Impediment to Refugee Status Determination in Kenya with specific reference to
the Right of Access to Information and Fair Administrative Action

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DEDICATION

I dedicate this dissertation to the Almighty God whose mercy and grace have followed me throughout. To my family and friends. A special feeling of immense gratitude to my loving Mother, Lillian Awich whose sacrifice, prayers, words of encouragement and push for tenacity ring in my mind. My sister Zawadi who has always wished me the very best and believed in me.

I also dedicate this dissertation to my many friends and church family who have provided me support throughout the whole process. I will always appreciate their prayers that have followed me all the way. I especially thank my friend Moraa Ombati whose words of encouragement and morale have helped me keep on track until the finish line. She has been my best cheerleader. Special thanks to my friend George Siage.
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I am also grateful for the assistance from Cecil Abungu in obtaining additional research material and I offer my sincere gratitude to Mr. Desmond Tutu for his encouragement and support during this study.
DECLARATION

I, Joy Margaret Mbogo Awich, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ...............................................................
Date: .................................................................

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ...............................................................
Mr. Humphrey Sipalla
ABSTRACT

Refugee and asylum seekers' processing in host countries has been approached differently in different countries. Some countries are welcoming while others close their borders and/or deport them.

This study aims to investigate and analyse the international and countries level approach on Refugee Status Determination (RSD) and the bodies set up to administer it with keen focus on the right of access to information (ATI) and fair administrative action (FAA). We begin with the United Nations body established to promote and when need be, step in to handle refugee status determination; United Nations High Commissioner for Refugees (UNHCR).

Through secondary modes of data collection, which mainly includes of books, journal articles and decided cases, we will review the theories behind what could be curbing an effective RSD procedure then assess RSD rules and guidelines proposed by the UNHCR with a prime focus on its domestication and application to the case study; Kenya. We will also review RSD processes in three other countries within Africa who are a host to neighbouring countries refugees and asylum seekers with the teleological objective of what Kenya, the case study ought to correct, change and/or adopt for a more humanitarian and efficient RSD procedure.
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<th>Full Form</th>
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<tr>
<td>ATI</td>
<td>Access to Information</td>
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<td>FAA</td>
<td>Fair Administrative Action</td>
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<tr>
<td>JSR</td>
<td>Jesuit Refugee Society</td>
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<td>NRC</td>
<td>Norwegian Refugee Council</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>RAS</td>
<td>Refugee Affairs Secretariat</td>
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CHAPTER ONE
INTRODUCTION

'...[T]he right to fair administrative action is a reflection of some of the national values in Article 10 of the Constitution such as the rule of law, human dignity, social justice, good governance, transparency and accountability'.

1.1 Introduction

Refugees and asylum seekers (RAAS) undergo a great deal of frustration in their attempts at achieving a credible, objective assessment of their refugee status in host states and the United Nations High Commissioner for Refugees (UNHCR) in operation to deal with RAAS.

RAAS, though discussed in the same breath are categorised differently;

Refugees are defined under international law in the Convention Relating to the Status of Refugees\(^2\) (1951 Convention) as people fleeing conflict or prosecution. Section 3 of the Kenyan Refugee Act\(^3\) defines refugee along the terms of:

- a) owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
- b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.

Article 1 of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa\(^4\) (OAU Convention) defines a refugee in similar terms. Asylum seekers are people who move across borders in search of protection, but

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\(^{1}\)Judicial Services Commission v Mbadu Mutava & Another [2015] EKLR CA 52/2014.

\(^{2}\)Article 1 (A) (2), Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

\(^{3}\)Section 3, Refugee Act (No. 13 of 2006).

who may not fulfil the strict criteria laid down by the 1951 Convention. Asylum seeker describes someone who has applied for protection as a refugee and is awaiting the determination of his or her status. Refugee is the term used to describe a person who has already been granted protection. Asylum seekers can become refugees if the local immigration or refugee authority deems them as fitting the international definition of refugee.

Due to this difference, not every asylum seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker. Further, the definition of asylum seeker may vary from country to country, depending on the laws of each country. In Kenya, for example, asylum seeker means a person seeking refugee status.

The South African Constitutional Court decision in Lawyers for Human Rights v Ministers of Home Affairs did help in clarifying the rights afforded to asylum seekers: the Court held that the protection granted by the Bill of Rights applies to everyone, including illegal foreigners and asylum seekers.

However, with the gradual international acceptance of asylum claims arising from economic disadvantages than pure physical persecution, there are a larger number of refugees and there is dire need for a uniform standard for evaluating such claims.

This thesis will be focussed on the Refugee Status Determination (RSD) process and will therefore encompass RAAS in their respective capacities.

Refugee Status Determination (RSD) is the ‘legal or administrative process by which host states or the UNHCR determine whether a person seeking international protection

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7 UNHCR Master Glossary of Terms, June 2006.
9 Section 2, Refugee Act, (No. 13 of 2006)
10 Lawyers for Human Rights v Ministers of Home Affairs 2004 (4) SA 125 (CC).
is considered a refugee under international, regional or national law. Protection, with regards to refugees, refers to either providing physical shelter or to use legal authority to secure the rights and freedom of those at risk.

The broad set of circumstances that can define an individual as a refugee and the statistical summary from United Nations High Commissioner for Refugees (UNHCR), The UN Refugee Agency (UNHCR) on refugees in Kenya is a pellucid indication that refugee determination can be a logistical nightmare.

Figures from the UNHCR as of 31 October 2017 stated that there were 489,239 registered RAAS in Kenya. A majority of RAAS in Kenya originate from Somalia, South Sudan, Congo, Ethiopia, Burundi and Uganda. As of 28th February 2018, there were 58,397 cases of RAAS seeking refugee status determination in Kenya with only 31 cases being recognized. With such high numbers, a procedure must be set up to ensure there is no backlog and cases are held as effective as possible.

The criteria the UNHCR uses under which a person may be declared as a refugee is stated under international law in the 1951 Convention.

The primary responsibility of determining the refugee status of asylum seekers lies with host states and may be supported by UNHCR operations where host states are unable or unwilling to effectively conduct the required procedure. In Kenya, presently

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18 Article 1 (A) (2), Convention Relating to the Status of Refugees.
assisted by UNHCR, RSD is conducted by the Refugee Affairs Secretariat (hereinafter referred to as RAS).\textsuperscript{21}

Established by the Refugee Act, RAS is a public office ‘responsible for all administrative matters concerning refugees in Kenya, and shall, in that capacity, co-ordinate activities and programmes relating to refugees\textsuperscript{22}.

\textbf{1.2 Background of Study}

The right to fair administrative action, as enshrined in the Constitution of Kenya\textsuperscript{23} is available to all persons under all persons under Kenya’s jurisdiction. Thus, an RAAS seeking assistance may invoke the same. Article 47 states that ‘every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair’.\textsuperscript{24} Article 35 on the other hand states that ‘every citizen has the right of ATI held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom’.\textsuperscript{25} As RAAS of necessity are not citizens of Kenya, on the face of the letter, it may be stated that this constitutional right is unavailable to them.

The primary link between the right to information and fair administrative action is observed under Article 47 (2) where the right to be given written reasons for an administrative action adversely affecting a right or a fundamental freedom of a person is stated and Article 35 (1) which stipulates the right of ATI required for the exercise or protection of any right or fundamental freedom of a person. Thus, the exercise of both rights in relation to the RSD process may be noted to be crucial for the access of other rights and fundamental freedoms of a refugee and/or an asylum seeker.

\textsuperscript{21}Formerly known as the Department of Refugee Affairs (DRA).

\textsuperscript{22}Section 6 (2), Refugee Act (No. 13 of 2006).

\textsuperscript{23}Article 47, Constitution of Kenya (2010).

\textsuperscript{24}Article 47 (1) Constitution of Kenya (2010).

\textsuperscript{25}Article 35, Constitution of Kenya (2010).
The right to ATI has been not only been captured under the Constitution of Kenya but also in international instruments\textsuperscript{26}, the African Union, United Nations\textsuperscript{27} and the Council of Europe\textsuperscript{28}.

The constitutional guarantee of fair administrative action has been expounded upon and given content and meaning by the Fair Administrative Act, 2015. In frame of Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017], Justice Mativo noted the following on the Act;

"... [T]he Act gives scope and meaning to procedural fairness by prescribing particular procedures, from which the public official must choose to ensure that administrative action affecting the public is procedurally fair. The aspiration of the requirements of procedural fairness to the public is to create a public administration that is justifiable and accountable in an open and democratic society."\textsuperscript{29}

Refugee Status Determination is a vital process affecting the lives of many RAAS across the globe. The RSD process incorporates various steps and processes including registration, document issuance, and verification.\textsuperscript{30}

In Kenya, this administrative process through which a person seeking international protection is determined a refugee under national, regional and international law is


\textsuperscript{27}Report of the Special Rapporteur, promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, 42.

\textsuperscript{28}Recommendation No.R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities, Council of Europe, 25 November 1981.

\textsuperscript{29}Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR.

\textsuperscript{30}UNHCR Kenya, Refugee Status Determination [http://www.unhcr.org/ke/refugee-status-determination on 19th January 2018.}
conducted by RAS and assisted by the UNHCR. The UNHCR is currently in the process of fully transferring this duty to RAS.\textsuperscript{31}

Over the years, there have been numerous complaints have been lodged by refugees with regards to ATI and fair administrative action\textsuperscript{32}. Refugees have stated that upon arrival in the country of asylum, they are unaware of the processes they need to undergo to successfully seek asylum and receive protection in the country of asylum. Most have stated that, upon arrival, they do not receive guidance with regards to registration, documentation and verification neither from the Government of Kenya at any stage of flight nor from the UNHCR save from fellow refugees who direct them to the UNHCR Offices.\textsuperscript{33}

This is contrary to the UNHCR RSD Handbook which states that;

‘... [T]he applicant should receive the necessary guidance as to the procedure to be followed’\textsuperscript{34}

The same concern is carried forward into the RSD process where asylum seekers and refugees claim\textsuperscript{35} that they are unable to receive precise information on the progress of their on-going case from the UNHCR or RAS when requested, and may be issued with a confirmation or rejection without receiving written reasons for their rejection.\textsuperscript{36} This is also contrary to the Constitution and the 2009 Refugee regulations.\textsuperscript{37}

\textsuperscript{31} UNHCR Kenya, Refugee Status Determination \url{http://www.unhcr.org/ke/refugee-status-determination} on 18th March 2018.
\textsuperscript{32} Norwegian Refugee Council (NRC) Recognising Nairobi’s Refugees; The Challenges and Significance of Documentation Providing Identity and Status, 10
\textsuperscript{33} NRC, Recognising Nairobi’s Refugees; The Challenges and Significance of Documentation Providing Identity and Status, 10.
\textsuperscript{35} Norwegian Refugee Council (NRC) Recognising Nairobi’s Refugees; The Challenges and Significance of Documentation Providing Identity and Status, 10.
\textsuperscript{37} Section 23 (3) (4), Refugees (Reception, Registration and Adjudication) Regulations (2009).
The aforementioned scenarios demonstrate the direct relation between RSD and the rights to fair administrative action and ATI.

1.3 Statement of the Problem

The Refugee Regulations state that where 'a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action; the person has the right to be given written reasons for the action.' However, this same provision is met with a limitation stipulated in the Constitution where the right to demand information is only available to Citizens of Kenya.

Therefore, this paves way for injustice in the RSD process expressed inadequate information, lengthy and cumbersome administrative procedures put in place for asylum seekers and refugees seeking assistance. Consequently, the supposed access to fundamental rights which may be made available to RAAS as a result of RSD is gravely impeded.

1.4 Hypothesis

Refugee Status Determination and its related administrative processes impacting the general access to human rights to asylum seekers and refugees is adversely affected by the gaps existing in ATI and just administrative action in Kenya.

1.5 Research Objectives

i. To investigate the effect of conflicting ATI and administrative laws in Kenya on fair administration of RSD and its related processes for refugees.

ii. To examine the impact of RSD and its related processes on access to fundamental rights and freedoms for refugees.

iii. To examine the measures necessary to curb the injustice faced by refugees during RSD processing due to the gaps existing in law with regards to right to information and fair administrative action.

38 Section 23 (3), Refugees (Reception, Registration and Adjudication) Regulations (2009).


40 Shall be further discussed in Chapter 3 and 4.
1.6 Research Questions

i. What effect does the conflict between ATI and administrative laws in Kenya have on fair administration of RSD and its related processes for RAAS?

ii. Whether RSD and its related processes create a significant impact on the access of fundamental rights and freedoms for asylum seekers and refugees.

iii. Whether there exist measures necessary to curb the injustice faced by refugees during RSD processing due to the gaps existing in law with regards to right to information and fair administrative action?

1.7 Justification the Study

Refugee Status Determination and all its related processes are crucial in the lives of asylum seekers and refugees due to the rights and duties attached to the legal status and available under the 1951 Convention.\(^1\) The rights stated in international refugee law mirror rights contained in the Bill of Rights such as the right to social security\(^2\) and the right to education.\(^3\) Thus, the loop existing between the right of ATI and the right to fair administrative action in the laws of Kenya relation to RSD and its related processes

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\(^1\) *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137


may be said to have an overall impact on the full exercise of human rights for asylum seekers and refugees as it often stated that '...one right cannot exist without the other. This development is in line with the prevailing wisdom that claims that human rights are interrelated, interdependent, interconnected, and equal in status.'

Regarding the significance of RSD procedures in the exercise of the rights of asylum seekers and refugees in Kenya, it is relevant to address the gaps existing in the law which may lead to an impediment to the exercise of their rights and fundamental freedoms existing in national and international law. Failure to address these gaps in the law may result in great unjust administrative action against refugees.

### 1.8 Theoretical Framework

This study examines the RSD process with specific reference to the right of ATI and fair administrative action. Considering the fact that RSD is an administrative process, the theoretical discussion will be guided through the development of administrative law in Africa.

#### 1.8.1 Public administration under colonial rule

During colonialism, colonialists introduced a system of administering justice that diminished the value and application of customary law and introduced a law that greatly favoured them.45

After its success in Nigeria, common law was transplanted into Kenya. It was however only set up to favour the British citizens who were familiar with the law and framework. As Mahmood Mamdani noted 'the colonial state was primarily constructed to enable a tiny and foreign minority rule over an indigenous authority'.47

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1.8.2 Public administration post-independence.

Post-colonial Africa had leaders who blatantly abused power to their benefit and practised nepotism. International, regional or sub-regional law too found its shortfalls and cannot adequately protect human rights. The then public administrative law met the main principles discussed by Professor Migai Akech: Legality, reasonableness, proportionality, the right to participate/the duty to consult, justification, legitimate expectation, independence and accountability.

In quest for control, African leaders strongly advocated the need for one party rule, controlled media and government bureaucracies were staffed by party loyalist. African leaders adopted a culture of autocracy from the colonial administration.

This autocracy and disregard for another seeped into RSD procedure where the refugees and asylum seekers rights were impugned.

1.9 Methodology

This study approaches the subject matter through literature review on the rights of ATI and fair administrative action in Kenya with regards to fair administrative action in the RSD processes affecting the rights and fundamental freedoms of refugees. It describes and conducts qualitative analysis in the course of dealing with the subject matter Refugee Law, soft law, statutes, and policies which are significant for laying down the legal position in relation to the subject matter nationally. Books, journal articles, conference papers, and online journals which document the studies on the subject matter by various scholars.

1.10 Chapter Summary

a) Chapter 1 - Introduction

This Chapter introduces the background of the main topic and explores its research expectations, objectives and assumptions.

b) Chapter 2 – Theoretical framework and methodology

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49 Wanyande P, 'Mass Media-State Relations in Post-Colonial Kenya' Michigan State University, 56
This Chapter examines the theoretical framework of the public administration in general and linking it to the current RSD administration.

c) Chapter 3 – Refugee Status Determination, related processes and benefits

This Chapter looks at the RSD process framework provided by UNHCR, its highs, pitfalls and then examines the case country's application of RSD using UNHCR rules and their own incorporation. The case country will be the author's home country; Kenya.

d) Chapter 4 – RSD Procedure – Comparative Study

This Chapter will be a comparative study where we shall compare and contrast other country's application of RSD making sure to point out what ought to be adopted by other countries and what could be better revised.

e) Chapter 5 - Conclusion

This Chapter makes the conclusions of the study with a review of the discussion and possible measures that can be adopted by Kenya to greatly ease RSD process in ensuring there is ATI and fair administrative action for RAAS.
CHAPTER TWO
THEORETICAL FRAMEWORK AND METHODOLOGY

In this Chapter, the study’s prime focus will be examining the background and framework of public administration in Africa then linking it with the main discussion on RSD.

2.1 Public Administration under Colonial Rule

Administration of the vast colonies was critical to Europeans. This was evident where an alliance between the British and a community was forged and there was an assumption of outright authority of the British. A police force was early stablished to be the iron fist protecting the British administration structure.

On the policy conundrum, the British applied a dual system of law: English Law was introduced to the Kenyan jurisdiction to serve and govern the British subjects. Governing of the Africans mainly administered through a system referred to as ‘indirect rule’ advocated for by Frederick Lugard when he was colonial administrator of Nigeria.

Indirect Rule was the strategy used existing tribal structures and traditions as conduits for establishing rules and regulations while English officials worked behind the scenes and could exercise veto power.

With success in Nigeria, the concept was further exported to Uganda and Kenya.

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Common law was first developed in England as a process of applying continental feudal law. English common law was developed to protect the property of individuals and limit the power of the state to expropriate resources. Its familiarity with the British citizens and adaptability led to easy transplantation to different regions of the world.  

2.1.1 The Repressive Common Law

Common Law was introduced in India and to the British East India Company and was a success.  

Public administration legitimacy is cemented by the establishment of law. There exists a very close relationship between public administration and law. The framework of rules and regulations set up for administration are laws.  

'Common Law, to the indigenous people however, was unknown in substance and procedure. It was an unequal system from the start. It was a system which the minority was well versed with and could operate while the majority did not know. Its legitimacy could hardly be cemented.

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63 Ghai and McAuslan, Public law and political change in Kenya, 508.
The introduction of Common Law in Kenya created a two class society. The scenario was paraphrased by Ghai and McAuslan from Lord Belloc when he stated;

'Whatever happens, we have got the Common Law and they have not' "

'Common law did not become quickly rooted in society, in part because it was restricted in its application to certain segments of society.'

The aforementioned may be seen to be related to the topic being discussed in this paper. The limited knowledge by the indigenous people on the 'substance and procedure' of the law, may be likened to the plight faced by RAAS constantly uninformed on RSD and its processes. Furthermore, the gap in the law (on article 35 and article 47) could be said to cause an inequality between RAS and RAAS. This is expressed through the alleged unfair administration identified in the process suffered by RAAS during RSD and its related processes such as applications for an alien card. E.g. use of bribes to enter the Department of Refugees Affairs. RAAS as a result are unable to seek redress for unfair administrative action administered.

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65Ghai and McAuslan, *Public law and political change in Kenya* 508.
66The Original Couplet is:
'Whatever happens, we have got
The Maxim gun and they have not.'

67Joireman SF, 'The evolution of the common law, 8.
2.1.2 Colonialism and Constitutionalism

The colonialists, as earlier mentioned, introduced and imposed new laws to the native Africans to strengthen their administration. However, the laws did not promote equality among the races and ethnicity, they practised segregation and hierarchy among the people it set to govern.

From the African point of view, the English Law introduced into East Africa was the focal point in the Europeans objective of colonial domination. As Mahmood Mamdani noted ‘the colonial state was primarily constructed to enable a tiny and foreign minority rule over an indigenous authority’

The colonialists ‘rule of law’ was regarded as legitimate by their home country governments and the international community: Mr. L.S. Amery, a Pro-Settler Colonial Secretary at the time out-rightly expressed that the responsibility for the future of Kenya law with the British Government alone. Administration of the colony was primarily placed in the hands of the Europeans. Other minorities and the African majority could contribute to administration however was subordinate to the greater good of the British Government and the Settlers.

On the international front, the colonial state and its laws were validated by the Berlin Conference at the start of the League of Nations. Article 35 of the General Act of the Berlin Conference on West Africa obligated the signatory powers to establish an authority in the regions occupied by them. The League of Nations, while dispossessing

76 By ‘legitimate’ I do not mean ‘found to be lawful’ but ‘found acceptable’ or ‘justifiable’.
78Hallett R, Africa Since 1875 A Modern History, 586
the losing states off their colonial spheres of influence, did not outlaw colonialism but strengthened the extant law on colonial dependencies.

This application of harsh constitutionalism has been transplanted to RSD where, as we will discuss later, the RSD process fails to be amenable to a particular RAAS plight or is applied discriminately to a group (like family) instead of a person.

2.2 Post-Independence Patrimonialism

Patrimonialism manifests itself through the practices of patronage. Migai Aketch defines patrimonialism as a political regime in which ‘all power relations between ruler and ruled, politics as well as administrative relations, are personal relations. There is no difference between the private and public realm’

Houphouet-Boigny once stated that the Africa Africans took from former masters (the colonialists) were not nations but rather, states with extremely fragile links between ethnic groups.

The leaders recognised threats to their leadership both externally and internally; at the independence of most African states, the Cold War was at its peak and Africa was a battle ground to forge ideologies. Internally, in the fight for independence, politicians sought nationalistic objectives, post-independence leaders sought their political base from their ethnic background. The division among the Africans arose partly from the restrictions established during the colonial era that barred country wide political parties. This resulted in ethnic based political parties.

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81 Germany and Turkey.
83 Migai A, Privatization & Democracy in East Africa, the Promise of Administrative Law, 24
84 Migai A, Privatization & Democracy in East Africa, the Promise of Administrative Law, 23
87 Mazrui A. Ali, Wondji C General History of Africa. VIII, 442.

The British in several of their colonies transferred the 'Westminster' model of government that encouraged multi-partyism and electoral competition among various parties. The African political elite contested for government seats on an ethnic or geo-ethnic or regional platform.

Independence enabled the elite control of land registration, taxation, credit, public investments all providing opportunities for patronage. The ethnic elites practice Patrimonialism with specific expectations. They expect political support during elections and even intra-elite competitions at the national level.

Ethnicised politics significantly influences peoples' attitude towards state institutions. Many communities feel marginalised and unjustly deprived of opportunities. The administration and leading party only derive their political legitimacy and capital firm their ethnic base.

Legitimacy may refer to two distinct situations, charismatic legitimacy and institutional legitimacy. Of the two, the latter is what states ought to transform into. A mechanism

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90 Nigeria, Sudan, Kenya, Uganda, Zimbabwe and others.
95 Ghai YP and Ghai JC, Ethnicity, Nationhood and Pluralism: the 2010 Kenya Constitution', 86.
where institutions facilitate Public Law values especially participation and accountability.98

The culture of autocracy could be said to exist in the current Kenyan government. In relation to the current topic, this is specifically identified in RAS where RSD and its related processes are heavily governed by the institution with minimal accountability towards the refugees and/or asylum seekers (hereinafter ‘persons of concern).

The gap in the law identified in this paper stimulates authoritarianism and unaccountability with the institution and its interaction with persons or concern. The aspect of legitimacy previously intended as a principle to facilitate public law values such as participation and accountability, are usurped by the said discrepancy resultantly impeding RSD and its benefits to persons of concern.

2.2.1 Post-Independence Africa and Constitutionalism

‘I am confident that it should be possible to devise a constitutional structure applicable to our special conditions in Africa and not necessarily framed in terms of the existing constitutions of Europe, America or elsewhere, which will enable us to secure the objectives I have defined and yet preserve to some extent the sovereignty of each state within a Union of African states.’99

The expectation of Africans during independence was that the constitution would become the truly fundamental law, with the governments acting in accordance with its values and framework.100

‘In Kenya, the Constitution was designed to introduce liberal democratic values, of which constitutionalism (the limitation of the powers of governments, the assurance of the rights of the citizens) and representation, values of which were present during the traditional societies unfortunately repressed during the colonial era.’101

98Migai A, Privatization & Democracy in East Africa, the Promise of Administrative Law, 19
101Ghai YP and McAuslan JPW, Public law and political change in Kenya, 513-14.
The 1963 Constitution eliminated the dual system of administration of justice. It also provided for a fully elected parliament, an independent judiciary and a Bill of Rights to protect Civil and Political Rights.

However, as patrimonialism crept into the post-independence leaders, key developments were backtracked and Constitution was dismantled.

The authoritarian state model adopted from the colonial regimes favoured the African postcolonial elite. The single, unquestionable and unaccountable executive possessed full control over colonies; economically and judicially.

In Kenya, Jomo Kenyatta, it may be stated that the first prime minister of Kenya in his quest for power, desired to acquire greater political for himself and his associates.

This is evidenced by the change in the 'system of government from parliamentary to presidential', hence weakening the parliament. Major legal provisions protecting democracy, power sharing and human rights were removed in the years shortly after the attaining independence. His successor, Daniel Moi reduced Kenya to a single party state, abolished the security of tenure of judges, auditor general and attorney general in order to facilitate their dismissal at will.

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102 Ghai and McAuslan, *Public law and political change in Kenya a study of the legal framework of government from colonial times to the present*, 516.


105 Macroeconomy to microeconomy. From the tax rate to the crops small scale farmers could produce at different locales.


110 Ghai and McAuslan JWP, *Public law and political change in Kenya a study of the legal framework of government from colonial times to the present*, 516-517.

111 Ghai YP and McAuslan JWP, *Public law and political change in Kenya a study of the legal framework of government from colonial times to the present*, 516-517.

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In Uganda, Milton Obote, in a bid to centralize the powers of the President, introduced a new revolutionary constitution that abolished the institution of the kingship not only in Buganda but also in Bunyoro. He further declared a state of emergency and ordered the army to attack and occupy the Kabaka’s palace in Mengo. The palace attack is estimated to have cost more than one hundred lives. Great injustice has been done under the pretext of ‘instilling the right administration.’

The state was regarded as the agent of development. It was thought that only the state was capable of providing public goods such as schools and infrastructure. Additionally, it was expected to provide employment and improve everyone’s standard of living. It was therefore important, to the African elites, that the executive is granted wide-ranging power.

2.3 Abuse of Power in Administration

Rules do matter, even in Africa. The flaw in the dominant accounts of African politics is their failure to grasp the role that the law plays and has always played in African politics. ‘...Africa’s formal legal systems tend to feature broad grants of poorly circumscribed discretionary powers, law and legal processes often important tools in political contests. Indeed, the sheer breadth of formal power is what facilitates informal and accountable uses of it.’

The limitation of the right of ATI as being available only to citizens and incidentally affecting the right to fair administrative action could be deemed to be against the liberal democratic values (limitations of powers of governments, the assurance of the

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113 Uganda Historical Background’, Human Rights Watch
114 Uganda Historical Background’, Human Rights Watch
119 Article 35 (1) *Constitution of Kenya*.
120 Article 35 (1) *Constitution of Kenya*. 
rights of citizens etc.) represented by constitutionalism and initially intended by the Constitution of Kenya.

As illustrated in the above narratives, the abuse of power by African leaders could be stated to have been orchestrated through manipulation of laws affecting various forms of administration. The discrepancy hereby identified with regards to article 35 and article 47 may be attributed to a devising in power with which ultimate power on matters affecting persons of concern would significantly lie with RAS. Incidentally, the inconsistency may advance potential abuse of power by state institutions in matters affecting persons of concern.122

It is noteworthy to mention that in the event where a citizen is unable to obtain information held by the ‘state or any information held by another person and required for the exercise or protection of any right or fundamental freedom. The style of administration in today’s government may be said to be significantly similar to that in the colonial era. Though the Kenyan people democratically can verbally contribute discussions on matters affecting the country and desire to further explore this, they are met with various limitations on the right of ATI.

Despite developments on the law on the right of ATI over the years,123 the aspect of ‘colonial domination’ is still identified in the current right to ATI laws and its administration. There exists a culture of secrecy in Kenya with regard to state-held information; this is evidenced by the enactment of certain legislation such as the Official Secrets Act, Evidence Act, National Assembly (Powers and Privileges) Act, Service Commissions Act and the provisions therein.

The right to information is a pivotal aspect of this thesis. RSD possesses its gaps with providing right to information. This could stem from the very abuse of administration and secrecy public bodies have been seen strive for.

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123Access to Information Act (Act No. 31 of 2016)
2.4 Pluralism and Human Rights

Pluralism refers to adoption of multi-ethnic or multi-cultural states.\textsuperscript{124} Pluralism assumes that diversity is beneficial to society and that autonomy should be enjoyed by disparate functional or cultural groups within a society.\textsuperscript{125}

The Honourable Court in Khan v Khan\textsuperscript{126} stated that ‘pluralism involves the recognition that different groups in society may have different traditions, practices and attitudes and from that value, tolerance must inevitably flow. Tolerance involves respect for the different traditions, practices and attitudes of different groups.’

Plurality, apart from being present in laws, rules and regulations, must be imbedded into society. States may implement the later by undertaking three steps\textsuperscript{127}: recognition, incorporation and decentralisation.

Recognition\textsuperscript{128} and incorporation will actively reflect cultural diversity and decentralisation will ensure that the diversity and rights seep to the lowest levels of administration, formal judicial systems and by effect, applying human rights.

This propels the study to the next chapter: A case study on refugee rights and status determination. The study has presented customary law pre-colonial system, the injustice during the colonial period, post-independence progress and setbacks, an international, regional, sub-regional and national approach to human rights and their failures and pluralism; a hope in the new world of multi-cultural, multi-ethnic communities.

Refugees are affected by failures in the administration of status determination that may have is roots of unjust application from the colonial era. They may also be wrongly


\textsuperscript{125}‘Definition of Pluralism’ Encyclopædia Britannica \url{https://www.britannica.com/topic/pluralism-politics} on 31\textsuperscript{st} January 2018.

\textsuperscript{126}Khan v Khan [2007] EWCA Civ 399.


targeted for a political agenda. Additionally, international instruments set up to protect them have claw back provisions and a nation’s failure to apply those rights is not met with the harshest condemnation.
CHAPTER THREE
REFUGEE STATUS DETERMINATION, RELATED PROCESSES AND RIGHTS

3.1 Introduction

In this chapter, this study shall focus on delve into the intricacies by definition and process of 'RSD in the main body of the text and in appendices.

RSD though legalistic and restrictive, is to ensure that upon recognition as a refugee, the special legal regime is granted to the refugee. This regime has with it rights and responsibilities that apply to both parties that is, state and refugees. This forms part of 'international refugee protection'.

It is noteworthy to state that RSD does not by default provide refugee status to an asylum seeker. This is because under international law, an asylum seeker is a considered a refugee as soon as they meet the definition set out in the 1951 Convention. In reality, though, an asylum seeker needs to be officially recognized as a refugee in order to receive the rights and entitlements that attach to refugee status.

3.2 The Refugee Criteria

The prose form of Article 1A (2) carries with it the required elements that are the relevant criteria a refugee is to meet. This section will categorise each element and interpret its key phrases.

\[129\] UNHCR Refugee Status Determination, Identifying who is a refugee, 1 September 2005, 6.

\[130\] UNHCR Refugee Status Determination, Identifying who is a refugee, 6.


\[132\] ‘Dr Joyce Chia, Alice Drury: Refugee Status Determination in Australia’

\[133\] ‘Dr Joyce Chia, Alice Drury: Refugee Status Determination in Australia’

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3.2.1 Events occurring before 1st January 1951

The date was provided to aid governments who wished to limit their obligations to refugee crises that were known to exist at the time.\textsuperscript{134} This however was done away with by the 1967 Refugee Protocol that had in its preamble\textsuperscript{135};

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951.

3.2.2 Well-founded fear of being persecuted

i. Fear

Fear is a subjective condition which will vary to each person and depends on an individual’s personal and family background.\textsuperscript{136} To deal with the subjective assessment of fear, it is assumed that a person does not leave his home and country to become a refugee unless they are fearful of being ‘persecuted’\textsuperscript{137}

ii. Persecution

Persecution has not been defined in the 1951 Convention but from Article 33. However, it can be inferred as a threat of life or physical freedom that constitutes persecution, as would other serious violations of human rights.\textsuperscript{138}

If the persecution is legitimate and not by a law enacted by the persecuting State protected under international law, the claim for a refugee status will be rejected.\textsuperscript{139}


\textsuperscript{136}UNHCR Refugee Status Determination, Identifying who is a refugee, 35.


\textsuperscript{138}UNHCR Refugee Status Determination, Identifying who is a refugee, 37.

\textsuperscript{139}UNHCR Refugee Status Determination, Identifying who is a refugee, 39.
3.2.3 The 1951 Convention Grounds.

Often referred to as the ‘nexus’ requirement, this refers to the reasons under the convention that gave rise to the fear of persecution: “for reasons of race, religion, nationality, membership of a particular social group or political opinion.”

The refugee applicant must show that his reason(s) from the nexus element of the 1951 Article carries with it, a fear of prosecution.

3.2.4 Is outside the country of his nationality

The refugee applicant must first establish that he in fact possesses the nationality of that country. Where the applicant’s nationality is difficult to establish, the status process will be similar to that of a stateless person.

The fear of persecution need not extend to the entire state. This ensures that grave circumstances such as ethnic clashes in inaccessible border areas gives the persecuted an option to flee the country and obtain a refugee status.

3.2.5 And is unable or, owing to such fear, is unwilling to availing himself of the protection of that country.

Being ‘unable’ to avail him or her of such protection implies circumstances that are beyond the will of the person concerned e.g. war or the state having denied him entry.

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140 UNHCR Refugee Status Determination, Identifying who is a refugee, 41.
141 UNHCR Refugee Status Determination, Identifying who is a refugee, 17.
145 An example of this is in the bordering Nigeria Countries that have adopted RRP that will aid those escaping from the Boko Haram insurgents and the human rights violations. UNHCR, Nigeria Regional Refugee Response Plan, January – December 2017.
Being ‘unwilling’ refers to refugees who refuse to accept the protection of the government of the country of their nationality.\textsuperscript{148} This is where the clause ‘owing to such fear’ comes to play. Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.\textsuperscript{149}

3.2.6 or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it

This phrase, relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality.

3.3 Parties involved in RSD

The parties involved are states and the UNHCR.\textsuperscript{150} States which are parties to the 1951 Convention, 1967 Protocol and/or the 1969 OAU Convention are bound by these instruments.

One of the core functions of the UNHCR is RSD.\textsuperscript{151} In most states, the UNHCR does, at least in an advisory capacity, get involved.\textsuperscript{152} The relationship and mandate shared between UNHCR and the Kenyan Government in RSD was earlier noted. This Chapter will be guided by the general practice provided by UNHCR.

Each UNHCR office is responsible to develop and implement RSD procedures to ensure quality and efficiency and to meet its objectives the diverse and challenging environment.\textsuperscript{153}

The 1951 Convention does not set out in the procedures that must be followed in an RSD system, but there are numerous non-binding international standards.\textsuperscript{154}


\textsuperscript{150} UNHCR Refugee Status Determination, Identifying who is a refugee, 7.

\textsuperscript{151} UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, 1.

\textsuperscript{152} UNHCR Refugee Status Determination, Identifying who is a refugee, 9.

\textsuperscript{153} UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, 2.
Though RSD procedure differs with the country or region, there are certain core principles and standards that must be incorporated into the RSD procedures of every UNHCR office.\textsuperscript{155}

3.4 RSD Procedure
This is the stipulated process provided for by the UNHCR (See Appendix 1 for procedure).

3.5 The Rights of Refugees
Upon arrival to the host country, during the asylum process and final decision making, asylum seekers are entitled to basic protection of their human rights. In certain occasions, they are to be granted equal rights as the hosting state’s citizens.

Article 12 through to Article 34 of the 1951 convention sets out the rights which individuals are entitled to.\textsuperscript{156}

i. All refugees must be granted identity papers and travel documents that allow them to travel outside the country.

ii. All refugees must be granted identity papers and travel documents that allow them to travel within the country. There are several identification papers available to refugees at different circumstances (See Appendix 2).

iii. Refugees must be accorded the same level of rights as nationals of the host country with regard to:\textsuperscript{157}

- Free exercise of religion and religious education\textsuperscript{158}.
- Equal treatment by taxing authorities\textsuperscript{159}.
- Free access to the courts, including legal assistance\textsuperscript{160}.

\textsuperscript{154} See e.g. UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, UNHCR Refugee Status Determination, Identifying who is a refugee, 3.

\textsuperscript{155} UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate.


\textsuperscript{158} Article 3 and Article 4, Convention relating to the Status of Refugees.

\textsuperscript{159} Article 29, Convention relating to the Status of Refugees.

\textsuperscript{160} Article 16, Convention relating to the Status of Refugees.
iv. Refugees must receive the most favourable treatment provided to nationals of a foreign country with regard to the following rights:
    o Right to engage in wage-earning employment
    o Right to belong to other non-political non-profit organization
    o Right to belong to trade unions

v. Refugees must receive the most favourable treatment possible, which must be at least as favourable to that accorded aliens generally in the same circumstances, with regard to the following rights:
    o The right to higher education
    o Access to housing
    o Right to self-employment
    o Right to practice a profession
    o Right to own property

vi. Refugees must receive the same treatment as that accorded to aliens generally with regard to the following rights:
    o The right to choose their place of residence

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161 Article 23, Convention relating to the Status of Refugees.
162 Article 22, Convention relating to the Status of Refugees.
163 Article 24, Convention relating to the Status of Refugees.
164 Article 14, Convention relating to the Status of Refugees.
166 Article 1, Convention relating to the Status of Refugees.
167 Article 15, Convention relating to the Status of Refugees.
168 Article 15, Convention relating to the Status of Refugees.
170 Article 22 (2), Convention relating to the Status of Refugees.
171 Article 21, Convention relating to the Status of Refugees.
172 Article 18, Convention relating to the Status of Refugees.
173 Article 19, Convention relating to the Status of Refugees.
174 Article 13, Convention relating to the Status of Refugees.
175 Article 26, Convention relating to the Status of Refugees.
o The right to move freely within the host country\textsuperscript{176}
o Right not to be expelled save for grounds of national security or public order\textsuperscript{177}.
o When facing expulsion, right to have decision reached in accordance with due process of law and right to appeal if decision is not satisfactory\textsuperscript{178}.

3.6 Case Study: Kenya

3.6.1 Introduction

To have a pellucid understanding of the subject topic, it is prudent to have a case study to review how it handles the RSD procedure as a case study.

Kenya has overwhelming indicators of being the right case study for the subject; As earlier mentioned, Kenya’s administrative process of RSD is not exclusively under the purview of UNHCR. Kenya, through the Act of Parliament created body RAS, conducts RSD with the help of UNHCR. It is critical to analyse RSD when government is involved as the case in Kenya.

It has an influx of RAAS\textsuperscript{179} who have fled conflict in border countries and some from non-border countries e.g. Eritrea\textsuperscript{180} and Congo\textsuperscript{181} and is further a host to several refugee camps with one infamously being, arguably, the largest refugee camp in the world\textsuperscript{182}. It may be said that it serves as a deep ‘petri-dish’ of which to find all the relevant data on RSD.

Article 2(5) and 2(6) of the Constitution of Kenya deepens the relationship of international law with the Kenyan legal system.

\textsuperscript{176}Article 26, Convention relating to the Status of Refugees.
\textsuperscript{177}Article 32, Convention relating to the Status of Refugees.
\textsuperscript{178}Article 32 (2), Convention relating to the Status of Refugees.
\textsuperscript{180}‘Ann Simons: Kenya is pulling welcome mat on 600,000 refugees, triggering fear of another mass migration’ LA Times Magazine, 11 May 2016.
\textsuperscript{181}‘Congolese refugee in Kenya determined to show he is not helpless’ UNHCR, 12 August 2013.
\textsuperscript{182}‘Gelle Abdi Z: My life in the world’s largest refugee camp’, BBC News, 18 January 2017.
3.6.2 Background

The Refugee Act\textsuperscript{183} created a detailed legal framework for the Kenyan government to exercise control over refugee affairs and affirmed Kenya’s commitment to abide by international general rules and convention on refugee rights.\textsuperscript{184}

In line with international regulation, Kenyan law distinguishes between ‘statutory’ refugees and ‘prima facie’ refugees. The Act,\textsuperscript{185} in broad terms, refers to statutory refugees as people who face a well-founded fear of persecution should they return to their countries of origin. ‘Prima facie refugees are persons who have been compelled to leave their country of residence by external aggression, occupation, foreign domination, or events seriously disturbing public order.’\textsuperscript{186}

3.6.3 RSD Procedure in Kenya

As earlier noted, RSD process in Kenya is mainly conducted by RAS with the help of UNHCR.\textsuperscript{187} Using the UNHCR RSD procedure as a blueprint, Kenya applies the Refugee Act together with the Refugees (Reception, Registration and Adjudication) Regulations.\textsuperscript{188}

3.6.4 Problems Refugees undergo during the RSD process.

The RSD process is not operating in its most efficient form. Administrative glut and political interference form a great part of this inefficiency. This study shall demonstrate key problems refugees undergo during the RSD process.\textsuperscript{189}

\begin{enumerate}
\item[183] Refugee Act (Act No. 13 of 2006).
\item[184] NRC, Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Providing Identity and Status, 7.
\item[185] Section 3 Refugee Act (Act No. 13 of 2006).
\item[186] NRC, Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Providing Identity and Status, 7.
\item[188] The Refugees (Reception, Registration and Adjudication) Regulations, Legal Notice no. 24 The Refugees Act (No. 13 of 2006)
\item[189] NRC, Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Providing Identity and Status, 10.
\end{enumerate}
1. Lack of access to adequate information

There is dire need for the host country to be cognisant of the surrounding countries possible tensions and subsequent wars to prepare any RAAS for orientation.

One applicant, upon entering Kenya, did not know where to go. He inquired from some of his countrymen who were already settled in Kenya.190

2. Administrative issues. E.g. a Refugee’s file being misplaced and lack of an interpreter. An applicant’s claim was rejected on the basis of language barrier. On the appeal interview, he requested for a French interpreter and only then was he able to obtain refugee documentation.191


4. RSD process being subjective – certain refugees have deemed the process to be based on personal preferences. The Commissioner’s power, though appealable, may not have fully weighed the circumstances and situation the refugee. A good example is presented by Tilahun, an Ethiopian refugee who was initially rejected by the UNHCR Eligibility Office in Kakuma. This rejection occurred despite being able to provide documentation from the ICRC verifying his visitation at Moyale Police Station. The reason for rejection stated on his letter was credibility.192

5. Lack of adequate staff at UNHCR.

6. Stalled or suspended processes.

7. Inconsistencies and delays.

The UNHRC guidelines and Kenya’s application manifests, in its many facets, gaps in administrative powers, its application, fair administrative action and ATI.

190Kabue S, ‘is my claim meritorious?’ RCK, 2013, 19.
191Kabue S, ‘is my claim meritorious?’ 19.
CHAPTER FOUR

A COMPARATIVE STUDY ON THE DEVELOPMENT OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION, ACCESS TO INFORMATION IN RELATION TO EFFECTIVE REFUGEE STATUS DETERMINATION

This chapter shall have a focus on three African countries' procedures, their laws and whether the right to fair administrative action and right to information have been fully addressed in relation to RSD. The author decided on South Africa, Arab Republic of Egypt and Cameroon.

4.1 South Africa

4.1.1 Background

South Africa (SA) is a party to the 1951 Convention, the 1967 Protocol, the 1969 OAU Convention, its local Refugee Act and Immigration Act. SA is the only country in Southern Africa that has not entered reservations to the 1951 Convention. Practice of the articles within the Convention however has met some shortfall. Review of the refugee policy history of SA is as follows;

Before the Refugee Act, RAAS were administered through the Aliens Control Act (ACA). ACA can trace its origins to British colonial policies designed to restrict the number of immigrants to the Union. It was widely and indiscriminately used in India. Due to its brash procedure and discriminate implementation to benefit the colonialists, it was adopted in apartheid era SA. As earlier mentioned, laws and regulations that did not promote fair administrative action and right to information

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193 The Refugee Act (No. 130 of 1998).
194 Immigration Act (No. 13 of 2002).
continued to apply post-independence to the detriment of Africans. This Act was implemented until its repealing by the Immigration Act. 200

On ATI, SA have a Bill of Rights chapter in their constitution 201 that is very similar to Kenya save for the wording of the Article on ‘Access to Information’; while Kenya’s constitution states “every citizen has the right to access information...”, South African Constitution states that “everyone has the right to access to...” 202 This distinction indicates how better suited the Constitution of SA is to better deal with the right of ATI. 203

On fair administrative action, it may be stated that Kenya and SA are at par, constitutionally, granting this right to everyone. 204

4.1.2 South Africa and Kenya: Comparative Study

Like Kenya, RSD in South Africa is handled by an entity set up by an Act of Parliament. The procedure from the point of arrival to confirmation of status is almost similar.

Both countries' ATI is however limited. Even with SA’s constitution granting rights to everyone, applicants may lack the necessary information to fully understand the process throughout. 205

In both countries, implementation of the existing law is one of the major problems. Fair administrative action is guaranteed in both constitutions and legislation however, officials fail to implement them. Administrative faults is a problem faced by many host states and the main issues are insufficient staff and inadequate equipment. 206 These faults cause major delay and backlog which in turn may place the application of an applicant in jeopardy. An example can be seen with the 14 day permit provided at the

200 Schedule 3, Immigration Act (No. 13 of 2002).
203 Particulars on this right was regulated under the Promotion of Access to Information Act 2 of 2000.
204 Article 33, the Constitution of the Republic of South Africa, 1996.
entry point of the applicant. In most occasions, the two weeks period may be inadequate time for the applicant to make it to the nearest RRO, be interviewed and be issued with a permit.\footnote{Human Rights Watch: ‘living on the margins inadequate protection for refugees and asylum seekers in Johannesburg’, 12.} This is present in Kenya too. Both countries must focus on implementation.

Fair administrative action also falls into immigration, a thorny issue in SA. ‘While refugee law and immigration law are separate regimes, they do overlap at certain points. One of the most critical junctures is where an asylum seeker receives a final rejection of their asylum claim and is termed a ‘failed asylum seeker’, transitioning from the refugee to immigration system’.\footnote{Johnson C, ‘Failed Asylum Seekers in South Africa: policy and practice’, 2.}

Despite the repealing of the ACA, immigrants are still a plight to violence. This was the case in Kenya too where, after a terrorist attack, there was sudden skepticism against Somalis and the government reacted by deporting hundreds to Somalia against their will and without any due process.\footnote{HRW, ‘Halt Crackdown on Somalis’ (2014)} This could be traced to the post-independence patrimonialism where political elites decide to amass power through their tribes and outsiders/foreigners can be made easy enemies and scapegoats for economic hardships.\footnote{Ramjathan-Keogh K, ‘presentation to refugee status determination and rights in southern and East Africa regional workshop Kampala, November 2010 country report: refugee status determination in South Africa’, (2010), 10.}

Though SA law allows asylum seekers and refugees to work and study, most employers and/or schools will fail to recognize the legal right to work and study.\footnote{Ramjathan-Keogh K, ‘presentation to refugee status determination and rights in southern and East Africa regional workshop Kampala, November 2010 country report: refugee status determination in South Africa’, 25.} Further, the Immigration Act establishes a very narrow applicable immigration that advocates for immigration of highly skilled immigrants but fails to provide a wide range of options for low-skilled workers.\footnote{Johnson C, ‘Failed Asylum Seekers in South Africa: policy and practice’, 2.}
The government should promote an inclusive employment policy that will lessen the fear of hiring RAAS and do more to punish xenophobia.\textsuperscript{213}

The South African Refugee Act does not provide for legal assistance to applicants.\textsuperscript{214} This is to the detriment of the Applicants who may not fully understand the law, its interpretation and application during the interviews, the final decision and/or any possible appeal. Kenya also has a similar scenario. Fair administrative action fails if the duty to consult is not available to RAAS.

4.2 Arab Republic of Egypt

The Arab Republic of Egypt is a party to the 1951 Convention, the 1967 Protocol and the 1967 OAU refugee convention.\textsuperscript{215} RSD however is not the responsibility of the Egypt’s government but dealt solely by the UNHCR.\textsuperscript{216}

An agreement was entered between the UNHCR and the Egyptian government on 10 February 1954 that fully placed the responsibilities and activities pertaining to RSD in the hands of the UNHCR Branch in Egypt.\textsuperscript{217} This agreement committed the government to maintain a generous admission policy, to observe the principle of non-refoulement, to grant UNHCR an unhindered access to any RAAS and to provide temporary residence permits to recognize RAAS.\textsuperscript{218}

Egypt has not adopted domestic legislation on refugees or to implement the 1951 Convention.\textsuperscript{219}

Apathy from the Egyptian government is further presented by the number of Articles they placed reservations when ratifying the 1951 Convention:\textsuperscript{220} Articles 12(1)

\textsuperscript{212}Handmaker J, ‘No Easy Walk: Advancing Refugee Protection in South Africa’, 2.

\textsuperscript{214}Human Rights Watch: ‘living on the margins inadequate protection for refugees and asylum seekers in Johannesburg’, 30.


\textsuperscript{216}Gozdziak E and Walter A, ‘Urban Refugees in Cairo’ \textit{Georgetown University Centre for Contemporary Arab Studies}, (2012), 11.

\textsuperscript{217}Egypt: Basic Information – Forced Migration’ \textit{Forced Migration Online}, \url{http://www.forcedmigration.org/research-resources/expert-guides/egypt/fmo029} on 5 April 2018.


\textsuperscript{219}Gozdziak E and Walter A, ‘Urban Refugees in Cairo’ 11.
(personal status), 20 (rationing), 22(1) (access to primary education), 23 (access to public relief and assistance) and 24 (labour legislation and social security). According to Egyptian government officials, “refugees should not have access to the same rights as those guaranteed to Citizens”. This statement is supported by the Egyptian constitution under article 9, which states that ‘the State ensures opportunity for all citizens without discrimination’.

This blanket limitation only further spreads to the core discussion: access to information and fair administrative action.

4.2.1 Egypt and Kenya: Comparative Study

Egypt’s constitution scribes that RAAS do not have access the same rights. A truly repressive law with deep entrenchment to patrimonialism. Any attempt at the prime focus rights being discussed would fail ab ovo as the constitution deems RAAS as lesser persons not entitled to the same rights as citizens. With regard to ATI, Kenya has granted this right just to the citizens. Both countries adopted this from the British colonials who considered themselves as superior to the natives.

A refugee or asylum seeker who followed due process (including possible appeals and reviews) but had has his/her application rejected is excluded from any formal assistance from UNHCR and Egypt. Furthermore, the Egyptian government may arrest, detain and deport the rejected applicants.

To prevent refoulement, government officials and the security personnel ought to be trained on refugee laws, the validity e.g. when freedom of movement is curtailed.

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221 Gozdziak E and Walter A, ‘Urban Refugees in Cairo’ 11.
224 Article 96 (due process) and Article 97 the Arab Republic of Egypt 2014.
trained police force will also curb trafficking of migrants from Egypt to Europe.227 The Egyptian society too may need to undergo sensitization over its interaction with the African refugees; racism and xenophobia is prevalent.228 The government may be said to be underacting to tackle this problem and certain government bodies may be regarded as part of the problem. In January 2003, the police began a campaign dubbed ‘Operation track down blacks’ whose main objective was to arrest RAAS with black African origin,229 practice clearly adopted from the colonials and lacking in fair administrative action.

The State should reconsider the reservations they put on the 1951 Convention on a basic human principle.

4.3 Cameroon
Cameroon is a party to the 1951 Convention, the 1967 Protocol and the 1967 OAU refugee convention.230 Its commitment to ameliorate the flight of RAAS is advanced by the enactment of the domestic law on refugee rights, RSD procedure and state obligations: The Refugee Act.231

4.3.1 The Refugee Act
Before the enactment of the Refugee Act, Cameroon handled RAAS under immigration laws.232 This was very disadvantageous to RAAS without any documentation as the law was silent on various crucial matters in refugee protection and is problematic when dealing with an influx of RAAS.233 A colonial adoption.234 The Refugee Act was

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enacted to solve these problems with a Chapter III which outlines the rights and obligations of refugees in Cameroon and the establishment of Commissions to administer RSD.

Article 9 of the Act stipulates that refugees are entitled to the rights provided in the 1951 Convention and the OAU Convention.235

Cameroon has also ratified the ICCPR and UDHR and is therefore both.236 These articles mirror the articles provided in the 1951 Convention and the OAU Convention. The right of ATI and fair administrative action are key pillars in the aforementioned conventions.

Cameroon’s constitution grants the right to fair administrative action to all237 however, is silent on right of ATI.

Article 16 of the 2005 refugee law established the Refugee Status Eligibility Commission and the Refugee Appeal Board.

The Eligibility Commission manages all applications for refugee status while the Appeal Board applicants a possibility to contest any decision rendered by the Eligibility Commission if such a decision does not favour them.238

4.3.2 RSD procedure

Cameroon’s RSD structure may be referred to as a good example of failure in implementation. The Eligibility and the Appeals Commissions have been formally

235 The substantive rights guaranteed in the 2005 refugee law include the right to practice religion freely, the right to property, freedom of association, the right to sue, the right to work, the right to education, the right to housing, the right to social assistance, freedom of movement, the right to obtain identity and travel documents, the right to transfer of assets, and the right to naturalization.
established but are not yet functioning.\textsuperscript{239} The eligibility officers and support staff are yet to be selected.\textsuperscript{240}

The entire RSD procedure is therefore carried out by UNHCR.\textsuperscript{241} There are discussions to operationalize the Commissions and shift responsibilities to the government.\textsuperscript{242}

4.3.3 Cameroon and Kenya: Comparative Study

The failure to implement the Refugee Act is not owed to special disregard for refugees but internal fractures which have made the government inept and dysfunctional. A state would find it challenging to handle RSD when it is, at the same time, causing its own citizens to flee to neighbouring countries. As is the case when 15,000 Cameroonians fled to Nigeria amid a crackdown on Anglophone separatists.\textsuperscript{243}

Government’s delay and apathy in the implementation of the Refugee Act has led to the delay in building and authorizing new refugee camps\textsuperscript{244} and the recently committed refoulement by returning 100,000 Nigerian asylum seekers escaping the Boko Haram.\textsuperscript{245} An outright failure in administrative action.

On previous parts of this paper, the international view the state has taken in its domestic law on the rights of the refugees was commended. It may thus be inferred that the

\begin{itemize}
\item \textsuperscript{239} UNHCR ‘Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: Cameroon’ 3.
\item \textsuperscript{240} UNHCR ‘Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: Cameroon’ 3.
\item \textsuperscript{241} The procedure we discussed in Chapter 3.
\item \textsuperscript{242} UNHCR ‘Submission by the United Nations High Commissioner for refugees (UNHCR) for the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: Cameroon’ 3.
\item \textsuperscript{243} Carsten P, ‘At least 15,000 Cameroonian refugees flee to Nigeria amid crackdown’ Reuters 11 January 2018.
\item \textsuperscript{244} Mbu E, ‘Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?’ 6.
\end{itemize}
problem is in access, understanding and enforcement. An example is in final decision making.\textsuperscript{246}

‘it is the UN Refugee Agency (UNHCR) in Yaounde that hears claims and makes decisions on refugee’s status. Asylum seekers register through the same UNHCR officer in Yaounde. Applicants receive appointment slips for eligibility interviews and wait up to five months for such interviews. The law permits denied applicants to appeal within 30 days of notification but does not allow ordinary courts to review decisions.’

This is further exacerbated by the fact that refugees do not receive legal aid.\textsuperscript{247} A major shortfall of the Act is in Article 17 that ‘states that decisions of the two commissions shall not be subject to any petition before national common law jurisdictions.’

Though the Act provides for right to employment and movement, there are limited options for self-reliance.\textsuperscript{248} This may stem from the failure in implementation of the domestic law. Its application could usher in opportunities for refugees and nationals to step in and offer proposals on how to better the situation. This could also lessen the xenophobia towards the refugees.\textsuperscript{249} The RAAS would easily have access to format education, hospitals and employment.\textsuperscript{250}

Though the commissions are yet to be enforced, their structure may threaten fair administrative action by leading to biased/partial judgments. The Commissions are filled with political and security officials and dangerously lacking in UNHCR

\textsuperscript{246}Iteo M, West Africa: Refugees in Cameroon: An overview’ Pambazuka News, 22 January 2010 on 6 April 2018.
\textsuperscript{247}Iteo M, West Africa: Refugees in Cameroon: An overview’ Pambazuka News, 22 January 2010 on 6 April 2018.
representatives, law practitioners, social and humanitarian workers. Patrimonialism has seeped into commissions set up by acts of parliament.

4.4 Conclusion
Apart from providing representation for every region of Africa, the three countries represent the core issues with implementation of RSD with reference to the thesis’ main pointers:

Egypt has no domestic law and the government is not involved in RSD. Unfortunately, its constitution, as Kenya’s, has a focus on citizens rather than ‘aliens’. Government officials in Kenya may view Egypt as a petri dish of a case where the laws are discriminate

South Africa has a better phrasing of its constitution as it applies to ‘everyone’. As Kenya, implementation and administrative issues are the main hinderances to efficient RSD processing. Both countries may apply the solutions discussed as well as revisit the leadership deficit that leads xenophobia in SA and looting of funds in Kenya.

Cameroon is the example of failure of implementation. A domestic law is available but the State is reluctant to implement what, in theory, would greatly benefit the RAAS. The lack of state will in Cameroon may be considered as caution to Kenya’s officials. As Kenya, Cameroon shares borders with countries that are undergoing conflict.

In the aforementioned countries, government involvement is a key preliminary aspect of the RSD process. A government expressing good-will, without prejudice as in colonial times, (functioning administrative power) in hand with the UNHCR would enhance the effectiveness of RSD. Public information on the plight of refugees (to the locals) and the ATI to the RAAS would significantly aid in the aim to achieve effective RSD for the overall access to fundamental rights for RAAS.

252 Central African Republic to the east and Nigeria to the West. The is an on-going civil war in the former: Kokopakpa L, ‘Civilians killed in Central African Republic were ‘manipulated: UN’ 13 April 2018 https://af.reuters.com/article/africaTech/idAFKBN1HK0PW-OZATP_on_14_April_2018. Jihadist militant organization Boko Haram in the later.
CHAPTER 5
CONCLUSION

'RSD is a means not an end. It is the process by which states and UNHCR identify who are entitled to the benefits of refugee protection and thereby facilitate the fulfilment of their obligations to the beneficiaries of the international refugee regime. It is a truism of refugee law that RSD does not confer status on a refugee but merely confirms it.' 253

Legal, psychological and cultural factors make refugee determination one of the most complex adjudication processes in any society.

This chapter will examine the recurring problems/issues that come with RSD, focus the discussion to aspects of fair administrative action and right to information and propose recommendations for each.

5.1 RSD Recommendations

In Kenya, it is crucial that the procedure ensures efficient case management and enhances protection. 254 This will be achieved through 255:

A continued effort to work towards better file management by developing consolidated databases of refugee information. This may be executed by promoting a standardisation of refugee documentation where all essential data is gathered to a central basis. 256

RAS should improve registration and RSD processes by streamlining the RSD process, increasing competent staff and resuming the regular issuance and renewal of refugee identity cards. The bias that 'all administrative acts are deemed to have been rightly done (Omnia praesumuntur rite acta esse) makes any rebuttal/appeal against an administrative decision very hard or purposely strenuous. 257 Procedural fairness may not

255 NRC, Recognising Nairobi’s Refugees; The Challenges and Significance of Documentation Providing Identity and Status, 20.
be seen to apply but rather apply to all. The procedure of RSD is a balancing of factors that seek to ensure that there exists no practical unfairness in decision making.\textsuperscript{258}

A continued interaction and promotion of sharing of information on changes to policy and practice with local and international NGOs working with refugees should be encouraged. Katiba Institute for example is a practical example of positive party building interaction. The institute drafted a handbook that will aid the populi in understanding their right of ATI.\textsuperscript{259} However, the right of ATI is still unavailable to all compared to South Africa’s constitution which grants the right to all. Patrimonialism ought to be exchanged for true constitutionalism.

The final determination and appeal should be delivered in a timely fashion.\textsuperscript{260} This can be done by creating specialised courts in RAAS settlement prone areas to aid in access of the courts.

The government should also fully recognise refugees’ right to freedom of movement and allow refugees freedom of movement within Kenya, including by ensuring refugees have the ability to access registration and live legally outside camps. Previously, in 2014, the right to fair administrative action was ignored and undocumented Somalis were deported.\textsuperscript{261}

There exists a problem with the management of funds. The plight of insufficient funding may always remain however careful right administration of the funds may create a significantly positive impact.

Funding to the UNHCR is entirely pegged on goodwill donations.\textsuperscript{262} Often, there exists an increasing need for more funding due to the rise in RAAS\textsuperscript{263} and when there exists a

\textsuperscript{259} Nyabira B & Ghai JC, ‘KATIBA: Understanding the Access to Information Law’ The Star (2018)
\textsuperscript{261} HRW, ‘Halt Crackdown on Somalis’ (2014)
\textsuperscript{262} UNHCR Global Appeal Funding and Budget 2001 \url{http://www.unhcr.org/3e2e05e30} on 26th March 2018.
\textsuperscript{263} UNHCR ‘Kenya comprehensive refugee programme’ 2015, 11.
shortage in funding, the UNHCR introduces food rationing and a cut in the supply necessary kits e.g. sanitary pads.\textsuperscript{264}

In a sudden crisis, UNHCR\textsuperscript{265} or a host state\textsuperscript{266} is obliged to seek funding from international bodies, NGOs and states.

Host states and UNHCR should be held accountable for the expenditure of funds; in Kenya, the Auditor General stated that Eight Billion Kenya Shillings\textsuperscript{267} could not be accounted from the Interior Ministry and more particular to this thesis, the immigration department was short of accounting for One Billion Four Hundred and Seven Million Kenya Shillings.\textsuperscript{268} The poor management of funds may be said to inhibit effective RSD as this may lead misrepresentation of the funds available, depicting a state of underfunding which may indirectly affect the size of workforce administering RSD vis a vis the influx of RAAS and eventually providing ineffective service.

'In a large centralized system, the sources of error are not so visible. Spreadsheets do not make people feel shame. The penalty of shame is a factor that counts in favour of governments (and businesses) that are small, local, personal, and decentralized versus ones that are large, national or multi-national, anonymous, and centralised...'\textsuperscript{269}

The same decentralized approach should be adopted by the UNHCR to prevent scenarios where the higher echelons in the agency are oblivious of what is happening on the ground. A macabre history is evidence of this failure: in Rwanda\textsuperscript{270} and Kosovo\textsuperscript{271}.

\begin{thebibliography}{99}
\bibitem{264} UNHCR ‘Kenya comprehensive refugee programme’ 2015, 14.
\bibitem{266} Kenya Citizen TV ‘DP Ruto accuses UN of reneging on refugees support pledge’ 19 September 2016.
\bibitem{267} Obala R, Standard Media Group ‘Sh8b ‘missing’ at Interior ministry’ 8 December 2017.
\bibitem{268} Ngirachi J, ‘Sh1.47bn unaccounted for at Immigration Department’ 11 December 2017.
\bibitem{270} Chisuwa J, ‘How effective has the UNHCR been in fulfilling its mandate to protect refugees?’ \textit{Australian National University}, 1999 (6).
\bibitem{271} UN ‘failed Kosovo Refugees’ BBC 11 February 2000,
\end{thebibliography}
BIBLIOGRAPHY

a) BOOKS


b) CHAPTERS IN BOOKS


c) JOURNAL ARTICLES


Harris K, ‘the fine line between deportation and refoulement the case of Zimbabweans in South Africa.’ Uppsala University, (2012).


Stern K, ‘Procedural Fairness – its Scope and Practical Application’ AustLII.


Chiusiwa J, ‘How effective has the UNHCR been in fulfilling its mandate to protect refugees?’ Australian National University, (1999)


d) ONLINE RESOURCES


Refugee Status Determination UNHCR, The UN Refugee Agency
http://www.unhcr.org/refugee-status-determination.html

UNHCR Kenya, Refugee Status Determination http://www.unhcr.org/ke/refugee-status-determination

UNHCR, UNHCR Global Appeal 1999 – Kenya

https://goo.gl/hkVgzn

Refugee Status Determination in Kenya’ Human Rights Watch,

‘Ojienda Tom and Aloo Leonard Obura: Researching Kenyan Law’ Hauser Global Law School Program, New York University,
http://www.nyulawglobal.org/globalex/Kenya.html

Maurice Nyamoti: Colonial System of Administration in Kenya’ Atika School, 31 March 2017
http://notes.atikaschool.org/kcsehistorynotes/colonial-administration

England’s Indirect Rule in its African Colonies’ American Historical Association,

Lugard F, ‘The Dual Mandate in British Tropical Africa’ 1926
https://archive.org/stream/cu31924028741175/cu31924028741175_djvu.txt

Gozubuyuk S: Public Administration and Law,
http://www.todaj.edu.tr/resimler/ekler/b2c5af6ba302e9a_ek.pdf?dergi=Turkish%20Public%20Administration%20Annual

‘The Modern Traveller’ https://archive.org/stream/moderntraveller00belluoft/moderntraveller00belluoft_djvu.txt

UNHCR Global Appeal Funding and Budget 2001 http://www.unhcr.org/3e2c05e30


Maboloc Ryan Christopher, Max Weber’s 3 types of authority 29 May 2015 http://opinion.inquirer.net/85293/max-webers-3-types-of-authority


Uganda Historical Background’, Human Rights Watch https://www.hrw.org/reports/1999/uganda/Uganweb-06.htm

Definition of Pluralism’ Encyclopaedia Britannica https://www.britannica.com/topic/pluralism-politics

Dr Joyce Chia, Alice Drury: Refugee Status Determination in Australia’ Kaldor Centre for International Refugee Law, 3 June 2016 http://www.kaldorcentre.unsw.edu.au/publication/refugee-status-determination-australia#footnote4_vyh9np6


With several other bodies on a consultancy basis e.g. Refugee Consortium of Kenya
https://www.reckkenya.org/refugees-asylum-seekers-and-returnees/

Kanere ‘Refugee Status Determination: Facing Rejections’ on 12 May 2009
https://kanere.org/2009/05/12/refugee-status-determination-facing-rejections/

General Procedure: Application for Asylum’, 2018

Why is UNHCR Doing RSD Anyway? A UNHCR Report Identifies the Hard Questions’
rsdwatch, 2014 https://rsdwatch.com/

Egypt: Basic Information — Forced Migration’ Forced Migration
http://www.forcedmigration.org/research-resources/expert-guides/egypt/fino029

UNHCR Global Appeal Update’ 2011 http://www.unhcr.org/4cd96bae2c.html

HRM, Cameroon: Mass Forced Return of Nigerian Refugees Military Deports 100,000,
Torture and Abuse in Remote Border Area’ 27 September 2017

Kokopakpa L, ‘Civilians killed in Central African Republic were ‘manipulated: UN’ 13
April 2018 https://af.reuters.com/article/af/ricaTech/idAFKBN1HK0PW-OZATP

e) INSTITUTIONAL REPORTS

UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining
Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status
of Refugees, UNHCR, 2011

Norwegian Refugee Council (NRC) Recognising Nairobi’s Refugees; The Challenges
and Significance of Documentation Providing Identity and Status

OHCHR Human Rights and Traditional Justice Systems in Africa, HR/PUB/16/2, 2016

Constitution of Kenya Review Commission Approved for issue at 95th plenary meeting
of the Constitution of Kenya Review Commission, 10 February 2005

Mazrui A. Ali, Wondji C General History of Africa. VIII Heineman California
UNESCO 1993

UNHCR ‘Submission by the UNHCR Complaint Report – Universal Periodic Review:
South Africa’, 2011.

Salomons M, Madeline G & Guild E, ‘Formative evaluation of RSD Transition Process
in Kenya’ UNHCR (2014),

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APPENDICES

APPENDIX 1

Reception Procedure

Each UNHCR Office must have and train staff and UNHCR interpreters. Their main duty is to meet refugee applicants as soon as possible after their arrival at the gate and aid them in dissemination of the necessary information and scheduling of RSD interview.²⁷²

The necessary information includes²⁷³;

1. Reception hours and procedures.
2. Access to UNHCR premises and all UNHCR services are free of charge.
3. Procedures for reporting misconduct by UNHCR staff and difficulties relating to access to the UNHCR Office.
4. The rights and responsibilities of RAAS.
5. Information about how host country laws and procedures that may affect the rights of RAAS.

The Registration Interview

These are scheduled to take place shortly after asylum seekers approach the UNHCR office.²⁷⁴ They should be conducted in a non-intimidating, non-threatening and impartial manner by a registration staff that is qualified and trained.²⁷⁵

On production of evidence, the asylum seeker could have problems with production of documents proving his case due to the nature of his departure of his home country²⁷⁶ e.g. abrupt civil war. Therefore, the responsibility for establishing the facts is shared between the applicant and the decision maker.²⁷⁷

²⁷²UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate.
²⁷³UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate.
²⁷⁴UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate.
²⁷⁵UNHCR, Procedural Standards for Refugee Status Determination under UNHCR’s Mandate.
²⁷⁶UNHCR Refugee Status Determination, Identifying who is a refugee, 118.
²⁷⁷UNHCR Refugee Status Determination, Identifying who is a refugee, 118.
Misrepresentations and withholding of information should not deem the applicant’s claim revocable. e.g. distrust or quality of interpretation.\(^{278}\)

The interviews ought to be conducted on an individual basis even for asylum seekers that come as a family.\(^{279}\)

**RSD Decision**

At the end of the RSD interview, the eligibility Officer should issue a date on when the RSD decision will be issued.\(^{280}\)

An asylum seeker can review and revise the RSD decision after it has been issued to the applicant through any of the established procedures\(^{281}\):

- Appeal procedures
- Re-opening if the RSD file
- Cancellation/Revocation of refugee Status
- Cessation of Refugee Status

**Cancellation of Refugee Status**

RSD incorporates the process of obtaining it and when necessary, cancelling the status. "The issue of cancellation arises where a person recognised as a refugee by a State under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol is subsequently found not to have been entitled to Convention refugee status at the time of the positive determination. In other words, the applicant was not eligible for protection as a refugee because the criteria of Article 1A (2) of the 1951 Convention were not met, or because the applicant was not in need, or not deserving, of such protection."\(^{282}\) Cancellation procedures should be distinguished from cessation\(^{283}\) procedures which are intended to reassess refugee status that was properly conferred but

\(^{278}\) UNHCR, *Refugee Status Determination, Identifying who is a refugee*, 119.

\(^{279}\) UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*.

\(^{280}\) UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*.

\(^{281}\) UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*.


\(^{283}\) This refers to the ending of refugee status pursuant to Article 1C of the 1951 Convention because international protection is no longer necessary or justified on the basis of certain voluntary acts of the individual concerned or a fundamental change in the situation prevailing in the country of origin.
may no longer be appropriate\textsuperscript{284} or revocation of refugee status that was proffered accordingly but the RAAS has engaged in conduct that would lead to the revocation of that status.\textsuperscript{285}

**Grounds for commencing cancellation procedures\textsuperscript{286}**

a) Misrepresentation or concealment by the individual concerned or a third party of facts that were material to the RSD determination, with or without fraudulent intent.

b) Misconduct by the individual, including threats or bribery.

c) Error of fact or law by UNHCR in applying the inclusion or exclusion criteria;

d) Misconduct or administrative error by UNHCR at any stage in the RSD procedures, including the wrongful issuance of UNHCR documents.

**Cancellation Procedures**

The Refugee Act\textsuperscript{287} states that the cancellation of a person’s refugee status shall-

a) be carried out using the same standards and due process that apply to refugee status determination procedures and

b) be determined on an individual basis.

**The Cancellation Interview\textsuperscript{288}**

Every individual whose claim is examined pursuant to cancellation procedures must have an individual cancellation interview where he/she will be given the opportunity to respond to specific allegations or provide other evidence that is relevant to the decision whether or not to cancel refugee status.\textsuperscript{289}

\textsuperscript{284} UNHCR, ‘Procedure for cancellation of Refugee Status’ 2.

\textsuperscript{285} Revocation applies if the refugee engages in conduct which comes within the scope of Article 1F (a) or 1F (c) of the 1951 Convention- regarding either a crime against peace, a war crime or crime against humanity or is guilt of acts contrary to the purposes and principle of the United Nations.

\textsuperscript{286} UNHCR, ‘Procedure for cancellation of Refugee Status’ 3.

\textsuperscript{287} Section 37 (2) Refugee Act (No. 13 of 2006).

\textsuperscript{288} UNHCR, ‘Procedure for cancellation of Refugee Status’ 4.

\textsuperscript{289} UNHCR, ‘Procedure for cancellation of Refugee Status’ 4.
The officer who conducts the interview should be thoroughly familiar with the RSD file of the individual concerned, including the evidence upon which the cancellation proceedings are based.290

Upon a decision being made and the individual ought to be duly informed that he/she has the right to appeal. If the appeal fails, UNHCR is to take all feasible steps to withdraw UNHCR documentation issued.291

This process begs two questions:

1. Is cancellation mandatory or discretionary?
2. What are the consequences of cancellation?

Cancellation clauses in national refugee and general administrative legislation292 often provide for the exercise of discretion on the part of authorities.293

On consequences:

i. The person is no longer deemed to be a refugee.294

Section 41295 makes the withdrawal of refugee status of a person result in the withdrawal of the members of the family of the refugee.

ii. Depending on the jurisdiction, the refugee may not be protected against non-refoulement and the host country will remove the person.296 To prevent this, RAAS, upon arriving to their desired destination, burn their fingertips to prevent recognition and subsequent deportation297. In other countries,298 the person concerned generally remains in possession of their residence permit.

292 Five among the countries reviewed for the purpose of this paper, cancellation is discretionary in Australia, Canada, New Zealand, United Kingdom and the United States of America.
295 Refugee Act (No. 13 of 2006).
298 For example, Kenya.
APPENDIX 2

The following documents are significant to a refugee: 299

A Mandate Certificate is issued by UNHCR that states the persons listed on the certificate (usually a family) are refugees under the UNHCR mandate in Kenya. It expires after two years.

An Alien Card refers to a government-issued identity card that includes a notation (either in the card’s title or elsewhere) to indicate the holder is a refugee. Since 2006 they have been formally called “refugee identity cards” in Kenyan legislation.

An Asylum Seeker Certificate is a document issued by UNHCR noting that those listed on it (usually a family) are recognised as asylum seekers by UNHCR.

A Waiting Card, waiting document, or appointment slip could refer to any number of documents issued by RAS or UNHCR. These documents usually indicate that the holder is waiting for a document, such as an alien card, that they are entitled to (but it may not state this is the case) or has an appointment for an interview as part of the RSD process.

A Movement Pass is a document issued by RAS that requires a refugee to move from an urban area to a camp within 10 days.

A Proof of Registration is a document issued by RAS that lists the members of a family registered in an urban setting. Its camp equivalent is usually referred to as a “manifest” and is very similar in form.

A Refugee Recognition Letter (or notification of recognition) is a letter issued by RAS with a validity of one year that states the holder has been recognised as a refugee by the government and is waiting for an alien card.

An Asylum Seeker Pass is a document issued by RAS that indicates the holder has been recognised as an asylum seeker by the government.

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299 Norwegian Refugee Council (NRC) Recognising Nairobi’s Refugees: The Challenges and Significance of Documentation Providing Identity and Status, 6.