (c) requires a registration officer to inform an asylum seeker of: the purpose of the registration interview; the duty to be truthful and cooperative; conditions of the asylum seeker pass and the requirement of appearing on the return date specified in the pass. The registration officer is also required to caution the asylum seeker against violating conditions of the pass and the potential consequences of a breach. The registration officer is further required to inform the asylum seeker in writing of the date of the RSD interview.⁶⁶

The obligation for dissemination of information continues to the RSD interview. Under Regulation 21 (1), the Refugee Status Determination Officer (RSDO) is duty-bound to ensure the asylum seeker fully understands the procedures, his or her rights and responsibilities and the evidence presented. The RSDO is further required to explain the purpose and nature of the interview to the asylum seeker including the, duty to be truthful and cooperative, role of the interpreter, confidentiality of the information given, procedures relating to the notification of the refugee status determination decision; and the relevant appeal procedures.⁶⁷ An asylum seeker should also be informed when his or her refugee status is determined⁶⁸ or when his or her refugee claim raises exclusion concerns⁶⁹ and when his or her refugee status is withdrawn,⁷⁰ revoked⁷¹ or deemed to have ceased.⁷²

Unfortunately, the Act does not address the provision of information to asylum seekers prior to the registration process. In order to access the refugee registration and status determination procedures, asylum seekers and refugees ought to be informed of the existence of the procedures upon entry which will also help to satisfy Kenyan authorities' desire for asylum registration within the thirty day time-limit. A positive note in this regard is that the Department of Refugee Affairs (DRA) in collaboration with RCK and the Danish Refugee Council (DRC) has published posters with pictorial information on

⁶⁶ See Regulation 10 (1) (d).

⁶⁷ See Regulation 21 (3).

⁶⁸ See Regulations 23 (3), (4) and 29 (3).

⁶⁹ See Regulation 28 (2).

⁷⁰ See Regulations 38 (1) and 40.

⁷¹ See Regulation 47 (2).

⁷² See Regulations 43 (1) and 46.

the RSD procedures set out in the Act. The same organisations have also published an information booklet on the Refugee Act which highlights the refugee definition, the RSD process and the rights and duties of refugees. This booklet is simple to read and understand and has been translated to Somali, Kiswahili and Oromo languages.⁷³

In terms of accessing information held by the government, the Refugee Act guarantees asylum seekers and refugees access to their records.⁷⁴ However, this guarantee only applies to records submitted by the asylum seeker or refugee and not to information obtained from the asylum seeker or refugee during registration and RSD interviews or during any other interaction with the asylum seeker or refugee. Regulation 11 (5) provides, ‘an asylum seeker, refugee or their legal representative shall have supervised access to the records specified in sub regulation (4) whereas sub regulation (4) only permits an asylum seeker or a refugee access to documents ‘he [or she] submitted to the commissioner.’ There is no mention of access to other documents in the claimant’s physical file. This provision fails to respond to challenges faced by refugees in the current UNHCR led RSD process where they are denied access to their interview transcripts and physical files.

2.4 Competent, Independent and Impartial Tribunal established by Law

‘The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 of the ICCPR.⁷⁵ The Human Rights Committee examined independence and proposed examination of appointment, tenure, promotion, transfer, conditions of service and termination of judges as important considerations in assessing independence. The European Court has also encouraged the examination of the financial aspect of independence.⁷⁶ Amnesty International defines independence as the ability of

⁷³ Refugee Consortium of Kenya and the Refugee Affairs Department, Ministry of State for Immigration and Registration of Persons, *The Refugee Act 2006, Information Booklet* (On file with author).

⁷⁴ See Regulation 11 (4), (5).

⁷⁵ UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, CCPR/C/GC/32, available at: <http://www.unhcr.org/refworld/docid/478b2b2f2.html> [accessed 25 March 2011] at 5 para. 18.

⁷⁶ In the case of *Salov v. Ukraine* the Court examined the wider judicial and financial background to a decision. The Court noted, inter alia, a decision by the Ukrainian Constitutional Court from 1999 which had

decision makers to decide matters before them impartially on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere.⁷⁷

In order to meet the threshold for impartiality, decision makers should not be influenced by personal bias or act in ways that promote the interests of one party to the detriment of another.⁷⁸ The decision making body must also appear to a reasonable observer to be impartial.⁷⁹ Competence on the other hand requires that the tribunal has jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person.

In regard to the phrase ‘established by law’, Amnesty International notes that tribunals ought to be established pursuant to an Act of Parliament, expressly authorizing the executive to establish them.⁸⁰ Therefore, ‘[a]n executive order or other administrative measure outside of the framework of a legislative act does not establish a tribunal by law for the purposes of fair trial guarantees.’⁸¹

Interestingly, UNHCR in its guidelines to states on minimum standards for fair and efficient RSD procedures advocates for the establishment of a ‘competent authority’ to assess claims. The organization does not follow the human rights model expressly requiring attributes of competence, independence and impartiality and is yet to provide guidance on the features of a ‘competent authority’. The Government of Kenya also did

found that the Cabinet of Ministers had acted unconstitutionally when drastically reducing the State budget for the judicial system – this was found to have exerted financial influence on the courts and infringed the citizens’ right to judicial protection. The European Court also noted a Resolution adopted by the Ukrainian Council of Judges in 2000, finding that the decisions of the Cabinet of Ministers to lower judicial salaries were contrary to the principle of the independence of the judiciary. Case referenced Council of Europe, The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights, August 2006, Human Rights Handbooks, No. 3, available at: <http://www.unhcr.org/refworld/docid/49f180362.html> [accessed 15 August 2010] at 33.

⁷⁷ Amnesty International, ‘United States of America: Justice at Last or More of the Same? Detentions and Trials after *Hamdan v. Rumsfeld*,’ AI Index: AMR 51/146/2006, 18 September 2006 <http://www.amnesty.org/es/library/asset/AMR51/146/2006/en/150e86d3-d3f3-11dd-8743-d305bea2b2c7/amr511462006en.pdf> [accessed 25 March 2011] at 40.

⁷⁸ UN Human Rights Committee *supra* note 75 at 21.

⁷⁹ *Ibid.*

⁸⁰ Amnesty International *supra* note 77 at 39 [rephrased].

⁸¹ *Ibid.*

not comply with this proviso in Article 14 of the ICCPR when it conducted RSD prior to 1991.

The Government established an Eligibility Committee (EC) under the Ministry of Home Affairs conduct RSD. The Eligibility Committee was composed of representatives from the Ministry of Home Affairs, Immigration Department and UNHCR.⁸² Majority of the members of this committee were lay persons with no legal qualifications. UNHCR's role in the EC was minor.⁸³ The Eligibility Committee did not have any formal procedures or formal criteria for determining refugee status.⁸⁴ During this period, UNHCR also ran a parallel system of RSD; the organization granted 'mandate refugee status'⁸⁵ to those whose claims were erroneously determined.⁸⁶

The Refugee Act however establishes several institutions to conduct RSD. The Act establishes the Department of Refugee Affairs (DRA)⁸⁷ a public office headed by a Commissioner of Refugee Affairs⁸⁸ responsible for all administrative matters concerning refugees in Kenya and which has powers to coordinate activities and programmes relating to refugees.⁸⁹ The Commissioner's functions include, *inter alia*, receipt and processing of asylum applications, registration of all refugees and asylum seeker and implementation of the decisions of the Refugees Affairs Committee.⁹⁰

⁸² Human Rights Watch (HRW), *Hidden in Plain View, Refugees Living Without Protection in Nairobi and Kampala* (Human Rights Watch, 2002) at 55.

⁸³ Odhiambo-Abuya *supra* note 57 at 65.

⁸⁴ HRW *supra* note 82.

⁸⁵ The term "mandate refugees" refers to persons in either category, who have been recognized as refugees by the High Commissioner on the basis of the 1950 Statute and subsequent General Assembly and ECOSOC resolutions. "Mandate refugee" status may be determined individually or on a group basis. See UNHCR, *Refugee Status Determination; Identifying who is A Refugee, Self-Study Module 2*, 1 September 2005, p. 9.

⁸⁶ *Ibid* at 11. Under its mandate to protect refugees UNHCR may conduct its own refugee status determination where the national asylum determination process is manifestly inadequate or where determinations are based on an erroneous interpretation of the 1951 Convention or as a precondition for the implementation of durable solutions such as resettlement.

⁸⁷ *Ibid*. Section 6.

⁸⁸ *Ibid*. Section 7.

⁸⁹ *Supra* note 54.

⁹⁰ Section 7 (2) Refugee Act 2006.

The Refugees Affairs Committee (RAC) is also established under Section 8 of the Refugee Act 2006 to assist the Commissioner in determining refugee status.⁹¹ The RAC comprises representatives from ministries concerned with provincial administration, refugee affairs, foreign affairs, local government, immigration, finance or planning. The RAC must also comprise representatives from the Attorney General's Office, the National Security Intelligence Service (NSIS), the Police and the National Registration Bureau (NRB). Other members of RAC include a representative from the host community (-ies) and a member from the civil society who will assist and advise the committee. This inter-ministerial model has been provided for in national refugee legislations in Uganda,⁹² Tanzania,⁹³ Malawi,⁹⁴ and Nigeria.⁹⁵ Unlike the aforementioned countries, Kenya's Refugee Act does not provide for UNHCR's membership in its status determination body.

The Act does not spell out the qualifications for positions of the Commissioner of Refugees and the chairperson of the RAC. This was raised during parliamentary debate and the sponsoring ministry cautioned about the loophole. During parliamentary debate, the then Assistant Minister for Foreign Affairs urged the Ministry of State for Immigration and Registration of Persons to include in the statute the necessary qualifications for the office of Commissioner of Refugee Affairs to avoid complaints from stakeholders that the government had appointed an unqualified person as Commissioner.⁹⁶ This warning was not heeded.

The Refugee Act provides slightly more specific qualifications in relations to the Refugee Appeal Board (RAB) which is to be headed by an advocate with over ten years

⁹¹ *Ibid.* Section 8 (2).

⁹² Section 11 Refugee Act [Uganda] 2006.

⁹³ Section 6 Refugee Act [Tanzania] 1998.

⁹⁴ Section 3 *Refugee Act* [Malawi], 1989.

⁹⁵ Lawal Gumi and Kashim Zannah, 'Refugee Status Determination Procedure in Nigeria,' available at: http://www.iarlj.org/general/images/stories/wp_papers_cape_town/refugee_status_dertmination_procedure_in_nigeria.pdf [accessed 15 August 2010] at 2.

⁹⁶ Hansard Report for Parliamentary Debates on the Refugee Bill (Excerpts of debates held on 14-15 November 2006 and 29 November 2006) [On file with the author] p. 3634.

experience.⁹⁷ The remaining members of RAB are required to have experience in refugee law, immigration, foreign affairs, national security, local administration and refugee affairs.⁹⁸ The chair and RAB members are appointed by the Minister⁹⁹ to serve three year terms with a further renewable term of four years.¹⁰⁰ They are required to be independent in exercising their functions as a board.¹⁰¹ The Appeal board's role is to determine appeal submissions of decisions made by the Commissioner of Refugee Affairs and RAC.

A progressive feature of the refugee status determination process in Kenya is that the High Court will have powers of judicial review over the Refugee Appeal Board's decisions thus ensuring independence of the entire process given the Court's independence from the administrative structures dealing with refugees.¹⁰² Heckman argues that where a tribunal cannot be entirely independent an appeal to a more independent judicial institution ensures the tribunal's independence.¹⁰³

Independence, competence and impartiality have been termed as key to any tribunal and fundamental to justice¹⁰⁴ yet the Refugee Act fails to fully guarantee these features. The first concern relates to the appointment of the Commissioner of Refugee Affairs and members of the Refugee Appeals Board. The Minister of Immigration and Registration of Persons (hereinafter referred to as the Minister) has wide powers in appointing the Commissioner, the Chair and Members of the Refugee Appeals Board.¹⁰⁵ While the issue of political appointment in itself is not a threat to independence,¹⁰⁶ the lack of express qualifications for the Commissioner and members of the Refugee Affairs Committee and

⁹⁷ The then Assistant Minister for Foreign Affairs complained that this qualification should be reduced to 7 years as Judges of the High Court of Kenya can be appointed from advocates of the High Court who have practised for a 7 year period. *Ibid* at 3635.

⁹⁸ Under Section 18 of Uganda's refugee legislation, UNHCR may attend proceedings of the Refugee Appeal Board and make representations.

⁹⁹ Section 9 (2) Refugee Act 2006.

¹⁰⁰ Section 9 (5).

¹⁰¹ Section 9 (4).

¹⁰² See Gerald P. Heckman, 'Canada's RSD System and the International Norm of Independence,' *Refugee*, (2008) 25(2): 79-102 at 87.

¹⁰³ *Ibid*.

¹⁰⁴ François Crépeau and Delphine Nakache, 'Critical Spaces in the Canadian Refugee Determination System: 1989–2002,' *International Journal of Refugee Law* (2008) 20(1): 50-122 at 113.

¹⁰⁵ Sections 7 and 8 (3) (a) Refugee Act 2006.

¹⁰⁶ Crépeau and Nakache *supra* note 104 at 60.

the loosely defined qualification for the chairperson and members of the Refugee Appeals Board pose significant challenges to the credibility of the appointment procedure and therefore the independence of these bodies. There is a high likelihood of political patronage.

In Canada, members of Canada's Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), which has the responsibility for adjudicating asylum applications in Canada, complained at the politically motivated appointments to the Board describing some of those appointed as incompetent and as a result directly affecting the functions of the institution.¹⁰⁷ In the United States there are also serious concerns and criticism regarding the fairness, efficiency, effectiveness and independence of the asylum system. One of the main issues that have arisen relating to independence of the process is the politicisation of the appointment of US Immigration Judges. There have been calls for the professionalization and depoliticization of the entire process.¹⁰⁸

The Minister's discretion in appointing these officials should be constrained by criteria relating to academic and professional qualifications and experience. Interestingly, the lack of specific qualifications for office holders involved in RSD is the trend in the region. Uganda and Tanzania's Refugee legislations have also not specified relevant qualifications for their Commissioner for Refugees and Director of Refugee Services respectively¹⁰⁹ although Uganda involves the Public Service Commission in the appointment of the Commissioner for Refugees. However, the Commission is not involved in appointment of members of the Ugandan Refugee Appeal Board.¹¹⁰

¹⁰⁷ *Ibid* at 59.

¹⁰⁸ See James C Simeon, 'A Comparative Analysis of the Response of the UNHCR and Industrialised States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration,' *International Journal of Refugee Law* (2010) 22(1): 72-103 at 96-97.

¹⁰⁹ See Section 9 Refugee Act [Uganda] 2006 and Section 5, Refugee Act [Tanzania] 1998.

¹¹⁰ Sections 9 and 16 (1) Refugee Act [Uganda] 2006.

The issue of qualification of asylum adjudicators has also not been addressed in the Refugee Act.¹¹¹ In its procedural standards UNHCR sets out basic qualifications for its RSD Officers which include, a degree in law, international relations or political sciences; legal training and relevant professional experience in human rights, psychology or social work, legal knowledge and the ability to apply legal principles; good analytical skills; good oral and written communication skills; strong interpersonal skills; cultural and gender awareness; tolerance for diversity and the ability to work effectively under stress and in crisis. In Kenya, UNHCR has historically hired law graduates to conduct RSD.¹¹² Commentators in this field agree that the refugee law and adjudication is complex and that analytical skills developed through legal training puts lawyers a step ahead of other professions.¹¹³ However, in South Africa decisions of RSD Officers with legal backgrounds have been described as poor.¹¹⁴ Canada's IRB officials have also noted that not all lawyers make good refugee adjudicators.¹¹⁵

The lack of criteria for reappointment for positions in the RAC and RAB also needs to be addressed. There is need for performance review as a precondition to re-appointment. The performance appraisal system adopted should target retaining those most efficient and removing the least efficient. The issue of training holders of positions provided in the Act has also not been addressed. In South Africa some of the decisions issued by RSDOs were rated poor for reasons such as limited training opportunities.¹¹⁶ It is necessary to avoid a similar determination. The South African refugee legislation obligates the officer overseeing refugee affairs (Director-General) to train officers appointed under the Act.¹¹⁷

¹¹¹ See UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, September 2005 at 4-3.

¹¹² Odhiambo-Abuya and Wachira *supra* note 27 at 192.

¹¹³ *Ibid.*

¹¹⁴ Roni Amit, 'Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions,' *Forced Migration Studies Programme*, University of the Witwatersrand Johannesburg, South Africa FMSP Report April 2010 available at http://oppenheimer.mcgill.ca/IMG/pdf/FMSP_Protection_and_Pragmatism.pdf [accessed August 10 2010] pp 22 -73.

¹¹⁵ Crépeau and Nakache *supra* note 104 at 71-74.

¹¹⁶ Roni Amit *supra* note 114 at 7, 10.

¹¹⁷ See Articles 10 (3) Refugee Amendment Act [South Africa], 2008, Act No 33, 2008.

The issue of organizational competence arises when examining the roles of the Commissioner and the Refugee Affairs Committee. There is no clear demarcation between the role of the Commissioner and the Refugee Affairs Committee. The Act provides that the Commissioner ‘may’ determine cases while another provision notes that the Committee ‘shall’ assist the Commissioner in recognition of refugee status. The former is a discretionary provision while the latter obligates the Committee to work with the Commissioner but only as far as recognition cases are concern. It is unclear whether denied applications will be placed before the Committee. Moreover, there are no provisions in the Act requiring the Commissioner to place cases before the Committee for debate. It is not clear who is the final decision making entity in determining refugee status.

In Zambia and Tanzania the procedure is clear. In Zambia, Legal advisors (equivalent of RSD Officers) interview the asylum seeker then refer the case to the National Eligibility Committee (NEC) based in Lusaka for determination. The NEC discusses the case, interviews the asylum seeker then makes a determination which it refers to the Commissioner for a final decision. A similar procedure is clearly indicated in Article 9 of Tanzania’s Refugee Act 1998. Nigeria and Uganda also clearly indicate how a decision is determined from admission into the country to the first instance and appeal decision.¹¹⁸

The financial independence of the Refugee Appeal Board has also not been guaranteed as the Act vests on the minister ‘the terms and conditions of service, remuneration, traveling and other expenses of board members.’ The minister’s discretion is only constrained by consultations with the minister for Finance.¹¹⁹

The impartiality of the institutions established to conduct refugee status determination in Kenya will also be threatened in two ways. First, while the inter-ministerial composition of the Refugee Affairs Committee may enrich debates on cases, departmental considerations and squabbles may seep into the debate thus inhibiting the work of the

¹¹⁸ See Part IV of Uganda’s Refugee Act 2006; Lawal H. Gumi and Kashim Zannah *supra* note 90; UN High Commissioner for Refugees, Analysis of the Gaps in Protection of Refugees: Zambia, September 2007, available at: <http://www.unhcr.org/refworld/docid/472897100.html> Last accessed July 10 2010.

¹¹⁹ See section 2, Schedule Refugee Appeal Board, Refugee Act 2006.

Committee. The second issue not considered in the Act relates to corruption. In 2010 the Commissioner of Refugee Affairs stepped aside due to corruption allegations and was replaced by an acting commissioner until the allegations were investigated.¹²⁰ In the same year it was reported that Somali asylum seekers paid approximately 7,500-15,000 shillings (\$100-\$200) per family in bribes and transportation costs to travel from the Kenya-Somalia border to the Dadaab refugee camps.¹²¹ Given these reports it is not unreasonable to safeguard the RSD process from corruption. The Act fails to consider this issue as there are no safeguards provided to prevent corruption from tainting the RSD process. While negative decisions may be reviewed by the Refugee Appeals Board and the High Court, there are no procedures for audit of recognized claims. The Act should vest powers in the RAB or the Commissioner to periodically and randomly review accepted applications to ascertain impartiality.

Conclusion

As noted above, the Refugee Act has restated the 1951 Refugee Convention's refugee definition and expanded it to include sex as a ground of persecution. This undoubtedly offers more protection to asylum seekers. The Act, to a fair extent, fosters the right to fair hearing by guaranteeing access to procedures, territory and information. Provisions relating to information however do not offer a departure from current UNHCR led procedures. The chapter has also noted that unlike the Eligibility Committee established under the Ministry of Home Affairs prior to 1991, the government has established institutions in the Act charged with carrying out RSD. There is however concern that the institutions established namely the office of the Commissioner of Refugee Affairs, Refugee Affairs Committee and Refugee Appeal Board may not meet the standards required for competence, independence and impartiality. The next chapter continues with the assessment of Kenya's RSD framework against seven additional fair hearing guarantees. Chapter 3 analyses the extent to which the RSD process in the Refugee Act conform to international standards guaranteeing access to: a personal interview/oral hearing, competent interpretation, legal aid and representation, evidence, written and

¹²⁰ United States Department of State, *2010 Country Reports on Human Rights Practices - Kenya*, 8 April 2011, available at: <http://www.unhcr.org/refworld/docid/4da56db68c.html> [accessed 10 June 2011] part d.

¹²¹ *Ibid.*

reasoned decisions, room for appeal, review or reconsideration and the right to an expeditious hearing.

CHAPTER THREE

FAIR HEARING FROM INTERVIEW TO FINAL DECISION

Introduction

The previous chapter examined the refugee definition as provided in various international, regional and national instruments and introduced nine components of the right to fair hearing that this study proposes ought to form the minimum guarantees in any RSD framework. This chapter continues the examination of the Refugee Act's compliance with international standards for a fair hearing relating to rights to an oral hearing (personal interview), competent interpretation, legal aid and representation, written reasoned decisions, right to evidence, the right to appeal or reconsideration of a negative decision and finally the right to an expeditious hearing.

3.1 Right to a Personal Interview

It is a basic principle of legal culture that an applicant must have the right to state his or her claim fully. This is particularly true when fundamental values such as life and freedom are at stake as is the case with refugee status determination where an erroneous decision can lead to torture or death of the denied applicant upon return to his country of origin.¹

Article 14 of the ICCPR guarantees the right to a public hearing which generally includes a right to an oral hearing.² UNHCR describes a personal interview as “extremely important” given the difficulty of assessing credibility solely on the basis of an interview transcript or report.³ A personal interview, the UN Refugee Agency continues, allows the decision-maker to assess the applicant's demeanour and to ask supplementary and

¹ European Council on Refugees and Exiles (ECRE), ‘ECRE Guidelines on Fair and Efficient Procedures for Determining Refugee Status,’ September 1999 available at: http://www.ecre.org/resources/Policy_papers/233 [accessed May 15 2010] at para 54.

² Council of Europe, *The Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights*, August 2006, Human Rights Handbooks, No. 3, available at: <http://www.unhcr.org/refworld/docid/49f180362.html> [accessed 15 July 2010] at 21.

³ See UN High Commissioner for Refugees, *Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee*, 1 September 2005, available at: <http://www.unhcr.org/refworld/docid/43141f5d4.html> [accessed 10 July 2010] p. 117.

detailed questions.⁴ UNHCR's position has been supported by a refugee judge in New Zealand who noted, 'I am of the view that when a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing,'⁵

The right to an oral hearing is however not guaranteed at all stages of a hearing. The Human Rights Committee has determined that 'the requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations.'⁶ This position has been adopted by bodies such as UNHCR and ECRE. UNHCR's RSD Procedural Standards allow for examination 'on file' of appeal cases⁷ whereas ECRE proposes for waiver of the right to an interview where it is possible to grant refugee status on the basis of documentation.⁸ According to ECRE, document based determination of claims ensures efficiency of the RSD process as speedier decisions can be made for claims which closely meet the criteria for recognition under the 1951 Convention.⁹

Prior to UNHCR taking up RSD in Kenya, the Eligibility Committee (EC) conducted oral interviews with asylum seekers prior to determining refugee status.¹⁰ The Refugee Act follows the same pattern. The Refugee Regulations requires the scheduling of oral interviews with Refugee Status Determination Officers (RSDO) for all asylum seekers.¹¹ RSDOs are required to conduct a 'non-adversarial hearing to elicit information on the

⁴ *Ibid.*

⁵ Wilson J in *Re Singh and Minister of Employment and Immigration* (1985) 17 DLR (4th) 422 at 465: Refugee Appeal No. 70951/98, New Zealand: Refugee Status Appeals Authority, 5 August 1998, available at: <http://www.unhcr.org/refworld/docid/3ae6b73ec.html> [accessed 5 December 2010].

⁶ UN Human Rights Committee (HRC), 'General Comment no. 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial,' 23 August 2007, CCPR/C/GC/32, available at: <http://www.unhcr.org/refworld/docid/478b2b2f2.html> [accessed 25 March 2011] at 8 para 28.

⁷ UN High Commissioner for Refugees, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, September 2005 at para. 7.4.1.

⁸ ECRE *supra* note 1 at 25 para 89.

⁹ *Ibid.*

¹⁰ Edwin Odhiambo-Abuya, 'Past Reflections, Future Insights: African Asylum Law and Policy in Historical Perspective', *International Journal of Refugee Law* (2007) 19 (1): 51-95, pp. 65-66.

¹¹ See Regulations 4 (7) and 18 (3).

asylum seeker's eligibility for refugee status.¹² The Refugee Act does not have specific guarantees to personal interviews for women claimants but makes provision for separate interviews for children above 16 and, with the consent of their parents, for children below 16.¹³ Children are guaranteed their rights to a personal interview in accordance with international standards relating to children.¹⁴

The Act however fails to provide for the right to an oral hearing in proceedings before the Refugee Affairs Committee (RAC), the Refugee Appeal Board (RAB) or Commissioner of Refugee Affairs. These bodies are the only status determining institutions under the Act yet an applicant does not have a right to appear before any of them. This is a significant oversight. While the Act empowers the Commissioner to summon an asylum applicant to make an oral presentation, this right is only exercisable by the Commissioner.¹⁵ There is still room to secure the right to an oral hearing before the RAC and RAB when drafting regulations regarding the function of the RAC and RAB.¹⁶

The field research carried out indicated that all the respondents had been granted an oral hearing by UNHCR at their RSD interviews. Their responses however indicated that an oral interview in itself is not a sufficient guarantee to a fair hearing. The results of the study indicated that in order to guarantee fair hearing, a claimant should be interviewed within a reasonable time, given sufficient time to prepare for the interview, briefed on the interview before its commencement and provided sufficient opportunity to fully present his or her claims.

¹² Regulation 21 (1) Prior to conducting the interview the RSDO is further required to brief the asylum seeker on the procedures his or her rights and responsibilities and the evidence provided as well as the role of the interpreter, confidentiality, appeal procedures and the decision notification process. See Regulation 21 (3).

¹³ See Regulations 21 (4) and (5).

¹⁴ See UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html> [accessed 6 May 2011] Para 71 of this document notes, 'where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made ...'

¹⁵ Section 11 (5) Refugee Act 2006, Act No 13 of 2006.

¹⁶ See Section 26(2) (a) and (c) of the Refugee Act 2006.

As indicated in Chapter 2, 43 percent of those interviewed were not briefed on the RSD process, their rights and duties and the roles of the interviewer and interpreter¹⁷ even though applicants need to know that the interview is their opportunity to explain their case in full and ensure that they convey all the facts that may have a bearing on the decision about their status.¹⁸ In one of the field interviews one respondent complained about not being briefed on the RSD process and the impact it would have on his life.

I did not know why I was being interviewed. I was informed about the process by fellow refugees [after the interview]. I did not know that there could a rejection or recognition [of my claim] or timelines to be followed [if application was denied].¹⁹

Jeanne, a respondent who arrived in Kenya in the early 1990s complained about not being given time to prepare for the interview. She noted:

I was registered on the day I went to the office [and on the same day] interviewed without information about what was happening. I did not have time to prepare for the interview. I just answered the questions as I was asked then I was issued a decision within a few minutes of my interview.²⁰

The conduct of the interviewer and the circumstances surrounding the interview is also important in so far as indicating whether the claimant had an opportunity to fully present his or her claim. In several cases, refugees were warned by the interviewing officer to restrict their answers to the questions asked. A number of the respondents were frustrated with this approach noting. Mohamed noted, 'I was asked to be short and precise. I only expressed the problems I faced in Ethiopia and not the problems I was experiencing in Kenya.'²¹ Kedir, an Ethiopian refugee respondent, complained bitterly:

'The female lawyer [caseworker] warned me at the beginning of the interview that I should not speak unless she asked me. I was interviewed for twenty or so minutes. I thought I would fail [the interview]. She was a dictator and shouted at me [during the interview]. I had never been interviewed before so someone

¹⁷ See Chapter 2 p. 14.

¹⁸ Forced Migration Studies Program (FMSP), 'National Survey of the Refugee Reception and Status Determination System in South Africa,' available at: <http://cornsa.org.za/wp-content/uploads/Research/Asylum/FMSPMRMPRefugeeReceptionReport.pdf> [accessed August 18 2010] at 48.

¹⁹ Interview with Mohamed, Refugee Respondent, (Nairobi, 01 March 2011).

²⁰ Interview with Jeanne, Refugee Respondent, (Nairobi, 24 February 2011).

²¹ Interview with Mohamed *supra* note 19.

[naturally] fears ... The interviewer did not ask me everything about my claim such as the number of days I was arrested and released. She asked me very few questions. I do not think I explained the problems I faced. I think I faced this problem because at the time there was corruption within UNHCR.²²

A further safeguard when granting an oral hearing or personal interview is provided by UNHCR. In order to promote disclosure UNHCR discourages states from using police or border guards to interview asylum applicants.²³ Kenya's Refugee Act assigns adjudicatory powers to police or immigration staff through their membership in the RAC. Their influence is however limited by the presence of other members of the RAC. In Zambia, police or immigration staff solely have authority to interview and determine refugee status.²⁴ The situation differs in Uganda where police officers carry out initial interviews for all asylum seekers and transmit transcripts to the Office of the Prime Minister (OPM) for a second oral interview before onward transmission of the case file to the Refugee Eligibility Committee (REC) for consideration.²⁵

3.2 Free Assistance of a Competent Interpreter

The right to have the free assistance of an interpreter enshrines one of the aspects of the principles of fairness and equality.²⁶ It has been argued that this right has acquired the status of a customary international law norm given its restatement in several international human rights instruments.²⁷

²² Interview with Kedir, Refugee Respondent, (Nairobi, 24 February 2011).

²³ See also UN High Commissioner for Refugees, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html> [accessed 14 July 2010] p. 10 para 46.

²⁴ Chongo V. Chitupila, 'The Administration of Refugees in Zambia', Paper prepared for Refugee Studies Centre Workshop on Refugee Status Determination and Rights in Southern and East Africa available at: <http://www.rckkenya.org/rokdownloads/Resources/Reports/RSDinAfricaWorkshopReport.pdf> [accessed December 15 2010] para 3.4.

²⁵ Statement by Bernadette Iyodu, Senior Legal Officer/Deportation & Human Trafficking Programme Coordinator, Refugee Law Project, Faculty of Law, Makerere University (Email correspondence 21 February 2001).

²⁶ Article 14(3)(f) of the ICCPR everyone shall be entitled to "have the free assistance of an interpreter if he cannot understand or speak the language".

²⁷ See Third Geneva Convention, Article 96, fourth paragraph and Article 105, first paragraph; Fourth Geneva Convention, Article 72, third paragraph and Article 123, second paragraph (*Ibid.*, § 3391). ICC Statute, Article 67(1)(f); ICTY Statute, Article 21(4)(f); ICTR Statute, Article 20(4)(f); Statute of the Special Court for Sierra Leone, Article 17(4)(f); International Covenant on Civil and Political Rights, Article 14(3)(f); Convention on the Rights of the Child, Article 40(2)(b)(vi); European Convention on Human Rights, Article 6(3)(e); American Convention on Human Rights, Article 8(2)(a). See also Rule 100. Fair Trial Guarantees No one may be convicted or sentenced, except pursuant to a fair trial affording all

The right to free assistance of an interpreter arises at all stages of the oral proceedings and applies to aliens as well as to nationals.²⁸ It is therefore applicable to refugees.

The application of this right to non-criminal proceedings has been contested. The Human Rights Committee has determined that the right is applicable only to criminal proceedings²⁹ whereas in the UK any person who is subject to a decision-making process must have access to an interpreter.³⁰ I agree with the latter conclusion because in many cases asylum applicants do not understand the national language of the country of asylum therefore requiring an interpreter. UNHCR considers competent interpretation as vital to carrying out its mandate³¹ and promotes provision of interpretation services at all stages of the RSD process right from interaction with border authorities to the final decision.³²

The field study carried out confirmed asylum seekers' need for competent interpretation during UNHCR's RSD process (See Figure 3 below). 21 out of 30 respondents required and were assigned interpreters. The research also indicated that mere appointment of interpreters is however not a sufficient assurance of a fair hearing. Issues of quality and competence and factors such as age and gender of the interpreters also arose as potential impediments to competent interpretation. In the study, 14 out of 21 respondents (67 percent) were provided with interpreters of the same sex while 7 (33 percent) were provided with an interpreter of a different sex. Respondents dissatisfied with the interpretation at UNHCR raised cogent concerns. Ahmed, a male refugee respondent complained:

The interpreter was a [Oromo] Borana and I am an Oromo from Arsi. We could not communicate easily and I had to verify what she was asking before I

essential judicial guarantees, available at: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule100 [accessed 21 March 2011].

²⁸ UN Human Rights Committee (HRC), *General Comment no. 32 supra* note 7 para 40.

²⁹ *Ibid.*

³⁰ Human Rights Law Resource Centre, 'The Right to a Fair Hearing: The Relevance of the Charter of Human Rights and Responsibilities Act 2006 (Vic) to Civil Justice,' Submission to the Victorian Law Reform Commission Civil Justice Review December 2006, available at: <http://www.hrlrc.org.au/files/8O25PH17P8/Final%20Submission.pdf> [accessed 10 December 2010] at 20 para 4.7.

³¹ UN High Commissioner for Refugees, Self-Study Module 3: Interpreting in a Refugee Context, 1 January 2009, available at: <http://www.unhcr.org/refworld/docid/49b6314d2.html> [accessed 16 July 2010] at 17.

³² UNHCR *supra* note 3 at 114, 117, 121-123.

answered. Sometimes [during the interview] I used signs to explain to the interpreter what I was trying to say.³³

Ago, a 68 year old Ethiopian male refugee, was assigned a younger female interpreter. He complained, ‘[The interpreter] was very young and there was a big difference in our dialect[s], which created a challenge in understanding each other.’³⁴ Ago further disclosed, ‘I had a female interpreter but I did not know I could ask for a male interpreter. I also did not know I could inform the caseworker of the problems I had with the interpreter.’³⁵

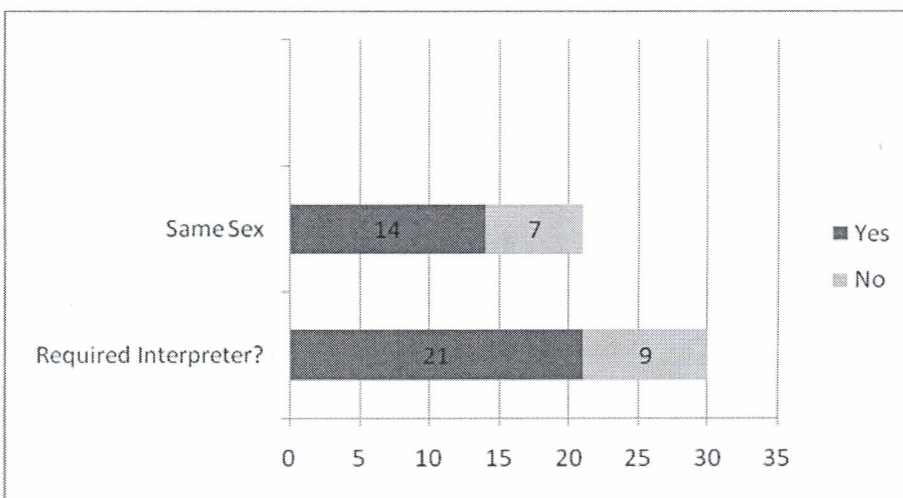


Figure 2: Interpretation at UNHCR

The state must also exercise a degree of control over the adequacy of the interpretation.³⁶ Kenya’s refugee law guarantees the right to free interpretation. It requires the Commissioner of Refugee Affairs to provide competent interpreters for asylum seekers and refugees.³⁷ Under the Regulations, an interpreter cannot be a representative or employee of the asylum seeker’s country of origin, an asylum seeker or a refugee who is not a competent interpreter.³⁸ The Regulations grant asylum seekers the right to choose an interpreter of the sex they prefer³⁹ and affords them the room to lodge complaints

³³ Interview with Ahmed, Refugee Respondent, (Nairobi, 24 February 2011).

³⁴ Interview with Ago, Refugee Respondent, (Nairobi, 02 March 2011).

³⁵ *Ibid.*

³⁶ Council of Europe *supra* note 2 at 69.

³⁷ Regulation 12.

³⁸ Regulation 12 (2).

³⁹ Regulation 12 (4).

about an assigned interpreter.⁴⁰ Those hired as interpreters will be required to be impartial and maintain confidentiality.⁴¹ The Act requires interpreters to be competent but offers no elucidation on the qualities of a competent interpreter. UNHCR describes a competent interpreter as one who has; adequate interpreting skills, competent command of the relevant languages, ability to accurately and faithfully interpret what is said by the interviewer and applicant without omission, addition, comment, summarising or embellishing, capacity to use the same grammatical person as the speaker, note-taking skills and gender, age and cultural sensitivity in interpretation.⁴²

Kenya's refugee legislation ensures that the government provides an interpreter at no cost to the applicant which is a progressive provision as some jurisdictions place the burden of interpretation on an asylum applicant. Tanzania's National Eligibility Committee used Kiswahili in their proceedings notwithstanding the fact that majority of the asylum applicants did not speak Kiswahili.⁴³ In South Africa, asylum applicants were forced to look for their own interpreters which in turn raised issues of cost, confidentiality and quality.⁴⁴ As a result, applicants who lacked financial resources were at a disadvantage and reliance was therefore placed on translators whose competence was unknown.⁴⁵ In Uganda and South Africa, it was rightly recognised that placing the burden of interpretation on the applicant often leads to allegations of extortion, malice, misinterpretation.⁴⁶ Refugee Law Project's, Bernadette Iyodu links competent interpretation with fair and efficient RSD. She supports her argument citing practice in Uganda:

⁴⁰ Regulation 12 (5).

⁴¹ Regulation 12 (5).

⁴² See UN High Commissioner for Refugees, *Improving Asylum Procedures - Comparative Analysis and Recommendations for Law and Practice: Key Gender Related Findings and Recommendations*, March 2010, available at: <http://www.unhcr.org/refworld/docid/4be01ed82.html> [accessed 23 November 2011] at 17.

⁴³ Charles M. Nkonya, 'Refugee Status Determination and Refugee Rights in Tanzania,' Paper prepared for Refugee Studies Centre Workshop on Refugee Status Determination and Rights in Southern and East Africa available at: <http://www.rckkenya.org/rokdownloads/Resources/Reports/RSDinAfricaWorkshopReport.pdf> [accessed December 15 2010] para. 4.2.

⁴⁴ FMSP *supra* note 18 pp. 37-38.

⁴⁵ *Ibid.*

⁴⁶ Bernadette Iyodu *supra* note 25.

Numerous asylum seeker applications [were rejected] owing to poor and non-professional interpretation services ... Once a competent interpreter was employed, [a number of these first instance denials] actually succeeded at review stage or appeal stage....⁴⁷

Indeed good interpretation helps in making correct decisions from the outset which in turn promotes efficiency of the entire RSD system.⁴⁸ The inadequate provision of interpreters affects an applicant's chances for success and denies her or him an administratively fair decision-making process.⁴⁹

3.3 Legal Aid and Representation

A right to legal representation is today, generally regarded as a necessity, and not as a privilege⁵⁰ though asylum seekers generally navigate the asylum process without legal representation, a situation which has been described as 'running a hurdle race blindfolded.'⁵¹

Jonathan Klaaren and Chris Sprigman recognise the difficulty for asylum seekers, many of whom lack legal training to effectively establish a well-founded fear of persecution under the refugee definitions provided in the 1951 Convention or the legal definition under the OAU Convention.⁵² Refugees in Kakuma Refugee Camp concur:

[Refugees] are not competent to succeed in legally detailed interviews ... Many refugees enter the RSD process equipped with very little knowledge, unaware of their rights and unclear about the significance of the process itself.⁵³

⁴⁷ *Ibid.*

⁴⁸ ECRE *supra* note 1 at 21 para 63.

⁴⁹ FMSP *supra* note 18 at 38.

⁵⁰ Jacques Johan Buchner, The Constitutional Right to Legal Representation during Disciplinary Hearings and Proceedings before the CCMA (LLM Thesis *Unpublished*, University of Port Elizabeth, 31 January 2003) available at <http://www.nmmu.ac.za/documents/theses/BuchnerJJ.pdf> [accessed 21 July 2011] at 5.

⁵¹ Lee Anne de la Hunt and William Kerfoot, 'Due Process in Asylum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act' in Handmaker, J. ; De la Hunt, L. & Klaaren, J. (eds.) *Advancing Refugee Protection in South Africa*. New York: Berghahn Books at 107.

⁵² Jonathan Klaaren and Chris Sprigman, 'Refugee Status Determination Procedures in South African Law' in *Advancing Refugee Protection in South Africa*, edited by Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren, (2007 New York: Berghahn Books) at 71.

⁵³ Kakuma News Reflector – A Refugee Free Press (KANERE), 'Refugee Experiences of Legal Protection in Kakuma Camp, May 12, 2009, Volume 1, Issue 4-5 / March-April 2009, available at: <http://kakuma.wordpress.com/2009/05/12/refugeeexperiences-of-legal-protection-in-kakuma-camp/> [accessed 15 December 2010].

Jonathan Klaaren and Chris Sprigman further argue for legal representation not only from the standpoint of a human right but also as a tool that enhances efficiency of the RSD process.⁵⁴ They argue regarding the latter stating that legal aid and representation eases efforts of the interviewing officer in gathering information as an asylum applicant will have already been guided on what information is relevant and which is not, thus reducing the time spent on a single case.⁵⁵ Furthermore, a legal advisory or representative may also filter non-meritorious cases by advising clients that relief may come through another avenue and not via the asylum process.⁵⁶

The right to counsel has been recognised in international and regional treaties.⁵⁷ In practice, however, legal aid and representation has only been available to nationals⁵⁸ though the ICCPR prohibits limiting access to human rights on discriminatory grounds by virtue of Article 2 (1) and 26 of the ICCPR.⁵⁹

In Kenya, there is no functioning national legal aid and representation system though legal aid is only available to all persons charged with capital offences in the High Court⁶⁰ A national legal aid program to benefit her indigent nationals is however absent. In 2008, the Kenyan Government launched the pilot phase of a proposed national legal aid scheme. The National Legal Aid and Awareness Programme (NALEAP) was established with the broad objective of providing access to justice for the ‘poor, marginalized and the vulnerable in society’.⁶¹ The programme was not yet fully functioning by 2011.⁶² It is

⁵⁴ Jonathan Klaaren and Chris Sprigman *supra* note 52.

⁵⁵ *Ibid.*

⁵⁶ Jonathan Klaaren and Chris Sprigman *supra* note 52 at 72.

⁵⁷ Articles 10 and 11 of the Universal Declaration of Human Rights, Article 14 (3) of ICCPR, Article 37 (d) of the Convention on the Rights of the Child and Article 7 of the African Charter on Human and Peoples’ Rights.

⁵⁸ James Hathaway, *The Rights of Refugees Under International Law*, (Cambridge: Cambridge University Press 2005) at 906.

⁵⁹ *Ibid* at 912.

⁶⁰ See also Kenya’s Section 77 of the Children Act No 8 2001 which also provides for free legal representation of unrepresented children before courts of law.

⁶¹ United Nations Office on Drugs and Crime, ‘Handbook on Improving Access to Legal Aid in Africa, Criminal Justice Handbook Series, United Nations, New York, 2011 available at: http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Handbook_on_improving_access_to_legal_aid_in_Africa.pdf [accessed July 21 2011] at 28.

⁶² *Ibid* at 23.

important to note that NALEAP makes no specific mention of asylum seekers and refugees.⁶³

The Refugee Act also fails to provide for free legal aid and representation to refugee but it guarantees asylum seekers the right to counsel as long as the asylum seeker bears the costs of the legal representation.⁶⁴ This provision may be of little effect as refugees may not be in a position to meet the costs of a legal advisor or representative. The respondents forming part of this study illustrate this. One refugee noted, ‘I can barely afford to rent a good house for my wife and children. How is it possible for me to afford a lawyer? It is not possible.’⁶⁵ Another poignantly remarked, ‘How can I pay a lawyer, with what?’⁶⁶ Though there was appreciation of the importance of having legal aid or representation with one respondent stating:

UNHCR would not have disregarded a lawyer ... Lawyers are informed on the policy and rights of refugees... We are normally scared during the entire process because we believe that whatever you say can be used against you. A lawyer [on the other hand] can bite the bullet.⁶⁷

Under the current UNHCR RSD procedures refugees have a right to legal representation.⁶⁸ As many refugees cannot afford legal representation during the RSD process, non-governmental organisations have sought to fill this gap. There are two main legal aid organisations in Kenya involved in the RSD process namely the Refugee Consortium of Kenya (RCK) and *Kituo Cha Sheria*. The former directly engages the UNHCR led RSD process while *Kituo Cha Sheria* is, on a limited scale, involved in the pre-registration stage of the RSD process.

⁶³ See Ministry of Justice, National Cohesion and Constitutional Affairs Government of Kenya on the National Legal Aid and Awareness Programme at its website at http://www.justice.go.ke/index.php?option=com_content&task=view&id=162&Itemid=99 [accessed October 3 2010].

⁶⁴ Regulation 20.

⁶⁵ Interview with Anab, Refugee Respondent, (Nairobi, 24 February 2011).

⁶⁶ Interview with Jean Marie, Refugee Respondent, (Nairobi, 03 March 2011).

⁶⁷ Interview with Josephine, Refugee Respondent, (Nairobi, 02 March 2011).

⁶⁸ UNHCR *supra* note 7 at 4-7.

Kituo Cha Sheria screens asylum seekers approaching its offices in Eastleigh then refers the screened refugees to UNHCR for registration.⁶⁹ The screening at *Kituo Cha Sheria* is targeted towards obtaining applicant's basic biodata, reason(s) for flight and flight route of the screened asylum seeker. Somalis form a significant number of the asylum seekers screened. Solomon Wasia believes the screening procedures enhance the asylum seekers registration process with UNHCR.⁷⁰

RCK is more directly engaged with the RSD process. This non-governmental organisation's legal counsellors assist asylum seekers rejected at first instance (by UNHCR) to understand the reasons for rejection and to help them lodge appeal submissions and prepare for the appeal interview.⁷¹ There seems to be no legal aid agency that provides asylum seekers' assistance in preparing for the first instance interview. Simon Konzolo disclosed that UNHCR has discouraged RCK from providing legal aid services to asylum seekers at the first instance stage.⁷² This is a clear violation of asylum seekers' right to counsel. It is also administratively unwise as early legal assistance is not only important to the asylum seeker but also to the State as costs through 'unmeritorious applications and onward appeals' are reduced.⁷³ It is important to note that both RCK and *Kituo Cha Sheria* are funded by UNHCR and are therefore not in a position to question UNHCR's RSD practices.⁷⁴

⁶⁹ Interview with Solomon Wasia, Program Coordinator, Forced Migration Program, *Kituo Cha Sheria*, (Nairobi, 25 February 2011).

⁷⁰ *Ibid.*

⁷¹ Interview with Simon Konzolo, Senior Program and Advocacy Officer, Refugee Consortium of Kenya, (Nairobi, 25 February 2011).

⁷² *Ibid.*

⁷³ European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'Survey on Legal Aid for Asylum Seekers in Europe,' available at: http://www.cironlus.org/ECRE_ELENA_Survey_on_%20Legal_Aid_for_Asylum%20Seekers_in_Europe_October_2010.pdf [accessed December 20 2010] p. 34.

⁷⁴ Simon Konzolo *supra* note 71 and Solomon Wasia *supra* note 69. *Kituo Cha Sheria* confirmed being funded by UNHCR. RCK received UNHCR resources in addition to resources from other donors while *Kituo Cha Sheria's* Forced Migration Program is wholly funded through UNHCR.

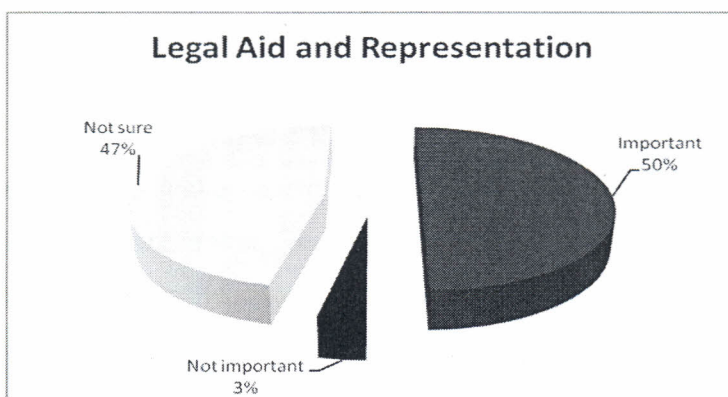


Figure 3: Importance of Legal Aid in RSD Process

A recent report highlighted the impact of quality legal representation to asylum claims acceptance rates. The report noted an increase in the number of accepted asylum requests partly attributable to increases in the proportion of applicants who obtain legal representation. The report noted:

The growing success of asylum seekers is partly attributable to increases in the proportion who obtain legal representation ... Having legal representation appears to have a major impact on outcome. During FY [Federal Year] 2010, for example, only 11 percent of those without legal representation were granted asylum; with legal representation the odds rose to 54 percent.⁷⁵

However, appreciation of the import of legal aid and representation in sub-Saharan Africa is not uniform. Uganda's Refugee Act mirrors Kenya's provision requiring claimants to meet the cost⁷⁶ though the Refugee Law Project (RLP) provides free legal representation to asylum seekers in the RSD process.⁷⁷ In Zambia, lawyers are not permitted to represent asylum seekers before the bodies determining refugee status.⁷⁸ Several NGOs and academics provide legal aid and representation services in South Africa but Asylum seekers are represented at the appeal stage as there is little room for representation and observation of the RSD process at first instance.⁷⁹

⁷⁵ Transactional Records Access Clearinghouse (TRAC) Immigration, 'Asylum Denial Rate Reaches All Time Low: FY 2010 Results, a Twenty-Five Year Perspective,' available at <http://trac.syr.edu/immigration/reports/240/> [accessed 15 May 2011].

⁷⁶ See section 24(3), Refugee Act 2006.

⁷⁷ Bernadette Iyodu *supra* note 25.

⁷⁸ Chongo V. Chitupila *supra* note 24 pp. 9, 11.

⁷⁹ Kaajal Ramjathan-Keogh, 'Refugee Status Determination in South Africa', Presentation to Refugee Status Determination and Rights in Southern and East Africa Regional Workshop Kampala, November 2010, Lawyers for Human Rights, available at: available at:

3.4 Written and Reasoned Decision

The right to a reasoned decision has not been expressly mentioned in the main human rights treaties but it has been argued that it is inherent in Article 14 of the ICCPR.⁸⁰ Abuya and Wachira also make several arguments in favour of written and reasoned decisions.⁸¹ The authors argue that, ‘reasons demonstrate an adjudicator’s independence showing that a decision has been arrived at strictly on its merits, free from political, social, diplomatic, or any other external influences or pressures.’⁸² Goodwin-Gill terms as meaningless decisions that do not offer reasons or provide an account on how the decision was reached.’⁸³

The requirement for written and reasoned decisions is essential to the entire RSD process as rejected asylum seekers are informed on why they are not refugees.⁸⁴ This help them (asylum seekers) to consider whether to appeal the decision which in turn reduces the number of poor appeal cases submitted and in turn saves time and resources that would have committed to examining these cases.⁸⁵

The requirement for reasoned negative decisions has also been addressed by South Africa’s Constitutional Court in Koyabe and Others v Minister for Home Affairs.⁸⁶ The South African Constitutional court examined the issue of reasoned decisions and made the following statements in its judgment:

<http://www.rckkenya.org/rokdownloads/Resources/Reports/RSDinAfricaWorkshopReport.pdf> [accessed December 15 2010] at para. 2.4.

⁸⁰ Office of the High Commissioner for Human Rights (UNHCHR), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 7, The Right to a Fair Trial: Part II—From Trial to Final Judgement, available at: <http://www.ohchr.org/Documents/Publications/training9chapter7en.pdf> [accessed April 29 2011] at 293.

⁸¹ Odhiambo-Abuya E and Wachira G.M, ‘Assessing Asylum Claims in Africa: Missing or Meeting Standards?’ *Netherlands International Law Review* LIII (2006) 171-204.

⁸² *Ibid* at 196.

⁸³ Goodwin-Gill G S and McAdam J, *The Refugee in International Law*, (Oxford: Oxford University Press 2007) at 535.

⁸⁴ See RSDWatch, ‘Large UNHCR RSD Operations will Give Detailed Written Reasons for Rejection to Asylum-Seekers Denied Protection, September 29, 2008 available at: <https://rsdwatch.wordpress.com/2008/09/29/large-unhcr-rsd-operations-will-give-detailed-written-reasons-for-rejection-to-asylum-seekers-denied-protection/> [accessed July 11 2011].

⁸⁵ *Ibid*.

⁸⁶ CCT 53/08 2009 ZACC 23, South Africa: Constitutional Court, 25 August 2009, available at: <http://www.unhcr.org/refworld/docid/4c976f492.html> [accessed 3 May 2011].

[Reasons are] therefore important in seeking a meaningful review by the Minister and in enhancing the chances of getting the immigration agent's adverse finding overturned ... Providing people whose rights have been adversely affected by administrative decisions with reasons, will often be important in providing fairness, accountability and transparency It is excessively over-formalistic and contrary to the spirit of the Constitution for the respondents to contend that ... they were not obliged to provide the applicants with reasons.⁸⁷

The requirement for written and reasoned decisions has been largely ignored by various actors who have carried out RSD in Kenya.⁸⁸ Prior to UNHCR assuming RSD responsibilities in Kenya, asylum seekers whose claims were denied by the Eligibility Committee were not provided with reasons for decisions.⁸⁹ The situation did not change once UNHCR took over RSD functions as UNHCR did not provide individualized reasoned decisions either.⁹⁰ UNHCR has however increasingly provided more and more reasoned decisions.⁹¹ In Kakuma Refugee Camp, UNHCR has gone a step further by allowing denied asylum seekers to request appointments with RSD Officers for a counselling session where the reasons for the denial of their claims are explained further.⁹² The rationale for this initiative is to assist asylum seekers to prepare an appeal submission. The counselling session is facilitated by a caseworker who did not assess the case at first instance and who has thoroughly reviewed the file prior to scheduling a counselling session.⁹³

In addition to assisting refugees to submit appeal applications, the counselling session is also used to notify asylum seekers, where applicable, of their eligibility to derivative refugee status and the procedures for making such applications. The sessions also provide opportunity to inform those whose cases were denied on appeal on procedures for re-

⁸⁷ *Ibid* at 20 para.61- 62.

⁸⁸ Edwin Odhiambo-Abuya *supra* note 10 at 69.

⁸⁹ *Ibid*.

⁹⁰ Human Rights Watch (HRW), *Hidden in Plain View, Refugees Living without Protection in Nairobi and Kampala* (Human Rights Watch, 2002) at 62.

⁹¹ RSDWatch, 'Large UNHCR RSD Operations will give Detailed Written Reasons for Rejection to Asylum-Seekers Denied Protection, September 29, 2008 available at: <https://rsdwatch.wordpress.com/2008/09/29/large-unhcr-rsd-operations-will-give-detailed-written-reasons-for-rejection-to-asylum-seekers-denied-protection/> [accessed July 11 2011].

⁹² Correspondence with Josephine Githige, Refugee Status Determination Associate, UNHCR Sub Office Kakuma (1 February 2011).

⁹³ *Ibid*.

opening.⁹⁴ UNHCR has indeed set a high standard for the Kenyan Government to emulate once it assumes its RSD responsibilities.

The field research conducted revealed that counselling sessions such as those provided in Kakuma were a necessary safeguard in addition to the provision of written and reasoned decisions. Several respondents disclosed that they did not understand the letter issued by UNHCR and thus relied on fellow refugees for explanations. One respondent acknowledged receiving explanations on the contents of his decision from a community leader.⁹⁵ A second respondent disclosed, 'I only understood the section [of the document] that indicated my name, date of birth and the documents expiration date ...'⁹⁶ Jackie, a female Congolese refugee, carried her decision letter home unaware of its significance. She said, 'I was informed that it was a mandate [recognition letter] when I got home.'⁹⁷ Another group of respondents relied on the colour of the document issued and the size of the envelope. One respondent from this group noted:

I knew I was given a mandate (letter recognising refugee status) because I knew the colour of a mandate. A rejection letter is a plain white document while a mandate letter is a coloured document with watermarks [and other security features].⁹⁸

The Refugee Act requires the Commissioner of Refugee Affairs to notify an applicant in writing of the decision relating to his asylum claim as well as reasons for those whose claims have been denied.⁹⁹ The Act however does not provide for verbal notification of the reasons of the decision. This, as shown above, is useful to asylum seekers who do not understand English and lack legal representation to explain the decision to them.

In Uganda, while the national legislation requires written and reasoned decisions,¹⁰⁰ in practice most rejected asylum seekers find their names listed as 'rejections' on the notice

⁹⁴ *Ibid.*

⁹⁵ Interview with Kedir, Refugee Respondent, (Nairobi, 24 February 2011).

⁹⁶ Interview with Ago, Refugee Respondent, (Nairobi, 02 March 2011).

⁹⁷ Interview with Jackie, Refugee Respondent, (Nairobi, 03 March 2011).

⁹⁸ Interview with Dawit, Refugee Respondent, (Nairobi, 01 March 2011).

⁹⁹ Section 11 (6) Refugee Act 2006 and Regulation 23 (3).

¹⁰⁰ Section 20(4), Refugee Act 2006.

board of the Office of the Prime Minister (OPM) Directorate of Refugees offices.¹⁰¹ The reasons provided are restricted to one or two sentences. An example of a decision issued in Uganda provided, ‘...the Refugee Eligibility Committee considered your application for refugee status and decided to reject your application because you do not meet the criteria for the grant of the refugee status.’¹⁰²

Asylum seekers in South Africa fared no better than their Ugandan counterparts. Following a study of decision letters in South Africa, Roni Amit commented:

many rejection letters either contained no reasons at all, or were filled with generalities—often comprised of cut and pasted paragraphs—that did not engage in any manner with the individual claim...Decisions in the latter category constituted generic letters that could be given to anyone, in the absence of a status determination interview or any individualized decision-making. As such, they could not be said to contain concrete reasons, nor did they engage with the evidence before the administrator as required by the rationality provision.¹⁰³

Although not a legally established right, the Zambian Commissioner of Refugees is required to advise refugees of their right to appeal. The Commissioner of Refugees often delivers this information verbally.¹⁰⁴ Results of an appeal are also supposed to be communicated by written notification though due to the administrative nature of the RSD process and its lack of documentation, the process is vague.¹⁰⁵

Given the foregoing it can be seen that the requirement for written and reasoned decisions gives effect to the right to appeal and as acknowledged by Abuya and Wachira ‘forms part of precedent - the raw material from which this law ultimately springs’ which develops jurisprudence in asylum law.¹⁰⁶

¹⁰¹ Refugee Law Project, ‘Critique of the Refugees Act (2006),’ available at: http://www.refugeelawproject.org/legal_resources/RefugeesActRLPCritique.pdf [accessed July 22 2010] at 15.

¹⁰² Bernadette Iyodu *supra* note 25.

¹⁰³ Roni Amit, ‘Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions,’ *Forced Migration Studies Programme*, University of The Witwatersrand Johannesburg, South Africa FMSP Report April 2010 available at http://openheimer.mcgill.ca/IMG/pdf/FMSP_Protection_and_Pragmatism.pdf [accessed August 10 2010] at 45.

¹⁰⁴ Chitupila *supra* note 24 at 9.

¹⁰⁵ *Ibid.*

¹⁰⁶ Abuya and Wachira *supra* note 72 at 199.

3.5 Right to evidence

Fairness requires that all information relied upon by the tribunal when making its decision is disclosed to the individual.¹⁰⁷ The right to examine all evidence is recognized as a general principle of administrative law. Procedural fairness requires that individuals whose rights, privileges or interests are to be affected by an administrative decision-making process, be provided with adequate information in order to know and respond to the case to be met.¹⁰⁸ The right originates in the principle *audi alteram partem* (“hear the other side”). Asylum Access recognizes this right as essential to the function of other parts of the asylum process and asserts ‘without access to evidence, rejected applicants, even with trained lawyers, will have to rely on guesswork to file effective appeals.’¹⁰⁹

This right has also found expression in the United Nations Basic Principles on the Role of Lawyers which emphasizes access to appropriate information, files and documents in sufficient time for effective legal assistance.¹¹⁰ The United States Appeal Court in Sazar Dent, Aka Cesar Augusto ü Jimenez-Mendez Petitioner v. Eric H. Holder JR,¹¹¹ addressed the issue of a claimant’s access to his or her file. The Court held that the US government’s failure to provide an applicant who was subject to removal proceedings access to his alien file without justification was unconstitutional and a failure to guarantee a fair hearing. The court held,

¹⁰⁷Jones & de Villars, *Principles of Administrative Law*, 2nd Edition (1994): (pp. 267-268) RSDWatch, The right to evidence in administrative law – the textbook version May 27, 2010 available at <https://rsdwatch.wordpress.com/2010/05/27/the-right-to-evidence-in-administrative-law-the-textbook-version/> [accessed July 11 2011].

¹⁰⁸ Andrew Pinto and Niiti Simmonds, ‘Disclosure Issues in Administrative Proceedings’, available at <http://www.pintowrayjames.com/pdf/Disclosure-Issues-Administrative-Proceedings.pdf> [accessed July 23 2010] at 1.

¹⁰⁹ Asylum Access, ‘Disclosure of Evidence in UNHCR’s Refugee Status Determination procedures: Critique and Recommendations for Reform,’ June 20, 2008, available at <http://rsdwatch.files.wordpress.com/2010/03/disclosure-of-evidence-in-unhcr-rsd.pdf> [accessed 15 June 2010] at 2.

¹¹⁰ Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 21.

¹¹¹ Sazar Dent, Aka Cesar Augusto ü Jimenez-Mendez v. Eric H. Holder JR., Attorney General, United States Court of Appeals for the Ninth Circuit No. 09-71987, Agency No. A037-082-657, April 13 2010—San Francisco, California, on Petition for Review of an Order of the Board of Immigration Appeals, Opinion by Judge Kleinfeld, available at: <http://www.ca9.uscourts.gov/datastore/opinions/2010/11/09/09-71987.pdf> [accessed April 29 2011] pp 18465-18467.

An alien has a Fifth Amendment right to due process, including the right to a full and fair hearing ... aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country... It would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it ... the only practical way to give an alien access is to furnish him with a copy.¹¹²

UNHCR's Procedural Standards limits asylum seekers and their legal representatives from accessing the case file maintained by UNHCR.¹¹³ Asylum seekers can only access records which they submitted to UNHCR. The UN Agency is however reforming its practice elsewhere.¹¹⁴ Simon Konzolo complained that RCK's caseworkers are denied access to refugee files maintained by UNHCR or even country of origin information relied by UNHCR caseworkers to deny claimants. As a result, the scope of their assistance to refugees to prepare appeal submissions is severely restricted.¹¹⁵

The Refugee Act seems to adopt UNHCR's practice on the right to evidence. Asylum seekers are allowed only to the records they submitted while their legal representatives' access to information is also limited to attending interviews, making submission and viewing documents submitted to the government by their clients.¹¹⁶ In order to respect this principle, an asylum seeker or legal representative should have full access to the case file in order to effectively represent their clients. The right to evidence as has been shown above is crucial given that it affects the quality of legal aid and representation and restricts the right of appeal.

3.6 Room for Independent Review or Appeal

'International law generally favours a second effective look at asylum claims, if only from the perspective of the effectiveness of obligations. At both national and

¹¹² *Ibid.*

¹¹³ UNHCR *supra* note 7 p. 2-3.

¹¹⁴ UNHCR's office in Beirut, since January 2007, has engaged in a pilot project to provide refugee applicants nearly complete access to the evidence considered in their RSD cases. For further details see RSDWatch, UNHCR-Beirut Tests Sharing Evidence with Legal Representatives in RSD Applications, August 1, 2007, available at: <https://rsdwatch.wordpress.com/2007/08/01/unhcr-beirut-tests-sharing-evidence-with-legal-representatives-in-rsd-applications/> [accessed July 11 2011].

¹¹⁵ Simon Konzolo interview *supra* note 71.

¹¹⁶ Refugee Regulations 11 (4) and (5).

international level, some sort of appeal, going both to the facts and to the legality, would appear to offer the best chance of correcting error and ensuring consistency.’¹¹⁷ It has been further noted that ‘for a refugee, limiting the right to appeal a decision rejecting his/her claim may be tantamount to a death sentence.’¹¹⁸ As a result the right to appeal has generally been included as one of the elements of a fair RSD process.¹¹⁹

The right to appeal or review is considered effective where appeals are examined by an independent body capable of reviewing the merits and legality of decisions taken by the competent authority. Moreover, the appeal process ought to provide a reasonable period upon which asylum applicants can apply for review.¹²⁰ Importantly, an appeal submission ought to suspend removal of the asylum seeker until finally determined. Asylum seekers should be allowed reasonable time to submit applications and permitted to remain in the host state with the same rights and duties, pending a decision on appeal.¹²¹ Other guarantees for fair hearing noted above such as competent interpretation, legal representation and written and reasoned decisions also apply to the appeal process.¹²²

When the Government of Kenya carried out RSD, the right to appeal was granted to asylum seekers whose claims were denied by the Eligibility Committee. Appeals were lodged with the Eligibility Committee and examined by senior officers of the Eligibility Committee.¹²³ This right was however severely restricted as the deciding officers at first instance failed to provide rejected applicants with reasons for those decisions.¹²⁴ It also failed the independence test as officers from the same body examined appeal cases.

¹¹⁷ Goodwin-Gill *supra* note 83 at 537.

¹¹⁸ ECRE *supra* note 1 at 30 para. 122.

¹¹⁹ UNHCR, *Human Rights and Refugee Protection*, Self-study Module 5, Volume 2, (UNHCR 15 December 2006) at 114.

¹²⁰ *Ibid* at 118.

¹²¹ *Ibid*.

¹²² ECRE *supra* note 1 at 30 paras. 122-131.

¹²³ Edwin Odhiambo-Abuya *supra* note 10 at 69.

¹²⁴ *Ibid*.

Section 10 of the Refugee Act guarantees the right of appeal. It allows applicants whose claims have been denied at first instance to lodge appeal submissions to the RAB within thirty days of receipt of notification of the first instance decision.¹²⁵ The Appeal will be examined by RAB and a decision in writing issued to the appellant.¹²⁶ The Appeals board has powers to confirm or set aside the first instance decision or to refer the matter to the Commissioner for further investigation and advice or make further inquiry or investigation into the matter as it deems necessary.¹²⁷ There is however no time line for the RAB to determine an appeal application. This may be addressed in the procedures to be set by the board once constituted.

An applicant aggrieved by the decision of the RAB has a further option for judicial review before the High Court of Kenya within twenty-one days of notification.¹²⁸ This right may however be illusory without provision of funding for legal representation.

The Refugee Act ensures that an asylum seeker who has submitted an appeal has the right to stay in the country until the appeal has been determined.¹²⁹ Those who fail to appeal or whose cases are denied on appeal have ninety days to return to their country of origin or to go to another country of their choice.¹³⁰

In the region, Tanzania's appeal procedures are the most restrictive as applications for appeal must be submitted within 7 days of notification.¹³¹ The process lacks independence as appeal claims are assessed by the Minister of Home Affairs who also determined the case at first instance. There is also no further room for review as the Minister's decision is final.¹³² Uganda's Appeal procedure is similar to Kenya's. Appeals from the Refugee Eligibility Committee (REC) lie with the Appeals Board and a further

¹²⁵ Section 10.

¹²⁶ Section 10 (2).

¹²⁷ Section 10 (2) (a) and (b).

¹²⁸ Section 10 (3).

¹²⁹ Sections 12 (b) and (c).

¹³⁰ Sections 12 (2).

¹³¹ Section 9 (g), (7) and (8), Refugee Act 1998.

¹³² *Ibid.*

judicial review is available with the High Court.¹³³ In practice, REC assesses both first instance and appeal cases as the Appeals Board is yet to be established.¹³⁴ This has implications to applications for judicial review to the High Court as review is only available for decisions of the Refugee Appeal Board. Therefore, applications for judicial review will be premature as the avenues under the Refugees Act will not have been exhausted.¹³⁵

Zambia's RSD procedures also allow for appeal of decisions made by the bodies established to assess refugee status. Appeals of decisions made by the first instance bodies lie with NEC and the Minister for Home Affairs who uses her or his discretion in the review of each case.¹³⁶ Asylum seekers aggrieved with the decision of the Minister can also apply for judicial review to the High Court of Zambia though by 2010 no claimant had applied for judicial review. Zambian law does not provide strict timelines for appeal submission and only requires asylum applicants to apply within reasonable time.¹³⁷ South Africa's refugee legislation is similar to Kenya and Uganda's, providing appeal of first instance decisions to an appeal board with further room for review by the High Court. The High Court can set aside or substitute the first instance decision though applications to the High Court are not pursued routinely as they are expensive and require the services of legal representatives.¹³⁸

3.6. Right to an expeditious hearing

Efficiency of justice is a major component of fair trial and of effective remedies.¹³⁹ Indeed the old adage 'justice delayed is justice denied' introduces an important aspect of a fair hearing relating to expeditiousness. The International Covenant on Civil and

¹³³ Section 17, Refugee Act 2006.

¹³⁴ Bernadette Iyodu *supra* note 25.

¹³⁵ *Ibid.*

¹³⁶ Chongo Chitupila *supra* note 24 at 9.

¹³⁷ *Ibid.*

¹³⁸ Kaajal Ramjathan-Keogh *supra* note 79 at 8 para 4.2.

¹³⁹ Icelandic Human Rights Center, Efficiency of Justice: Providing Final Judgements within a Reasonable Time, available at: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/therighttodueprocess/efficiencyofjustice/> [accessed January 5 2011].

Political Rights recognizes the accused person's right "to be tried without delay".¹⁴⁰ The African Charter requires that criminal proceedings take place within a reasonable time but like its universal counterpart limits the right to criminal proceedings.¹⁴¹ In Europe, the requirement for conducting proceedings without delay is provided for both criminal and civil proceedings and is one of the most litigated grounds¹⁴² under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁴³

The Human Rights Committee (HRC) has sought to clarify the terms 'without delay' or 'within reasonable time' noting that 'without delay' will depend very much on the circumstances of the case and the factors to be taken into account include: (a) the type and complexity of the case; (b) the conduct and diligence of both sides of the dispute; and (c) the conduct and diligence of the court.¹⁴⁴ The European Court on Human Rights has adopted the same criteria.¹⁴⁵

UNHCR promotes this right but has for various factors, including reduced funding and staffing as well as high number of asylum seekers in the country, been unable to expeditiously process asylum claims in Kenya. In an article by refugees in Kakuma titled 'Justice Delayed is Typical', refugees in Kakuma complained about the long delays in processing cases:

Thousands of asylum seekers stay in Kakuma Refugee Camp for years awaiting refugee status determination (RSD) from UNHCR ... it is not uncommon for asylum-seekers who arrived in Kakuma in 2003 to continue awaiting an eligibility decision today (2010).¹⁴⁶ While UNHCR does not publish statistics on RSD waiting times, refugees report that the typical waiting period is about three years.

¹⁴⁰ Article 14 (3)(c) .

¹⁴¹ Article 7(1)(d) of the Organization of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁴² Council of Europe *supra* note 2 at 24.

¹⁴³ Council of Europe 4 November 1950, ETS 5.

¹⁴⁴ Human Right Committee *supra* note 6 at para 70.

¹⁴⁵ Council of Europe *supra* note 2 at 26.

¹⁴⁶ Kakuma News Reflector (KANERE), 'Refugee Status Determination: Justice Delayed is...Typical?' (February 28, 2009) Vol. 1, Issue 3 / February 2009, available at: <http://kakuma.wordpress.com/2009/02/28/refugee-status-determination-justicedelayed-istypical/> [accessed December 12 2010].

UNHCR has not denied criticisms relating to delays in its RSD process stating that it is plagued by insufficient human and financial resources given its donor based resources.¹⁴⁷ The large number of asylum seekers in the country has also stretched the organization's capacity to efficiently conduct RSD.¹⁴⁸ By September 2010, UNHCR Kenya had received 15,295 asylum seekers requiring individual RSD but had only examined 5877 applications.¹⁴⁹ This large number of applications has seen UNHCR's waiting period range from between six (6) and twenty-four (24) months.¹⁵⁰

The refugees interviewed as part of this study also complained at the period taken by UNHCR to assess asylum claims. Meseret complained:

... I used to tell the officer issuing appointment slip[s] to give me my appointment slip [immediately I got to the reception] instead of keeping me there for the whole day... It was frustrating to go to the UNHCR offices every time, spend the whole day then return home with another appointment. I got my decision letter after 9 appointments. It was almost two years.¹⁵¹

Salat, an Ethiopian refugee, stated, 'It is not fair to wait from 2005 to 2008 to get your decision...this is contrary to UNHCR's own rules.'¹⁵² Yet another respondent, a 14 year old minor who was still waiting for her decision more than a year after being interviewed expressed frustration and anxiety at the long delay.¹⁵³

The Refugee Act requires the adjudication of claims at first instance within ninety (90) days of submission. The Act however does not set out timeframes for considering appeals

¹⁴⁷ Odhiambo-Abuya E., 'United Nations High Commissioner for Refugees and Status Determination *Imtaxaan* in Kenya: An Empirical Survey,' *Journal of African Law* (2004) 48(2): 187-206 at 190.

¹⁴⁸ At the end of 2009 Kenya was the sixth largest hosting country with close to 360,000 refugees. See UNHCR, 2009 Global Trends Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, available at <http://www.unhcr.org/4c11f0be9.html> [accessed 28 December 2010] pp.7, 17.

¹⁴⁹ Simon Konzolo, 'An Overview of Refugee Status Determination and the Rights of Refugees in Kenya, The protection envisaged under the 2006 Refugees Act,' Paper prepared for Refugee Studies Centre Workshop on Refugee Status Determination and Rights in Southern and East Africa available at: <http://www.rckkenya.org/rokdownloads/Resources/Reports/RSDinAfricaWorkshopReport.pdf> [accessed December 15 2010] at 4.

¹⁵⁰ Sara Pavanello, Samir Elhawary and Sara Pantuliano, 'Hidden and Exposed: Urban Refugees in Nairobi, Kenya' Humanitarian Policy Group, March 2010, available at <http://www.odi.org.uk/resources/download/4786.pdf> [accessed May 28 2010] at 15.

¹⁵¹ Interview with Meseret, Refugee Respondent, (Nairobi, 03 March 2011).

¹⁵² Interview with Salat, Refugee Respondent, (Nairobi, 03 March 2011).

¹⁵³ Interview with Robertine, Refugee Respondent, (Nairobi, 03 March 2011).

at the RAB or judicial review before the High Court. These timeframes can nevertheless be provided in subsequent refugee regulations under Article 26 of the Refugee Act.

It is my view that given Kenya's large number of refugees and the relative inexperience of the DRA in carrying out RSD, the ninety day timeline provided in the Act is unreasonable. UNHCR's Refugee Status Determination Coordinator concurs. She termed the first instance timeline in the Refugee Act as unreasonable noting the timelines as one of the 'problems' UNHCR has with the Act.¹⁵⁴ The Acting Commissioner of Refugee Affairs, Badu Sora Katelo, however insisted on the government's ability to efficiently carry out this process within the stated timeline. He stated:

RSD will be conducted very quickly. It can happen in even a month...If the government is the one who has decided that the time period is 90 days, then we must find the capacity to do it ... It is simple. The real question is do we accept this people or not?¹⁵⁵

Challenges faced by countries in East and Southern Africa support the contention that the timelines in Kenya's Refugee Act are unreasonable. In Malawi, the RSD process was about a year long whereas the process in Uganda could be as long as two years.¹⁵⁶ Tanzania also had difficulties interviewing applicants and issuing decisions within a reasonable time. Tanzania's RSD backlog of cases was attributed to irregular intervals for NEC sessions, irregular attendance of sessions by members from security organs and lack of funding to convene NEC sessions.¹⁵⁷

The problem of delays persists in South Africa as the country was the main destination for new asylum-seekers worldwide with more than 222,000 asylum claims registered in 2009 and 207,000 in 2008 almost as many as were lodged in the 27 Member States of the

¹⁵⁴ Correspondence with Lucie Gagne, Refugee Status Determination Coordinator, UNHCR Nairobi (1 February 2011).

¹⁵⁵ Devon Cone, Interview with Badu Sora Katelo, Acting Commissioner for Refugee Affairs, Department of Refugee Affairs, Nairobi Kenya, (April 2011).

¹⁵⁶ University of Oxford, Refugee Studies Centre, 'Report on Refugee Status Determination and Rights in Southern and East Africa,' International Workshop Report 16–17 November 2010, Kampala, Uganda available at: <http://www.rsc.ox.ac.uk/pdfs/RSDinAfricaWorkshopReport.pdf> [accessed December 20 2010].

¹⁵⁷ Charles M. Nkonya *supra* note 43, para 3.3.2.5.

European Union combined.¹⁵⁸ The country had a backlog of 309, 800 undecided cases at the first instance and on appeal; the largest in the world.¹⁵⁹ Delay in the RSD process is not a regional concern. Globally, more than 983,000 individuals were still awaiting a decision on their asylum claim by the end 2009.¹⁶⁰

Conclusion

This chapter has examined provisions of the Refugee Act against international standards for fair hearing and compared Kenya's provisions with laws and practices of countries in East and Southern Africa. The analysis above showed that Kenya's national refugee legislation partially meets international standards for fair hearing. There is however need to provide additional guarantees in order to fully align those provisions with international standards. The next chapter discusses the extent of the Act's compliance with these standards and makes recommendations targeted towards ensuring the Act's compliance with standards for fair hearing.

¹⁵⁸ UNHCR Global Trends *supra* note 148 at 19.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

Introduction

This thesis has argued that international human rights standards for fair hearing complement international refugee law in the refugee status determination procedures as the latter is silent on the application of fair hearing principles to RSD. The main argument for application of international human rights standards to refugees draws not from international jurisprudence or express provision for the same in international refugee law instruments but from the inherent nature of asylum seekers as human beings. They are entitled to human rights safeguard like any other human beings. Furthermore, the deadly consequences of death, torture, imprisonment and other forms of persecution arising from an erroneous status determination procedure require application of human rights standards in the RSD process. The rights to life and freedom from torture, cruel, inhuman and degrading treatment all within the domain of international human rights law are at risk in any RSD process.

The application of the right to fair hearing therefore directly applies to RSD. This chapter makes conclusions regarding the extent to which Kenya's RSD framework conforms to international standards for fair hearing and makes recommendations essential for compliance with international standards.

4.1 Conclusions

Refugee Status Determination is the cornerstone of refugee protection as it is the first step in determining who qualifies as a refugee.¹ It is a matter of life and death as an erroneous decision can result in a serious threat to life or liberty of a *bonafide* asylum seeker. A fair and efficient RSD process therefore saves lives, prevents torture and reduces violence and helps innocent people avoid all types of persecution. RSD is essentially 'difficult and high stakes adjudication'.²

¹ Richard Stainsby, 'UNHCR and Individual Refugee Status Determination', *Forced Migration Review*, available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:4877 [accessed July 10 2010].

² RSD Watch, 'In Criticizing EU States on RSD Fairness, UNHCR Challenges its own Policies', April 12 2010, available at: <http://rsdwatch.wordpress.com/2010/04/12/in-criticizing-eu-states-on-rsd-fairness-unhcr-challenges-its-own-policies/> [accessed April 15 2010].

This thesis has examined the refugee definition as provided in international and regional instruments against Kenya's refugee definition as the substantive provisions of national legislation must comply with international standards set out in the 1951 Convention and its 1967 Protocol. The main focus of the thesis however was assessing the extent to which the RSD procedure as provided in the Act complied with international minimum guarantees for the right to a fair hearing. The minimum standards against which the RSD process was measured related to access to territory, procedures and information, access to an oral hearing, competent interpretation and legal representation as well as rights to written reasoned decisions, disclosure of evidence, and appeal. The final guarantee against which the Act was examined related to the right to expeditious process.

This thesis has not attempted to craft a one-size-fits all structure but rather to highlight nine essential minimum guarantees that must be provided to guarantee a fair hearing in the RSD process.

Kenya's Refugee Act is a product of intense lobbying by various stakeholders in the refugee sector and is a firm indication of the Government's determination to fully assume its international obligations. The Act is important in Kenya's legislative history as it is the first time refugee issues are specifically provided for in law. In that respect, the Act should be celebrated.

This study has highlighted additional reasons for celebration as several provisions of the Act meet international minimum standards for a fair hearing. These provisions relate to:

- Expansion of the grounds for refugee status to include sex;
- Inclusion of the 1969 OAU Convention definition in Article 1(2) which allows for prima facie determination of asylum;
- Prohibitions on refoulement and penalization for illegal entry;
- Right to a personal interview before RSDO;
- Free access to competent interpretation;
- Time frame for lodging asylum claims, appeal submission as well as the aspirational timeframe for completion of the entire process;

- Participation of legal representatives in the RSD process;
- Expedited procedures for vulnerable persons;
- Requirement for written and reasoned decisions;
- Provision for appeal to the RAB and further review to the High Court; and,
- Asylum seeker's right to stay in Kenya until case is finally determined and suspensive effect of appeal.

These signify an important departure from the current UNHCR-led RSD procedures which suffer from:

- Relatively unreasoned decision letters;
- Poor information dissemination to applicants;
- Limited room for legal aid and representation at first instance stage;
- Lack of independent appeal procedures; and,
- Long delays in processing claims.

Several aspects of the Act however fail to fully guarantee the right to fair hearing. The non-compliant provisions relate to:

- Access to case files or client records maintained by the DRA, RSDO, RAC of RAB;
- Independence, impartiality and competence of the institutions established to carry out RSD namely, Office of the Commissioner of Refugee Affairs, the Refugee Affairs Committee and the Refugee Appeals Board;
- Access to legal representation and competent interpretation; and,
- Reasoned and detailed decisions for cases determined by the Commissioner of Refugee Affairs, the Refugee Affairs Committee and the Refugee Appeals Board.

The Refugee Act requires revision to ensure that the provisions for RSD under Kenya's Refugee Act align with international refugee law, administrative law and international human rights law. The following recommendations seek to contribute to the discourse on improving the level of compliance to these bodies of law. The recommendations have been categorized in three: legal, administrative and policy.

4.2 Recommendations

4.2.1 Legal Reforms

There is need to make amendments and revisions to the Refugee Act to ensure compliance with international and regional refugee and human rights standards. First, there is need to amend the provisions of the Refugee Act that limit an asylum seeker or his or her legal representative's access to records used to determine his or her claim in order to guarantee procedural fairness. Failure to do so as has been discussed in chapter 3 restricts the rights to appeal and limits the quality of legal representation.

Second, in order to address the issue of independence, there is need for inclusion in the Act the specific qualifications for members of the Refugee Affairs Committee (RAC) and the Refugee Appeals Board (RAC) as well as the Commissioner of Refugee Affairs. This will ensure that appointment is based on merit and aptitude of the candidate. Unfortunately, refugee legislations examined as part of this study also failed to provide specific qualifications for holders of substantive positions established under their various legislations. In Canada the current head of the IRB has undergraduate and graduate degrees in public law and has held a number of senior legal and executive positions.³ In the US, the head of USCIS has a broad legal background and has served as the United States Attorney for the Central District of California as well a partner in a law firm.⁴ These office holders shed some light on the depth of experience required for persons overseeing refugee issues.

A further amendment required to safeguard the independence of the RAC and RAB is the trimming back of the wide powers vested in the Commissioner of Refugee Affairs with regard to RSD to the Refugee Affairs Committee.⁵ This will insulate the refugee status determination process from the control and whim of an individual. There will

³ Immigration and Refugee Board of Canada (IRB), Brian Goodman, Chairperson Immigration and Refugee Board of Canada, available at: <http://www.irb-cisr.gc.ca/eng/brdcom/bio/Pages/chair-pres.aspx> [accessed July 23 2011].

⁴ US Citizenship and Immigration Services (USCIS), Alejandro Mayorkas Sworn in as USCIS Director Mayorkas Becomes Third Director to the World's Largest Immigration Service August 12 2009, available at: <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d7a83282d9f03210VgnVCM100000082ca60aRCRD> [accessed 23 July 2011].

⁵ Section 11 (6) Refugee Act 2006 implies that the Commissioner for Refugee Affairs can make decisions on refugee status without involvement of the Refugee Affairs Committee.

be need to further clarify the roles of the Commissioner of Refugee Affairs and the RAC to reduce possibilities of duplication of roles or turf battles leading to inertia.

In addition to clarifying the roles of the RAC and the Commissioner of Refugee Affairs, it may be necessary to do away with the inter-ministerial composition of adjudicatory bodies such as the RAC in order to avoid departmental interests seeping into the adjudication process. It would be preferable to establish a specialized body composed of persons whose main duties would be to determine cases. This model also avoids the challenges faced by Tanzania where security officers delayed proceedings as they could not regularly attend sessions of the NEC. The inter-ministerial model may serve better as an advisory body to discuss cross-cutting issues that affect refugees.

Finally, the Government needs to amend the Act to provide for increased UNHCR participation in the RSD process. The organization should be accorded observer status in the Refugee Affairs Committee and the Refugee Appeal Board. The organization should also be guaranteed the right to make representations to both bodies. UNHCR's experience in carrying out RSD worldwide may prove crucial in complex cases and accessing country of origin information. In South Africa, Zambia, Uganda and Tanzania, UNHCR has been granted observer status in the adjudicatory bodies.

4.2.2 Administrative Reforms

In terms of administrative issues, the Act as it is remains incomplete. Section 26 requires the minister to draft ten sets of regulations to ensure the implementation of the Act. Only one set, the Refugee (Reception, Registration and Adjudication) Regulations 2009 has been gazetted. Regulations for the Appeal process, for instance, have yet to be published. The first instance process cannot commence without these Regulations. This will further delay the government's assumption of RSD functions. The Department of Refugee Affairs and the Minister of Immigration and Registration of Persons need to draft the remaining regulations.

The delay in drafting the remaining regulations notwithstanding, officials tasked with drafting the aforementioned regulations for the RAB and RAC the must be cognizant of the minimum requirements discussed in this thesis relating to personal/oral hearing,

competent interpretation, legal representation, access to procedures and information, access to evidence, expeditious processing and written and reasoned decisions.

Second, the terms and remuneration of RSD Officers and members of RAC and RAB need to be proposed with a view to insulating officers from corruption. Low salaries will invariably result in higher levels of corruption. There is also need to safeguard the financial autonomy of the institution as a whole.

Third, it is best practice to devote sufficient resources to the first instance process as it saves the host countries cost related to legal representation and those associated with the appeal process.⁶ A poor first instance process will overwhelm the appeal process thus denying asylum seekers a fair and efficient process. The Department of Refugee Affairs will need to devote sufficient resources in terms of the numbers of Refugee Reception Officers and Refugee Status Determination Officers. Sufficient resources will also be required in continuous training for RSD Officers and members of the Refugee Affairs Committee. The Government needs to continue spending resources in the training of judges on refugee law as they form an important component of the RSD framework. Given the competing priorities for a developing country like Kenya where asylum issues may not attract the attention of the ex-chequer, the DRA ought to approach developed countries to help fund the department under the principle of burden-sharing. UNHCR may prove to be a helpful partner in this endeavour given its profile and supervisory role under the 1951 Convention.

The Department of Refugee Affairs must utilize an evaluation system that accurately appraises RSD Officers, members of the Refugee Appeal Board and the Refugee Affairs Committee in order to retain those most efficient and remove the inefficient. Re-appointment as an RSD Officer or to the membership of the Refugee Appeals Board and the Refugee Affairs Committee must be based on a performance review.

While the Refugee Act guarantees asylum seekers free use of interpreters, the Department of Refugee Affairs ought to set out internal procedures for identifying and

⁶ See Richard Stainsby and Richard Towle, 'Best Practices for RSD: A UNHCR Global Perspective', available at <http://www.law.monash.edu.au/castancentre/events/2008/prato-conf.html> [accessed May 14 2010]; François Crépeau and Delphine Nakache, 'Critical Spaces in the Canadian Refugee Determination System: 1989–2002', *International Journal of Refugee Law* (2008) 20 (1): 50-122.

recruiting competent interpreters and also to ensure continuous training of interpreters. As the Act fails to mention what amounts to competent interpretation, the DRA ought to further list the qualities of competent interpretation. UNHCR's standards may prove to be a helpful starting point.⁷ An evaluation system such as the one described in the previous paragraph may be useful to evaluate efficient interpreters.

The requirement for written and reasoned decisions provided in the Act is commendable, though interviews carried out as part of this study have indicated that this guarantee in itself is not sufficient to ensure notification as refugees were illiterate or not acquainted with English. The DRA ought to adopt the UNHCR practice in Kakuma for counseling sessions for asylum seekers who have received their RSD decision, and for both acceptances and denials.

Finally, the Refugee Appeals Board through the Department of Refugee Affairs should annually publish records of their activities and the determinations they make in specific cases. This builds an institutional culture as well as jurisprudence which enhances the right to fair hearing.

4.2.3 Recommendation on Policy

Fair hearing cannot be secured only by amendments in the law. There is need for policies to increase the number of lawyers versed in refugee law. Currently, refugee law is offered at the University of Nairobi and as an elective at the postgraduate level and as an elective course during the final year at African Nazarene University.⁸

There is need to increase the pool of refugee lawyers by including refugee law as an undergraduate study in all public and private universities. For practicing advocates, the Department of Refugee Affairs ought to liaise with the Council of Legal Education to have the subject included in the continuous legal education for lawyers.

⁷ As discussed in Chapter 3 p.7. See UN High Commissioner for Refugees, *Improving Asylum Procedures - Comparative Analysis and Recommendations for Law and Practice: Key Gender Related Findings and Recommendations*, March 2010, available at: <http://www.unhcr.org/refworld/docid/4be01ed82.html> [accessed 23 November 2011] at 17.

⁸ 'Refugee Studies' is offered by the United States International University, Kenya at undergraduate level but also as an elective. See the USIU website at <http://www.usiu.ac.ke/index.php?page=140>. See also http://www.anu.ac.ke/blaws_description.htm.

The government will require officers well versed with refugee law to work as RSD Officers. The government will also require new members of the Refugee Appeal Board every seven years hence the need for a large pool of persons well versed in refugee law.

As is the practice in South Africa and Uganda and as suggested by Stephan Anagnost, given the challenges of providing free legal aid to developing countries, the Department of Refugee Affairs ought to engage law schools in the country to establish legal aid programs for asylum seekers and refugees.⁹ This process can be carried out in conjunction with UNHCR, RCK and Kituo Cha Sheria which are well versed in this area. Under this system, students will acquire much needed experience while the state will have an increased pool of lawyers from which to select for positions established by the Act.

There is also need for the government to adopt a national refugee policy that informs the Government approach to the refugee status determination process.¹⁰ The policy should reaffirm the government's commitment to its international refugee and human rights obligations under international law.

It is generally accepted that there is no RSD system without shortcomings.¹¹ This study has shown that the Refugee Act has its shortcomings but there is still room for improvement. The next crucial stage for this law is in its implementation. The progressive provisions of this law should not remain on paper. This means that intense lobbying that led to the adoption of the Act should not cease.

⁹ See Stephan Anagnost, 'The Challenge of Providing High Quality, Low Cost Legal Aid for Asylum Seekers and Refugees,' *International Journal of Refugee Law* (2000) 12 (4), 577-588 as discussed in Chapter 1 and Kaajal Ramjathan-Keogh, 'Refugee Status Determination in South Africa', Presentation to Refugee Status Determination and Rights in Southern and East Africa Regional Workshop Kampala, November 2010, Lawyers for Human Rights, available at: <http://www.rckkenya.org/rokdownloads/Resources/Reports/RSDinAfricaWorkshopReport.pdf> [accessed December 15 2010].

¹⁰ The Danish Government is currently funding a project to develop a national refugee policy to build the Government's institutional capacity. See Sara Pavanello, Samir Elhawary and Sara Pantuliano, 'Hidden and Exposed: Urban Refugees in Nairobi, Kenya' Humanitarian Policy Group, March 2010, available at: <http://www.odi.org.uk/resources/details.asp?id=4786&title=urban-refugees-nairobi-kenya> [accessed May 28 2010] at 15.

¹¹ James C Simeon, 'A Comparative Analysis of the Response of the UNHCR and Industrialised States to Rapidly Fluctuating Refugee Status and Asylum Applications: Lessons and Best Practices for RSD Systems Design and Administration,' *International Journal of Refugee Law* (2010) 22(1): 72-103 at 100.

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APPENDIX 1

Questionnaire

Study Title: The Dawn of a New 'Error': A Review of Kenya's Legal Framework for Refugee Status Determination

Researcher: Steven Choka, LLM Candidate, University of Nairobi

Supervisor: Dr. Celestine Musembi

Introduction

This questionnaire is administered as part of a study on the refugee status determination procedures under Kenya's Refugee Act. The study seeks to understand the current refugee status determination process from a refugee's perspective and to learn the problems (if any) encountered by refugees during the RSD process.

The important points to note during the interview are:

- Participation is completely voluntary. You are at liberty to terminate the interview at any point;
- The interview session will last approximately 45 minutes;
- If you cannot confidently speak English or Swahili a professional interpreter will be present during the discussion to verbally translate your responses to English;
- You are free to ask for clarification on any question asked or any aspect of the study you do not understand;
- Responses will be recorded on the questionnaire; and,
- Each participant's identity will be protected by an identifying number known only to the researcher. Participants will not be named in any study reports, presentations or publications.

SECTION 1: BASIC INFORMATION

Name: _____

(To remain confidential if provided)

Age: _____ Sex: *(Tick relevant box)* Male Female

Country of Origin _____

Time of Interview: Start _____ End _____

Language of Interview: _____

Contact Information: _____

Current refugee Status *(Tick relevant box)*

- Unregistered Asylum Seeker Asylum Seeker
 Recognised Refugee Rejected Asylum Seeker

Date of Arrival _____ Date of Registration _____

Date of UNHCR RSD/Eligibility Interview _____

Kindly read the following instructions before answering the following questions.

- i. *If the refugee has not yet done the RSD/Eligibility interview please skip section 3.*
- ii. *If the refugee was recognised at first instance skip section 5*

SECTION 2: REGISTRATION

1. How did you come to Kenya *(include brief reasons for flight, flight route used, as well as knowledge of UNHCR registration procedures)*?

2. Did you face any problems during the registration process? YES NO *If yes, please expound.*

3. Were you informed about the process that would follow after being registered?
 YES NO

SECTION 3: RSD/ELIGIBILITY INTERVIEW

4. Were you informed by the RSD/Eligibility Officer why you were being interviewed?
 YES NO

5. Did you have an opportunity to fully state your claim/story during the interview?
 YES NO

If no, what problems did you face in presenting your case? Please state whether the problems you faced were resolved to your satisfaction

6. Did you need an interpreter?' YES NO
Were you provided with an interpreter? YES NO
If yes, was the interpreter of the same sex? YES NO

7. Did you have any problems with the interpreter? YES NO
If yes, what problems did you face?

8. Did you face any other problems while being interviewed for refugee status?
 YES NO *If yes, please expound*

SECTION 4: DECISION

9. How long did you wait before receiving your first instance decision letter? _____

10. How was the decision communicated? _____

11. Did you understand what was written on your decision letter? YES NO
If No, please expound.

12. If your case was rejected, were you informed why your case had been denied?
 YES NO

SECTION 5: APPEAL *(Only for refugees who were rejected at first instance or those who are now recognised refugees but were recognised as refugees after appeal)*

13. Did UNHCR explain to you the appeal process? YES NO

14. Did you receive any assistance writing appeal application? YES NO
If yes, please expound on the kind of assistance you received.

15. What happened after you lodged/submitted the appeal?

16. How long did you wait before receiving your appeal decision? _____

17. Did you face any other problems during your appeal process? YES NO
a) *If yes, please expound*

b) Were these problems resolved satisfactorily YES NO

SECTION 6: CONCLUDING QUESTIONS

18. Do you think having a lawyer or legal assistance during the RSD/Eligibility process would have helped? YES NO *If Yes or No please expound.*

19. Is there anything else you wish to add?

Use of Information Waiver

I have freely and without undue pressure been assisted to complete the above questionnaire. I have also understood that personal details capable of leading to my identification will be strictly confidential. I consent to the information provided above being utilised for purposes of research and will not be shared with any other party outside the research without my subsequent and written consent.

Name: _____ **Signature:** _____

Date: _____

Researcher Signature: _____ **Date:** _____

APPENDIX 2

LIST OF REFUGEE RESPONDENTS

No	Pseudonym	Code Name	Country of Origin	Sex	Refugee Status	Date of Interview
1	Bakari	R1	Congo, DR	Female	Refugee	08/Mar/2011
2	Hamisi	R2	Congo, DR	Male	Refugee	08/Mar/2011
3	Omar	R4	Congo, DR	Male	Refugee	08/Feb/2011
4	Fatuma	R5	Ethiopia	Female	Refugee	15/Feb/2011
5	Kedir	R7	Ethiopia	Male	Refugee	24/Feb/2011
6	Anab	R8	Ethiopia	Female	Refugee	24/Feb/2011
7	Abukar	R9	Ethiopia	Male	Refugee	24/Feb/2011
8	Jeanne	R10	Rwanda	Female	Refugee	24/Feb/2011
9	Angel	R11	Congo, DR	Female	Refugee	24/Feb/2011
10	Ahmed	R12	Ethiopia	Male	Refugee	24/Feb/2011
11	Pierre	R13	Congo, DR	Male	Asylum Seeker	28/Feb/2011
12	Pascal	R14	Burundi	Male	Refugee	28/Feb/2011
13	Meselech	R15	Ethiopia	Female	Refugee	28/Feb/2011
14	Girmai	R16	Ethiopia	Male	Refugee	28/Feb/2011
15	Joyeuse	R17	Burundi	Female	Refugee	28/Feb/2011
16	Mohamed	R18	Ethiopia	Male	Refugee	01/Mar/2011
17	Genevive	R19	Congo, DR	Female	Refugee	01/Mar/2011
18	Dawit	R20	Ethiopia	Female	Refugee	01/Mar/2011
19	Aline	R21	Rwanda	Female	Refugee	01/Mar/2011
20	Josephine	R22	Rwanda	Female	Refugee	02/Mar/2011
21	Meseret	R23	Ethiopia	Female	Refugee	02/Mar/2011
22	Ago	R24	Ethiopia	Male	Refugee	02/Mar/2011
23	Bahati	R25	Congo, DR	Female	Refugee	03/Mar/2011
24	Jackie	R26	Congo, DR	Female	Refugee	03/Mar/2011
25	Robertine	R27	Congo, DR	Female	Asylum Seeker	03/Mar/2011
26	Abebe	R28	Ethiopia	Female	Refugee	03/Mar/2011
27	Abdi	R29	Ethiopia	Male	Refugee	03/Mar/2011
28	Jean Marie	R30	Burundi	Female	Refugee	03/Mar/2011
29	Salat	R31	Ethiopia	Male	Refugee	03/Mar/2011
30	Jacques	R32	Congo, DR	Male	Refugee	03/Mar/2011