



## **Synopsis of the Refugees Act, 2021**

### **1. Introduction**

The Refugees Bill, 2019 was developed to respond to the current context of refugee management in the country. The proposed legislation was assented to by His excellency the President of Kenya on 17<sup>th</sup> November 2021. The law reaffirms commitment by Government of Kenya to offer protection to refugees in line with the UN Convention relating to the status of refugees and the OAU Convention<sup>1</sup>. The Refugees Act, 2021, gives effect to Article 2 of the Constitution. The law will be operational 90 days from the date of publication in the Kenya Gazette which was on 3<sup>rd</sup> December 2021. Below is a summary of the Refugees Act, 2021.

### **2. Synopsis of the Refugees Act**

#### **Part I of the Act: Preliminary**

##### **Interpretation of terms**

The preliminary part of the Act covers sections 1 and 2 which highlight the citation of the 2021 law; its operationalization process; and provides for the interpretation of key terms used in the Act including but not limited to Appeal Committee, asylum, asylum seeker, prima facie refugee status, reception area, transit centres and refugee as expounded in the succeeding section 3.

The Act defines asylum as the protection granted to a person in Kenya who is outside his or her country of nationality or habitual residence who is fleeing persecution or serious harm or for other reasons. Transit centres includes prison, immigration detention centre, police station, remand homes or any other similar place that may be designated as a transit centre. Transit centres will be used to temporarily accommodate persons covered under the Act pending transfer to the designated areas, reception centres, settlement centres or pending repatriation and resettlement or pending health or security screening. While at transit centres, refugees and asylum seekers will be able to access essential services including food and shelter.

##### **Refugee definition**

The term refugee is defined in Section 3 as a person who is outside his country of nationality or habitual residence owing to a well-founded fear of being persecuted for reasons of race, religion,

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<sup>1</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

nationality, membership of a particular social group or political opinion and is unable or unwilling to avail himself of the protection of his country. Country of nationality in cases where one has more than one nationality, means each of the countries of which that person is a national. The definition also includes a person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order is compelled to leave his place of habitual residency. The Act expressly makes provision for prima facie refugee in Section 3 (2) where the Cabinet Secretary responsible for matters relating to refugee affairs on recommendation from the Committee<sup>2</sup> may consider any class of persons as prima facie refugees through the Gazette.

### **Exclusion, disqualification and cessation of refugee status**

A person is excluded from being considered for refugee status if he has committed a war crime, crime against humanity, serious non-political crime outside Kenya, guilty of acts contrary to the purposes of the UN and AU or determined a threat to national security.

A person shall cease to be a refugee in Section 5 if such a person:

- Voluntarily re- avails himself of the protection of the country of his nationality or the country he left owing to fear of persecution;
- Re-acquires his nationality;
- Acquires nationality of another country that can offer him protection;
- Circumstances in connection with which he was recognized as a refugee has ceased to exist.

### **New provisions**

- Clear provisions for prima facie status made through a declaration by the CS in the Kenya Gazette as advised by the Refugee Advisory Committee.<sup>3</sup>
- A person is disqualified from seeking asylum in Kenya if they have sought asylum in another country or have been granted refugee status.<sup>4</sup>
- A person who is a resident or enjoys rights and obligations similar to those of a national and can be readmitted to the county he left is also disqualified from seeking refugee status.<sup>5</sup>

### **Part II of the Act: Administrative provisions**

The Refugees Act, 2021 creates 3 administrative bodies in Section 6 namely:

1. The Department of Refugee Services;
2. The Refugee Advisory Committee; and
3. The Refugee Status Appeals Committee.

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<sup>2</sup> Refugee Advisory Committee established under Section 11 of the Refugees Act

<sup>3</sup> Section 3(2), Refugee Act, 2021

<sup>4</sup> Section 4 (2) (b) Refugees Act, 2021

<sup>5</sup> Section 4 (2) (c) Refugee Act, 2021

## Department of Refugee Services- Section 7

- Headed by a Commissioner whose functions are listed below:
- Chair the Refugee Advisory Committee;
- Receive, register and maintain a register for all refugees;
- Issue refugee identification documents;
- Be the liaison between the Department, state actors and relevant stakeholders;
- Manage refugee designated areas;
- Issue movement passes;
- Exempt asylum seekers from residing in designated areas;
- Ensure that refugee activities do not have a negative impact on host communities;
- Promote procurement or purchase of local products and services in support of refugee intervention and programmes.

## Refugee Advisory Committee- Section 9

- The Commissioner shall be the chairperson of the Advisory Committee and provide secretarial support
- The Committee has 11 persons drawn from ministries, Inspector General and a representative from the council of governors
- Advise the CS on formulation of national policies on matters relating to refugees
- Advise on declaration, amendment or revocation of prima facie determinations
- The Committee shall convene at least 4 meetings every year.

## Refugee Status Appeals Committee- Section 11

- The Appeals Committee shall hear and determine appeals against any decision of the Commissioner with regard to rejection of any individual application for refugee status; and the cancellation, revocation and termination of refugee status.
- The Appeals Committee has 7 members while quorum for a meeting shall be 3 members.
- The Appeals Committee shall be headed by a representative of the Principal Secretary responsible for refugee matters and co-opt an officer from the United Nations High Commissioner for Refugees to advice in performance of its functions.

*Diagram 1: Summary of administrative bodies in the Act*

## **New provisions**

- New functions of the Commissioner in the Act include to maintain a register for all refugees in Kenya; ensure humanitarian character of designated areas is maintained; issue visitor permits for entry to refugee camps; and promote use of local products.
- The Commissioner is the chairperson of the Advisory Committee. In the 2006 law, the chairperson was appointed by the CS.
- Members of the Refugee Advisory Committee are Principal Secretaries or a representative appointed in writing. New members to the Committee include a representative from the Ministry of Education, Inspector General and a person from the Council of Governors. In the 2006 law, the appointee was a representative from the ministry and the appointment was not in writing.
- Functions of the Committee are also clearly provided for, this was lacking in the 2006 law.
- Chairperson of the Appeals Committee is a representative of the PS responsible for refugee matters. In the 2006 law, the chairperson was an advocate of not less than 10 years appointed by the CS.
- Members of the Appeals Committee include a representative of the KNCHR<sup>6</sup>, immigration, AG and 3 persons with knowledge on refugee matters. In the 2006 law, members were appointed from persons with knowledge or experience in immigration, national security, refugee and immigration.
- UNHCR can be co-opted to advise the Appeals Committee in the performance of its function.

## **Part III of the Act: Application for refugee status**

An application for grant of refugee status shall be made to the Commissioner directly or through an authorized officer.<sup>7</sup>

A person aggrieved by the decision of the Commissioner may appeal to the Appeals Committee within 30 days of receiving the decision. If aggrieved by the decision of the Appeals Committee, an applicant can appeal to the High Court in person or through an advocate within 30 days of being notified.

The non-penalization clause contained in Article 31(1) of the Refugee Convention<sup>8</sup> has been replicated in Section 15 of the Refugees Act. Section 15, therefore, provides that no proceedings shall be instituted against any person or member of his or her family in respect to his or her unlawful entry or presence within Kenya if such a person has made an application for recognition as a refugee or has become a refugee.

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<sup>6</sup> Kenya National Commission on Human Rights

<sup>7</sup> Section 12 (1) Refugees Act, 2021

<sup>8</sup> 1951 Convention Relating to the Status of Refugees

### Cancellation of refugee status- Section 17

- The Commissioner shall have the power to cancel refugee status where a person recognized as a refugee has fraudulently misrepresented facts ,if known, could have changed the decision to recognize the person as a refugee or new evidence becomes available that a person should not have been recognized as a refugee.

### Revocation of refugee status- Section 18

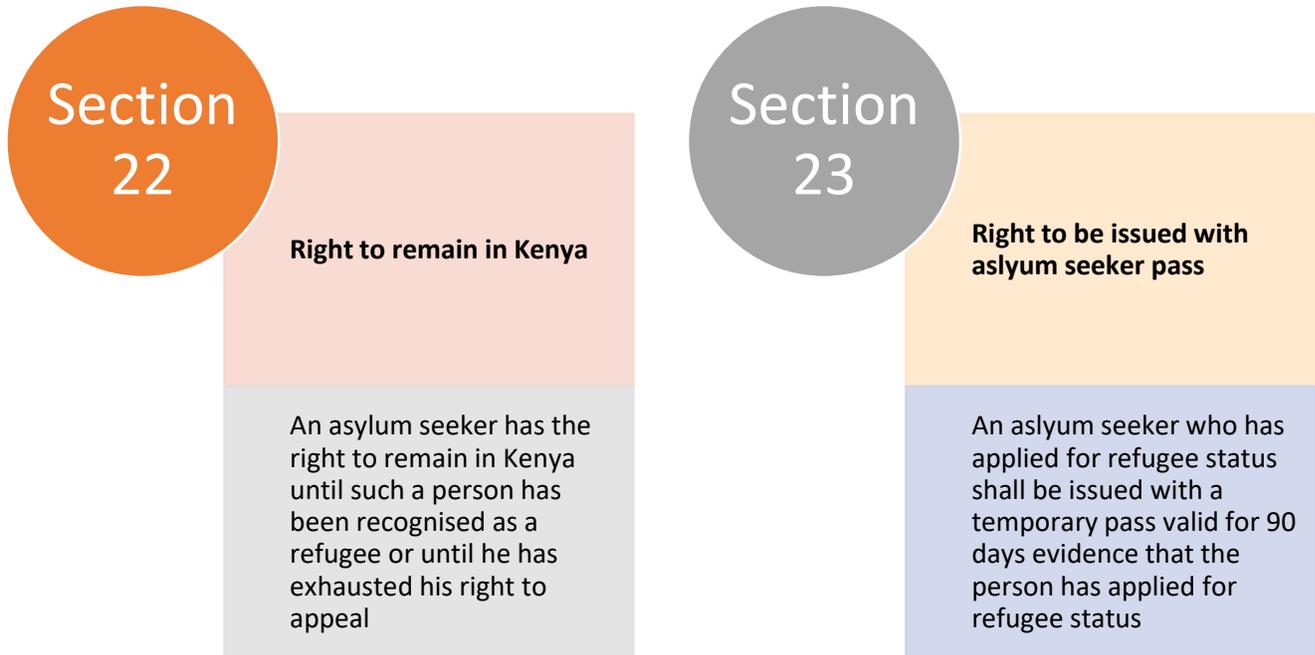
- The Commissioner shall revoke refugee status where a refugee has committed a war crime or a crime against humanity as defined in any international instrument to which Kenya is a party.

*Diagram 2: Diagram highlighting difference between cancellation and revocation.*

In both cancellation and revocation of refugee status, persons with derivative status shall cease to be so recognized but have the right to apply to be considered refugees. A person whose status has been cancelled or revoked and has exhausted available appeal mechanisms shall leave the country within 30 days, failure to which the CS shall order for his immediate removal.

Non-refoulement in Section 19 and 29 is an international principle which prohibits States from returning a refugee or asylum seeker to territories where there is risk that his or her life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion, external aggression, occupation, foreign domination or event seriously disturbing public order. However, this does not apply to a refugee or asylum seeker who is a danger to national security or public order.

The Refugees Act, 2021 in Section 20 recognizes vulnerable groups among refugees and asylum seekers and calls for appropriate measures to be taken to ensure the safety of women, children, persons living with disability, the elderly, persons who have been traumatized or otherwise require special protection at all times.



*Diagram 3: Diagram highlighting asylum seeker rights*

### **New provisions**

- The Eligibility Panel is a new creation of the Refugees Act, 2021 which is to review and forward to the Commissioner recommendations to grant or not to grant status.
- A person shall present their claim for asylum in person or through a legal representative.<sup>9</sup>
- The Commissioner is mandated to make a determination for refugee status within 90 days. The timeline can be extended on reasonable cause and on a case by case basis. The extension was not in the 2006 Act.
- The Act mandates the Commissioner to notify the Director of Immigration within 60 days of the decision against an unsuccessful application for refugee status, and the Director of Immigration shall deal with the applicant in accordance with immigration law.
- All refugees and asylum seekers who have entered Kenya shall be subject to health screening for detecting and containing spread of contagious diseases.<sup>10</sup>
- Inclusion of special consideration for persons living with disability, the elderly, persons who have been traumatized or otherwise require special protection at all times.<sup>11</sup>
- A person whose claim for asylum has been rejected and has exhausted the appeal process has 60 days to seek admission to a country of his choice. The Act provides that the CS may

<sup>9</sup> Section 12 (1) Refugees Act, 2021

<sup>10</sup> Section 16 Refugees Act,2021

<sup>11</sup> Section 20 Refugees Act,2021

extend the 90- day timeline if there is reasonable likelihood of the person being admitted to a country of his choice. There is confusion on the timeline.<sup>12</sup>

- The CS may also expel from Kenya a refugee or asylum seeker who is engaging in conduct that is in breach or is likely to breach public order or public morality.<sup>13</sup>

#### **Part IV of the Act: Reception for refugees and asylum seekers**

Any person entering Kenya to seek asylum shall make his intention known immediately or within 30 days by reporting to the nearest reception centre or government administrative office.<sup>14</sup>

Reception officers shall give application guidelines for refugee status to persons who wish to apply for refugee status; take photographs and biometric data of asylum seekers; and screen asylum seekers so as to ensure they pose no public health hazard.

#### **New provisions**

- Where there are no designated reception officers, immigration and other government officers at entry points shall act as reception officers. Where the reception officer is not from DRS, the officer shall liaise with DRS for assistance.<sup>15</sup>
- Asylum seekers may be temporarily accommodated in transit centres and be processed within a reasonable time. If a person enters the country through places other than gazetted entry points, they shall immediately report to the nearest government administrative office.<sup>16</sup>
- Where there is a large influx of persons seeking asylum, the Commissioner shall make provision for relevant services and sensitize the local population for their reception.
- Refugees and asylum seekers are also subject to security screening for purposes of detecting any person who may pose a danger to security of Kenya and safety of the people.<sup>17</sup>

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<sup>12</sup> Section 22 (2) Refugees Act, 2021

<sup>13</sup> Section 19 (2) Refugees Act, 2021

<sup>14</sup> Section 24 Refugees Act, 2021

<sup>15</sup> Section 25 (1) Refugees Act, 2021

<sup>16</sup> Section 25 (4)(5) Refugees Act, 2021

<sup>17</sup> Section 27 Refugees Act, 2021

## **Part V of the Act: Rights and duties of refugees and asylum seekers in Kenya**

Every refugee and asylum seeker shall be entitled to the rights and subject to:

1. The duties contained in the UN Convention, its protocol and OAU Convention
2. All the laws in Kenya.

Refugees shall be enabled to contribute to the economic and social development of Kenya by facilitating access to and issuance of documentation including identification and civil registration documents which shall be sufficient to identify a refugee.<sup>18</sup>

### **New provisions**

- The CS to designate specific counties to host refugees. The 2006 law provided for designation of areas.
- The law takes to account the special circumstances of refugees in seeking gainful employment or enterprise or to practice a trade or a profession where they hold qualifications recognized in Kenya.<sup>19</sup>
- The refugee identity card shall at a minimum have similar status to the Foreign National Registration Certificate for purposes of accessing rights and fulfilling obligations under the law.
- Section 28 (8) provides that a person from the East African Community who has been recognized as a refugee may opt to voluntarily give up his refugee status for purposes of enjoying any of the benefits due to him under the Treaty for the Establishment of the East African Community, the Protocol for the Establishment of the East African Community Common Market, and any other relevant written law. This provision facilitates implementation of the EAC Protocol and substantially reducing the refugee population while simultaneously operating as a durable solution to the protracted refugee situation.

## **Part VI of the Act: Control of designated areas**

The Commissioner is mandated to work with the National and County Governments to ensure the protection of the environment and places used as designated areas. Any refugee or asylum seeker residing outside designated areas after the commencement of the 2021 Act, shall also notify the Commissioner.<sup>20</sup>

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<sup>18</sup> Section 28 (4) and (6) Refugees Act, 2021

<sup>19</sup> Section 28 (5) Refugees Act, 2021

<sup>20</sup> Section 31 Refugees Act, 2021

## **New provisions**

- The Commissioner may order any refugee within a designated area to move to or reside in any other designated area. In addition, any refugee or asylum seeker who wishes to change his place of residency shall notify the Commissioner.
- No person or body shall enter a designated area except with permission of the Commissioner. A person who contravenes this provision shall be liable to a fine not exceeding Ksh. 200,000 or imprisonment for a term not exceeding 5 years or both.<sup>21</sup>

## **Part VII of the Act: Integration, repatriation and resettlement of refugees**

The Act encourages peaceful coexistence between refugees and host community. Voluntary repatriation is provided for in Section 37 where an asylum seeker or refugee shall have the right at any time to return voluntarily to the country of his nationality. A refugee who leaves Kenya on voluntary repatriation shall surrender all documents issued to him by virtue of being a refugee. A refugee residing in Kenya may also access resettlement in any country outside Kenya except their country of origin.

## **New provisions**

- The Refugees Act, 2021 has made provision for integrated use of public institutions, facilities, and spaces between refugees and host communities in so far as is practicable in Section 34.
- The Commissioner in Section 34 (2) shall sensitize the host communities about the presence of refugees in relation to peaceful co-existence with each other.
- The Commissioner in consultation with the CS to establish measures for the handing over of amenities to the National and County Government upon departure of refugees.
- Refugee matters are to be taken into consideration in formulation of sustainable development and environmental plans.<sup>22</sup>

## **Part VIII of the Act: Miscellaneous provisions**

Offences and penalties are provided for in Section 41. The part also makes reference to transitional provisions and repeal of the 2006 Act.

## **New provision**

- The Department under the new law is mandated to keep and maintain a register for all persons who have been granted refugee status and persons seeking asylum in Kenya.<sup>23</sup>

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<sup>21</sup> Section 33 Refugees Act 2021

<sup>22</sup> Section 36 Refugees Act, 2021

<sup>23</sup> Section 39, Refugees Act, 2021

- Members of the Department shall also not disclose any information acquired under the Act except in the course of duty or with the consent of the Commissioner. This is an offence and if found guilty the penalty is a fine not exceeding Ksh. 20,000 or to imprisonment for a term not exceeding 6 months. <sup>24</sup>
- New offences in the Act include:
  - Failing to report without good reason within 30 days of entry in Kenya to a refugee officer;
  - Knowingly submit without justifiable cause, an application for asylum after the period for which he was admitted in Kenya expires;
  - Forging, altering or destroying refugee identification documents;
  - Knowingly use or possess a forged refugee identification document;
  - Gives, or sells refugee identification document knowing it may be used by another person;
  - Use a refugee identification document issued to another refugee or asylum seeker;
  - Bribes or attempts to bribe a refugee officer or authorized officer to access any rights;
  - Solicits a bribe from a refugee to facilitate access to services or rights;
  - Knowingly enters into a marriage for the sole purpose of enjoying benefits under the Act;
  - Work or engage in gainful employment without payment of taxes.
- A person convicted for any of the offences shall be liable to pay a fine not exceeding Kshs. 50,000 or imprisonment for a term not exceeding 6 months or both. The fine has been increased from Kshs. 20,000 as contained in the 2006 Act.
- A person in Section 41 (3) commits an offence if that person being a Kenyan Citizen knowingly applies for registration as an asylum seeker or being a refugee knowingly applies for a Kenyan ID or passport or assists a person to commit the offence. This offence addresses the issue of double registration, and if found liable, on conviction, the person shall pay a fine not exceeding 500,000 or imprisonment for a term not exceeding 3 years or both.

### **Opportunities provided by the Refugees Act, 2021**

- Social economic inclusion of refugees into the Kenyan economic and social spectrum through access and recognition of refugee documentation.
- Opportunities for County Governments to benefit from resources on handing over of refugee facilities.
- Inclusion of the Ministry of Education in RAC provides opportunities for enhanced inclusion of refugees in Kenyan education.

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<sup>24</sup> Section 40, Refugees Act 2021

- Inclusion of a representative from the Council of Governors in RAC will enhance the participation of counties in refugee protection to more counties other than Turkana and Garissa County.
- Inclusion of refugees in development of sustainable development goals, policies and laws and contribute to realization of development goals.
- Enhanced collaboration of Kenyans and refugees in the economic growth of the country through payment of taxes.
- Enhanced co-ordination between various government departments in the management of refugees where asylum claims are rejected (DRS and immigration) or avoid double registration (DRS and Registrar of Persons).
- Opportunity for refugees from EAC countries to enjoy benefits under the EAC treaty and protocol such as access to labour market and livelihood opportunities.

## **Conclusion**

The Refugees Act, 2021 reaffirms the commitment by the Government of Kenya to protect asylum seekers in Kenya. The law reaffirms also the sustainable development goals to achieve a better future for all including Kenyans and refugees.

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