

Limitations to accessing legal representation in Kenya's RSD processes

Eileen Imbosa and Andrew Maina

Opportunities for asylum seekers in Kenya to appeal refugee status determination (RSD) decisions are restricted by limited access to legal representation.

Under the Kenyan Refugees Act of 2006, asylum seekers in Kenya have to apply to the Commissioner for Refugee Affairs (the Commissioner) for first-instance consideration of their asylum claim. If they are dissatisfied with the decision of the Commissioner, they can appeal to the Refugee Appeals Board (the Board) which is a statutory body established by the Refugees Act to review the decisions of the Commissioner. Should they be dissatisfied by the decision of the Board they then have access to the High Court of Kenya. In theory, there should be a smooth progression from one institution to the next, with the High Court at the apex. However, no refugee recognition case has reached the High Court since UNHCR handed over the RSD process to the Refugee Affairs Secretariat (the Secretariat) – headed by the Commissioner – in July 2014.¹

Judicial influence – that is, the involvement of courts of law – on RSD processes in Kenya is limited, and the most significant reason for this is Kenya's application of *prima facie* status to certain groups of asylum seekers. Those from South Sudan and Somalia comprise up to 78% of

Kenya's asylum seekers, and this group-based recognition has for some years been applied to both groups (although it was revoked for Somalis in 2016). As a result, a significant proportion of asylum seekers are granted recognition on this basis and therefore do not need to access the appeal process.

Kenyan courts are predominantly engaged in resolving access to territory and freedom of movement issues. Such cases involving asylum seekers in Kenya focus exclusively on charges of residing outside a designated area without lawful authority. Seeking asylum *per se* is not a crime but asylum seekers are required to reside in a designated area – often refugee camps in Dadaab and Kakuma – and are only permitted to move in and out of the camps with express authorisation from the Secretariat.

Access to legal representation

The Kenyan judicial system is adversarial, meaning that the courts only become involved either when an asylum seeker or the Commissioner files an appeal against a decision made by the Board. Courts in Kenya very rarely allow for self-representation –

which in any case is not permitted in cases of appeal against decisions of statutory bodies such as the Board. Asylum seekers who are dissatisfied with the Board's decision must therefore engage the services of a registered lawyer to represent them in court. Legal services in Kenya, however, are expensive and out of reach for most asylum seekers.

Although in theory asylum seekers have recourse to the Legal Aid Fund and can apply for support through the National Legal Aid Service, in practice the Fund does not have sufficient financial resources to meet the legal bills either of asylum seekers or indeed of Kenyans unable to obtain effective legal representation in other matters. This leaves services provided by legal aid NGOs as the only alternative for rejected asylum seekers who are unable to pay legal fees. However, there are fewer than ten legal aid NGOs in Kenya offering court representation generally, and only a few of them specialise in asylum law. Furthermore, funding for these organisations to enable them to offer these services for free has been reduced significantly in recent years.

Lack of access to effective legal representation also affects asylum seekers' ability to launch appeals. Although they are permitted to instigate appeals to the Board without legal representation, asylum seekers who do so may lack the legal knowledge to first interpret the legal reasoning provided by the Commissioner in support of its decision. For instance, some level of legal knowledge is often required in order for an asylum seeker to decipher the meaning of refugee law concepts such as a well-founded fear of persecution or the reasonable possibility of suffering serious harm. Without this legal knowledge, it is difficult for asylum seekers to draft the points of appeal that are required to successfully instigate a review, and they may either present less effective, non-legal points of appeal, or be deterred from launching an appeal in the first place.² The lack of access to legal representation in Kenya therefore limits the ability of asylum seekers who wish to appeal against RSD decisions both to put forward an effective point or points of appeal, and to enable those appeals to proceed through the court process.



Newly arrived South Sudanese refugees being provided with non-food items, Kakuma camp, Kenya.

November 2020

www.fmreview.org/recognising-refugees

In light of these challenges, we suggest a number of ways to improve access to legal representation for asylum seekers in Kenya:

Boosting the Legal Aid Fund: The Fund needs to be better financially resourced by the Attorney General, the State officer responsible for its administration. Additional financial resourcing would enable funds to begin to be disbursed to lawyers that provide legal representation to Kenyans and asylum seekers who would otherwise be unable to afford these services.

Raising awareness: The National Legal Aid Service needs to take steps to raise awareness among registered lawyers about the Fund's existence and the rules for application. There needs to be a large-scale sensitisation and training of registered lawyers in Kenya to raise their awareness of refugee issues and to encourage them to take up these matters. Many registered lawyers with whom the Refugee Consortium of Kenya (RCK) has engaged had no knowledge of the Fund or that it can be used to provide asylum seekers with legal services. Awareness-raising sessions conducted by RCK have produced some early positive results, such as increasing the number of advocates who are willing to provide free legal representation at the Board. Steps also need to be taken

to raise awareness among asylum seekers of the existence of the Fund by providing and publicising information in languages that asylum seekers can understand.

Supporting legal aid NGOs: The Government of Kenya through the Office of the Attorney General should also ensure that sufficient funding is provided for legal aid NGOs so that they are able to continue to provide legal support to asylum seekers who require it. Such support can also include related efforts to improve legal protection of asylum seekers, such as through providing Protection Monitors – refugees who are trained to offer legal knowledge on documentation and asylum-related issues. Following these steps will increase asylum seekers' ability to access free, effective legal advice and representation, which should in turn ensure fairer access to the appeal process.

Eileen Imbosa imbosa@rckkenya.org
Legal Officer

Andrew Maina maina@rckkenya.org
Advocacy Officer

Refugee Consortium of Kenya www.rckkenya.org

1. UNHCR (2020) *Building on the foundation: Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya* www.unhcr.org/5551f3c49.pdf

2. For appeals in the High Court against decisions made by the Board, an advocate is required both to lodge the appeal and then to navigate the rigorous appeal process in court.