



A FALSE SAFE HAVEN

The Registration and Documentation Woes of Intersex, Transgender and Gender Non-conforming Asylum Seekers and Refugees in Urban Kenya.

Promoting access to **justice**
for the poor, the **minority** and
marginalized groups in Kenya
and the rest of Africa.



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Our gratitude extends to all the research participants, especially ITGNC refugees and asylum seekers, for taking time and voluntarily sharing their experiences



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Acronyms

CBOs	Community-Based Organizations
CFLI	Canada Fund for Local Initiatives
COVID-19	Corona Virus Disease – 2019
CSOs	Civil Society Organizations
CRRF	Comprehensive Refugee Response Framework
DRA	Department of Refugee Affairs
FGD	Focus Group Discussion
GBV	Gender-based Violence
GNC	Gender Non-conforming
GOK	Government of Kenya
HIAS	Refugee Trust of Kenya
ICCPR	International Covenant on Civil and Political Rights
IPOA	Independent Policing Oversight Authority
ITGNC	Intersex, Transgender and Gender Non-conforming Persons
JKUAT	Jomo Kenyatta University of Agriculture and Technology
KISED P	Kalobeyei Integrated Socio-economic Development Plan
KHRC	Kenya Human Rights Commission
KRA PIN	Kenya Revenue Authority Personal Identification Number
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex persons
NHIF	National Hospital Insurance Fund
NPS	National Police Service
ORAM	Organization for Refuge, Asylum & Migration
PoCs	Persons of Concern
RAS	Refugee Affairs Secretariat
RIC	Refugee Identity Card
RSD	Refugee Status Determination
SIM	Subscriber Identification Module
SGR	Standard Gauge Railway
UNHCR	United Nations High Commission for Refugees



Glossary of Terms

Intersex person refers to a person with sex characteristics that do not fit the typical binary notion of male or female bodies.¹ The ambiguity may manifest through the person's genitals, gonads or chromosomes at birth or during puberty.

Transgender Person refers to a person who is born with the anatomy of a person of one sex but with the unshakeable belief that they are persons of the opposite sex.²

Gender non-conforming persons are persons who express an identity that does not fall squarely in either the female or male gender.³ They identify 'between or beyond the male or female genders'.

Gender identity refers to 'a person's internal and individual experience of gender.'⁴

Gender expression is how a person publicly expresses their gender through behaviour and outward appearance such as dressing, hair, body language, voice and preferred pronouns.⁵

Sexual Orientation is a person's inherent emotional, romantic and sexual attraction to other people.

Transphobia is the fear and contempt of transgender persons, usually based on negative stereotypes.

M-Pesa is a mobile phone-based money transfer service, payments and micro-financing service owned by Safaricom, the largest mobile network operator in Kenya.

Asylum Seeker is a person who is seeking refugee status in Kenya but their request is yet to be processed.

A Refugee is a person who has fled their home country due to war, violence, conflict or persecution and has been granted the refugee status in Kenya.

1 The Taskforce on Legal, Policy, Institutional and Administrative Reforms regarding Intersex Persons in Kenya, Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya (2018) 44 - 46 <<https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf>> (accessed 20-11-2021)

2 Bellinger v Bellinger (2003) UKHL 21 <<https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030410/bellin-1.htm>> (accessed 20-11-2021)

3 S Hanssen "Beyond Male or Female: Using Non-binary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law" (2017) 96 *Oregon Law Review* 283-287

4 F Pega & J F Veale "The Case for the World Health Organization's Commission on Social Determinants of Health to Address Gender Identity" (2015) 105 (3) *Am J Public Health* 3 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4330845/pdf/AJPH.2014.302373.pdf>> (accessed 20-11-2021)

5 World Health Organization "FAQ on Health and Sexual Diversity: An Introduction to Key Concepts" GER <<https://www.who.int/gender-equity-rights/news/20170227-health-and-sexual-diversity-faq.pdf>> (accessed 20-11-2021)

The objective of the research was to identify the documentation challenges facing **ITGNC** refugees and Asylum Seekers in Urban Kenya



Executive Summary

Previous studies show that asylum seekers and refugees experience various barriers when trying to obtain and renew their requisite documentation that prove their legal status in Kenya. There is no data that focuses solely on the plight of intersex, transgender and gender non-conforming (ITGNC) refugees.

Amka Africa Justice Initiative (Amka Africa), funded by the Canada Fund for Local Initiatives (CFLI), conducted this implementation research between November 2021 and February 2022 in Nairobi and Kajiado Counties in Kenya. The objective of the research was to identify the practical and policy challenges that face ITGNC refugees and asylum seekers when interacting with the refugee registration and documentation processes in Kenya. The study included desktop and field research that involved ITGNC refugees and key informants from the Refugee Affairs Secretariat (RAS) and the United Nations High Commission for Refugees (UNHCR) and other stakeholders.



Methodology

This is a report on the baseline survey conducted between 16th November 2021 and 4th February 2022. Five research assistants comprising of Jomo Kenyatta University of Agriculture and Technology (JKUAT) Legal Clinic students and leaders of grassroots that work with refugees and asylum seekers, interviewed 28 respondents who included: 13 transgender women, 1 transgender man, parents of four intersex children (in the presence of the children) and 10 gender non-conforming persons. Majority of the interviews were conducted via phone calls while interviews with the intersex children were conducted in person.

The interviewers recorded the interview proceedings with the respondents verbatim and with the aid of questionnaires and phone call recorders. The research also included three in-person Focus Group Discussions (FGDs). Two FGDs brought together 26 ITGNC asylum seekers and refugees. The third FDG was conducted during a sensitisation workshop with staff from RAS, UNHCR, HIAS Refugee Trust of Kenya (HIAS) and national grassroot Civil Society Organizations (CSOs) including Jinsiangu, Slum Dwellers International and Kenya Works.

The report made use of existing literature and research on the registration and documentation of asylum seekers and refugees in Kenya. It also evaluated the existing laws and regulations, precedents and policy documents including but not limited to: the Refugee Act No. 13 of 2006, the Refugees (Reception, Registration and Adjudication) Regulations, 2009, the recently assented Refugee Act 2019 and the court judgments in **Attorney General v Kituo cha Sheria & 7 others**⁶ and **Refugee Consortium of Kenya & another v Attorney General & 2 others**.⁷

The respondents involved in this research only reflect a small fraction of ITGNC asylum seekers and refugees in Kenya. Further, it only focused on the plight of urban refugees particularly those in Nairobi and Kajiado Counties. The names of most of the respondents have been changed in order to protect their privacy. Where real names have been changed, an asterisk indicates this change thus*.

6 (2017) eKLR

7 (2015) eKLR

1. Introduction: **A False Safe Haven**

1. Introduction: A False Safe Haven

Kenya has had a long history of hosting refugees from the neighbouring countries since the 1970s. The UNHCR statistics show that Kenya is the second biggest refugee hosting country in Africa after Ethiopia.⁸ Asylum seekers from not only war-torn countries but also those persecuted for their sexual orientation and gender identity have considered Kenya a safe haven. This is mostly because the country boasts of a progressive constitution that puts human dignity, equity, social justice, equality, human rights, non-discrimination and protection of the marginalised at the forefront.⁹ Furthermore the Kenyan courts have arrived at a number of land mark rulings that have affirmed the rights of Lesbian, Gay, Bisexual, Transgender, Intersex and Gender Non-conforming (LGBTI) persons. This makes it a far much better option for the asylum seekers compared to their home countries.

UNHCR demographics as of 31st December 2021 shows that there are 481,058 registered refugees and 59,010 asylum seekers in Kenya. 84% of these reside in the designated camps while 16% live in urban areas.¹⁰ Of this, the UNHCR estimates that around 64,000 refugees live in Nairobi and its environs.¹¹ There are no statistics on the number on ITGNC asylum seekers and refugees in the camps and urban areas. However, the UNHCR estimates that Kenya holds an estimated 1,000 LGBTI refugees,

8 UNHCR, 'Refugees' <https://www.unhcr.org/ke/who-we-help/refugees> (Accessed 13/2/22)

9 Article 10 (2) (a), Constitution of Kenya 2010

10 UNHCR, 'Kenya: Registered Refugees and Asylum Seekers' (31 December 2021) < <https://data2.unhcr.org/en/country/ken> > (Accessed 13/02/22)

11 Norwegian Refugee Council and International Human Rights Clinic, 'Recognizing Nairobi's Refugees: The Challenges and Significance of Documentation Proving Identity and Status' (November 2017) 1 < <https://www.nrc.no/resources/reports/recognising-nairobis-refugees---the-challenges-and-significance-of-documentation-proving-identity-and-status/> > (accessed 14/11/20221)



300 of whom reside in Kakuma camp.¹² The umbrella term 'LGBTI' has been used to advocate for the rights of persons persecuted for their sexual orientation and gender identity together. The term 'ITGNC' is used to advocate for the rights of persons discriminated because of their gender identity and expression. A lot of research studies focus on the LGBTI group as a whole, hence the lack of statistics of the number of ITGNC refugees and asylum seekers. An increase in the enactment and enforcement of homophobic and transphobic laws in the neighbouring countries has led to an influx in the number of LGBTI asylum seekers in Kenya. In Uganda, for instance, the signing into law of the Anti-Homosexuality Act on 24th February 2014 forced at least 400 LGBTI asylum seekers to flee to Kenya.¹³ Besides the discriminatory laws, the stigmatization, and persecution of this community has led asylum seekers from Burundi, Rwanda, the Democratic Republic of Congo, and Somalia to Kenya.¹⁴

To begin with, the Kenyan society is not accommodative to even national ITGNC persons.

Nonetheless, Kenya is far from a safe haven for ITGNC asylum seekers and refugees. They often find themselves living in a hostile and stigmatizing environment that is similar to that which they fled. To begin with, the Kenyan society is not accommodative to even national ITGNC persons. A 2019 study by the Southern and Eastern African Research Collective for Health et. Al found that 61.3% of ITGNC persons in Kenya have experienced gender-based

12 UNHCR Kenya, 'UNHCR Statement on the Situation of LGBTIQ+ Refugees in Kakuma Camp' (25 March 2021) <https://www.unhcr.org/ke/19859-unhcr-statement-on-the-situation-of-lgbtqi-refugees-in-kakuma-camp.html> (accessed 22/November 2021)

13 Samuel Mwaniki 'World Refugee Day: The Plight of LGBT Refugees in Kenya' (2020) <<https://www.linkedin.com/pulse/world-refugee-day-plight-lgbt-refugees-kenya-samuel-mwaniki>> (Accessed 15/1/2022)

14 Ibid



violence (GBV) at some point in their lifetime with 53% having encountered physical violence and 44% sexual violence.¹⁵

The Kenyan society holds cis-heteronormative constructions of gender that exclude ITGNC persons. These norms stipulate that those who are labeled as male are assumed to have a corresponding masculine gender and therefore identify and express as men, while females are assumed to have a corresponding feminine gender, and therefore identify and express as women. It is also assumed that the sex of a person and the corresponding gender are fixed at birth based on the genitalia. Consequently, ITGNC persons are deemed to be outcasts and deviants who do not deserve humane treatment. A 2018 research by Kenya Human Rights Commission (KHRC) and Columbia University found that 78.1% of religious leaders believe it is morally wrong to identify as a transgender woman and 77.1% found it morally wrong to identify as a transgender. Interestingly, 27.4% opined that violence against transgender persons is permissible in order to preserve social values.¹⁶

Furthermore, the Kenyan law does not recognize ITGNC nationals. For instance, the Births and Deaths Registration Act¹⁷ establishes a system that registers a child's gender in the birth certificate solely based on their genitalia. When an intersex child is born, this process simply stalls as the law is oblivious of sex besides the male and female classification. The particulars in the birth certificate inform all other documents that are issued to that child all the way to adulthood and in death. The Registration of Persons Act¹⁸ furthers this notion into adulthood by issuing National Identity

Cards that duplicates the details in the birth certificate. Similarly, the Kenyan Citizenship and Immigration Act¹⁹ emulates the same system in regards to the issuance of passports.

ITGNC asylum seekers flee to Kenya expecting a safer and friendlier environment

For transgender and gender non-conforming persons whose gender identity and expression becomes more pronounced at puberty and young adulthood, the challenges start with the inability to obtain a National Identity Card with a sex/gender marker that match their gender identity and expression, contrary to the particulars contained in the birth certificate. Although the Kenyan law allows change of name via deed poll, there is no legal provision for change of the gender marker.²⁰ The inability to change the gender marker on their documents even after changing one's name creates a social-legal complexity that makes ITGNC persons unable to enjoy their basic human rights.

In essence, ITGNC asylum seekers flee to Kenya expecting a safer and friendlier environment but these expectations are quickly disillusioned as they meet hostile conditions almost similar to those they fled from. This report will shed light on the policy and practical challenges that face ITGNC refugees and asylum seekers when interacting with the refugee registration and documentation processes in Kenya and its impact on their lives.

- 15 A Müller, K Daskilewicz, Mc L Kabwe, A M Chalmers, C Morroni, N Muparamoto, A S Muula, V Odira, M Zimba, & The Southern and Eastern African Research Collective for Health "Experience of and Factors Associated with Violence against Sexual and Gender Minorities in Nine African Countries: A Cross-Sectional Study" (2021) 21 BMC Public Health 1-9 <<https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-021-10314-w>> (Accessed 17/1/2022)
- 16 D K Mbote, T G M Sandfort, E Waweru & A Zapfel "Kenyan Religious Leaders' Views on Same-Sex Sexuality and Gender Non-conformity: Religious Freedom versus Constitutional Rights" J Sex Res 1-9, 10 < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5474220/pdf/nihms-826257.pdf> > (accessed 17-1-2022)
- 17 CAP 149, Laws of Kenya
- 18 CAP 107, Laws of Kenya
- 19 Act No. 12 of 2011, Laws of Kenya
- 20 Rule 9 of the Registration of Persons Rules, 1948 Laws of Kenya

2.

An Assessment of the Legal and Regulatory Framework for Asylum Seekers and Refugees in Kenya



2. An Assessment of the Legal and Regulatory Framework for Asylum Seekers and Refugees in Kenya

2.1. A Brief History

The registration and documentation of asylum seekers and refugees in Kenya has changed over time with the adoption of different laws and policies. The history of such laws in Kenya is particularly important for one to understand the various documentation held by refugees and asylum seekers. This history can be traced through three distinct periods: the golden age, the rise of the encampment policy and the balance of protection and national security.²¹

The Golden Age

The golden age was between 1963 -1991 when the government was fully in charge of refugee administration. There was no refugee law on paper till 1967. The formulation of the initial refugee law was influenced by Kenya's ratification of the United Nations Convention Relating to the Status of Refugees on May 16, 1966. The independence constitution required that the legislature to enact a domestic law to domesticate this international treaty. Consequently, the Aliens Restriction Act²² and the Immigration Act²³ were enacted to cater for the situation of refugees.²⁴ These laws contained provisions as to the entry and settlement of asylum seekers and refugees but did not provide for their rights, the principle of non-refoulement, the right to work or freedom of movement. As a result, refugees had a de facto

freedom of movement and access to work. A lot of them integrated into the Kenyan society.

The Rise of the Encampment Policy

The rise of the encampment policy spanned through 1991-2007. During this period, civil wars erupted in Ethiopia, Sudan and Somalia leading to an influx of refugees in Kenya. The government abandoned direct involvement with refugees and left this role to the UNHCR.²⁵ The government then set up the Dadaab and Kakuma camps primarily for the asylum seekers from Somalia and Uganda. Asylum seekers from Somalia were primarily accommodated at Dadaab while those from Ethiopia and Uganda were sheltered at Kakuma.²⁶ At the time, these camps were deemed to be temporary and to facilitate the voluntary return of these asylum seekers to their home country while protecting Kenya's national security and facilitating the provision of essentials like food for refugees and new arrivals.

Overtime, it became a requirement for refugees and asylum seekers to reside at the camps. Movement outside the camps was restricted and limited to only those with written permission. Up until 2006, the encampment policy was not codified, thus its implementation was less rigorous. Its strict application was spearheaded by the enactment of the Refugee Act of 2006. This act provided for the rights and duties of refugees and incorporated international law provisions. Nonetheless, this law codified the encampment policy by restricting the movement of refugees and asylum seekers. Both were required to reside in the refugee camps unless they had the authorization to live somewhere else. The act also made it a punishable offence for refugees and asylum seekers to be found outside the designated areas without such authorization.

21 Andrew Maina, 'Development of Refugee Law in Kenya' (Refugee Consortium of Kenya) <<https://www.rckkenya.org/development-of-refugee-law-in-kenya/>> (accessed 25-1-2022)

22 CAP 173 (Repealed by the Kenya Citizenship and Immigration Act 2011)

23 CAP 172 (Repealed by the Kenya Citizenship and Immigration Act 2011)

24 Robert Doya Nanima, 'An Evaluation of Kenya's Parallel Legal Regime on Refugees, and the Court's Guarantee of their Rights' (2017) 21 LDD 42- 45 <https://www.ajol.info/index.php/ldd/article/view/161036/150597> (Accessed 22-1-2022)

25 Andrew Maina (n 22)

26 UNHCR Policy Development and Evaluation Service, 'Navigating Nairobi: A Review of the Implementation of UNHCR's Urban Refugee Policy in Kenya's Capital City' DES/2011/01 (January 2011) 5 < <https://www.unhcr.org/4d5511209.pdf> > (Accessed 13/02/21)



At the same time, terrorist attacks in Kenya increased prompting the government to enforce stricter encampment measures.²⁷ The 2006 Act regulations were amended in 2017 to include an asylum seeker's and refugee's designated camp in their registration document.²⁸ Only those with an exemption letter from the commissioner could be allowed to reside outside the camps.²⁹ The Kenyan community also started viewing refugees as a burden to the economy and the cause of increase in criminal activity. This shifted the focus of refugee regulation from prioritizing refugee protection to national security.

The Balance of Protection and National Security

This era began in 2010 upon the promulgation of the new Constitution and is mainly characterized by the struggle to achieve a balance between protecting refugees while upholding Kenya's national security on the other hand. Despite the strict implementation of the encampment policy, the UNHCR and the Kenyan authorities established certain exceptions to the encampment rule. A refugee and asylum seeker could be allowed to reside outside the encampment areas if they needed to access higher education or specialised medical care or they were confronted with serious protection threats at the camps.³⁰ This has allowed some refugees to legally reside at urban areas.

In a bid to fulfil its responsibility of protecting Kenya's national security, the government has sometimes issued directives to close the camps altogether. At other times, it has ordered all refugees and asylum seekers to relocate, including those with an exemption, from urban areas to the refugee camps. The justification for these directives has been the devastating terrorist attacks in the country. The most shocking was; the Westgate Mall attack in 2013 and the Garissa University attack in 2015. The government's argument has been that its security concerns are legitimate and well

within its mandate. On the other hand, CSOs have countered that the government ought to ensure national security while complying with its international obligations to protect refugees. The courts have agreed with the CSOs in several occasions that the mere allegation that refugees are a threat to national security cannot be used to undermine their protection. This was the case in *Attorney General v Kituo cha Sheria & 7 others*.³¹ This case related to the government's directive published on 18th December 2012, to stop the reception and registration of refugees in urban areas. This directive also required all Somali refugees to report to Dadaab refugee camp and those from other countries to report to Kakuma refugee camp. Kituo cha Sheria and other CSOs filed a constitutional petition to challenge the constitutionality of this decision and the court ruled in their favour. The government's main argument was that refugees, being non-citizens, have no right to reside anywhere in Kenya pursuant to Article 39 (3) of the Constitution. However, the appellate court decided that although Article 39 (3) limits the rights to enter, remain in and reside anywhere in Kenya to citizens, it does not expressly limit the right of refugees to move freely and reside anywhere in Kenya.

The court also upheld Article 12 of the International Covenant on Civil and Political Rights (ICCPR) which limits any restrictions to the freedom of movement to only those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights; and Article 26 of the 1951 Refugee Convention, which affords refugees the right to choose their place of residence and move freely in the receiving state subject to regulations applicable to aliens generally in similar circumstances. Accordingly, the government directive was found to be a violation of refugee fundamental rights and freedoms.

27 Ibid

28 Refugees (Reception, Registration and Adjudication) Regulations 2009, Laws of Kenya, Rule 35 A

29 Legal Notice No. 71 of 2017, Laws of Kenya

30 UNHCR Policy Development and Evaluation Service (n 27) 6

31 (2017) eKLR



A similar directive compelling the relocation of refugees from urban areas to refugee camps was issued by the government vide Gazette Notice 1927 on 17th March 2014. The same was nullified for being a violation of the fundamental rights and freedoms protected in the bill of rights in Refugee Consortium of Kenya & another v Attorney General & 2 others.³² The court arrived at this decision following the precedent in the Kituo cha Sheria case above.

Transfer of the Refugee Status Determination Process from UNHCR to RAS

The roles of UNHCR and the Kenyan government when it comes to the Refugee Status Determination (RSD) process has changed gradually. Until the end 1980s, the government was in charge of the reception and registration of asylum seekers. The government's Eligibility Committee was in charge of the RSD process. In the early 1990s, there was a large-scale influx of refugees which overburdened the government. The UNHCR assumed a predominant role in the RSD process.³³ Upon arriving in Kenya, an asylum seeker would be register at the UNHCR offices where they would be issued with an appointment slip.³⁴ They would later be issued with an asylum seeker certificate which contained a date of their RSD interview. If one was successful in obtaining the refugee status, they were given a mandate certificate which they used to apply for an alien card from the government of Kenya. An alien card is a government-issued identity card that includes a notation that indicates that the holder is a refugee.

The passing of the 2006 Refugee Act paved the way for the transfer of RSD powers from the UNHCR to the RAS. However, the government did not take over up until 1st July 2014. The RSD mandate was granted to the Department of Refugee Affairs (DRA), which was subsequently disbanded on 6th May 2016 and replaced by the RAS.³⁵ Between 2014 and 2016, the government of Kenya and the UNHCR endorsed a new 'Work Plan for Transition of RSD Responsibilities', with the goal of 'successful assumption of RSD responsibilities by the Government of Kenya as of 1 January 2016.'³⁶ This work plan served as a guide to the transition process of handing over the mandate of RSD to the Kenyan government. It also led to the formulation of a working agreement and memorandum of understanding between the UNHCR and the DRA which defined the roles and responsibilities of each body during the transition process.³⁷As a result, registration activities were harmonised into one data management system manned by RAS with the technical support of the UNHCR. Between 2017 and 2018, all UNHCR issued documents were phased out to give room for the RAS issued documents.³⁸

2.2. The Present Regulations and Laws

The current operative RSD process is anchored on the Refugee Act 2006 and its regulations as amended by Act No. 11 of 2017. All asylum seeker applications are addressed to the Commissioner for RAS.³⁹ The commissioner considers such applications and either grants or rejects the applicants' the refugee status.

32 (2015) eKLR

33 UNHCR Policy Development and Evaluation Service (n 27) 6

34 Norwegian Refugee Council and International Human Rights Clinic, 'Recognizing Nairobi's Refugees: The Challenges and Significance of Documentation Proving Identity and Status' (November 2017) < <https://www.nrc.no/resources/reports/recognising-nairobis-refugees---the-challenges-and-significance-of-documentation-proving-identity-and-status/> > (accessed 14/11/20221)

35 UNCHR, 'Contextual Information and Observations on LGBTI Asylum-seekers and Refugees in Kenya' < <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34418> > (accessed 14/11/2021)

36 United Nations High Commissioner for Refugees Policy Development and Evaluation Service (PDES), 'Building on the foundation Formative Evaluation of the Refugee Status Determination (RSD) Transition Process in Kenya' PDES/2015/01 (April 2015) 16 < https://reliefweb.int/sites/reliefweb.int/files/resources/5551f3c49_0.pdf > (Accessed 7/2/22)

37 Ibid, 17

38 UNHCR, 'Registration and Documentation' < <https://www.unhcr.org/ke/registration> > (Accessed 6/2/22)

39 Section 7 of the Refugee Act No. 13 of 2006.



The procedure for applying for the refugee status is as follows:⁴⁰

- a. An asylum seeker presents themselves at RAS and fills an asylum-seeking application. The registration officer collects the applicant's bio data and will ask them a few questions relating to their reasons for seeking asylum in Kenya.
- b. The registration officer issues the applicant with either Proof of Registration or an Asylum Seekers Pass. The proof of registration does not expire but the asylum seeker pass remains valid for one year from the date of issuance or until final determination of the asylum application, whichever is earlier.
- c. The applicant is then invited for the RSD interview. The purpose of this interview is to have the registration officer verify the information provided by the asylum seeker in their application.
- d. After the RSD interview, one is given an appointment slip which is valid for six months. On the appointment date, the asylum seeker is expected to approach the RAS to check whether their decision has been made.
- e. The RSD decision can either be recognition of refugee status or rejection of the asylum application. If an asylum seeker's application is accepted, they are given a recognition letter which they can use to apply for the refugee identity card. If the application is rejected, one receives a letter containing the reasons for such rejection. One has a right to appeal such a decision to the Refugee Appeals Board within 30 days.
- f. For those whose application was accepted, they apply for the Refugee Identity Card (RIC) at the RAS registration centre. One is then given a waiting slip pending the processing of the refugee identity card.

The Encampment Policy

The 2006 Refugee Act requires refugees and asylum seekers to reside at the refugee camps where they are accommodated and provided with livelihood support by the UNHCR. To temporarily travel outside the camps, an asylum seeker or refugee must apply to the commissioner for a movement pass. The movement pass grants the refugee or asylum seeker the permission to travel from their designated camp for a certain period of time. Upon lapse of the specified period, the refugee or asylum seeker is expected to surrender the pass to the Refugee Camp Officer. If one overstays the validity of the pass, they are deemed to have committed an offence and are liable to either a fine of 20,000 Kenyan Shillings or imprisonment for a term not exceeding six months.

There is no law, policy or regulation that guides the criteria upon which movement passes are granted.⁴¹ The only existing guidance is on students studying in Kenya who are issued with a pupil's pass.⁴² In reality, RAS has developed its own criteria. The application form lists six reasons for travel: medical, education, visiting an embassy, visiting a friend or relative, business or trade, and "other," and gives examples of additional documents refugees and asylum seekers should provide to support each reason. A Vetting Committee at the camp considers these applications and can question an applicant where necessary. The duration of a movement pass varies as per the RAS officials' discretion. Further, if one needs to extend the validity of their movement pass, they ought to return to the camps to apply for a new movement pass.

The regulations provide that a refugee or an asylum seeker is not allowed to reside outside the refugee camps unless they have been granted an exemption by the Commissioner. The issued exemption letter states the reasons for such exemption and can specify a certain period of its validity. There is no policy document that

⁴⁰ Refugees (Reception, Registration and Adjudication) Regulations 2009, Laws of Kenya

⁴¹ Norwegian Refugee Council and International Human Rights Clinic, 'Supporting Kakuma's Refugees: The Importance of Freedom of Movement' (August 2018) 12 < <https://hrp.law.harvard.edu/wp-content/uploads/2018/09/Movement-Briefing-NRC-IHRC-1.pdf> > (Accessed 13/02/22)

⁴² Regulation 36



guides the commissioner's decision to exempt a refugee or asylum seeker.⁴³ In practice, the exemption process is manned by a combined effort of RAS and UNHCR. In 2015, the DRA expressed the prerogative to exempt some refugees from residing in the refugee camps based on compelling reasons including but not limited to; medical services, education, employment or business, resettlement, security reasons.⁴⁴ In 2017, an informal RAS committee was formed in Nairobi to allow a few refugees to reside in Nairobi but was later disbanded.

A refugee or asylum seeker seeking an exemption approaches a protection officer at the camp and states their case. The protection officer determines whether the case is one that is merited for relocation and forwards the file to the commissioner to have the residential area particulars on the applicant's documents changed. Pending this change, one is given an exemption letter which is valid for 3 months. This is purely on a case to case basis and at times the protection officer may forward the application to UNHCR to give a recommendation. The UNHCR gives such recommendation taking into account whether one requires specialized medical care, or access to higher education or they are facing serious protection threats at the camp.

The upshot of exemption is that urban refugees and asylum seekers are cut off from receiving humanitarian assistance from the UNHCR. Only a small number of highly vulnerable urban refugees and asylum seekers receive cash payments on a short-term basis. Other humanitarian assistance received by urban refugees and asylum seekers comes from other CSOs and Community-based Organizations (CBOs) which are limited in numbers.⁴⁵ The UNHCR deems them as self-reliant and the ability to sustain oneself is actually a consideration during the determination of an application for exemption.

43 Ibid, 7

44 Norwegian Refugee Council and International Human Rights Clinic, 'Recognizing Nairobi's Refugees: The Challenges and Significance of Documentation Proving Identity and Status' (n 35) 41

45 UNHCR Policy Development and Evaluation Service (n 27) 37

46 Section 7 (2) of the Refugee Act 2019, Laws of Kenya

47 Ibid, section 11 (1)

A New Dawn: The Refugee Act 2019

On 17th November 2021, the president of Kenya assented the Refugee Bill 2019 into law. The act is yet to become operational hence the RSD process is still running under the Refugee Act 2006. It establishes the Department of Refugee Services as the administrative body on matters refugees.⁴⁶ The department will act as the registrar of asylum seekers and refugees in Kenya and will keep records of all refugees in Kenya. In essence, the department will take over the duties currently performed by RAS.

The Act also creates the Refugee Advisory Committee whose functions include advising the Cabinet Secretary on matters relating to refugees and the formulation of national policies, making recommendations for declaration and revocation of prima facie status and ensuring in liaison with other government authorities that adequate and appropriate facilities and services are provided for the reception and care of refugees during emergency situations.

The Statute also sets up the Refugee Status Appeals Committee as the successor of the Appeals Board established under section 10 of the Refugee Act 2006. The appeals committee shall hear and determine appeals against any decision of the commissioner with regard to the rejection of any individual application for refugee status and the cancellation and termination of the refugee status. These appeals should be filed within 30 days of receiving the commissioner's decision. Further appeals lie to the High Court.

Further, the new law establishes a Refugee Status Eligibility Panel to review recommendations made on the RSD by the commissioner or his staff who conduct the status determination interview.⁴⁷ The eligibility panel may co-opt representatives of the UNHCR or other agencies to provide technical advice. This panel is



envisaged to perform a role similar to the Refugee Affairs Committee under the Refugee Act 2006. However, the panel has broader powers as the committee only assists the commissioner of RAS on matters concerning the recognition of persons as refugees.

On encampment, the act takes an approach that prioritizes the local integration of refugees. It obligates the cabinet secretary in consultation with the relevant county governments, to designate specific counties to host refugees and asylum seekers. This will provide an opportunity for them to reside in other areas other than the refugee camps. Similarly, the cabinet secretary may designate places and areas in Kenya to be transit areas for purposes of temporarily accommodating refugees and asylum seekers.⁴⁸ Further both levels of government are obligated to issue refugees and asylum seekers with the required documentation that will enable them contribute to the social and economic development of Kenya.⁴⁹

On the integration, the statute envisages a situation where the host communities and refugees will share social amenities. The commissioner is obligated to sensitize the host communities on the presence of refugees so as to ensure a peaceful coexistence between the two. Additionally, the government is to take into consideration the concerns of refugees in the formulation of environmental and sustainable development plans.⁵⁰

These new changes present a new dawn for refugees and asylum seekers as they can now obtain work, better education, start businesses and thrive outside the refugee camps. Their strict encampment under the Refugee Act 2006 had restricted their ways of living, for instance, even though refugees qualify for the class M work permit the restrictions in movement has made its acquisition unattainable. Further, the 2019 act ensures the government systems

recognize refugee documentation unlike the 2006 act which did not provide any such inclusion. Refugees can now obtain government services including but not limited to; registering a business, obtaining a Kenya Revenue Authority Personal Identification Number (KRA PIN) and acquiring a drivers' license. Moreover, refugees and asylum seekers can now access essential services like healthcare outside the restrictions of the camp. Due to the strict encampment policy in the 2006 act, refugees and asylum seekers could only access such services from Kakuma and Dadaab unless with an exemption.

International Obligations

Kenya has ratified the 1951 Convention and Protocol⁵¹ Relating to the Status of Refugees. Article 25 of the Convention obligates the Kenyan government to provide refugees with the documents that are normally delivered to aliens. Article 27 requires Kenya to provide identity documents to refugees who do not have ideal travel documents. More importantly, Article 35 of the Convention read together with Article II of the Protocol commits state parties to cooperate with the UNHCR to implement their obligations under the convention. Kenya has also ratified the Convention Governing the Specific Aspects of Refugee Problems in Africa.⁵² This Convention reiterates the essence of the 1951 Convention and obligates states to cooperate with the Organisation of African Unity and the UNHCR to maintain the welfare of refugees.

Generally, the Kenyan government has been cooperating with the UNHCR and other humanitarian organizations in providing protection and assistance to refugees and asylum seekers. In 2017, the government pledged to adopt the UNHCR Comprehensive Refugee Response Framework (CRRF) to enhance refugee self-reliance, increase access to solutions, and

48 Ibid, Section 28 (2) and (3)

49 Ibid, Section 28 (4)

50 Ibid, Sections 34 (1), 34(2) and 35

51 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267

52 Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 U.N.T.S. 45 (O.A.U)



improve conditions in countries of origin for safe and voluntary returns.⁵³ In October 2020, the RAS came up with Kenya's Comprehensive Refugee Response Framework and an action plan to implement this framework running through 2020-2022.⁵⁴ This framework includes strategic responses to improve refugee registration and documentation.⁵⁵ It is noteworthy that the Refugee Act 2019 was passed in the spirit of implementing this framework.

2.3. The Essence of Documentation for ITGNC Refugees and Asylum Seekers

The UNHCR recognizes that registration is an essential protection tool that protects refugees from refoulement and enables their enjoyment of basic human rights.⁵⁶ The agency recommends that the registration of asylum seekers should be a continuous and confidential process which is easily accessible and upholds their dignity. Further, the agency encourages states to register and document asylum seekers as soon as possible upon their arrival. The agency also encourages states to establish fair and efficient asylum procedures. Such procedures communicate decisions promptly, handle asylum seeker claims expeditiously and avoid protracted periods of uncertainty for the asylum seeker.⁵⁷

The UNHCR acknowledges that the lack of identity documents is a gross inconvenience for asylum seekers. It reiterates that state parties are obligated to provide asylum seekers with either a travel document as per Article 28 or identity papers as per Article 27 of the Convention.⁵⁸ Consequently, the agency

directs that the issued identity papers should be issued in a format that prevents misuse and easily proves a person's legal status to national authorities. As standard practice, the issued papers should contain details on a person's name, date of birth, current address and refugee status.

Documentation for urban ITGNC refugees and asylum seekers is everything. First and foremost, it proves their legal status in the urban areas promoting a sense of security. This is particularly important for ITGNC refugees and asylum seekers whose gender identity and expression increases their susceptibility to encounter authorities. Due to the high cost of medical procedures, a lot of ITGNC refugees and asylum seekers have not begun their medical transition. They may however dress or carry their day to day activities in a manner that expresses their gender identity. This exposes them to suspicion and arrests for offences such as personation. The lack of proper documentation, having expired documents or documents that places them at the refugee camps aggravates such situations. Documentation is also essential to access essential services like healthcare which are requisite for their gender transitioning journeys and to live a dignified life. It is also important to access protection services from authorities whose need often arises due to their vulnerability to violence from the local community members.

53 Ibid

54 Support for Host Community and Refugee Empowerment, 'Kenya's Comprehensive Refugee Response Framework' (October 2020) < <https://refugee.go.ke/wp-content/uploads/2021/03/Kenya-Comprehensive-Refugee-Response-Framework-CRRF.pdf> > (Accessed 6/2/22)

55 Ibid, 7

56 Executive Committee of the High Commissioner's Programme, Conclusion on Registration of Refugees and Asylum-seekers No. 91 (LII) - 2001, 5 October 2001, No. 91 (LII) < <https://www.refworld.org/docid/3bd3e1d44.html> > [accessed 8 February 2022]

57 Inter-parliamentary Union and UNHCR, A guide to international refugee protection and building state asylum systems: Handbook for Parliamentarians N° 27, 2017, 155 < <https://www.unhcr.org/3d4aba564.pdf> > (accessed 8 February 2022)

58 UNHCR, Identity Documents for Refugees (10 July 1984) EC/SCP/33 < <https://www.unhcr.org/excom/scip/3ae68cce4/identity-documents-refugees.html> > (Accessed 5/2/22)

3.

A Double Jeopardy:

The Case of Urban ITGNC Asylum
Seekers and Refugees



3. A Double Jeopardy: The Case of Urban ITGNC Asylum Seekers and Refugees

Although this research focuses on the challenges faced by ITGNC refugees and asylum seekers, it is worth noting that the registration policies affect all refugees thus, most obstacles cut across. However, these hindrances exacerbate when it comes to ITGNC refugees and asylum seekers due to their gender identity and expression which often conflicts with the binary notion of gender. Often times, they experience the same persecution and discrimination that they are fleeing from their home countries. There is no research that specifically focuses of ITGNC refugees and asylum seekers, hence the need for this research.

3.1. The Identity Dilemma

The Refugee (Reception, Registration and Adjudication) Regulations provides that a refugee can apply to have a change of details in their RIC.⁵⁹ Nonetheless, the regulations do not clearly state whether one can apply for a change of name or the gender marker based on this provision. Worse still, the law does not provide an avenue for asylum seekers who have interim documents like the asylum seeker pass and the asylum seeker certificate to change the particulars in their documents.

Due to this policy loophole, most ITGNC refugees and asylum seekers possess documents with different gender markers and names that do not conform to their gender identity and expression.⁶⁰ Most asylum seekers do not leave their home country with any documentation. At the point of reception and registration in

the Kenyan system, the vast majority have not begun their transitioning journey. Therefore, registering with a name that conforms with their gender identity is far from their list of priorities as the same would raise many questions due to their appearance. Additionally, others fear that the bio data taken by the registration officers will reveal their entire profile from their home country. Consequently, they worry that using a new name that conforms with their gender identity could make them appear suspicious and culminate to a rejection of their asylum-seeking application.

On the other hand, those who come with documentation are advised to present them to the registration officers. The details in such documentation is transferred to the refugee registration system resulting in documentation that bears their birth names and sex markers. Amari* a gender non-conforming (GNC) person explained how documentation from their home-country was used to register them as an asylum seeker.⁶¹

“I was required to produce my national identity card which was issued in my home country when I was registering as an asylum seeker. My details were transferred from that card to the Kenyan system.”

None of the respondents who took part in this research had changed the names on their documents to those that conform to their gender identity. This included recognized refugees who had a RIC and were at a better position to effect a change in their documents' particulars. The vast majority were not aware that an option of changing the particulars in one's documents was available. Others were of the view that the process was too bureaucratic, tedious and flawed that it was not worth it. Jane* a transgender woman categorically stated:⁶²

59 Regulation 33 (4)

60 Refuge Point, 'Disaggregating LGBTIQ Protection Concerns: Experiences of Refugee Communities in Nairobi' (Refuge Point) 23 < https://www.refugepoint.org/wp-content/uploads/bsk-pdf-manager/FINAL_LGBTIQ_07122018_web_33.pdf > (Accessed 17-11-2021)

61 Amka Africa interview with Amari*, Kajiado/Nairobi November, 2021

62 Amka Africa interview with Jane*, Kajiado/Nairobi November, 2021



“If registration alone is tedious, there is no point of even trying to change your name.”

Another respondent was advised that their asylum-seeking process would take longer if they pursued a change of name first. Suli* a transgender woman expressed her despair:⁶³

“It is taking me so long to obtain the refugee documents, I do not want to subject myself to a similar prolonged process. I would rather just remain with the names as they are.”

Having documentation that reflects one's gender identity and expression is at the heart of upholding the dignity of ITGNC persons. Nadia* a transgender woman narrated how demeaning it was to see the RSD officer record the 'M' gender marker in her file:⁶⁴

“I told them that I am a transgender woman and that my pronouns are she/her. To my dismay, the RSD officer proceeded to put the 'M' marker. Since then I realized it is pointless to try to change the name on my documents as no one cares. I feel very bad every time a person calls me by the name on my document.”

3.2. Unwarranted Delays

The asylum-seeking process is characterized with unwarranted delays. Most of the RSD interviews are not scheduled within 90 days as expected, hence completing the process and obtaining the RIC takes years. Asylum seekers who commenced the process prior to the 2014 or 2017 changes report being stuck in the process. These delays have mostly been attributed to UNHCR'S administrative incapacity and the switchover to RAS.⁶⁵ The transition from UNHCR to state responsibility has created a backlog of cases both for asylum seekers who had initiated the RSD process with the UNHCR

and the new arrivals.

Delays were a common concern for the ITGNC asylum seekers who took part in this study. The Refugee Act provides that the Commissioner should consider asylum seeking applications within 90 days and make an inquiry or investigation by inviting the applicant for an interview within 90 days then communicate the decision to the asylum seeker.¹ In essence, the RSD process should be completed within six months. Most of the time even the RSD interview is not scheduled within those six months, hence the decision could take years.

Only 17 respondents from this study had been to the RSD interview yet all of them had been in the country for more than a year, and some had stayed for more than 5 years. The rest had been trying to secure an appointment date for their RSD interview to no avail. Other respondents explained how they had their appointment dates postponed severally for three years. Idah* a transgender woman explained how her application has stalled since 2016:⁶⁶

“I came to Kenya in 2016 and was given a manifest. I was instructed to wait for my RSD interview yet up to date, the same has not materialized. Every time I follow up, I am told that I will receive a call or an email but no such feedback is sent.”

Jade* a GNC person described the hopelessness of all 2019 arrivals:⁶⁷

“I came to Kenya in 2019 but I have not even secured an appointment date for the RSD interview. When I followed up with RAS, I was dismissed and told that the focus currently is on those who have done their RSD interview. None of my friends who I came with in 2019 have been to the interview.”

63 Amka Africa interview with Suli*, Kajiado/Nairobi November, 2021

64 Amka Africa interview with Nadia*, Kajiado/Nairobi November, 2021

65 Ibid, 13

66 Amka Africa interview with Idah*, Kajiado/Nairobi November, 2021

67 Amka Africa interview with Jade*, Kajiado/Nairobi November, 2021



Worse still, majority stated that their follow up phone calls to the UNHCR/RAS toll-free line are never picked while any visits at the offices are sometimes met with violence from security guards and the police. Suli* a transgender woman recounted an occurrence at the UNHCR offices:⁶⁸

“My friends and I went to follow up our cases at the UNHCR offices. When we demanded feedback and tried to explain our predicament, the UNHCR officials called the police who came and chased us away.”

Abigael* a transgender woman, spoke of her ordeal:⁶⁹

“I have been unable to secure an appointment since 2019. Sometime back I tried camping at the UNHCR offices to get an RSD appointment date but I was arrested for disturbing peace and public order.”

The process is not any faster for asylum seekers who have been to the RSD interview. The few respondents who had been to the eligibility interview were yet to receive a decision from the commissioner. Some have been waiting for two to three years since they attended the RSD interview but they had not gotten a response. Martin* a father to one of the intersex children reported his wait since 2020:⁷⁰

“I attended my RSD interview in 2020 but I am yet to receive any communication about my decision. I have been calling the RAS hotline to follow up but my calls are not going through.”

3.3. Renewal of Asylum Seekers' Documents

Although the law establishes a simplified process, there is a lot of bureaucracy which hinders ITGNC asylum seekers from getting the refugee status within the stipulated time.⁷¹ The majority have commenced the process but are unable to complete it. They have interim documents like the asylum seeker pass for those who commenced post 2016 or appointment slips or asylum seeker certificates for those who commenced the process pre-2016 while others have a proof of registration. 14 of the research participants had interim documents. All these documents proof their legal status as asylum seekers while they await to complete the RSD process.

The asylum seeker certificate and pass are valid for a period of one year from the date of issuance.

Except for the proof of registration, the other interim documents have a validity period as the law envisaged a simple and efficient RSD process that ends within 6 months. The asylum seeker certificate and pass are valid for a period of one year from the date of issuance. In practice however, the RSD process takes longer thus the documents expire leaving asylum seekers in a state of limbo where their legal status is unknown. Ultimately, this predisposes them to arrest for offences such as being illegally present in Kenya. Worse still, their applications for renewal are not treated with the urgency they deserve.

68 N (70)

69 Amka Africa interview with Abigael*, Kajiado/Nairobi November, 2021

70 Amka Africa interview with Martin*, Kajiado/Nairobi November, 2021

71 Kate Pincock, 'UNHCR and LGBTI Refugees in Kenya: The Limits of 'Protection.' (2020) *Disasters* 45 (4) 844- 854 < <https://onlinelibrary.wiley.com/doi/full/10.1111/disa.12447> > (accessed 14/11/2021)



3 passes of the 5 respondents with an asylum seeker pass had expired in 2020 but they were yet to be renewed. Linda* who had experienced several renewals explained:⁷²

“Every time I go with my appointment slip; my RSD interview is pushed further for six months. It has been two years now. My Asylum Seeker Pass expired again in 2020 and I am yet to receive a new one.”

3.4. Renewal of Refugee Documents

Once one completes the RSD process and their asylum-seeking application is accepted, they are granted the refugee status. They are then issued with a RIC which is conclusive proof of their legal presence in Kenya. Only 7 of the 28 respondents held valid RIC which translates to a meagre 25%. This card is valid for 5 years from the date of issuance. The renewal process is expected to be smooth and straight forward but this is not always the case.

2 of the respondents had an expired RIC while another had lost the same. Maggie's* document expired on 16th May 2020 while Mildred's* expired on 28th August 2021. Maggie* a transgender woman stated that:⁷³

“It has been more than a year now since my RIC expired. I visited the RAS offices in October 2021 but was told that the offices have been closed due to COVID 19.”

Dina* a GNC person whose card was stolen narrated that:⁷⁴

“In 2015, I was attacked by some people who stole my alien card. I reported this to the UNHCR and they said that they will call me back but they never did. After the government took over, I visited RAS in 2016 to apply for a new card. I was instructed to go back to Kakuma to renew the card from there. I cannot go back to Kakuma because I did not feel safe there. I considered this a dead end and stopped following up all together.”

Even upon successful renewal of the card, other obstacles still lie ahead. For instance, the number of the RIC can change unlike the Kenyan Identity Card. This triggers other consequences like the blockage of bank accounts, SIM cards or deactivation of the KRA PIN. Hence, upon renewal one has to constantly update the particulars with other institutions. In 2017, RAS stated his intention to change this system but it is not clear whether the same has changed.

Table 1.0
Summary of the distribution of documentation among the study population

REFUGEE DOCUMENTATION	STUDY POPULATION
Valid RIC/Alien Card	7
Expired RIC	2
Los RIC	1
Valid Asylum Seeker Pass	3
Expired Asylum Seeker Pass	2
Mandate Certificate	1
GOK/UNHCR Proof of Registration ALIAS Manifest	7
Asylum Seeker Certificate	3
NONE	2

⁷² Amka Africa interview with Linda*, Kajiado/Nairobi November, 2021

⁷³ Amka Africa interview with Maggie*, Kajiado/Nairobi November, 2021

⁷⁴ Amka Africa interview with Dina*, Kajiado/Nairobi November, 2021

3.5. COVID-19 Pandemic and the Unresponsive Toll- Free Line

Since the onset of the COVID-19 pandemic, the situation has worsened. The RAS and the UNHCR offices were closed for 18 months, from 16th March 2020 to 20th October 2021. Even upon reopening, refugees and asylum seekers are not allowed to visit the offices without an appointment which is scheduled by calling the toll-free line '1517'. Asylum seekers and refugees have found this line to be quite unresponsive. For those with expired documents, the situation is dire as they are at risk of getting in conflict with the law. On the other hand, new arrivals who entered the country during the COVID-19 pandemic were yet to get an appointment for initial registration. They are now navigating the city without any documentation risking arrests and police harassment.

2 of the respondents who arrived in the country during COVID-19 did not have any documentation at all. Janet* a transgender woman stated that:⁷⁵

“I have been calling that number every week since I arrived in 2020 to no avail. Most of the time no one picks and the few times they do they give me empty promises but never set an appointment date. Recently, I escorted my friend to the airport and I was arrested because I did not have any documentation.”

Leila* a GNC person told a similar story:⁷⁶

“I have called that number for more than 10 times but it has never been picked.”

Maggie* a transgender woman whose RIC expired in May 2020, told us that visiting the RAS offices without an appointment is futile:⁷⁷

75 Amka Africa interview with Janet*, Kajiado/Nairobi November, 2021

76 Amka Africa interview with Leila*, Kajiado/Nairobi November, 2021

77 N (80)

The officials involved in the RSD process often lack an understanding on the issues unique to ITGNC persons;

“My RIC expired in May 2020 and when I heard the offices had reopened in October, I went to have it renewed. I was however chased away by the security guard as I did not have an appointment.”

3.6. Ignorance on ITGNCs by RSD Officers

The officials involved in the RSD process often lack an understanding on the issues unique to ITGNC persons; gender identity and expression. This has led to delays in the completion of the RSD process especially when the asylum seekers are unable to articulate their issues properly at the RSD interview. They are often misgendered and or labelled gay, a situation that attracts aggravated stigma and discrimination.

Interviewees from this research reported that transphobia was a common occurrence at the RSD interviews and other encounters with either the RAS or UNHCR officers. Amla* a gender non-conforming respondent, reported that the interviewers perceived them as a homosexual and asked them questions like:⁷⁸

“How do you have sex with a fellow man? Why did you leave your country Uganda to come to Kenya to teach people homosexuality?”

Another respondent stated that they were advised not to say that they are transgender at the RSD as this could be problematic. They opted to say that they were in Kenya for medical assistance. Nova* a transgender woman, told a story of constant humiliation:⁷⁹

78 Amka Africa interview with Amla*, Kajiado/Nairobi November, 2021

79 Amka Africa interview with Nova*, Kajiado/Nairobi November, 2021



“When I was registering for the Alien Card with RAS, the officials kept asking me demeaning questions like; ‘you cannot even erect when you see a girl, can I bring you my cousin?’ Further, when I attended my RSD interview, the panel made me very uncomfortable. They kept referring to me with pronouns that I was not comfortable with. They also categorically stated that they were only aware of asylum seekers running from political unrest and civil wars.”

She reported the matter to the UNHCR but no action was taken.

Idah* a transgender woman explained the level of misunderstanding:⁸⁰

“I told the UNHCR officers at Kakuma that I am a transgender woman but they could not understand or believe me. They asked what a transgender woman is but when I explained myself, they told me to go home and come and give a better explanation at the eligibility interview.”

Janet* recounted a similar experience at the UNHCR registration desk:⁸¹

“The ladies at the UNHCR registration desk were so unkind and inconsiderate when I went to fill my asylum-seeking application form. They clearly did not understand what I meant by saying that I am a transgender woman and that my pronouns are she/her. They nonchalantly proceeded to write the ‘M’ gender marker.”

Denver* a GNC person explained that:⁸²

80 N (73)

81 N (82)

82 Amka Africa interview with Denver*, Kajiado/Nairobi November, 2021

83 Amka Africa interview with Mandy*, Kajiado/Nairobi November, 2021

84 Amka Africa interview with Ayaan*, Kajiado/Nairobi November, 2021

“The RAS and UNHCR officials look at you and automatically make conclusions about your gender. I specifically told them at the RSD interview that I am a GNC person. They proceeded to put the ‘F’ gender marker and to refer to me using the she/her pronouns all through the interview.”

Mandy* a transgender woman from Somali reported being harassed for her gender identity and expression by a RAS security guard:⁸³

“When I went to pick my manifest, the security guard could not let me in. He kept questioning whether I was a girl or a boy which was very humiliating.”

3.7. Language Barrier

Language barrier remains a hindrance to access to services from RAS as most asylum seekers are illiterate and can hardly speak English or Swahili, which are the official languages in Kenya. Although the law provides for the provision of a translator especially during the RSD interview, the same is not often provided. This limits the ITGNC asylum seekers in giving their testimony to prove their eligibility for the refugee status, prolonging the process.

In some instances, the translators, influenced by bias and transphobia, interpret things differently from what the asylum seeker could be saying. Ayaan*, a transwoman explained how the inability to communicate clearly with the RSD officers at RAS and the translator’s transphobia frustrated her efforts to obtain the refugee status. She stated:⁸⁴

“The translator was very transphobic and he translated what I was saying differently. He kept making snide comments and expressions when I explained my situation.”



Another informant stated that the RSD officials used English and Kiswahili at the eligibility interview yet they could only speak and understand Luganda at the time.

3.8. Scarcity of Information

This study found that there is a lot of misinformation and lack of information among asylum seekers. The various changes in the law leaves them and other stakeholders including non-governmental organizations in a state of confusion. Asylum seekers have reported that it is difficult to obtain clarity from the UNHCR or the RAS on the processes and the status of their individual cases.⁸⁵

Most ITGNC asylum seekers are uncertain about what documentation they should obtain and the steps to take to complete the refugee identification process. They find it difficult to obtain clear, accessible and reliable information from the UNHCR and RAS about the processes or the status of their individual cases. This has been worsened by the indistinguishable simultaneous involvement of both the UNHCR and the RAS in the process. For instance, some interviewees could not explain whether one should register with the UNHCR or RAS upon arriving in the country. As a result, they end up shuttling back and forth between the UNHCR and the RAS offices looking for information and assistance. Worse still, this shuttling is futile as they mostly encounter long lines, discrimination from security officers manning the queues and are unable to speak to the officials. Very few of the respondents of this study had a cogent understanding of the asylum-seeking process in Kenya. Those with such knowledge were misinformed on a number of issues. For instance, some participants stated that after the RSD interview, one is given a mandate certificate. This was the case in the previous regime administered by the UNHCR while under the current regime one is given a recognition letter. Others confused the asylum-seeking

process and the resettlement processes. Some interviewees were also misinformed on the physical location of the RAS offices. This situation reflects a failure on the part of the government as it its obligation to ensure that asylum seekers receive the necessary information and guidance on the asylum-seeking procedure in a language and manner they understand.

3.9. The Exemption Problem

Legal Notice 71 of 2017 inserted a provision in the Refugee Act Regulations that requires all refugees and asylum seekers to reside in the refugee camps.⁸⁶ To be allowed to reside outside the refugee camps, one has to apply for an exemption from the commissioner. Consequently, all refugee and asylum seekers documents contain details on their residence.

Life at the refugee camps is not always conducive for ITGNC refugees and asylum seekers. The main motivating factor pushing them from the camps is the security threats and violence. There is increased tension between other refugees and those with an ITGNC profile. This has prompted UNHCR to move some of the victims to a 'protection' zone at the camps. Such zones are no better as they are made up of a small field filled with plastic tents with no basic facilities like kitchens. Moreover, ITGNC refugees and asylum seekers are harassed and condemned by the other vulnerable refugees held at such zones.⁸⁷ A 2021 report by the Organization for Refugee, Asylum & Migration (ORAM) found that 100% of transgender persons at Kakuma have experienced physical assault.⁸⁸ This coupled with the ineffective protection measures prompts ITGNC refugees to apply for exemption and where the same is unsuccessful, to move to urban areas on their own. The process of determining applications for exemption at RAS and being ultimately relocated by UNHCR is made on a case to case basis. There is no law that lays down any criteria to guide RAS/UNHCR.

85 Norwegian Refugee Council (n 32) 16

86 Regulation 35 A

87 Kate Pincock (n 71) 853

88 Christopher Agripino Kennedy, 'Queer Asylum Seekers Face Violence in Kakuma Refugee Camp' (12th November 2021) <https://theowp.org/queer-asylum-seekers-face-violence-in-kakuma-refugee-camp/> (Accessed 14/02/22)



Consequently, some ITGNC refugees and asylum seekers qualify for relocation while others are not considered at all yet security threats and violence at the camps is experienced by all of them. This prompts the majority to move to Nairobi on their own volition. Consequently, they end up in urban areas without an exemption letter and with documents that indicate their residential area as Kakuma or Dadaab camp. Those whose applications are approved are given a temporary pass and have to wait long periods to have the residential areas in their documents changed. In essence, both are forced to navigate urban areas with documentation that place them at the camp risking arrest as the Refugee Act makes it an offence to reside outside the refugee camps without authorization.

6 of the respondents had documents that placed them at Kakuma while one had a document that placed them at Dadaab. They explained that they had applied for exemption but their applications were pending for a period ranging between 1 to 3 years. Idah* divulged that:⁸⁹

“I was first assaulted at the camp when I was 16 years old in 2016. I reported this assault to UNHCR’s child protection officers but did not get any assistance. The other refugees and asylum seekers at the camp kept calling me ‘shoga’⁹⁰ hence I did not feel safe. I applied for an exemption in 2019 but there was no progress. When I heard that other ITGNC persons had been moved to Nairobi by UNHCR, so I left without an exemption.”

Kiki* a Transgender woman reported that:⁹¹

“I had to move to Nairobi on my own because people at Kakuma burnt my house. I had no option as my life was obviously in danger yet the UNHCR did not treat my exemption application as an emergency.”

Maria* a mother to an intersex child narrated her experience at Kakuma:⁹²

“I was discriminated and abused at Kakuma because my child is intersex and the other refugees deemed him an abomination hence, I relocated to Nairobi for our safety. I only have a temporary pass which is not a conclusive confirmation of my legal status in Nairobi.”

The situation is ameliorated for asylum seekers who arrive and seek initial registration in Nairobi. During the FGD with the RAS and UNHCR officials, it was noted that the exemption process for new arrivals had been suspended for a few years, hence all new asylum seekers who seek initial registration in Nairobi were being sent to Kakuma or Dadaab.⁹³ Tim* a transgender man recalled how he was denied registration in Nairobi in 2018:⁹⁴

“I came to Nairobi from Uganda in 2018 and went to register at the RAS offices. The officials told me that they were not registering new arrivals at the moment.”

Table 1.1
Summary of the residential details in the participants’ documents.

RESIDENTIAL DETAILS IN THE RESPONDENTS’ DOCUMENTS	STUDY POPULATION
Nairobi	19
Kakuma	6
Dadaab	1

89 N (73)

90 Shoga is a slang word used to demean persons falling under the LGBTI spectrum.

91 Amka Africa interview with Kiki*, Kajiado/Nairobi November, 2021

92 Amka Africa interview with Maria*, Kajiado/Nairobi November, 2021

93 Amka Africa focus group discussion with RAS and UNHCR officials in Nairobi February, 2022.

94 Amka Africa interview with Tim*, Kajiado/Nairobi November, 2021

4.

**Impact of the Documentation
Challenges** on the Lives of ITGNC
Asylum Seekers and Refugees



4. Impact of the Documentation Challenges on the Lives of ITGNC Asylum Seekers and Refugees

Documentation is everything for asylum seekers and refugees. The UNHCR recognizes that personal documentation is essential for a wide range of activities including; the registration of births and deaths, contracting marriage, obtaining employment, housing, hospital care or rations, qualifying for social benefits, entering educational institutions, or requesting the issuance of official documents and permits.⁹⁵ More importantly, documentation confirms their legal status, and enables their day to day life in the host country.

4.1. No Documents, No Health-care Services

Previous research shows that without documentation, an asylum seeker cannot access healthcare services in Kenya. Asylum seekers interviewed in a research by the Norwegian Refugee Council stated that even when they have money, they are often denied healthcare services at public hospitals for lack of documentation.⁹⁶ This has been aggravated by the strict enforcement of the encampment policy. Refugees and asylum seekers who are in urban areas with documents that indicate their residential area is either Kakuma or Dadaab are denied services as they are deemed as camp runaways despite having left the camp for their own safety.

A Respondent with an asylum seeker certificate stated that they could not even access COVID-19

Vaccination. Maria* a mother to an intersex child recalled how she was turned away from Mama Lucy Hospital because her manifest indicates Kakuma as their residential placement:⁹⁷

“My child is intersexed, he experiences urinary incontinence, abdominal pain and swellings. He is 7 years but has to wear diapers. I once took him to Mama Lucy Hospital to seek treatment but we were turned away because my document places me in Kakuma camp. I ran away from Kakuma to save my child from community hatred and seek treatment, but here I am not able to do anything about it yet it’s been years of going to RAS without help.”

Idah* recounted being denied hormonal treatment:⁹⁸

“When I came to Nairobi in 2019, I had not begun my transition. I tried accessing the hormonal treatment from several hospitals but could not even secure a consultation appointment because I have an Asylum Seeker Pass which places me in Kakuma. I finally accessed the injection through a friend who is a doctor.”

Notably, the alien/RIC enabled some refugees to access health care services. Better still, they were able to obtain health insurance cover by registering for the National Hospital Insurance Fund (NHIF). However, refugees who had the mandate Certificate could not access health care services. A mandate certificate is given to an applicant who has been given the refugee status while they await the processing of their RIC.

95 UNHCR Identity Documents for Refugees (20 July 1984) EC/SCP/33 <https://www.unhcr.org/excom/scip/3ae68cce4/identity-documents-refugees.html> (accessed 2/2/22)

96 Kanyiva Muindi and Blessing Mberu, ‘Urban Refugees in Nairobi: Tackling Barriers to Accessing Housing, Services and Infrastructure’ (IED, December 2019) < <https://pubs.iied.org/sites/default/files/pdfs/migrate/10882IIED.pdf> > (Accessed 22/November/2021)

97 (N 99)

98 N (73)



Tim, a transgender man told a traumatic ordeal of being denied medical services at Mbagathi public hospital thus:⁹⁹

“Sometime back, I fell sick and the UNHCR referred me to Mbagathi hospital. I was denied the medical services because I had neither a RIC nor a mandate certificate. My case was forwarded to a social worker who turned out to be very abusive. She questioned my presence in Nairobi while Uganda was safe. When I explained my situation as a transgender man, she made demeaning statements. ‘Why can’t you just be normal like everyone else?’ she asked. I left the hospital crying and without any medication. The UNHCR had to refer me to a private hospital to get treatment.”

4.2. Denial of Other Essential Services

Refugees’ and asylum seekers’ documentation affects their ability to access all essential services in public and private spheres. Even those who hold the RIC find it difficult to access some services for various reasons, including the fact that many service providers are not aware of this card and it is not widely recognized as an identity document akin to a national identity card or passport. Further, respondents complained of transphobia, stigma and discrimination against refugees and asylum seekers by the people manning the institutions. Kim* recalled how they were denied a driving license even after satisfying all the requirements and being a holder of a valid RIC.¹⁰⁰

“I used my RIC to enroll into driving school. I passed the test and applied for a driving license but I was told the National Transport and Safety Authority system did not recognize my identity card hence I could not be registered and issued with a driving license.”

Linda* stated how she could not register her salon business:¹⁰¹

“I tried to register my salon business so as to obtain a business license and permit but was turned away because I have an Asylum Seeker Pass.”

This challenge extends to welfare support services from CSOs. During an FGD, Petra* a worker at HIAS, an international non-governmental organization that supports and protects refugees explained how the lack of documentation affects the ability of asylum seekers and refugees to obtain services even from CSOs and other organizations that provide support to asylum seekers:¹⁰²

“If one comes with a document that places them at Kakuma or Dadaab, there is only so much we can do. We only offer our services to those with an exemption or to those whose documents allow them to reside in Nairobi.”

This is particularly detrimental because organizations like HIAS offer humanitarian support including; financial support, medical assistance and psychosocial support.

Moreover, some of the respondents reported that they could not access housing without the help of a Kenyan. Most house owners demand for identity documents before they can lease a house, and they do not appreciate or recognize the asylum seekers documents or even the RIC. In some instances, house owners take

99 N (101)

100 Amka Africa interview with Kim*, Kajiado/Nairobi November, 2021

101 N (79)

102 Amka Africa focus group discussion with RAS and UNHCR officials in Nairobi February, 2022.



advantage of their asylum seekers/refugee status to defraud of them of the rental deposits or charge them more than the nationals.

4.3. Restrained Freedom of Movement

Without the requisite documents, ITGNC asylum seekers are forced to restrict their movements at any given time to avoid encountering authorities, especially the police. This restriction extends to movements outside the country thereby prolonging and affecting their eligibility for resettlement.¹⁰³ Those residing in camps must obtain a movement pass to travel outside the camp and a Convention Travel Document to travel outside the country.

Further, some internal transportation modes like the Standard Gauge Railway (SGR) insist on certain identity documents like the mandate certificate and the RIC. Consequently, holders of interim documents like the asylum seekers pass are barred from travelling on the SGR. Denver* a GNC person narrated how their trip to Mombasa almost aborted because of their documentation:¹⁰⁴

“I was almost stopped from boarding the SGR train to Mombasa because I have an asylum-seeking certificate. I really had to explain myself to be allowed to board.”

The participants reported that they restrained their movement because they risk being arrested and/or forcefully returned to the camps seeing that most of them had documents that placed them at the camps or temporary passes. Some had on occasion been forcefully returned to the camps in spite of a court ruling that such forceful relocation is a violation of

their freedom of movement guaranteed by the constitution and International Refugee Law.¹⁰⁵ Tim* detailed his experience of being forcefully relocated to Kakuma:¹⁰⁶

“The police have on many occasions threatened to take me to the camps. There was an instance when they forcefully took me to Kakuma but I managed to come back to Nairobi.”

The situation is worse for new arrivals who lack any documentation at all yet they have registered and/or tried to get an appointment with RAS. The law requires every asylum seeker to register with the commissioner immediately upon their entry into Kenya, failure upon which they are liable for an offence. The 2 interviewees who lacked any documentation resided in safe houses where they were hosted by refugee CBOs leaving only when it was extremely necessary.

4.4. Inaccessible Financial Services and Economic Deprivation

Documentation is a major hindrance to accessing banking and other financial services. To open a bank account in Kenya, one needs a KRA PIN. To obtain this PIN, refugees are required to obtain some recommendation documents from the UNHCR and RAS. Respondents reported that it is very tedious, bureaucratic and takes time to obtain these recommendation documents. Despite applying, only 2 of the 10 refugees, holders of RIC, had been able to obtain a KRA PIN. Shirley* a GNC person recounted their experience with this process:¹⁰⁷

“When I got my RIC, I applied for these recommendation documents so that I could open bank and M-Pesa accounts.¹⁰⁸ I am yet to get feedback one and half years later. This has affected the quality

¹⁰³ Norwegian Refugee Council and International Human Rights Clinic (N 35) 28

¹⁰⁴ N (89)

¹⁰⁵ Refugee Consortium of Kenya & another v Attorney General & 2 others (N 8)

¹⁰⁶ N (101)

¹⁰⁷ Amka Africa interview with Shirley*, Kajiado/Nairobi November, 2021

¹⁰⁸ M-Pesa is a mobile phone-based money transfer service, payments and micro-financing service owned by Safaricom, the largest mobile network operator in Kenya.



of my business as I cannot set up a M-Pesa payment option for my clients which is essential especially during this COVID-19 period. I cannot keep my money at the bank which is extremely unsafe.”

The situation is worse for asylum seekers with interim documents like the Asylum Seeker Pass. They are not eligible to apply for recommendation documents. This is quite unfortunate as they are the majority. For instance, 64% of the respondents in this study did not have the Alien/RIC.

Unfortunately, even with a KRA PIN, there are still other obstacles that bar refugees from opening a bank account. Some banks systems do not recognize the reference number on the refugee documents. Other banks do not have a provision for refugees at all. Only one of the 28 respondents had successfully opened a bank account. Even in this case, they were given a special card to enable them to deposit money and obtain financial assistance. Nonetheless, this does not guarantee a success story for all refugees as another interviewee, Sam* recalled how their alien card’s reference number was rejected by the same bank:¹⁰⁹

“I tried to open a bank account with the same bank but the system could not recognize the reference number on her card.”¹¹⁰

This can be attributed to the fact that the alien cards and RICs were issued under different regimes and although they are supposed to be similar in function, they hardly offer the same guarantees.

An estimate of two-thirds of Kenyans use M-Pesa, hence exclusion from such a system is a gross denial of the opportunity to participate in the formal economy.¹¹¹ To access, M-Pesa services, one must have a registered Subscriber

Identification Module (SIM) card from the provider, Safaricom. Only 4 of the 28 respondents had been able to register a SIM Card using their refugee documents. Of the successful four, only those who used their passports were able to register a SIM Card without much difficulty. Suli* a transgender woman recalled being unable to register her SIM card even with an alien card.¹¹²

“I was turned away and told that the identification number on my card could not be filed into the system. The service provider explained that the number of digits on my card were lesser than those required to be filed in the system.”

Interestingly, some respondents with the RIC were able to register a SIM Card but were not able to register for M-Pesa services. Most were told that only a Kenyan Identity Card or a Passport is acceptable to register for M-Pesa registration.

Consequently, none of the asylum seekers with interim documents like the asylum seeker pass or the asylum seeker certificate had a SIM card registered in their name. To navigate day to day life, all these respondents operated M-Pesa through SIM Cards registered under their Kenyan friends. Others confessed to have used Kenyan national Identity cards they collected from ‘lost and found’ places. This is particularly risky as all transactions made through the SIM Card are attributed to the registered person. This makes them an easy target for con-men and fraudsters. Additionally, it restricts their ability to transact via M-Pesa as most business persons refuse to do transactions whereby a customer cannot produce an identification card in adherence to Safaricom’s security policies.¹¹³

109 Amka Africa interview with Sam*, Kajiado/Nairobi November, 2021

110 The name of the bank has been withheld for privacy reasons.

111 Norwegian Refugee Council and International Human Rights Clinic (n 32) 23

112 N (70)

113 Claire Alexandre, ‘10 Things you Thought you Knew about MPESA’ (22 November 2010, CGAP) < <https://www.cgap.org/blog/10-things-you-thought-you-knew-about-m-pesa> > (Accessed 7/2/22)



4.5. Limited Earning Opportunities

The Kenya Citizenship and Immigration Act,¹¹⁴ recognizes and allows refugees to engage in any occupation, trade, business, or profession, upon approval of an application for Class M work permits. However, none of the respondents had applied and successfully obtained this work permit. Further, the use of the term ‘recognized refugees’ means that asylum seekers do not qualify for the work permit. This coupled with the lack of proper documentation affects their ability to secure any employ. Nadia* a transgender spoke of how she lost a job opportunity because of her documentation:¹¹⁵

“**I had obtained a job with a certain company but lost it because of my document. I have a proof of registration which the company did not recognize.**”

Most of the participants resorted to informal casual jobs which were easier to secure. Others engaged in sex work while others opened informal businesses or in partnership with nationals. These too were not safe havens as their gender identity and expression remains an issue that threaten their security and peaceful engagement with the society. Tim* a transgender man recounted how he closed his nail parlor business because of stigma and threats of violence.¹¹⁶

“**Sometime back, I opened a nail parlor in Rongai in Kajiado county, but I had to close shop when the community members found out that I am a transgender man. My customers stopped coming and I worried for my safety because of the rumors that were going around.**”

114 Act No. 12 of 2011, Laws of Kenya

115 N (70)

116 N (101)

117 Amka Africa interview with Maya*, Kajiado/Nairobi November, 2021

118 Business Daily, ‘Nyeri and Embu Top List of Counties with the Lowest Unemployment Rates.’ (27 February 2020) < <https://www.businessdailyafrica.com/bd/economy/nyeri-and-embu-top-list-of-counties-with-lowest-unemployment-rates-2281860> > (Accessed 15/02/22)

119 N (73)

The refugee status also limited the interviewees from accessing credit thus affecting the growth of their businesses. Even holders of the RIC reported that they could not access credit from banks and even digital lending financiers which are easier and less bureaucratic lenders. Additionally, the interviewees, including the recognized refugees reported that they were unable to register their businesses under the government business registration systems. Consequently, the majority run small businesses which are unregistered and unlicensed. Maya* reported their experience with business registration services:¹¹⁷

“**I tried seeking guidance on business registration from a government office but the officer told me that my alien card was invalid in so far as business registration is concerned.**”

4.6. Economic Deprivation

Upon leaving the camps, ITGNC asylum seekers and refugees are exempt from receiving any humanitarian assistance from UNHCR. This is especially because the ability to sustain oneself is one of the considerations for granting one an exemption. However, for ITGNC refugees and asylum seekers leaving the camps is more of a safety issue. They are thus forced to navigate Nairobi, a city with an unemployment rate of 43% with documents that give them no chance at all.¹¹⁸ Consequently, they live a life of total economic deprivation. The majority were being hosted by CBOs which help refugees at safe houses.

Idah* a transgender woman disclosed that at the time of the research study she was homeless and was being hosted by a friend:¹¹⁹



“I have no job at the moment. I have defaulted on my rent payment for the last 3 months hence the landlord kicked me out. I am now moving from one friend’s house to another.”

Tim* narrated being homeless when he first arrived in Nairobi.¹²⁰

“When I first arrived in Nairobi, I had nowhere to go. The RAS officials were not registering any new arrivals so I had no documentation at all. Without documentation, I had no means of earning a living at all. I ended up sleeping outside the UNHCR offices.”

Martin* told a story of living in poverty yet his child requires urgent medical care from a specialized medical facility in India.¹²¹

“Finding employ with my manifest is really hard yet I have to provide for my family. Our intersex child was diagnosed with Congenital Posterior Urethral Valves and referred to India to seek urgent medical care. I cannot afford healthcare services in Kenya let alone India. I am also the sole breadwinner because my wife has to stay at home to take care of our son.”

4.7. The Police Harassment: The Everyday Asylum Seeker and Refugee Pandemic

Asylum seekers and refugees in urban areas have to constantly butt heads with law enforcement officers. All the 28 respondents had experienced police harassment in one way or another while in the country. They recounted harrowing details of violence, abuse

120 N (101)

121 N (77)

122 N (69)

123 N (86)

124 N (83)

and inhumane treatment. Jane* a transgender woman with an asylum seeker pass recalled her ordeal.¹²²

“A police man tried to insert a stick into my genitalia and beat her up at Nairobi West police station. I had been arrested because the police did not recognize my document. When they realized that I am a transgender woman they undressed me and started inspecting my genitals.”

Another transgender woman, Nova* stated that:¹²³

“I was arrested together with my friends while we were peacefully demonstrating outside the UNHCR offices. I was repeatedly slapped by the police. We were taken to Industrial area where I told the police that I am a transgender woman and requested to be put in the women’s cell. The police called a doctor to ascertain my gender. He inserted fingers into my sexual body parts without my consent.”

Another transgender woman reported that the police undressed her and shamed her at the police station. Leila* a GNC person recounted how they were kidnapped by police officers.¹²⁴



“My friends and I had gotten an opportunity to dance at an event in Mombasa. Some men who introduced themselves as police officers offered us a ride and we took up the offer. They kidnapped us, accused us of perpetrating homosexuality, beat us badly and raped our lady friend. We woke up at Makueni hospital. Investigations by Makueni police showed that some of the perpetrators were indeed police officers from Machakos police station. We consulted UNHCR and Kituo cha Sheria, but we were told that we cannot sue the government.”

Kiki* a transgender woman recalled her experience with the police thus:¹²⁵

“I was arrested together with my friends, taken to Kileleshwa police station and charged with causing disturbance in a manner likely to cause breach of peace. We requested not to be put in the same cell as men as we are transgender women. This prompted the police to transfer us to Kibera magistrates’ court holding centre. At the holding centre, we were undressed and a doctor forcibly examined our genitals to determine our gender/sex without our consent. The charges were also changed to the offence of engaging in same sex conduct.”

Worse still, the police, especially in Kajiado county, constantly raid safe houses that host asylum seekers and refugees and accuse them of engaging in human trafficking because of lack of documentation. Some of the asylum seekers who have been arrested in these raids are new arrivals who have registered and/or sort appointment with RAS but are yet to get any documents and are thus hosted by refugee

125 N (98)

126 N (89)

127 N (90)

128 N (85)

CBOs. The informants also accused the police of planting drugs in their houses during the raids so as to justify the arrests. Having the requisite documentation does not alleviate the police violence. The police often do not recognize refugee documents even the superior RIC. Denver* reported how attempts to prove their legal status by showing their documents is usually futile:¹²⁶

“Once the police raided our safe house and questioned our legal status in Kenya. When we showed them our registration documents, it did not change a thing, they just arrested us and kept saying that we were illegal immigrants.”

Another respondent, Mandy* stated that:¹²⁷

“I showed a police officer my asylum seeker pass when he asked for my identification document. He blatantly took out a match box and burnt it.” Amla* narrated how the police deemed their document useless.¹²⁸

“I showed the police my Asylum Seeker Pass and they just laughed and said even the Alshabaab can obtain similar documents. They even threatened to beat me.”

In most cases, the respondents had to call UNHCR to explain the documents to the police. However, in some circumstances, the police recognized the alien card. The violence also increased whereby one has a document that places them in encampment areas like Kakuma and Dadaab but is arrested in Nairobi. This study established that most of the ITGNC refugees and asylum seekers have been moved to safe houses in Nairobi by the UNHCR for safety purposes but the police do not acknowledge that.



The police believe that asylum seekers only come from war-torn areas and have the perception that asylum seekers from Uganda are homosexuals and immoral. As a result, some respondents stated that upon arrest, they avoid showing their documentation to the police to prevent further harassment. Amari* a GNC respondent reported how details of their country of origin alleviated the police's abuse:¹²⁹

“The police became more violent and abusive once they saw I am Ugandan from my alien card.”

4.8. We Are a Cash Cow for the Police

ITGNC asylum seekers and refugees in urban areas are constantly forced to give bribes to the police to avoid being arrested. Kim* told us about their unfortunate experience:¹³⁰

“I was once arrested when I did not have any documentation although I had registered with RAS. I had to part with my day's earnings of KES 2,000 /- to be released.”

Sometimes, even having the proper documentation does not help. Several respondents who hold the RIC reported that upon being arrested they were only released upon parting with bribes. The bribes requested ranged from KES 2,000/- to 10,000/-. The situation is so dire that the police have reduced them into some earning scheme. During the FGDs, the respondents explained that it has become a pattern for the police to raid their safe houses to demand for bribes. Sam* explained how some of the police cells even have an M-Pesa till number for bribes:¹³¹

“I was once arrested and, the police did not take my phone when they took my other belongings before putting me in the police cell. They said that I will comprehend its use later on. Sure enough, I was later asked to send a bribe to an M-Pesa till number that was written on the cell's wall.”

The type of document that an urban refugee and asylum seeker has determines their susceptibility to police violence. Respondents with the RIC reported that the card gave them some sort of security as regards their legal status in Kenya. However, those with interim documents like the asylum seeker certificate or asylum seeker pass have to explain their situation every time they show their identification documents. Suli* explained that:¹³²

“When I had an asylum seeker pass, I was harassed severally by the police. The instances have however reduced since I got the refugee identity card.”

4.9. Violence from the Host Communities

Due to their gender identity and expression, ITGNC refugees and asylum seekers are prone to gender-based violence and other forms of abuses from the host communities in Kenya. Idah* a transgender woman showed us scars from an encounter whereby some men from her neighborhood had attacked her when they found out that she is a transgender.¹³³ Mandy* another transgender woman from Somalia recounted how she constantly lives in fear because her brother is looking for her to kill her

129 N (68)

130 N (114)

131 N (123)

132 N (70)

133 N (73)



because of going against the family's religious beliefs.¹³⁴

Nonetheless, the police blatantly deny ITGNC refugees and asylum seekers protection services because of their documentation, refugee status and gender identity and expression. Normally, when a person reports a violence incident at a police station, they must produce an identification document to aid entering of the complainant's details in the P3 form. The problem arises when ITGNC refugees and asylum seekers produce a document that; the police do not recognize and/or places them at Kakuma and/or whose details do not match their gender expression. Ayaan* a transgender woman told how the police dismissed her documents when she went to report a case of violence.¹³⁵

“The police out rightly denied the validity of my Refugee Identity Card and told me that they only protect Kenyans and not foreigners.”

Tim* the transgender man explained how the police dismissed his assault report due to his gender identity and expression:¹³⁶

“I reported an incident where I had been assaulted but the police dismissed me and stated that I should beat the perpetrators since I consider myself a man.”

Martin* a father to an intersex child narrated a story of being shunned by the community:¹³⁷

“Our is a story of facing constant abuse and violence. Community members always abuse our son saying that he is not a boy. Often such abuse culminates into violence against the boy's mother. We even reported one case at Eastleigh North police station in November 2019 but the perpetrator was not caught. Some community members have even advised me to divorce the children's mother saying that she is the one who brought upon this 'curse' to our family. Due to this abuse and its effect on our son's safety and mental wellbeing, he does not attend school or madrasa.”

Maria* a mother to another intersex child told a similar tale of being forced to stay with her son at home to protect him from abuse.¹³⁸

134 N (90)

135 N (91)

136 N (101)

137 N (77)

138 N (99)

5. **Conclusions** and Recommendations



5. Conclusion & Recommendations

The notion that Kenya is a safe haven for refugees and asylum seekers has been disproved by the findings in this report. This is more so for ITGNC refugees and asylum seekers whose gender identity and expression increase their vulnerability to stigma, discrimination and violence by police and society. For asylum seekers, they are subjected to a prolonged RSD process whereby their RSD interviews and decisions take years. Meanwhile their documents expire before they conclude the RSD process and they begin another despairing process of seeking renewal. Although these interim documents are vital to proving their standing in Kenya, they cannot access any government services including healthcare. Further, the police do not recognize these documents hence, they are constantly arrested. For recognized refugees, their legal security is short lived as once the card either expires or gets lost they are subjected to another never-ending tedious process of seeking renewal.

Violence and stigmatization characterize their day to day lives. It pushes them from the camps to urban areas where they face the same predicament. The police who are meant to protect this vulnerable community, have turned out to be perpetrators of violence and bribery solicitors. Having documentation that places them at camps and/or interim documents and/or no documents at all coupled with their gender identity and expression has denied them employment opportunities. Worse still, they cannot run legal businesses as the registration services do not recognize their documents. On the other hand, those who run unlicensed businesses often encounter stigmatization from the host communities. Additionally, they do not receive any humanitarian aid from UNHCR. Consequently, ITGNC refugees and asylum seekers are forced to survive a life of economic deprivation where they sought refuge.

5.1. Recommendations for the Refugee Affairs Secretariat The

RAS should:

- Undertake measures to expedite the RSD process and eliminate the existing backlog of cases including but not limited to increasing its staff capacity. It should not be taking longer than one year for an asylum seeker to complete the RSD process or a refugee to renew their RIC.
- Resume regular registration of new arrivals in Nairobi.
- Establish a policy that stipulates the criteria for determining exemption applications. This policy should take cognizance and prioritize the safety threats experienced by ITGNC asylum seekers and refugees at the camp. Such a policy should also reinstate the exemption committee to accelerate the determination of such applications. It is only when this process slacks that such asylum seekers and refugees, desperate and fearing for their safety, move to urban areas on their own volition without the requisite exemption.
- Sensitize its staff starting from the security guard who receives the asylum seekers on gender identity and expression and adopting a human-rights approach when interacting with ITGNC persons. To this end, it is imperative to establish an ITGNC inclusive gender desk.
- Produce and widely disseminate clear, simplified and accessible guidance on registration and RSD procedures to ITGNC asylum seekers. Upon initial registration, for instance, an asylum seeker should be guided on the next steps in the RSD process and the potential waiting period.
- In partnership with the UNHCR, establish an accessible and operational system for refugees to follow-up the progress of their individual cases.
- Strengthen the inclusion of the UNHCR in the RSD process by entering into periodic memorandums of understanding and working arrangements which are currently



lacking. Such policy documents should clearly stipulate the roles of each body to avoid uncertainties and grey areas. This will be a proper way to rationalize the Refugee Act which has expressly provided for the inclusion of UNHCR officials at certain stages of the RSD process unlike the 2006 Act.

5.2. Recommendations for the UNHCR

The UNHCR should:

- Operationalize the toll-free line '1517' in partnership with the RAS. There is a need to create a system that ensures every caller is attended to.
- Provide for the welfare of urban refugees as they are mostly excluded from the usual community-based protection programmes. ITGNC asylum seekers and refugees are particularly vulnerable hence they should be prioritized when determining their eligibility for such programmes.
- Strengthen the technical support advanced to RAS to enable the latter properly manage the struggling RSD process.
- Strengthen protection measures for ITGNC asylum seekers and refugees at the refugee camps. This can include the sensitization of the other camp residents to influence the accommodation of ITGNC refugees and asylum seekers.
- Prioritize complaints brought to their camp officers by ITGNC asylum seekers and refugees on their safety concerns and make prompt exemption recommendations to RAS.
- Educate their staff on gender identity and expression to improve service delivery to ITGNC asylum seekers and refugees.

5.3. Policy Recommendations

Policy makers should:

- Consider loosening the encampment policy to allow asylum seekers and refugees freedom of movement and provide them an opportunity for integration. The Refugee Act 2019 is an admirable step towards this end. This is one of Kenya's commitment under the UNHCR Comprehensive Refugee Response Framework (CRRF) and the Global Refugee Compact. At the heart of these frameworks is the need to integrate refugees in the host communities from the very beginning. The aim should be to 'help refugees thrive, not just survive.'¹³⁹ The Kalobeyei Integrated Socio-Economic Development Plan (KISED) in Turkana is a commendable step towards meeting Kenya's commitment under the CRRF. The plan adopts an integrated approach whereby there are shared amenities between the host community and refugees.
- Establish clearly in the regulations for the Refugee Act 2019, a step to step process for granting movement passes and exemption for refugees and asylum seekers to reside outside the designated areas. This should stipulate the considerations that the commissioner/exemption committee should take into account when determining an exemption application. Safety threats should be a priority among these considerations. Additionally, the regulations should establish a short period within which such exemption applications should be determined.
- While formulating the regulations for the Refugee Act 2019, the legislature ought to consider addressing the loopholes in the Refugees (Reception, Registration and Adjudication) Regulations 2009. To begin with, there is a need to provide an avenue that allows recognized refugees to change their names and gender markers in the RIC. The German Act on Changing Surnames and First Names (NamÄndG) can provide guidance to this end.

139 UNHCR, 'Comprehensive Refugee Response Framework: Delivering more Comprehensive and Predictable Responses for Refugees.' < <https://www.unhcr.org/comprehensive-refugee-response-framework-crrf.html> > (accessed 8/2/22)



- Adopt a gender-sensitive data entry approach similar to the UNHCR Resettlement Guidelines in the regulations for the Refugee Act 2019. This should allow an asylum seeker's sex and birth name to be recorded only at the bio-data part of the Registration Form while an Alias name and the applicant's pronouns are used in the rest of the document.
- Amend laws like the Registration of Business Names Act, Banking Act, Traffic Act, Tax Procedures Act,¹⁴⁰ to allow the recognition of the RIC as valid identity documents akin to the Kenyan National Identity Card. This will allow ITGNC asylum seekers and refugees to access essential government services to enable them contribute to the social and economic development of the country. This serves a benefit for both the refugees and the government. For instance, accessibility of the KRA PIN and business registration services allows refugees to contribute to the economic development of the country. On the other hand, it provides an avenue for Kenya to achieve the CRRF goal of building self-reliance among refugees.

5.4. Recommendations for the National Police Service (NPS) & the Independent Policing Oversight Authority (IPOA)

The NPS and IPOA should:

- Educate and sensitize police officers on refugee documents, gender identity and the essence of a human-rights approach when dealing with refugees and asylum seekers.
- In the spirit of deterrence, the Internal Affairs Unit and the IPOA ought to work together to investigate and prosecute police misconduct including; the perpetration of violence against ITGNC refugees and asylum seekers and the soliciting of bribes.
- Educate ITGNC asylum seekers and refugees on the existing reporting mechanisms for police misconduct.

5.5. Recommendations for Civil Society Organizations

CSOs ought to:

- In the spirit of actualising the Refugee Act 2019, conduct advocacy with the host communities to influence an acceptance of refugees and particularly ITGNC asylum seekers and refugees.
- Assist ITGNC asylum seekers and refugees to defend their human rights. The evidenced violations are an incentive to back ITGNC refugees and asylum seekers especially through public interest litigation.
- Provide for the legal needs of ITGNC asylum seekers throughout the RSD process. For instance, by providing legal representation to represent them at the RSD interviews. To this end, they can also provide interpreters to accompany them at the RSD interviews.
- Partner with each other to create referral pathways for individual cases. This is particularly vital to the provision of psychosocial support to ITGNC asylum seekers and refugees.
- Conduct outreach to private service providers, such as schools, banks, and hospitals, to promote the recognition and acceptance of the wide range of documents urban refugees may hold.

5.6. Recommendations for the Private Sector

The private sector has largely not given a thought to the inclusion of refugees and asylum seekers in their consumer populace. Businesses like banks and telecommunication service providers ought to:

- Consider improving their systems to recognize refugees' and asylum seekers' documentation.

¹⁴⁰ CAP 499; CAP 488; CAP 403; Act No. 19 of 2015, Laws of Kenya



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