



## COMMENTARIES

# The Role of African Courts in Promoting Refugee Rights

Isaac Lenaola\*

### INTRODUCTION

In every democracy, courts play a vital role in safeguarding, promoting, and protecting human rights. With the mandate of interpreting and applying the law, courts are the ultimate custodians of the law and hence occupy a sacrosanct place in the justice system. Refugees are entitled to human rights protection just like every other person. Furthermore, as vulnerable members of society – in that they reside in a foreign country – they deserve special protection. By adjudicating the cases that come before them, courts strengthen the refugee protection regime and develop the law to advance refugee rights.

The legal framework for the protection, promotion, and enforcement of refugee rights is contained in the various international, regional, and domestic legal instruments. In the African context, there is the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).<sup>1</sup> Article 1(1) of the OAU Convention defines a ‘refugee’ as:

every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 1(2) extends the definition to include:

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of

\* MCI Arb, MBS; Judge of the Supreme Court of Kenya.

<sup>1</sup> Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

It has been argued that the said definition is broad enough to incorporate persons fleeing from political unrest, civil war, and even disasters, widening the scope through which a person qualifies for recognition as a refugee.<sup>2</sup> As a result, there is broader protection for refugees in Africa, in that the OAU Convention takes into consideration the ‘crisis’ that requires a person to seek safety in another country. It is therefore up to the courts to breathe life into this broad protection by giving meaning to the terms in the definition and to interpret the law within the context of African realities.

### JURISPRUDENCE AND LESSONS EMANATING FROM THE COURTS: EXPLORING THE ROLE OF THE COURTS IN ADVANCING REFUGEE PROTECTION

African countries have produced refugees and have been host to refugees.<sup>3</sup> In particular, South Africa, Kenya, and Uganda host a large number of refugees from their neighbouring countries.<sup>4</sup> As host countries, they have obligations to protect refugees living within their borders. A review of cases from these three jurisdictions provides an indication of how the courts have taken up the mandate of protecting and promoting refugee rights.

The South African Supreme Court of Appeal case of *Minister of Home Affairs v Watchenuka* lifted the general prohibition on the right to work for asylum seekers.<sup>5</sup> It recognized that some asylum seekers have no reasonable means of support other than by engaging in employment. Hence, the denial of employment was a direct infringement of their right to dignity. This case also highlighted the need for giving deserving asylum seekers the opportunity to study and cautioned against a universal prohibition. It is therefore important to decide each case on its own basis, taking into consideration its unique facts and circumstances.

In another Supreme Court of Appeal case, *Scalabrini Centre, Cape Town v Minister of Home Affairs*,<sup>6</sup> the decision of the Director-General of the Department of Home Affairs to close down the Cape Town Refugee Reception Office was challenged. The effect of this decision was that asylum seekers had to travel to major centres at Musina, Pretoria, and Durban to apply for or renew their permits. The question before the Court of

<sup>2</sup> See Tamara Wood, ‘Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention’s Expanded Refugee Definition’ (2014) 26 *International Journal of Refugee Law* 555, 555–56.

<sup>3</sup> Jamil Ddamulira Mujuzi, ‘The African Commission on Human and Peoples’ Rights and the Promotion and Protection of Refugees’ Rights’ (2009) 9 *African Human Rights Law Journal* 160, 161.

<sup>4</sup> Wood (n 2). See also Frank Ahimbisibwe, ‘The Legal Status of Refugee Protection and State Obligations in Uganda’ (2016) 13 *US–China Law Review* 730, 730.

<sup>5</sup> [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).

<sup>6</sup> [2017] 4 All SA 686 (SCA).

Appeal was whether that decision was unlawful and reviewable. The court noted that the Cape Town refugee office was the second busiest in South Africa.<sup>7</sup> It also noted that the closure of that refugee office made it extremely difficult for affected persons to access the next closest refugee centre. That would mean that many asylum seekers would be unable to get their temporary permits on time, thus making them prone to arrest or even deportation.<sup>8</sup> The court found that the decision was irrational and ordered the Director-General to maintain a fully functional refugee office in or around Cape Town.<sup>9</sup>

Similarly, Kenyan courts have invalidated policy directives that unjustifiably limit the rights of refugees to movement, dignity, family, and fair administrative action. In the case of *Attorney General v Kituo Cha Sheria*,<sup>10</sup> the Government of Kenya issued a directive seeking to move all refugees residing in urban areas to some designated refugee camps. According to the government, the directive was necessitated by security concerns following a series of terrorist attacks in urban centres. The High Court quashed that directive and declared it a violation of the refugees' right to freedom of movement and dignity. When the matter went before the Court of Appeal, it affirmed that rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible.

This case also reaffirmed the principle of *non-refoulement* as a cornerstone of enforcing refugee rights by ensuring that refugees are not sent back to the countries from which they are escaping. The court was categorical that it was not sufficient to allege a security risk posed by the influx of refugees in a country. There has to be a correlation between the affected refugees (those who are before the court) and the alleged security threat. Therefore, in their interpretative role, courts should seek to advance the rights of all persons protected by the national constitution.

It is also important that judicial officers keep abreast of the happenings within and beyond their countries. For example, now more than ever before, threats of persecution may result from a person's sexual orientation. Hence, when defining terms such as 'particular social group',<sup>11</sup> courts need to be alive to changing societal needs, including the social and political climate. Sometimes persons may risk persecution due to their health status, gender, or age. At all times, when making their decisions, courts should not bow down to public perceptions or opinions but rather be strictly guided by the law.

<sup>7</sup> *ibid* para 39.

<sup>8</sup> See a report by the Consortium for Refugees and Migrants in South Africa (CoRMSA), 'Protecting Refugees, Asylum Seekers and Immigrants in South Africa' (18 June 2008) 21 <<http://www.migration.org.za/wp-content/uploads/2017/08/Protecting-Refugees-Asylum-Seekers-and-Immigrants-in-South-Africa.pdf>> accessed 6 August 2018, which recognizes the difficulties experienced by foreign nationals in South Africa who are in the process of seeking recognition as refugees. The report indicates that the delay in processing permits or the difficulties of applying for permits due to inaccessibility of Refugee Reception offices makes the foreign nationals susceptible to arrests and detention and, in some cases, deportation.

<sup>9</sup> This decision had been preceded by the case of *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* [2015] ZASCA 35; [2015] All SA 294 (SCA) where, on 25 March 2015, the Supreme Court of Appeal again ordered the reopening of the Port Elizabeth Refugee Reception Centre.

<sup>10</sup> Civil Appeal No 108 of 2014 (17 February 2017).

<sup>11</sup> Sourced from art 1(1) of the OAU Convention (n 1).

For example, in the case of *TB (PSG – Women) Iran v Secretary of State for the Home Department*,<sup>12</sup> the United Kingdom Immigration Appeal Tribunal found that the claimant was able to demonstrate a well-founded fear of persecution based on her membership of a particular social group. In this case, an Iranian woman was granted asylum in the United Kingdom for belonging to a particular social group of women who had refused forced marriages in Iran. The Tribunal cited with approval the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Membership of a Particular Social Group which provide:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>13</sup>

The rights of families to live together as one unit should also be preserved, including the special protection of children who are the most vulnerable members in a family. In the Kenyan case of *Refugee Consortium of Kenya v Attorney General*,<sup>14</sup> children had been separated from their parents when the government arrested their parents, took them to designated refugee camps, and left the children alone in urban areas. In nullifying the government's directive, the High Court of Kenya took into consideration the fact that the affected parents were arrested impromptu without being given an opportunity to make arrangements for the care of their minor children.<sup>15</sup> As to whether the directive was in the best interests of the child, the court held that:

The effect of the separation has been to deprive children of the right of family life and parental care which they had previously enjoyed. The children's lives have been therefore disrupted; many of them had no choice but to leave school because they have had to deal with the trauma of losing their parents and some no longer have the means to pay for school fees or transport and some had to move in with relatives who do not live near the schools where they had been enrolled.<sup>16</sup>

Furthermore, courts need to fast-track cases whose determination impacts on fundamental freedoms and rights of persons. Justice delayed is justice denied, and every day in which a matter is pending in court is a continuation of the rights violation. After all, most cases of human rights infringement cannot be adequately compensated by way of damages.

<sup>12</sup> [2005] UKIAT 00065.

<sup>13</sup> *ibid* para 49, citing UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', UN doc HCR/GIP/02/02 (7 May 2002) para 11.

<sup>14</sup> Petition No 382 of 2014 (High Court of Kenya, 18 December 2015).

<sup>15</sup> *ibid* para 58.

<sup>16</sup> *ibid* para 60.

When reviewing the decisions of policymakers, courts should always endeavour to do justice and always craft adequate remedies. In most cases, by the time the litigants come to court, they have exhausted all other avenues and court is their last resort. In such cases, courts cannot appear helpless in the face of blatant breaches and infringements of a person's rights. I am not in any way suggesting that courts should overreach into the mandates of other organs, but they should be bold enough not only to declare illegality where it exists, but also to come up with practical legal solutions. However, at all times, courts should respect the principle of separation of powers.

Some of the remedies a court might impose include directing the decision maker to comply with the statutory criteria for admitting refugees. At other times, courts may substitute their decision for that of the decision maker.<sup>17</sup> In the case of *Kiliko v Minister of Home Affairs*,<sup>18</sup> the High Court of Cape Town, South Africa, issued a structural interdict to ensure that the manner in which the relevant government department processed applications for asylum did not offend South Africa's obligations under international law and the South African Constitution. This decision recognized how, in some cases, bureaucracy may hinder the realization of one's right. In this case, for example, applications were taking too long to be processed. In such a case, an adequate and pragmatic remedy would be one that directly targets the manner in which the relevant department discharges its mandate.

Likewise, in the case of *Tafira v Ngozwane*,<sup>19</sup> the High Court of South Africa at Transvaal Provincial Division appointed a curator *ad litem* on behalf of the class of persons seeking asylum at the Marabastad and Rosettenville Refugee Reception offices in order to investigate and monitor the refugee application process and to ensure compliance with the court order. Such an order ensures that the court can monitor compliance with its orders and still maintain jurisdiction to issue any other subsequent directive as may be required.

In its interpretative role, a court may identify gaps in the law. In such a situation, it should bring such shortcomings to the attention of the relevant legislative body or State organ. In that way, courts contribute to shaping policies and developing the law. In particular circumstances, courts should go beyond the mere affirmation of rights and demand certain minimum standards for adequate protection of the right in question. In the Kenyan situation, for example, the majority of refugees live in camps that are located in Kakuma and Dadaab. Among the refugees are children, women, the elderly,

<sup>17</sup> See eg the case of *Tantoush v Refugee Appeal Board* (13182/06) [2007] ZAGPHC 191; 2008 (1) SA 232 (T) (11 September 2007), where the High Court at Transvaal Provincial Division, South Africa, set aside the decision of the Refugee Appeal Board and went on to declare the applicant a refugee who was entitled to asylum in South Africa.

<sup>18</sup> 2006 (4) SA 114 (C). The policy at that time at the Refugee Reception Centre at Western Cape was that not more than 20 asylum permits could be processed each day. The court found the policy to be inconsistent with the fundamental rights of illegal foreigners as provided in ss 10 and 12 of the South African Constitution (1996). The purpose of the interdict was to ensure that the relevant government agency rectified the identified breach of the Constitution within the provided timeframes under the supervision of the court.

<sup>19</sup> Case No 12960/06 (High Court of South Africa, 12 December 2006).

and people with disabilities – from all walks of life. Sometimes, living conditions in such areas may be so poor that the attainment of basic human rights is impossible.

In conclusion, courts – and especially regional courts, such as the African Commission on Human and Peoples' Rights – should encourage dialogue amongst States with the aim of reaching an amicable solution.

### CONCLUSION

The cases reviewed in this article show that courts have been centre stage in enforcing the rights and freedoms of refugees. They have recognized that, just like all other people, refugees are protected by the national constitution and any limitation on their rights must be justifiable in an 'open and democratic' society. In making decisions, courts are guided by the constitution, national legislation, and relevant international and regional instruments. When arriving at a decision, judicial officers should draw inspiration from the decisions of their peers within and outside their jurisdiction. They should always keep abreast of legal developments. However, for the courts to perform their roles effectively, their decisions must be free and fair and immune from external influences. Above all, judicial decisions must be respected and obeyed. Courts must not shy away from enforcing the rights and freedoms of refugees and affirming the constitution and other recognized international principles.