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LEGAL ALERT



**Distinguishing Refugees from Economic Migrants:
Understanding Section 28 (5) of Kenya's Refugees
Act**



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Introduction

On 20 June 2026, the world marks the 75th anniversary of the 1951 United Nations Convention Relating to the Status of Refugees (“the UN Refugee Convention”) which is the cornerstone of international refugee protection. As the United Nations High Commissioner for Refugees (“UNHCR”) observes, the UN Refugee Convention has saved lives, protected rights, and enabled millions of refugees to rebuild their livelihoods – establishing principles such as non-refoulement and rights to documentation, education, movement and work. This alert examines Kenya’s current refugee protection regime, focusing on access to employment.

The Old v The New: A Progressive Shift

The Refugees Act, 2006 (“the 2006 Act”) domesticated Kenya’s obligations under the UN Refugee Convention and the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“the OAU Refugee Convention”). Before the enactment of the 2006 Act, refugee matters in Kenya were largely handled administratively. The 2006 Act created formal structures, including the Department of Refugee Affairs, and provided a legal framework for the recognition and management of refugees.

However, the 2006 Act did not provide refugees with direct access to employment. Section 16 (4) of the 2006 Act subjected refugees to the same restrictions as other non-citizens, effectively requiring work permits under the relevant immigration law. This meant that refugees had to meet employer sponsor-

-ship or skills-based criteria designed for economic migrants, in order to qualify for work permits.

The Refugees Act, 2021 (“the 2021 Act”) introduced a significant shift. Section 28 (5) of the 2021 Act grants refugees the right to engage in gainful employment, business, or professional work, subject to applicable laws but with consideration of their special circumstances. The use of “shall have the right” denotes a statutory realignment and establishes a clear legal entitlement for refugees to gainful employment.

Additionally, the 2021 Act provides for issuance of refugee identification documents, which are crucial for enjoying rights and services, including access to financial services. This reflects a legislative intent to enable refugees to participate economically and integrate fully into society.

Legislative Intent

The omission of restrictive language from the 2006 Act and its replacement with an affirmative right to work is indicative of a deliberate policy shift. Under principles of statutory interpretation, including the doctrine of implied repeal, the subsequently enacted and more specific 2021 Act should prevail over earlier enacted statutes on matters concerning refugee affairs in case of any inconsistency, including immigration law.

The phrase “subject to the applicable laws” should therefore be construed accordingly and should not be interpreted in manner that would defeat or nullify refugees’ right to work, but rather, preserve only non-conflicting or complementary requirements to enable the realization of the right.



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Immigration Law v Refugee Protection

Kenya's Citizenship and Immigration Act, 2011 ("the **Immigration Act**") imposes strict work-permit requirements on all non-citizens. Employment without a permit where such permit is required is unlawful, and employers must obtain authorization before hiring foreign nationals. The law on immigration is designed to regulate economic migration and protect the domestic labour market – which is a matter of concern for every nation and its citizens.

Refugees, however, find themselves in foreign countries not due to economic migration, but rather, forced migration often fueled by armed conflict resulting in the arising protection obligation of the receiving state. Refugees cannot safely return to their home countries, and Kenya is legally bound under the UN Refugee Convention and the OAU Refugee Convention to offer them protection. The 2021 Act recognizes "special circumstances" that apply to refugees which implies that ordinary immigration restrictions should not be strictly applied to refugees. Applying the same work permit requirements to refugees as to ordinary economic migrants is to disregard the special circumstances pertaining to refugees alluded to in the 2021 Act.

Unlike economic migrants, refugees should not be required to demonstrate scarce skills or secure employer sponsorship. Section 28 (5) of the 2021 Act only requires that refugees' qualifications be recognized by competent authorities.

Imposing ordinary work-permit criteria would likely exclude most refugees, effectively rendering their

lawful right to work wholly illusory. The refugee statutory framework is therefore distinct from labour migration systems and each should be considered in its own light.

Constitutional Considerations

Constitutionally, Kenya guarantees equality (Article 27) and fair labour practices (Article 41) to all persons and makes no qualification as to the person's status as a citizen, immigrant or refugee. Kenya has ratified both the UN Refugee Convention and the OAU Refugee Convention and as such, these Conventions have the force of law pursuant (Article 2). Notably, any law that is found to be inconsistent with the Constitution is null and void to the extent of such inconsistency.

To the extent therefore that any law or regulation would operate to deny refugees access to work, such law or regulation would be in conflict with Kenya's obligations under the UN Refugee Convention and the OAU Refugee Convention, and arguably unconstitutional.

Practical Implications

Following the restrictive enactment of the 2006 Act, Kenya introduced the Class M Work Permit for refugees, which is issued free of charge. However, it is arguable that requiring such permits is tantamount to reintroducing the same barriers that the 2021 Act sought to remove.

A more purposeful approach and interpretation would be that recognized refugees with valid identification documents should be able to be employed without undergoing immigration permit processes. Treating refugee documentation as



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sufficient basis for employment would be consistent with the legislative intent of the 2021 Act and the legal obligation of refugee protection.

Conclusion

The 2021 Act reflects a progressive shift toward recognizing refugees as meaningful contributors to the country's economy, in spite of their troubled background. Maintaining restrictive immigration controls risks undermining this recognition. A coherent legal approach requires interpreting refugee law as it properly should – with the unwavering intention of protecting refugees and uplifting their livelihoods.

DISCLAIMER

This alert is for informational purposes only and should not be considered or interpreted as legal advice. If you have any questions or require clarification, please feel free to contact the authors John Mbaluto, FCI Arb, Deputy Managing Partner (john@oraro.co.ke) and Ajak Jok Ajak, Associate (ajak@oraro.co.ke) – or your usual contact at our firm for legal guidance.



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