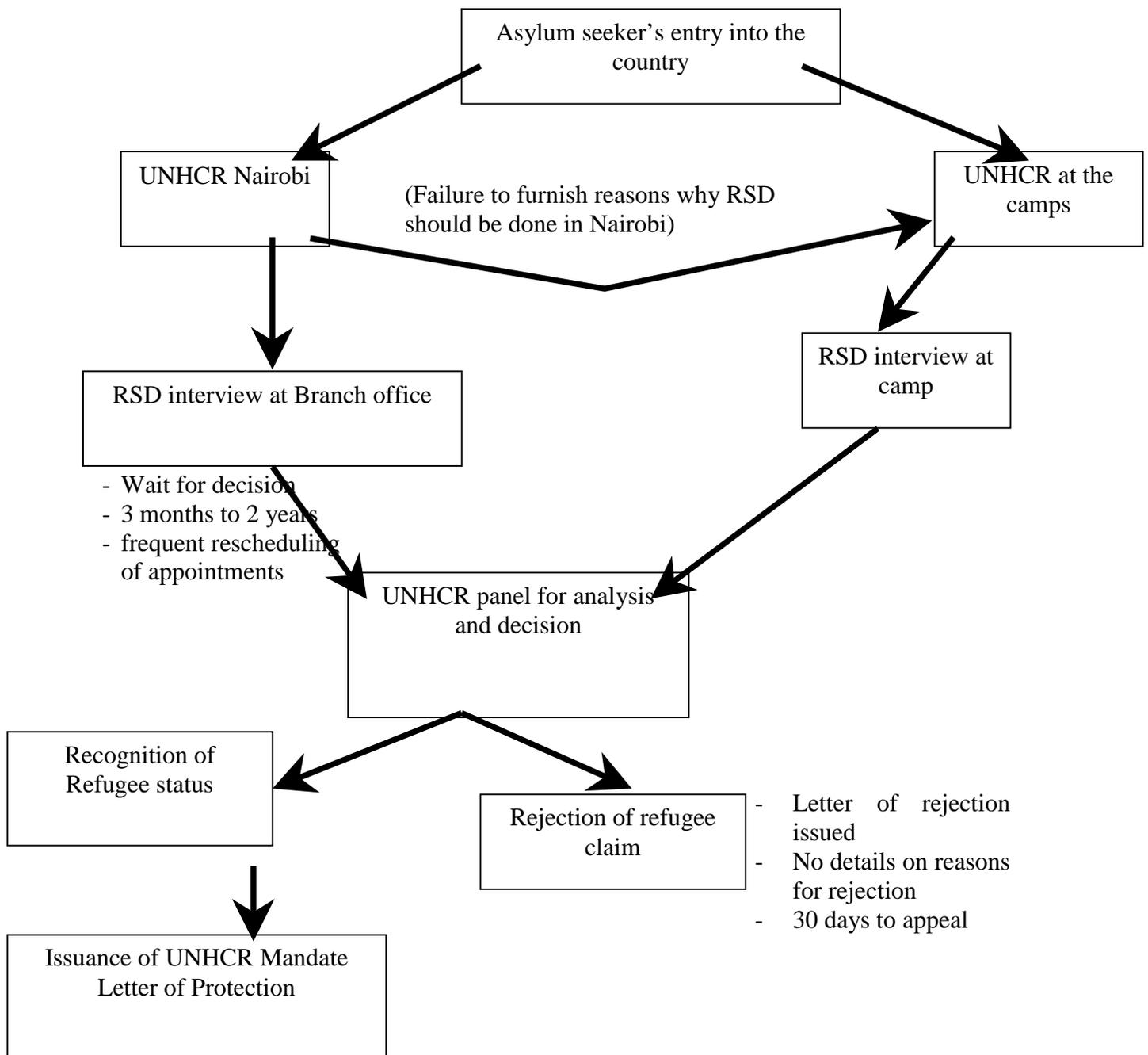


**Presentation by Refugee Consortium of Kenya CCR Refugee Rights
Conference 1-19 June, Toronto Canada**

**RSD as an Effective Protection Tool
Snapshot of RSD in Kenya**

- In Kenya, UNHCR carries out RSD on behalf of the State, a situation that has been in existence since 1991 when Kenya experienced sudden mass influxes from Somalia, Sudan and Ethiopia.
- UNHCR, with the authority of the Government, accords refugee status through individual interviews and through prima facie group determination.
- The individual status determination:



Asylum seekers enter into the country and are usually informally advised to approach the UNHCR offices or reception centres for purposes of registration and subsequent RSD. Where no good reasons are shown to have RSD conducted at the UNHCR Branch Office in Nairobi, the asylum seekers are given referral documents, called ‘movement passes’ to enable them proceed to the camps where RSD is conducted.

The RSD interview is conducted by a UNHCR official who transcribes it and passes it to a panel of at least 3 other UNHCR officers for analysis and consideration. Presentation by legal counsel, other than occasional ‘watching brief’ by counsels from NGO’s is not always recognized as a right to applicants. When an Advocate accompanies applicants, the advocates appear only as mere ‘observers’ and are not allowed to articulate the applicants’ claims on their behalf.

Upon interviews, the decision is processed, and decisions take 6 months or longer, depending mainly on the pressure of work on UNHCR eligibility officers. The asylum seeker is given a document indicating the outcome, called a ‘Protection Certificate’ or ‘Mandate Document’ if the decision is positive. A letter of rejection is issued in the case of an unsuccessful interview, but the reasons for rejection are given in short and ambiguous statements like ‘lack of credibility’ or ‘material inconsistency’.

An applicant who is rejected has the opportunity to appeal usually within 30 days. A decision after a case review of a first appeal is final, and an applicant’s case for RSD cannot be reopened after the review.

Effective protection

‘Effective protection’ is a wide concept that does not render itself to a concise definition. Effective protection is however said to be afforded when certain minimum benchmarks informed by the rights set out in the 1951 Convention and the 1967 Protocol as well as other international and regional instruments are met.

In relation to the UNHCR RSD Process as the one described above, the following benchmarks are relevant in considering if effective protection is afforded by the process :

- ◆ Asylum seekers are admitted to safety
- ◆ The rights of asylum seekers are respected
- ◆ Refugees and asylum seekers are documented and enjoy basic rights
- ◆ Asylum procedures are fair and expeditious
- ◆ The protection needs of women and children(special groups) are met

Procedural weaknesses, and Recommendations

The Kenyan UNHCR RSD process as described above is laded with weaknesses that would justify a verdict that it does not offer effective protection. Some of these weaknesses include:

1. Letters of rejection for asylum seekers that do not qualify for protection do not give room for ample explanation of the reasons for rejection to a level that would permit applicants to submit appeals that respond to the exact reason(s) that was/were given for the rejection, or even decide whether there is need for appeal. While the generic letter of rejection was an improvement in that it at least gives the reason of rejection, little explanation on the reason given would help applicants in preparing for appeals and deciding on the need for such appeals.

2. The time between the first contact with the UNHCR to registration, RSD interview and eventual recognition is very long. There have been reported cases where three years after the first contact with the UNHCR, applicants still await issue of protection certificates. This leaves the applicants 'unprotected' as refugees are sometimes are looked at as 'illegal aliens' particularly by the law enforcers, considering that no interim documentation is issued to recognize them as asylum seekers.
3. The long waiting period also fails to recognize RSD as a fundamental tool for refugee protection as full refuge rights under international law accrue only after RSD. It is recommended that the issuance of an 'asylum seeker's certificate' be considered as a standard practice to act as a means of identification as asylum seeker's go through the process of RSD and before they are eventually issued with 'Protection Certificates' to enhance their protection before recognition.
4. Moreover, the UNHCR does not as yet provide to applicants information or evidence that may be used to eventually determine the claims of the applicants for reasons of 'confidentiality'. This if not reviewed will continue to increase the risk of factual errors and undermine effective protection of asylum seekers as applicants fail to correct or explain any contradictions that may arise from their interviews. This is particularly noting that situations at the countries of origin often change and applicants are usually not up-to-date with situations in their countries of origin.

Granted, some of these salient weaknesses of the UNHCR RSD were addressed with the publication of the new UNHCR Procedural Standards for RSD. The Standards however failed in certain aspects to fully enhance the protection of some of the minimum safeguards.

Though the Standards provided the right of appeal as one of the safeguards, for instance, they failed to establish an independent mechanism to ensure that rejected asylum seekers will not have to submit their requests to the same officials, or closely related officials who assed their claims in the first instance. Lack of an independent appellate system also cuts out the opportunity to re-look at cases and eliminate the chance of rejecting genuine asylum seekers particularly on factual, procedural and technical grounds. As a practice, rejected asylum seekers routinely resubmit their cases for appeals or reviews to the same officers who were involved in the determination of the case in the first instance. Perhaps it is time the UNHCR set up an independent Asylum Court to review 'reject' cases.

Confidentiality: It is a practice in Kenya (and elsewhere in the global south) that refugees and asylum seekers who have pending applications in most UNHCR offices usually get feedback via a system in which their names are either called out in the public or posted on public notice boards, including for purposes of fixing appointments. This can greatly infringe upon the need to maintain a high level of the applicant's need for confidentiality in processing asylum claims, and even compromise the applicant's security. In the Nairobi Branch Office, for instance, there have been claims that applicants are sometimes waylaid by 'security agents', sometimes of the country of origin outside or near the UNHCR offices on days when they have appointments.

It is commendable that the new Standards underpin the need for confidentiality in the processing of asylum/refugee claims, but perhaps there should be clear guidelines on how to ensure the same though out the RSD process. Such guidelines could include, for instance, requirements that asylum seekers have the option of using say, their UNHCR reference numbers or aliases to identify them during the RSD.

In regard to the right to counsel, though the new standards categorically provide that asylum seekers have a right to take a legal counsel, the kind of assistance that such counsels may give, and a clarification that this right is available at all stages should have formed the substance of this right.

Undoubtedly, though, the new Standards have and will surely continue to enhance the effectiveness of using RSD as a protection tool. This will however only happen if the new Standards are followed and implemented as standard practice whenever RSD is conducted.

The Gender aspects

It is of concern that the general guidelines and norms surrounding RSD processes in many jurisdictions pay little or no attention to incorporate mandatory safeguards and/or requirements that ensure that gender equity is promoted in the process of determining refugee status.

In family situations, for instance, men invariably tend to be the sole applicants for asylum on behalf of themselves and the family.

Consequently, cases in which whole families –at least those consisting of children below eighteen years and the wife- are recognized or fail to be recognized on the basis of the claim of the husband as the sole applicant are not uncommon. When some women in family situations are interviewed, it is often only to corroborate the testimony of their spouses. Separate interviews for women are often seen as unnecessary, time consuming and costly. And yet in some situations, women are socialized to be passive and have someone speak for them, hence their ‘voices’ are not heard when the family RSD interviews are done. There could be problems of reluctance on the part of women to speak candidly about their experiences in cases where male officers conduct the interviews, or when the only available translation is done through a male translator.

Consequently, the experiences of women are subsumed under those of their husbands, and the woman’s ability to obtain asylum becomes dependent on the husband’s claim. In some cases, however, the woman’s claim could be the basis of acceptance. In such cases, entire families could be rejected even when they should be extended the full protection afforded to them by international law.

Further, refugees’ experiences on gender related persecution has not always been adequately take into consideration in many instances during RSD. It has been internationally recognized that persons do indeed flee gender related persecution, and some legal jurisdictions have recognized gender persecution such as rape (coupled with other elements covered under 1951 Convention definition of a ‘refugee’) as good grounds upon which recognition could be granted

Recommendations

These concerns make it imperative to make deliberate efforts in ensuring RSD procedures and practices promote equality in access to RSD processes, make visible women’s experiences and empower both refugee women and men.

Applicants should have the choice of being interviewed by either male or female interviewer and interpreter, and sensitivity to gender considerations and cultural norms should be promoted in the RSD process.

There should be **mandatory** extension of RSD interviews to both husbands and wives, so that their recognition is not merely pegged on the claims of husbands, and to enable wives lodge their own individual claims. This would overcome an unintentional institutional practice of excluding women by considering them dependents of their spouses even for purposes of conferring RSD status.

Moreover, it should be mandatory as a standard RSD procedure that both women and men over the age of 18 file their own separate claims, without crumpling them as dependants to their parents. Though this is the practice, the claims of persons beyond eighteen years (which is the age of majority in most jurisdictions) is some times be clouded by the claims of the 'principal dependants' in their families, thus denying them access to independent evaluations of their claims.

RSD interviewers should also, as a standard practice, ask whether or not applicants encountered gender related violence/harm. While not implying that gender related persecution is an automatic ground for claiming asylum, this information would be central in determining whether an applicant had a well-founded fear of persecution. It would also help in facilitating a wider interpretation of the existing grounds for seeking asylum when persecution exists. It would ensure that situations in which gender persecution, including battery, deprivation of freedom of movement of women, rape and sexual violence are dismissed or viewed as 'private', 'local custom' or 'family conflict' are minimized.

If gender is to be mainstreamed in the RSD process, women and men must also be empowered by training them on their rights as refugees and asylum seekers, thus fostering increased understanding of human rights among female applicants who feel the need for lodging individual claims.

Likewise, collecting information on the position of women refugees and asylum seekers reinforces the experiences of female applicants, further raising their sense of self as well as the sensitivity and knowledge of the interviewers.