



# RECEPTION OF CHILDREN ON THE MOVE IN SOUTH AFRICA

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## **1. APPLICATION OF INTERNATIONAL LAW IN DOMESTIC LAW OF SOUTH AFRICA**

### **1.1. Status of international treaties in South Africa**

As a state holding one of the world's most progressive constitutions, South Africa has a responsibility to "protect, promote and fulfil the rights"<sup>1</sup> set out in the Bill of Rights, rights "modelled on their international counterparts"<sup>2</sup>. In practice, a court or tribunal, when interpreting the Bill of Rights, must consider international law<sup>3</sup>. Insofar as the application of international law in rulings is concerned, the following cases illustrate the deference courts give to international law.

In *Mubake v Minister of Home Affairs*<sup>4</sup>, the applicant sought an order declaring that accompanying children, separated from their parents, be regarded as "dependents" of their primary care-givers as defined by the Refugees Act<sup>5</sup> (RA). The first applicants' parents were both killed in the war in the Democratic Republic of Congo. He crossed the border with his aunt and upon arrival, his aunt successfully applied for and was issued<sup>6</sup> an asylum seeker's permit in terms of section 22 of the RA<sup>7</sup>. She, however, was informed that she could not apply for her nephew as he was not her biological child and as a result, he would need the assistance of a social worker.<sup>8</sup> The court referred to Article 22(1) of the United Nations Convention on the Rights of the Child<sup>9</sup> (UNCRC), which provides that state parties should take appropriate measures to ensure that a child seeking asylum, unaccompanied or accompanied, receive appropriate protection and humanitarian assistance. Further, the court held that s1 of the RA be read expansively together with

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<sup>1</sup> Constitution of the Republic of South Africa, Act No. 108 of 1996, s2

<sup>2</sup> Dugard, John. 'International Law and the South African Constitution' (1997) 8 *European Journal of International Law* 77, 84

<sup>3</sup>(n1), s39

<sup>4</sup> *Mubake v Minister of Home Affairs* 2016 (2) SA 220 (GP)

<sup>5</sup> Refugees Act 130 of 1998

<sup>6</sup>(n4), para 6

<sup>7</sup> (n5), s22

<sup>8</sup> (n4), para 6

<sup>9</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, pg. 3 available at <http://www.refworld.org/docid/3ae6b38f0.html> (accessed 6 August 2017)

the definition section of the Children's Act<sup>10</sup>, which provides that the term family includes any person a child has developed a significant relationship with, based on a psychological or emotional attachment and which resembles a family relationship. This can include a close family member. The court, thus, declared that separated children are dependants of their primary caregivers in terms of s1 of the RA.<sup>11</sup>

In *Centre for Child law v Minister of Home Affairs and others*<sup>12</sup> an application was brought before the court regarding children detained at Lindela Repatriation Centre in the same accommodation as adults.<sup>13</sup> These children were facing unlawful deportation. In his judgment, De Vos states that the detention of the children at Lindela was unlawful and invalid.<sup>14</sup> He expresses his shock and states that the manner in which deportation was taking place was not only unlawful but also shameful.<sup>15</sup> De Vos then refers to the fact that South Africa is signatory to the UNCRC<sup>16</sup>, a convention which affords every child the right to health, to social security and to education, all of which were, on the facts, violated.<sup>17</sup> South Africa has, furthermore, ratified the *African Charter on the Rights and Welfare of the Child*<sup>18</sup> (ACRWC), which similarly affirms every child's right to education and health care.<sup>19</sup>

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<sup>10</sup> Children's Act No. 38 of 2005, s1

<sup>11</sup> (n4), para 28

<sup>12</sup> *Centre for Child Law v Minister of Home Affairs and Others* (2005) (6) SA 50 (T)

<sup>13</sup> (n12), para 4

<sup>14</sup> (n12), para 23

<sup>15</sup> (n12), para 23

<sup>16</sup> (n12), para 23

<sup>17</sup> (n12), para 26

<sup>18</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> (accessed 6 August 2017)

<sup>19</sup> (n12), para 23

In *C v Department of Social Development*<sup>20</sup>, the High Court declared s151<sup>21</sup> and 152<sup>22</sup> of the *Children's Act*<sup>23</sup> unconstitutional to the extent that these provisions provide for the removal of a child from family care by state officials and placing in temporary safe care, but do not provide an automatic safeguard by ensuring a child is brought before the children's court for automatic review of that removal.<sup>24</sup> This occurred after social workers removed Mr C and Ms M's children from their care, and placed them in the Department's care facilities without notifying the parents of where they were. No review mechanisms are provided for under by law.

The court, in making its decision, refers to constitutional requirement that courts take international law into account when interpreting the Bill of Rights and referred to the ACRWC and the UNCRC in reaching a decision.<sup>25</sup> Article 19(1) of the ACRWC provides that every child is entitled to the enjoyment of parental care and protection and shall, whenever possible have the right to reside with his or her parents, "except where judicial authority determines... that such separation is in the best interests of the child."<sup>26</sup> The UNCRC guarantees every child the right to know and be cared for by his or her parents<sup>27</sup> and to preserve his or her identity, including family relations as recognized by law without unlawful interference.<sup>28</sup> Furthermore, the court refers to *S v M*<sup>29</sup>, which states that:

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<sup>20</sup> *C v Department of Social Development and others* 2012 2 SA 208 (CC)

<sup>21</sup> S151(1) of the Children's Act states that if, on evidence given by any person on oath or affirmation before a presiding officer it appears that a child who resides in the area of the children's court concerned is in need of care and protection, the presiding officer must order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2).

<sup>22</sup> S152(1) provides that a designated social worker or a police official may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing-(a) that the child- (i) is in need of care and protection; and 35(ii) needs immediate emergency protection; (b) that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being; and (c) that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being.

<sup>23</sup> (n10)

<sup>24</sup> (n20), para 1

<sup>25</sup> (n20), para 23 & 32

<sup>26</sup> (n18)

<sup>27</sup> (n9), Article 7(1)

<sup>28</sup> (n9), Article 8(1)

<sup>29</sup> *S v M* [2008] (3) SA 232 (CC) 261

[S]ection 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC). Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the CRC has become the international standard against which to measure legislations and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice.<sup>30</sup>

Regard accordingly has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currently, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and to enjoy special care.<sup>31</sup>

The court held that the provisions concerned were indeed unconstitutional as they failed to provide for automatic review procedures where a child is removed from the care of his/her parents and provided an additional paragraph which is now read into section 151 of the Children's Act, which ensures such removal is brought before a Children's Court for review.<sup>32</sup>

The judgments above illustrate the importance courts place on international and regional obligations. Where potential conflicts between international and domestic law arise, the Constitution provides, "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."<sup>33</sup> Thus, not only is it a requirement to consider international law insofar as the interpretation of the bill of rights is concerned, the interpretation of all domestic legislation is subject to compliance

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<sup>30</sup> (n29), para 16

<sup>31</sup> (n29), para 17

<sup>32</sup> (n20), para 96.

<sup>33</sup> (n1), s233

with the standards imposed by international law. Further, section 232 of the Constitution provides that “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”<sup>34</sup>

## 1.2. Ratified international treaties

Since democracy, South Africa has signed and ratified many international conventions creating a framework for legislation and policy in keeping with human rights.<sup>35</sup> These include, *inter alia*:

- African Charter on Human and Peoples' Rights ("Banjul Charter")<sup>36</sup>
- African Charter on the Rights and Welfare of the Child (ACRWC).<sup>37</sup>
- Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")<sup>38</sup>
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages<sup>39</sup>
- Convention Relating to the Status of Refugees.<sup>40</sup>
- Protocol Relating to the Status of Refugees<sup>41</sup>

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<sup>34</sup> (n1), s232

<sup>35</sup> Southern Hemisphere, 'Final Report for System Mapping of the Protection of Unaccompanied and Separated Migrant Children in South Africa' Submitted to Save the Children, South Africa, 18 March 2016 pg. 14.

<sup>36</sup> (n18)

<sup>37</sup> (n18)

<sup>38</sup> Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45, available at: <http://www.refworld.org/docid/3ae6b36018.html> [accessed 2 November 2018]

<sup>39</sup> UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962, available at: <http://www.refworld.org/docid/456d89064.html> (accessed 10 September 2017)

<sup>40</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series vol. 189, p. 137 available at <http://www.refworld.org/docid/3be01b964.html> (Accessed 10 September 2017).

<sup>41</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html> (accessed 10 September 2017)

- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>42</sup>
- Hague Convention on the Civil Aspects of International Child Abduction.<sup>43</sup>
- Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.<sup>44</sup>
- Southern African Development Community, Declaration on Gender and Development for the Prevention and Eradication of Violence against Women and Children<sup>45</sup>
- Southern African Development Community, Prevention and Eradication of Violence against Women and Children (Addendum to the SADC Declaration on Gender and Development)<sup>46</sup>
- United Nations Convention on the Rights of the Child (UNCRC)<sup>47</sup>
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.<sup>48</sup>

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<sup>42</sup> UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317, available at:

<http://www.refworld.org/docid/3ae6b38e23.html> (accessed 10 September 2017)

<sup>43</sup> Hague Conference on Private International Law, *Hague Convention on Civil Aspects of Child Abduction*, 25 October 1980, Hague XXVIII, available at

<http://www.refworld.org/docid/3ae6b3951c.html> (accessed 10 September 2017)

<sup>44</sup> Hague Conference on Private International Law, *Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*, 29 May 1993, 33, available at

<http://www.refworld.org/docid/3ddcb1794.html> [accessed 10 September 2017]

<sup>45</sup> Southern African Development Community, *Declaration on Gender and Development*, 1997, available at [http://www.sadc.int/files/8713/5292/8364/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](http://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf) (accessed 10 September 2017)

<sup>46</sup> Southern African Development Community, *Prevention and Eradication of Violence against Women and Children (Addendum to the SADC Declaration on Gender and Development)*, 14 September 1998, available at <http://www.achpr.org/instruments/eradication-violence-woman-sadc-addendum/> (accessed 10 September 2017)

<sup>47</sup> (n9)

<sup>48</sup> UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, available at:

<http://www.refworld.org/docid/47dfb180.html> (accessed 10 September 2017)

- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime<sup>49</sup>

Apart from the following, South Africa has not entered into any reservations in relation to the above conventions at all or insofar as they affect migrant children. It is worth pointing out that South Africa has entered a declaration with regards to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict affirming that their position with regards to the conscription is a) voluntary b) by law prohibits under 18's.<sup>50</sup> With regards to the Protocol against the Smuggling of Migrants by Land, Sea and Air, South Africa has entered a reservation relating to the compulsory jurisdiction of the International Court of Justice.<sup>51</sup>

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<sup>49</sup> UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/479dee062.html> (accessed 10 September 2017)

<sup>50</sup> *Declaration:*

"a) The South African National Defence Force (SANDF) is a voluntary force and therefore there is no compulsory conscription into the SANDF;

b) The process of recruitment in the SANDF is initiated through advertisement in the national newspapers and the minimum age limit of 18 years is stipulated by law as a requirement;

c) The induction of all recruits is conducted in public;

d) All recruits are required to present a national identity document which states their date of birth and where appropriate, their educational records; and

e) All recruits undergo a rigorous medical examination in terms of which prepubescence would be noticed, and any recruit determined to be underage is routinely declined from recruitment." Available at [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=iv-11-b&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-b&chapter=4&lang=en) (accessed 1 October 2017)

<sup>51</sup> *Reservation:*

"AND WHEREAS pending a decision by the Government of the Republic of South Africa on the compulsory jurisdiction of the International Court of Justice, the Government of the Republic does not consider itself bound by the terms of Article 20 (2) of the Protocol which provides for the compulsory jurisdiction of the International Court of Justice in differences arising out of the interpretation or application of the Protocol. The Republic will adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case." Available at [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=xviii-12-b&chapter=18&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-b&chapter=18&lang=en) (accessed 1 October 2017)

### 1.3. Best interest of child principle in domestic law

The UNCRC states that the best interests of the child shall be **a primary consideration**<sup>52</sup>. The South African Constitution, on the other hand, frames it in a significantly different way, acknowledging that their interests are of **paramount importance**.<sup>53</sup> The ACRWC too contains different, yet significant wording and states that the best interests of the child shall be **the primary consideration**<sup>54</sup>. Thus, the standard established by domestic and regional law is arguably greater than those imposed by international law as the best interests of the child seemingly outweigh competing interests.

In addition to the constitutional dictates involving this principle, South Africa reaffirms this principle in the Children's Act. It provides a list of factors requiring consideration when determining what constitutes the best interest of the child,<sup>55</sup> thereby supplementing the best interest principle. Furthermore, insofar as customary law is concerned, where disputes exist involving children, the relevant customary law will be subject to the standard imposed by the best interest principle<sup>56</sup>.

The Constitutional Court in *Raduvha v Minister of Safety and Security and Another*<sup>57</sup> considers this principal in depth and asks what it means to accord the best interests principle paramount importance as required by the Constitution. The court states that police are required to not only "consider but accord the best interests of such a child paramount importance"<sup>58</sup>, however in the circumstances officials were seemingly unaware of their constitutional obligations as set out in section 28(2)<sup>59</sup>. Had they considered the best interests of the child, the court finds that "there would have been no reason for them

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<sup>52</sup> Emphasis added

<sup>53</sup> Emphasis added

<sup>54</sup> Emphasis added

<sup>55</sup> S7 of the Children's Act lists 13 factors that require consideration when determining the best interest of the child.

<sup>56</sup> Walsh TJ, 'Advancing the Interests of South Africa's Children: A Look at the Best Interests of Children under South Africa's Children's Act.' [2011] 19(2) Mich St U Coll L J Int'l L 201, 241

<sup>57</sup> *Raduvha v Minister of Safety and Security and another*<sup>57</sup> [2016] ZACC 24

<sup>58</sup> (n57), para 48

<sup>59</sup> (n57), para 51

to arrest [the child].”<sup>60</sup> The court, furthermore, determines that according this principal paramount importance does not equate to assigning it precedence over competing rights<sup>61</sup> but rather that the “Constitution demands that [the] criminal justice system [...] be child-sensitive.”<sup>62</sup>

The Constitutional Court in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*<sup>63</sup> finds determining the best interests of a child a “balancing act” and one that requires consideration of various factors.<sup>64</sup> It held that a court “may declare a scheme to be contrary to the best interests of the child in terms of section 28(2), and therefore invalid”<sup>65</sup>, finding the provisions in question contrary to the best interests principle<sup>66</sup> and the Constitution.<sup>67</sup>

In *Minister for Welfare and Population Development v Fitzpatrick and others*<sup>68</sup> the court was required to confirm the High Court’s declaration of invalidity of s18(4)(f) of the Child Care Act<sup>69</sup> insofar as it proscribed the adoption of a South African child by non-citizens.<sup>70</sup> In making its determination, the Constitutional Court finds the provisions of section 18(4)(f) “too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens”.<sup>71</sup> In particular, the court reasons that insofar as paramountcy is not afforded to the best interests principle, it violates section 28(2) of the Constitution and is, therefore, invalid.<sup>72</sup> The court a quo, however, suspended the order of invalidity in order

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<sup>60</sup> (n57), para 52

<sup>61</sup> (n57), para 59

<sup>62</sup> (n57), para 59

<sup>63</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* (CCT 12/13) [2013] ZACC 35

<sup>64</sup> (n63), para 71

<sup>65</sup> (n63), para 71

<sup>66</sup> (n63), para 79

<sup>67</sup> (n63), para 102

<sup>68</sup> *Minister for Welfare and Population Development v Fitzpatrick and Others* (CCT08/00) [2000] ZACC 6

<sup>69</sup> Child Care Act No. 74 of 1983

<sup>70</sup> (n68), para 1

<sup>71</sup> (n68), para 20

<sup>72</sup> (n68), para 20

to provide parliament with time to make the necessary amendments to the legislation, while the Constitutional Court determined it prudent to order the immediate declaration of invalidity, thereby affording the prospective adoptive parents the right to adopt the child right away.<sup>73</sup> “Both the Minister and the amicus curiae accepted that it is in the best interests of the child and the respondents for the order to have immediate effect.”<sup>74</sup>

#### **1.4. Separated and Unaccompanied Children in domestic law**

South Africa’s definition of “separated child” and “unaccompanied child” is in line with that of the Committee on the Rights of the Child, as described in General Comment No. 6 (2005).<sup>75</sup> In fact, the Department of Social Development’s Guidelines on Separated and Unaccompanied Children<sup>76</sup> defines separated and unaccompanied children exactly as the Committee has defined it in its general comment.

## **2. RECEPTION OF CHILDREN IN SOUTH AFRICA**

### **2.1. Initial evaluation**

Migrant children, in general, are regarded as dependants of the adult/s that accompany/ies them. Insofar as the provision of their own accounts is concerned, legislation does not speak directly to taking a child’s account into consideration. Section 33 of the Refugees Act simply makes provision for dependants to obtain the status given to their primary care-giver. There is nothing to indicate that children are given the opportunity to present their own claims or express themselves in such a setting. This is contrary to the obligations contained in the UNCRC, which provides that states are

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<sup>73</sup> (n68), para 20

<sup>74</sup> (n68), para 22

<sup>75</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html> (accessed 30 September 2017)

<sup>76</sup> Republic of South Africa, Department of Social Development, ‘Guidelines on Separated and Unaccompanied Children Outside of their Country of Origin in South Africa’, [nd], available at [http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=699&Itemid=39](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=699&Itemid=39) (accessed 30 September 2017)

obliged to provide a child the opportunity to express his or her views in matters involving them, particularly judicial or administrative proceedings.<sup>77</sup>

Insofar as unaccompanied children are concerned, the RA is silent on how to approach such claims, and rather refers the matter to the Children's Court, which theoretically assigns that child a social worker who assists in making a claim for asylum.<sup>78</sup> Practically speaking, however, social workers are incapable of meeting their legal obligations<sup>79</sup> with regards to unaccompanied minors and are ill-equipped and untrained in asylum law<sup>80</sup> to adequately assist children through the asylum route, resulting in many undocumented minors subject to deportation. Similarly, stakeholders lack the knowledge and understanding of the relevant legislation, policies and procedures, resulting in poor implementation and protection of migrant children.<sup>81</sup> The law does not provide for unaccompanied children to make asylum claims "independent of external assistance"<sup>82</sup>, entrenching a view and interpretation of the law held by many that apart from the Children's Court, there is no alternative means by which to make an asylum claim as an unaccompanied minor.<sup>83</sup> Even where children take the children's court route, they remain asylum seekers until they have reached the age of 18, during which time not only are they never interviewed, their status remains as that of an asylum seeker, which requires regular renewal.<sup>84</sup> This, naturally, raises a number of concerns regarding the best interests of these children and runs counter to domestic, regional and international legal obligations.

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<sup>77</sup> (n9), Article 12

<sup>78</sup> (n5), s32

<sup>79</sup> Anderson, K, Aplan, K and Yarrow, E, 'Unaccompanied and unprotected: The systemic vulnerability of unaccompanied migrant children in South Africa', in Ton Liefwaard and Julia Sloth-Nielson (ed), *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead*, (Brill, Niehof, 2017) 361, 365

<sup>80</sup> (n79), pg. 381

<sup>81</sup> (n35), pg. 64

<sup>82</sup> (n79), pg. 380

<sup>83</sup> (n79), pg. 380

<sup>84</sup> (n79), pg. 382

Practically, unaccompanied minors who approach refugee reception centres for asylum on their own are turned away simply because they are thought to lack the legal capacity to sign a statement.<sup>85</sup> The practical difficulties children have in accessing the asylum system and processing their claims has “reinforced the general belief amongst migrants themselves that children are not permitted to claim asylum at all.”<sup>86</sup> Thus, children are not provided the opportunity to make an asylum claim on their own, never mind one that allows for consideration of their views or the prioritisation and acceleration of their cases. In fact, the converse is true, and they are largely ignored and considered a group incapable to making independent claims prior to attaining the age of majority.

According to the Department of Social Development’s guidelines<sup>87</sup> unaccompanied children must be assumed in need of care and protection, assigned a social worker and may be placed in care.<sup>88</sup> Thereafter, a claim for asylum is made by the social worker<sup>89</sup> and the child is provided with the appropriate documentation. Failure to provide a child the appropriate documentation could result in that child facing detention and deportation upon reaching the age of majority.<sup>90</sup> The Refugee Reception Officers will only process an asylum claim for an unaccompanied child where such child is assisted by a social worker.<sup>91</sup> However, “short of reporting themselves to the police, there is no clear mechanism which [children] may use to access social workers or the Court.”<sup>92</sup> This

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<sup>85</sup> (n79), pg. 381

<sup>86</sup> (n79), pg. 382

<sup>87</sup> (n76), pg. 4

<sup>88</sup> (n76), pg. 4

<sup>89</sup> (n5), s32

<sup>90</sup> Legal Resources Centre and Coram Children’s Legal Centre, ‘Guide 4, Unaccompanied and separated foreign children’ 19 February 2015, pg. 7 available at <http://lrc.org.za/lrcarchive/publications/booklets/item/unac-com-pa-nied-and-sep-a-rated-for-eign-chil-dren> (accessed on 28 October 2017)

<sup>91</sup> Sloth-Nielsen J and Ackermann M, ‘Unaccompanied and Separated Foreign Children in the Care System in the Western Cape – A Socio-Legal Study’, PER / PELJ 2016(19), 1, 20 available at <http://journals.assaf.org.za/per/article/view/1207/2613> (accessed 28 October 2017)

<sup>92</sup> Ackermann, M, ‘Unaccompanied and Separated Foreign Children in the Western Cape, South Africa: Exploring (the lack of) durable solutions for children in informal relations of care’, September 2017, pg. 21, available at <http://scalabrini.org.za/wp-content/uploads/2017/10/Unaccompanied-children-revised-5.0-Printversion-.pdf> (accessed on 18 November 2017)

problem is further exacerbated by the recent closures of Refugee Reception Centres in Cape Town, Johannesburg and Port Elizabeth, leaving the processing of all asylum applications and renewals, refugee renewals and appeals to three centres: Durban, Pretoria and Musina. Not only are there now only three Refugee Reception Offices country-wide, which have already proven incapable of tending to the needs of asylum seekers and refugees, social workers representing children are now required to travel with these children to one of these offices to make an initial application as well as to renew permits regularly. It is unlikely that a social worker entrusted with caring for an unaccompanied refugee child will prioritise obtaining and renewing a permit where such burdens exist, potentially resulting in undocumented children or children who choose to forgo the practical hurdles required to legalise their stay in the country.

Recently, however, the Supreme Court of Appeal in *Scalabrini Centre and Others v Minister of Home Affairs and Others*<sup>93</sup> held the closure of the Cape Town Refugee Reception Office unlawful and gave the Minister of Home Affairs and two other respondents until 31 March 2018 to “reopen and maintain a fully functional refugee reception office in or around”<sup>94</sup> Cape Town. Similarly, the closure of the Port Elizabeth Refugee Reception Office was challenged in the Supreme Court of Appeal. The court states that “[t]he relevant authorities attempt to downplay the significance of the decision to close the PE RRO, contending its closure, couple with the closure of the two other RRO’s gives rise to what is describes as ‘inconvenience’ for asylum-seekers. But that may well trivialise the vulnerability and desperate circumstances of many asylum seekers in the country.”<sup>95</sup> The respondents were directed to re-open the Refugee Reception Office by 1 July 2015<sup>96</sup>, however, it appears that neither the Port Elizabeth nor the Cape Town

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<sup>93</sup> *Scalabrini Centre and Others v Ministers of Home Affairs and others* (1107/2016) [2017] ZASCA 126 (29 September 2017)

<sup>94</sup> (n93), para 1

<sup>95</sup> *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015), para 28

<sup>96</sup> (n95), para 40

Refugee Reception Offices are fully functional.<sup>97</sup> The re-opening of both reception offices will significantly reduce the hardships experienced by all asylum seekers and refugees in the Eastern and Western Cape, though how this will impact unaccompanied minors, only time will tell.

The South African Department of Social Development's guidelines<sup>98</sup> acknowledges the state's obligations set out in the UNCRC<sup>99</sup>, however, it fails to mention asylum at any point in its document. It provides for "immediate" registration and documentation of children, "conducted in an age appropriate and gender sensitive manner, in a language the child understands, by professionally qualified persons."<sup>100</sup> Again, whether this takes place in practice, however, is uncertain as research has shown that due to a lack of data available, any accurate findings relating to unaccompanied children is impossible to make.<sup>101</sup> Research does suggest that language barriers present a major challenge in assisting the children, especially if they are very young.<sup>102</sup> Further, translation resources are scarce and "informal mechanisms to assist with translation"<sup>103</sup> are used, which is certainly not ideal when dealing with vulnerable persons.

## **2.2. Establishment of identity /Age assessment**

The reality of migrant children is that they, more often than not, enter their host countries with no formal documentation, which is problematic insofar as identity and age assessments go. Research suggests that the South African refugee system is ill-equipped to deal with age assessments<sup>104</sup> creating a gap in the system when it comes to the identification of applicants as minors. Thus, while in fact minors, children are often not

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<sup>97</sup> News 24, 'PE Refugee Reception Office still not functioning', 5 September 2018, available at <https://www.news24.com/SouthAfrica/News/pe-refugee-reception-centre-still-not-functioning-20180905> (accessed 27 September 2018)

<sup>98</sup> (n76), pg. 2

<sup>99</sup> (n76), pg. 2

<sup>100</sup> (n76), pg. 5

<sup>101</sup> (n81), pg. 2

<sup>102</sup> (n81), pg. 64

<sup>103</sup> (n81), pg. 62

<sup>104</sup> (n79), pg. 387

considered minors and are treated accordingly. As the system is not adequately placed to make age assessments, it is difficult to know if age assessments are made with consent, by a medical professional and if such assessments take place as a measure of last resort. Research indicates<sup>105</sup> that a social worker may conduct an age assessment of a child by visiting a doctor, though the manner in which these age assessments take place and whether children are given the option to consent<sup>106</sup> or not is unknown. No case law was found that may shed light on this topic.

### **2.3. Migrant Children and Trafficking.**

South Africa has ratified the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*<sup>107</sup> and its contents are law in South Africa, subject to provisions contained in chapter 18 of the Children's Act. Chapter 18 gives effect to the provisions contained in the Protocol. The Children's Act provides that where children are trafficked into South Africa, they must be assigned a social worker and provided a safe place to reside pending further investigation.<sup>108</sup> The Children's Court may, furthermore, order that the child be assisted in making a claim for asylum<sup>109</sup>, or if the court finds in terms of section 156 that the child is in need of care and protection, such an order constitutes grounds to authorise such child's legal stay in the country.<sup>110</sup> In addition, South Africa has ratified the *Protocol against Smuggling of Migrants by Land, Sea and Air*,<sup>111</sup> aiming to combat and prevent the smuggling of migrants. In 2013, the

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<sup>105</sup> (n90), pg. 5

<sup>106</sup> The Children's Act stipulates that a child over the age of 12 may consent to his or her own medical treatment if that child has the necessary maturity and mental capacity to arrive at such a decision. However, one would need to know that the child is at least over the age of 12 in order for this provision to be of benefit.

<sup>107</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/4720706c0.html> (accessed 29 October 2017)

<sup>108</sup> (n10), s289(1)

<sup>109</sup> (n10), s289(2)

<sup>110</sup> (n10), s289(3)

<sup>111</sup> (n49)

*Prevention and Combating of Trafficking in Persons Act*<sup>112</sup> was signed into law and is aimed at giving effect to South Africa's international obligations relating to trafficking of persons. Despite these legislative accomplishments, South Africa is still not regarded as having met the "minimum standards for the elimination of trafficking"<sup>113</sup> and greater strides are required by the government to enhance the "effectiveness of the law."<sup>114</sup>

Furthermore, insofar as reintegration of trafficked children is concerned, the Act fails to support the proper reintegration of victims, particularly those returning to their families as returning to circumstances that might have contributed to leaving their family homes to begin with will require support.<sup>115</sup> While support and reintegration of victims is provided for both by international and domestic law, much of the work is picked up by non-governmental agencies rather than by the state.<sup>116</sup>

To combat child trafficking in South Africa, the Department of Home Affairs produced new regulations relating to children travelling in and out of the country. These came to effect in June 2015. Currently upon entry, a) where both parents travel with a minor child, they must provide an unabridged birth certificate stating the names of both parents b) minors travelling with one parent are required to provide an unabridged birth certificate containing the names of the parents as well as a Parental Consent Affidavit from the parent not travelling with the child consenting to such travel, c) when unaccompanied, an unabridged birth certificate, a letter containing the address and all other relevant details of the receiving adult, as well as their identity document and an affidavit from the parents are required d) when accompanied by an adult who is not the parent, in addition to the

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<sup>112</sup> Prevention and Combating of Trafficking in Persons Act No. 7 of 2013

<sup>113</sup> US Department of State, Office to Monitor and Combat Trafficking in Persons, '2016 Trafficking in Persons Report: South Africa' available at <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258860.htm> (accessed 29 October 2018)

<sup>114</sup> Aransiola, J and Zarowsky, C, 'Human trafficking and human rights violations in South Africa: Stakeholders' perception and the critical role of legislation' (2014), 14 AHRLJ 509, 525

<sup>115</sup> (114), pg. 524

<sup>116</sup> Warria, A, 'International and African Regional Instruments to Protect Rights of Child Victims of Transnational Trafficking' (2016), Victims and Offenders, 12:5, 682, 695

unabridged birth certificate, a Parental Consent Affidavit from both parents is required e) when the child is in alternative care, a letter from the Provincial Head of the Department of Social Development where the child resides is required, which authorises the entry or departure into South Africa.<sup>117</sup> Unfortunately, while this regulation aims at combatting trafficking, most migrant children cross the South African border illegally and won't be subject to the safeguards the regulations aim to provide.

Further, it is unlikely that a migrant child would have access to information regarding the risks of trafficking, how to report instances of trafficking and where to seek protection. Undocumented migrant children are also fearful of possible detention if they approach police regarding trafficking. A helpline in South Africa called Human Trafficking Resource Line<sup>118</sup> exists, which appears to aid victims of trafficking and/or persons who come across victims. They are available 24/7 by phone and online. However, accessing online resources is impractical for migrant children, though it is certainly useful if others witness potential trafficking.

#### **2.4. Application for International Protection**

Anyone entering South African borders has a right to claim international protection irrespective of their country of origin and this includes children. Whether or not they meet the criteria established in order to prove a genuine fear of persecution is a different matter and often Refugee Reception Officers will reject an application without the necessary justification. However, the so-called "safe-country" list does not exist in South Africa as in the EU and other states, leaving the determination of eligibility based on the individual facts before them.

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<sup>117</sup> Department of Home Affairs, 'Advisory: New requirements for children travelling through South African ports of entry – effective 1 June 2015' 26 May 2015, available at <http://www.home-affairs.gov.za/index.php/statements-speeches/621-advisory-new-requirements-for-children-travelling-through-south-african-ports-of-entry-effective-1-june-2015> (accessed 29 October 2017) & Department of Home Affairs, 'New Immigration Regulations Made Easy', [n.d] available at <http://www.dha.gov.za/files/Brochures/Immigrationleaflet.pdf> (accessed 29 October 2017)

<sup>118</sup> Human Trafficking Resource Line, available at <https://0800222777.org.za/> (accessed 17 March 2018)

A Zimbabwe Special Dispensation Permit has existed since 2009<sup>119</sup>. This came about due to the great number of Zimbabweans began entering South Africa. Many left Zimbabwe due to the political instability, while others left due to the economic conditions prevalent. Most were illegal and often arrested, detained and deported in terms of the Immigration Act<sup>120</sup> prior to having an asylum claim heard. Though unofficially, they were most often considered as ineligible for asylum before their cases were considered. With the inception of the Dispensation of Zimbabweans Project, now succeeded by the Zimbabwean Special Dispensation Permit, all Zimbabweans were entitled to apply for the permit to regularise their stay in South Africa, which in turn aimed to reduce the pressure on the Refugee Reception Offices. It also provided Zimbabweans with amnesty in the event that documents were fraudulently obtained. This is the only scheme in place at the moment that addresses nationals of a particular state. How this scheme applies to unaccompanied minors is unclear. However, it is worth noting that as recently as 6 March 2018, eight unaccompanied Zimbabwean children were repatriated to Zimbabwe and to the care of Zimbabwe's Ministry of Labour and Social Welfare.<sup>121</sup>

The law relating to asylum and refugees does not explicitly refer to child-specific forms of persecution in its criteria and it is unclear whether children would constitute a particular social group for the purposes of obtaining refugee status. It is not inconceivable that a group of children could form part of a "particular social group", though this may require test litigation as no research findings suggest that this has been done before.

Civil and political rights, by their very nature, impose a negative duty on states to refrain from interfering with individual freedoms, such as free speech and political opinion. Socio-

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<sup>119</sup> Lawyers for Human Rights, 'Factsheet: The New Special Dispensation Permit and What it Means for Zimbabweans in SA' [n.d], available at <http://www.lhr.org.za/news/2014/factsheet-new-special-dispensation-permit-and-what-it-means-zimbabweans-sa> (accessed 17 March 2018)

<sup>120</sup> Immigration Act 13 of 2002

<sup>121</sup> Bulawayo 24News, 'SA Repatriates 8 Smuggled Zimbabwean Minors', 7 March 2018, available at <https://bulawayo24.com/index-id-news-sc-national-byo-129540.html> (accessed 17 March 2018)

economic rights, or “second generation rights” as they are often referred to, impose a greater responsibility on states; a positive duty to provide, within available resource constraints, various rights such as housing, health and education. As with many states, South Africa’s asylum laws primarily considers civil and political rights when assessing asylum claims. However, arguments have been raised that the refugee legislation as it currently stands provides for the consideration of socio-economic reasons for fleeing and that “[it] is capable of accommodating a more complex and nuanced analysis that recognizes many types of refugee and asylum claims with an ‘economic element.’<sup>122</sup>Section 3(b) of the Refugees Act<sup>123</sup> contains a unique provision, one that does not exist in the Refugee Convention, and which provides that a person qualifies for asylum not only if persecution exists on one of the listed grounds such as race or religion, but also where “owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere”.<sup>124</sup> Thus, it is argued that the above provision accommodates socio-economic reasons for fleeing<sup>125</sup>, that “South Africa’s constitutional doctrine of rights rejects the distinction between civil-political and socio-economic rights” and that “the traditional refugee/migrant dichotomy is untenable in South African law.”<sup>126</sup> While no case law has been found to demonstrate the use of this provision in such a way, it is possible that a court challenge on this ground would be successful.

Practice in South Africa a decade ago demonstrated the view taken towards those fleeing due to economic reasons, as evidenced by the influx of Zimbabwean migrants, many of

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<sup>122</sup> Marouf, Fatma E. & Anker, Deboarh, ‘Socio-Economic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law’, (2009), 784, 785. Scholarly Works. Paper 417 available at <https://scholars.law.unlv.edu/facpub/417/> (accessed 31 October 2018)

<sup>123</sup> (n5)

<sup>124</sup> (n5), s3(b)

<sup>125</sup> Klinck, J A, ‘Recognising Socio-Economic Refugees in South Africa: a Principled and Rights Based Approach to Section 3(b) of the Refugees Act’, *International Journal of Refugee Law*, 21(4), 2009, 653, 655

<sup>126</sup> (n125), pg. 666

which fled Zimbabwe due to the dire economic circumstances at the time. They were categorised as economic migrants and were thus, often refused asylum. It wasn't until the Special Dispensation regarding Zimbabwean migrants was introduced that they were provided with paperwork legalising their stay.<sup>127</sup>

## **2.5 Migrant Children's access to justice.**

The Legal Aid South Africa Act<sup>128</sup> establishes an entity called Legal Aid South Africa, which aims to provide legal advice and representation at state expense<sup>129</sup> to those who qualify in terms of a means test. The Legal Aid Manual states that a Justice Centre Executive is to assist a child who is not assisted by an adult in making an application for legal aid.<sup>130</sup> Further, it states that asylum seekers who intend on applying for asylum in terms of the Refugee Act<sup>131</sup> may apply for legal aid in order to make the claim. Legal aid is provided to citizens and non-citizens alike in criminal cases and matters involving children and asylum seekers. Non-citizens do not have access to Legal Aid for civil cases. While a means test is ordinarily necessary to determine if one qualifies for legal aid, children automatically qualify for legal aid where the case is criminal in nature<sup>132</sup> and legal aid may not be refused<sup>133</sup> to a child charged with an offence in a child justice court. However, the Legal Aid South Africa Act Regulations<sup>134</sup> do not make a distinction between civil and criminal cases for non-citizens where children are involved and provides that legal aid may be provided to a child who will suffer substantial injustice and under certain conditions.<sup>135</sup> Further, Legal Aid may be granted to an unaccompanied foreign child where the best interests of the child need protecting and if substantial injustice would

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<sup>127</sup> See above, section 2.4.

<sup>128</sup> Legal Aid South Africa Act No. 39 of 2014

<sup>129</sup> (n128), s3

<sup>130</sup> Legal Aid South Africa, 'Your Voice. For Justice. Independent and within reach, Legal Aid Manual 2017' available at [http://www.legal-aid.co.za/wp-content/uploads/2017/08/FINAL-Legal-Aid-Manual-for-website\\_11-August-2017.pdf](http://www.legal-aid.co.za/wp-content/uploads/2017/08/FINAL-Legal-Aid-Manual-for-website_11-August-2017.pdf) (accessed 4 November 2017), pg. 27

<sup>131</sup> (n130), pg. 37

<sup>132</sup> (n130)

<sup>133</sup> Legal Aid South Africa Act No. 39 of 2014, Regulations s3(14)

<sup>134</sup> (n133)

<sup>135</sup> (n133), s22

otherwise result.<sup>136</sup> In *Centre for Child Law v Minister of Home Affairs*<sup>137</sup>, the court states that “all unaccompanied foreign children who found themselves in South Africa illegally had to have legal representation appointed to them by the State”<sup>138</sup>. In *Centre for Child Law v Minister of Justice*<sup>139</sup>, the court confirms the view held in *S v Thomas*<sup>140</sup> that foreign citizens have the right to legal representation appointed by the state.<sup>141</sup>

In addition to legal aid provided by the state, legal organisations exist, which are theoretically capable of providing children with assistance, though who they take on as clients may be limited by their respective mandates. These organisations include the Legal Resources Centre<sup>142</sup>, Lawyers for Human Rights<sup>143</sup> and the UCT Refugee Rights Law Clinic<sup>144</sup>. The Law Society also provides pro bono legal services by requiring all attorneys to provide 24 hours of free legal services per year to indigent members of the community and which is subject to a means test.<sup>145</sup> These pro bono attorneys will likely not have the specialised knowledge relating to child trafficking and migrant children as most will have a corporate/commercial legal background. Other legal organisations such as the Legal Resources Centre will specialise in specific areas of law, such as refugee law, housing and land rights, while others such as the Centre for Child Law will specialise in children’s rights and the promotion of the best interests of children.

While state-provided and independent organisations provide free legal services, the question is whether unaccompanied children are aware of the resources available to them. While such a child should be assigned a social worker to assist with asylum

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<sup>136</sup> (n133), s23(6)

<sup>137</sup> (n12)

<sup>138</sup> (n12)

<sup>139</sup> (n12)

<sup>140</sup> *S v Thomas 2001 (2) SACR 608 (W)*

<sup>141</sup> (n140), para 28

<sup>142</sup> Legal Resources Centre, available at <http://lrc.org.za/> (accessed 4 November 2017)

<sup>143</sup> Lawyers for Human Rights, available at <http://www.lhr.org.za/> (accessed 4 November 2017)

<sup>144</sup> UCT Refugee Rights Law Clinic, available at <http://www.refugeerights.uct.ac.za/law-clinic> (accessed 4 November 2017)

<sup>145</sup> Law Society of South Africa, available at <http://www.lssa.org.za/public/getting-legal-assistance/pro-bono> (accessed 4 November 2017)

applications, it is unclear if social workers are aware of the rights a child has to accessing justice. If a child is arrested and appears before a court, the presiding officer is obliged to offer such child representation, and in fact, most insist upon such representation.

Asylum seekers (children and adults) as well as other migrants are not necessarily provided with legal counsel as soon as authorities detect them. The South African police are empowered to arrest and detain illegal foreigners for up to 48 hours<sup>146</sup>, however, where children are concerned, police are obliged, under the Children's Act, to remove an unaccompanied child not in the care of the Department of Social Development, place them in a shelter and report such placement to the Children's Court.<sup>147</sup> The South African Police, however, work with the provisions of the Immigration Act<sup>148</sup> more than those of the Children's Act, which often results in the arrests of children rather than identifying them as a child in need, placing them in care and reporting such placement with the Children's Court. "A notable gap ... is the absence of a provision in the Immigration Act 13 of 2002 that sets out the fact that unaccompanied foreign migrant children must, despite the absence of travel documents, be handed over to the Department of Social Development and not summarily deported."<sup>149</sup>

In situations where migrant children and/or their guardians feel they require access to legal remedies against decisions affecting them, there are review and appeal mechanisms in place, depending on the decision. As mentioned earlier, they would theoretically have access to Legal Aid, pro bono attorneys and/or specialised independent

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<sup>146</sup> Elphick, R and Amit, R, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender Based Violence in Musina', African Centre for Migration and Society Research Report, 2012 available at <http://www.migration.org.za/wp-content/uploads/2017/08/Border-Justice-Migration-Access-to-Justice-and-the-Experiences-of-Unaccompanied-Minors-and-Survivors-of-Sexual-and-Gender-Based-Violence-in-Musina.pdf> (accessed 5 November 2017), pg. 31

<sup>147</sup> (n146)

<sup>148</sup> (n120)

<sup>149</sup> PAN: Children, 'Unaccompanied Foreign Migrant Children in South Africa, Policy Brief', November 2014, available at <http://children.pan.org.za/sites/default/files/publicationdocuments/Unaccompanied%20Foreign%20Migrant%20Children-Policy%20Brief.pdf> (accessed 5 November 2017), pg. 4

legal organisations, which could advise them of their rights and an appropriate course of action. These are all theoretical in that migrant children and/or their guardians often are unaware of their legal options. However, organisations like the Legal Resources Centre allow for drop-in consultations to obtain the legal advice they require, which could entail a referral to an appropriate organisation better suited to take on the case.

The Centre for Child Law in Pretoria provides information in an accessible manner regarding the rights of children<sup>150</sup> while Childline,<sup>151</sup> an NGO dedicated to providing child protection services, provides a free telephonic helpline service in each province. The information provided, however, is all in English and it is unclear whether these organisations, and others like them have the capacity to provide legal advice in an accessible language. Finally, section 14 of the Children's Act provides that every child has the right to bring, and to be assisted in bringing a matter to a court.<sup>152</sup>

No legislation was found with regards to the provision of free interpreters to a minor child in this context. It appears that insofar as interpreters in general are concerned, no legislation exists defining the role and responsibilities of interpreters in the legal setting.<sup>153</sup>

The Magistrate's Court Act<sup>154</sup>, section 6(2) stipulates:

[i]f in a criminal case evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appear to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not."

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<sup>150</sup> Centre for Child Law, 'Do children have rights?', [nd], available at <http://www.centreforchildlaw.co.za/children/your-rights> (accessed 18 November 2017)

<sup>151</sup> Childline, South Africa, available at <http://www.childline.org.za/#> (accessed 18 November 2017)

<sup>152</sup> (n10), s14

<sup>153</sup> Lebesse, S, 'A Pilot Study on the Undefined Role of Court Interpreters in South Africa', *Southern African Linguistics and Applied Language Studies* 2011, 29(3): 343, 343

<sup>154</sup> Magistrate's Court Act 44 of 1944

Further, the Constitution protects the rights of all to the use of their own language<sup>155</sup> and insofar as an accused, arrested and detained person is concerned, the right to a trial in a language understood by the accused or to have the proceedings interpreted in that language<sup>156</sup> is protected. South Africa recognises eleven official languages in the Constitution<sup>157</sup> though the extent to which languages spoken by foreign nationals is protected is, apart from criminal settings, unclear. Theoretically, where the lack of interpreters or the inadequacies of the provision of interpretation results in injustice, those proceedings are subject to review by a higher court.

### **3. CHILD PROTECTION SYSTEM**

#### **3.1. Guardianship system**

All unaccompanied children entering South Africa should be presumed in need of care and protection.<sup>158</sup> This is important because the Children's Act states that a child deemed in need of care and protection must be taken to a place of safety and a Children's Court enquiry should be opened. Thereafter, a social worker must investigate to confirm that the child is indeed in need of care and protection and must issue the Children's Court with a report<sup>159</sup>. Any social worker who does an adequate investigation of the circumstances surrounding an unaccompanied child, will understand that documenting that child is a priority. However, this is not the case in practice. Should the social worker, after completing an investigation, believe such child is not in need of care and protection, that child must be brought before the Children's Court.<sup>160</sup> Implicit in this legislative requirement is the notion that the Children's Court will act as a safeguard for that child in determining whether s/he is in need of care and protection, and in fact it is suggested that it is not only

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<sup>155</sup> (n1), s30

<sup>156</sup> (n1), s35(3)(k)

<sup>157</sup> (n1), s6(1)

<sup>158</sup> University of Cape Town Refugee Rights Unit, 'Children's Rights Manual' [n.d] available at [http://www.refugeerights.uct.ac.za/sites/default/files/image\\_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf](http://www.refugeerights.uct.ac.za/sites/default/files/image_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf) (accessed 18 November 2017), pg. 2

<sup>159</sup> (n10), s47(1) and 155

<sup>160</sup> (n10), s155 (5)

the responsibility of the social worker in making such a determination, but also the responsibility of the Children's Court.<sup>161</sup> A Children's Court enquiry should be opened for every unaccompanied child<sup>162</sup> as unaccompanied minors qualify for the designation of a child in need of care and protection under a number of grounds listed in the Children's Act. Once that determination is made, a social worker is designated as 'guardian' for that child.<sup>163</sup>

A social worker, however, is not officially the guardian, despite being the person entrusted with the safe placement and care of a child. In fact, only a court may assign and confirm guardianship of a child, a process which may take weeks or months<sup>164</sup> and one which requires that an interested person make an application for guardianship. Section 24 of the Children's Act provides that any person having an interest in the care, well-being and development of a child may apply to a High Court for an order granting guardianship of the child.<sup>165</sup> However, it is unclear what happens to an unaccompanied minor child where an adult does not institute proceedings to confirm guardianship over that minor. Section 24 of the Legal Aid Regulations provides that Legal Aid may be granted to any person wanting an order granting guardianship.<sup>166</sup> The fact that social workers are not considered the legal guardians of unaccompanied minors pending a court confirmation of legal guardianship may present an obstacle when children attempt to apply for the relevant permit to regularise their stay in the country, as apart from social workers, no other 'legal guardian' exists to assist these children.<sup>167</sup> As mentioned above, however, the Department of Home Affairs most often does treat social workers as guardians for the

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<sup>161</sup> Schreier, T, 'Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the University of Cape Town Refugee Rights Unit' (2011), *Refuge* vol. 28, 61, 65 available at <https://refuge.journals.yorku.ca/index.php/refuge/article/viewFile/36480/33167> (accessed 18 November 2017)

<sup>162</sup> (n161)

<sup>163</sup> Fritsch, C, Johnson, E & Juska, A, 'The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: A Call for Comprehensive Legislative Action', (2009-2010) 38 *Denv J. Int'l L. & Pol'y* 623, 645, available at <http://www.law.du.edu/documents/djilp/38No4/Juska.pdf> (accessed 18 November 2017)

<sup>164</sup> (n163), pg. 651

<sup>165</sup> (n10), s24

<sup>166</sup> (n133), s24

<sup>167</sup> (n163), pg. 647

purposes of making an asylum claim, though many social workers are not trained in Refugee Law and are incapable of determining if a child should be directed to make such asylum claims.<sup>168</sup>

In practice, unaccompanied children are not automatically deemed in need of care and protection and a Children's Court Inquiry is not always opened for each child. In the case of *Shaafi Daahir Abdulahi*<sup>169</sup>, after visiting a 17-year old minor, the social worker made a determination that despite his minor status, he was not in need of care and protection. The Refugee Reception Office refused to allow him to "apply on his own for asylum in the absence of a parent or guardian or Children's Court order."<sup>170</sup> Thus, children are caught between the refugee system, which refuses to allow an unaccompanied minor child an opportunity to lodge an asylum claim and the child protection scheme, which often refuses to open a Children's Court inquiry<sup>171</sup>, leaving unaccompanied children with no tangible options to regularise their stay in the country. It is likely that without court intervention the applicant was at risk of arrest, detention and deportation, a risk he faced even as a minor.

### **3.2. Appointment of Guardians**

The appointment of guardians is regulated by section 24 of the Children's Act. If a non-citizen wants to make an application for guardianship, section 25 provides that the application is regarded as an inter-country adoption for the purposes of The Hague Convention on Inter-country Adoption<sup>172</sup>. As of September 2017, there were no reported cases on section 25 applications<sup>173</sup> presumably because "guardianship over children by refugees and asylum seekers is not easy, and in fact, it is misleading to say that

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<sup>168</sup> (n146), pg. 63

<sup>169</sup> *Shaafi Daahir Abdulahi and others v Minister of Home Affairs and others* (2657/2001) North Gauteng High Court

<sup>170</sup> (n161), pg. 65

<sup>171</sup> (n161), pg. 67

<sup>172</sup> (n10), s25

<sup>173</sup> (n92), pg. 29

guardianship applications are available to noncitizens.”<sup>174</sup> This effectively excludes a large number of potential guardians of unaccompanied children who may, in fact, be better suited to care for these children.

Prior to a formal guardianship application, it is assumed the social worker tends to the safety and care of the child concerned. Reports are, however, contradictory insofar as they relate to the acceptance of social workers as guardians for the purposes of making an asylum claim. According to one report<sup>175</sup>, the Department of Home Affairs fails to recognise the Department of Social Development’s social workers as guardians, resulting in unaccompanied minors “effectively being denied access to asylum and documentation”<sup>176</sup>. Another report, however, states that the Department of Home Affairs requires both a children’s court order and the assistance of a social worker for an unaccompanied minor to make an asylum claim.<sup>177</sup> Given the nature of the Department of Home Affairs and the tendency of its staff to create policy at a whim, it is likely that experiences have varied in Refugee Reception Offices throughout the country, which arguably demonstrates that a clear and concise allocation of guardianship, apart from that prescribed in section 24 of the Children’s Act, does not exist to protect the interests of unaccompanied migrant children. This despite the Committee on the Rights of the Child, general comment 6 clearly setting out the requirement that “states should appoint a guardian or advisor as soon as the above identification [of a child as unaccompanied] takes place...and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory...”<sup>178</sup>

Where a child is accompanied by an adult, that adult can make a claim for guardianship as provided for in section 24 of the Children’s Act, though only if a South African citizen. The accompanying adult can also claim guardianship by proving a relationship with the

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<sup>174</sup> (n92), pg. 29

<sup>175</sup> (n163)

<sup>176</sup> (n163), pg. 647

<sup>177</sup> (n146), pg. 63

<sup>178</sup> (n75), para 33

child using documentation such as a birth certificate or passport, though most often asylum seekers are not in possession of identifying documentation. The court hearing an application for guardianship will take into account the best interests of the child, the relationship between the applicant and the child and any other relevant factors.<sup>179</sup> Information regarding the recruitment, placement and supervision of guardians was not found.

### **3.3. Other Categories of persons that may carry out guardianship functions.**

Apart from a social worker, there does not appear to be any separate guardianship system for unaccompanied minors. However, reports have shown that while no legal provisions exist authorising the guardianship of unaccompanied children by NGOs for the purposes of lodging an asylum claim, it appears that the Department of Home Affairs in Musina has allowed Save the Children UK (SCUK) to do just that<sup>180</sup>. It is unclear, however, whether or not that guardianship extends beyond simply assisting that minor with obtaining the relevant documentation to providing general guardianship for the remainder of their minor lives.

### **3.4. Responsibilities and duties of guardians for migrant children**

S24 of the Children's Act states that any person who has an interest in the care, wellbeing and development of a child may apply to the High Court for an order granting guardianship to the applicant.<sup>181</sup> In making such a determination, the court will consider the relationship between the child and the applicant, as well as the best interests of the child.<sup>182</sup> Section 18 of the Children's Act defines the responsibilities of parents and guardians. It states that guardians must a) administer and safeguard the child's property and property interests b) assist or represent the child in administrative, contractual and other legal matters (c) give or refuse any consent required by law in respect of the child, including i) consent to the child's marriage ii) consent to the child's adoption, iii) consent to the child's

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<sup>179</sup> (n10), s24(2)

<sup>180</sup> (n163), pg. 647

<sup>181</sup> (n10), s24(1)

<sup>182</sup> (n10), s24(2)

departure or removal from the Republic, iv) consent to the child's application for a passport, v) consent to the alienation or encumbrance of any immovable property of the child.<sup>183</sup> The Act further states that a person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a caregiver who otherwise has no parental responsibilities and rights in respect of a child, must safeguard the child's health, well-being and development<sup>184</sup> and must protect the child from maltreatment, abuse, neglect, degradation, discrimination exploitation, and any other physical, emotional or mental harm or hazards.<sup>185</sup> An example could be a social worker as they perform certain functions for unaccompanied children.

Article 101 of the United Nations Guidelines for the Alternative Care of Children<sup>186</sup> specifies that where a child's parents are absent, a designated person is to be appointed to make "day-to-day decisions in the best interests of the child"<sup>187</sup>. The role and responsibilities of such a designated person is specified in article 104 and includes

(a) ensuring that the rights of the child are protected and, in particular, that the child has appropriate care, accommodation, health-care provision, developmental opportunities, psychosocial support, education and language support; (b) ensuring that the child has access to legal and other representation where necessary, consulting with the child that the child's views are taken into account by decision-making authorities, and advising and keeping the child informed of his/her rights; (c) contributing to the identification of a stable solution in the best interests of the child; (d) providing a link between the child and various organizations that may provide services to the child; (e) assisting the child in family tracing; (f) ensuring that, if repatriation or family

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<sup>183</sup> (n10), s18(3)

<sup>184</sup> (n10), s32(1)(1)

<sup>185</sup> (n10), s32(1)(b)

<sup>186</sup> UN General Assembly, *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly*, 24 February 2010, A/RES/64/142, available at:

<http://www.refworld.org/docid/4c3acd162.html> [accessed 12 November 2017]

<sup>187</sup> (n186), article 101

reunification is carried out, it is done in the best interests of the child; (g) helping the child to keep in touch with his/her family, when appropriate.<sup>188</sup>

In contrast to the guidelines set out above, the Children's Act is more specific with respect to the rights and responsibilities of a guardian. The Act, however, does not provide for the provision of developmental opportunities, psychosocial support, education and language support presumably because such responsibilities are onerous ones, particularly where limited social welfare is only available to citizens, permanent residents and refugees. The same is true of other responsibilities such as assisting with family tracing and providing a link between a child and organizations that provide child-specific services.

### **3.5. Profile of guardians**

As previously mentioned, according to the Children's Act, any interested person may apply to the High Court for an order declaring them as the guardian of a child. The relationship between the applicant and the child, as well as the best interests of the child and any relevant factors are taken into consideration by the court in determining guardianship. Presumably unaccompanied minors, defined as those in need of care and protection, will have their designated social worker take care of them until they are placed in foster care or a child or youth centre.<sup>189</sup> There does not appear to be any formal training available to potential guardians, aside from the training that social workers would ordinarily receive.

### **3.6. Child Bride**

South Africa has one of the most progressive constitutions worldwide<sup>190</sup>. Its Bill of Rights offers everyone, citizen or not, protection of their basic human rights and directs that

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<sup>188</sup> (n186), article 104

<sup>189</sup> (n10), s156

<sup>190</sup> Oeschli, C & Walker, D, '20 Years on, South Africa's Remarkable Constitution Remains Unfulfilled: Commentary: Realizing Mandela's vision of a democratic future is a collective global responsibility', 21 March 2015, available at <http://www.atlanticphilanthropies.org/news/20-years-south-africas-remarkable-constitution-remains-unfulfilled> (last accessed 1 July 2017); Meshoe, K, 'Praise for SA's progressive

interpretation of these rights must take international law into consideration<sup>191</sup>. Section 28 relates to children and their rights and states that children are all persons below the age of 18<sup>192</sup> and that a child's best interests are of paramount importance.<sup>193</sup> Section 9 guarantees that everyone is equal before the law and has the right to equal protection and benefit from the law.<sup>194</sup> Section 10 refers to the inherent dignity of all and the right to have their dignity respected and protected<sup>195</sup>, while section 12 refers the right of all to freedom and security of person<sup>196</sup>, which includes the right not to be deprived of freedom arbitrarily and without just cause.<sup>197</sup> Section 13 prohibits slavery, servitude and forced labour<sup>198</sup>, which the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices<sup>199</sup> defines as the promising or giving in marriage of any woman, without the right to refuse, on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group, as a practice of slavery.<sup>200</sup>

Insofar as marriage is concerned, the Constitution and legislation prohibit marriage without consent. The Children's Act<sup>201</sup> states that a child may not be subjected to social, cultural and religious practices which are detrimental to his or her well-being<sup>202</sup>. This is particularly relevant in South Africa where various social, cultural and religious practices are often used to justify acts that would otherwise be unlawful. The Act further states that a child below the minimum age set by law for a valid marriage may not get engaged

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*Constitution*, 20 March 2017 available at <https://www.pressreader.com/south-africa/cape-times/20170320/281870118256239> (last accessed 1 July 2017)

<sup>191</sup> (n1), s39

<sup>192</sup> (n1), s28(3)

<sup>193</sup> (n1), s28(2)

<sup>194</sup> (n1), s9(1)

<sup>195</sup> (n1), s10

<sup>196</sup> (n1), s12

<sup>197</sup> (n1), s12(1)(a)

<sup>198</sup> (n1), s13

<sup>199</sup> UN Economic and Social Council (ECOSOC), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, available at: <http://www.refworld.org/docid/58c156dc4.html> [accessed 18 November 2017]

<sup>200</sup> (199), article 1(c)(i)

<sup>201</sup> (n10)

<sup>202</sup> (n10), s12(1)

or married<sup>203</sup> and above that minimum age, must consent to such marriage<sup>204</sup>. South Africa is also signatory to the United Nations Convention on the Rights of the Child<sup>205</sup>, which requires state parties ensure that the best interests of a child are a primary consideration<sup>206</sup>, while the Universal Declaration of Human Rights<sup>207</sup>, The International Covenant on Civil and Political Rights<sup>208</sup>, The Convention on the Elimination of All Forms of Discrimination Against Women<sup>209</sup>, The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>210</sup> and The African Charter on the Rights and Welfare of the Child<sup>211</sup> all enshrine some or other form of protection for children against child marriage.

Marriage in South Africa is dealt with by three pieces of legislation: the Marriage Act<sup>212</sup>, The Recognition of Customary Marriages Act<sup>213</sup> (RCMA) & Civil Unions Act<sup>214</sup>. The

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<sup>203</sup> (n10), s12(2)(a)

<sup>204</sup> (n10), s12(2)(b)

<sup>205</sup> (n9)

<sup>206</sup> (n9), article 3(1)

<sup>207</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 18 November 2017], article 16(2) provides that marriage is to be entered into only with the free and full consent of the intending spouses.

<sup>208</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, pg. 171, available at <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 2 November 2008). Article 23(3) provides that no marriage shall be entered into without the free and full consent of the intending spouses.

<sup>209</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> [accessed 18 November 2017], article 16 provides that state parties are required to eliminate discrimination against women in all matters relating to marriage and family relations.

<sup>210</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <http://www.refworld.org/docid/3f4b139d4.html> [accessed 18 November 2017], article 6 provides that no marriage shall take place without the free and full consent of both parties; that the minimum age of marriage for women shall be 18.

<sup>211</sup> Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> [accessed 18 November 2017], article 21 Prohibits child marriage and betrothal of girls and boys and demands that legislation specify the minimum age as 18 years and that registration of such marriages is compulsory (see later where South African customary laws do not fully enforce registration of marriages).

<sup>212</sup> Marriage Act No. 25 of 1961

<sup>213</sup> South Africa, The Recognition of Customary Marriages Act No. 120 of 1998 (RCMA)

<sup>214</sup> South Africa, The Civil Union Act No. 17 of 2006

Marriage Act allows for the solemnisation of marriages between a man and a woman while the Civil Unions Act allows for the solemnisation of a marriage or civil partnership of two people regardless of their sex. The RCMA governs customary marriages, which allows for polygamous marriages.

Provisions relating to marriage in these pieces of legislation are detailed hereunder. However, as a rule, under no circumstances may a boy under the age of 14 or a girl under the age of 12 enter into a marriage.<sup>215</sup>

Marriage Act: This act allows for the solemnisation of marriage between a man and women over the age of 21, which was previously the age of majority. Since the passing of the Children's Act<sup>216</sup>, however, the age of majority has changed from 21 to 18. Therefore, any person over the age of 18 is not considered a child any longer and is legally capable of entering into a marital contract, amongst other things. Where one or both parties to a marriage are under the age of 18, the consent of the parents of those children is required before they are permitted to marry.<sup>217</sup> If the minor/s is/are unable to obtain such consent, the Commissioner of Child Welfare may grant permission upon application.<sup>218</sup> If the parents and/or the Commission refuses to grant permission, the minor/s may make an application to the High Court for permission to marry, though consent will not be granted unless there is evidence to suggest that it is in the best interests of the minor/s concerned and that consent was unreasonably withheld.<sup>219</sup>

The Marriage Act further states that no boy under the age of 18 and no girl under the age of 16 may conclude a marriage without the consent of the Minister of Home Affairs.<sup>220</sup> This provision related to minors significantly younger than the age of majority at the time,

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<sup>215</sup> Johannes Wilhelmus Wessels, *'History of the Roma-Dutch Law'*, Grahamstown, Cape Colony: African Book Co., 1908. Reprinted 2005, 2013 by The Lawbook Exchange, Ltd. pg. 74

<sup>216</sup> (n10)

<sup>217</sup> (n212), s24(1)

<sup>218</sup> (n212), s25(1)

<sup>219</sup> (n212), s25(4)

<sup>220</sup> (n212), s26(1)

which prior to the Children's Act was 21. It acted as an additional safety net presumably guarding against child marriage. There is nothing in the new Children's Act to suggest that the prescribed ages, where such a strict prohibition against marriage existed, is lowered in line with the reduction of the age of majority to 18. Thus, if the Marriage Act is read strictly, all minors would require the additional consent from the Minister of Home Affairs. Read together with the Children's Act, however, one can only assume that the strict prohibition would no longer apply to those of the ages of 18 and 16.

The Department of Home Affairs, in its website, indicates that a boy under the age of 18 and a girl under the age of 16 *may* require the consent of the Minister of Home Affairs<sup>221</sup>, in addition to parental consent, though it does not stipulate under which circumstances such consent is required. Confusingly, in a section on the same website entitled "Documents required to enter into a marriage"<sup>222</sup> it further states that where boys are under 18 and girls under 15, written consent from the Minister *will be* required. This language suggests a similar prohibition against marriage that exists in the Marriage Act. Further, as it relates to documentation required in order for a marriage officer to solemnise the marriage, one can presume that in practice the consent for 18-year-old boys and 15-year-old girls is the safety net. One thing to note, however, is that while minor boys of any age require parental consent and the consent from the Minister of Home Affairs, the marriage of a girl child does not require the same strict oversight. It is only once she is under the age of 15 that the consent of the Minister is required. In a society where girl children are the most vulnerable, this clause seems at odds with international and domestic obligations aimed at protecting girls from child marriage.

Civil Union Act: This Act provides for the solemnisation of the marriage or civil partnership of two people irrespective of gender. It paved the way for the recognition of same-sex marriages. This Act states that a civil union may only be registered by parties who, apart

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<sup>221</sup> Department of Home Affairs, Republic of South Africa, '*Preparing to get married*' available at <http://www.home-affairs.gov.za/index.php/civic-services/marriage-certificates> (last accessed 1 July 2017)

<sup>222</sup> (n221)

from the fact that they are of the same sex, are not prohibited under the Marriage Act or Customary Marriages Act from concluding a union.<sup>223</sup> Thus, the law relating to the marriage of minors is equally applicable in civil unions.

Recognition of Customary Marriages Act (RCMA): The same legal requirements set out in the above two acts applies in customary marriages that have taken place after the commencement of the RCMA. Monogamous couples may marry both in terms of civil law as well as in terms of the RCMA. However, because the RCMA allows for polygamous marriages and civil law does not, a second, polygamous marriage in terms of the RCMA is only permitted if no civil marriage exists. Any customary marriage requires registration within three months of the marriage<sup>224</sup> and it is the duty of the spouses to ensure that their marriage is registered<sup>225</sup>. However, failure to register such marriage does not affect the validity of that marriage.<sup>226</sup> This suggests a lack of state oversight in ensuring that underage children are not forced into customary marriages.

In South Africa, a phenomenon called ukuthwala exists. In its truest form, it was a traditional form of marriage negotiations between families who might have ordinarily disapproved of a marriage. Current practice, however, has departed from this and now involves the abduction of girl children by older men who intend on compelling them into marriage and often involves rape and other forms of physical abuse intended on ensuring the girl child remains subservient and obedient to the older man. It no longer involves the consent of the girl, whereas previously the girl was privy to the abduction and merely pretended to withhold consent. Presently, it subjects girls between 11 and 15 to this practice and is used as justification for abducting a girl child.<sup>227</sup> According to the South African Law Reform Commission, when law enforcement and traditional leaders were

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<sup>223</sup> (n214), S8(6)

<sup>224</sup> (n213), s4(3)(b)

<sup>225</sup> (n213), s4(1)

<sup>226</sup> (n213), s4(9)

<sup>227</sup> South African Law Reform Commission, Discussion Paper 132, Project 138, 'The Practice of Ukuthwala', May 2014, pg. 1-2 available at <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf> (last accessed 1 July 2017)

asked for assistance, they defended such actions as cultural practice.<sup>228</sup> This despite the Children's Act protecting against cultural practices detrimental to the well-being of a child.<sup>229</sup>

Many regard ukuthwala as abuse of women and believe it “perpetuates a form of gender-based violence in the context of a culturally sanctioned patriarchy; and that it entrenches patriarchal power.”<sup>230</sup> The research pertaining to ukuthwala is seemingly extensive and supports the idea that it has indeed become a method for men to exercise dominance over women by forcing them into abusive situations. The consensus, however, does seem to depart from the use of “any aberrant form of custom or traditional practice”<sup>231</sup> that could “of itself constitute a substantial and compelling circumstance”<sup>232</sup> to “secure protection under [the] law”<sup>233</sup> for acts that directly violate the rights of a child. In *Jezile v S*<sup>234</sup> the defendant, a 28-year-old man, arranged a customary marriage with the complainant's uncle which led to her abduction. The complainant was 14-years-old at the time. The court held that there exists “an abundance of clear authority to the effect that child trafficking, and any form of child abuse or exploitation for sexual purposes, is not to be tolerated in our constitutional dispensation.”<sup>235</sup>

#### A child arriving in the country accompanied by her adult spouse?

One can enter any given country in several ways. Where relevant visas are obtained, the child would likely also possess a visa to enter the country. In such a case, no legislation, case law, reports or the like that address any intervention the state may make to protect a young married child seems to exist. It is probable that such a child would fall through

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<sup>228</sup> (n227), pg. 2

<sup>229</sup> (n10)

<sup>230</sup> (n227), pg. 14

<sup>231</sup> *Jezile v S and Others* 2015 (2) SACR 452 (WCC), para 103

<sup>232</sup> (n231), para 103

<sup>233</sup> (n231), para 95

<sup>234</sup> (n231)

<sup>235</sup> (n231), para 69

the cracks and enter the country with their adult spouse with no protection from the state.<sup>236</sup>

Much of the relevant research material found on this topic involves the unaccompanied minor entering South Africa. This is distinguished from the question involving an accompanied married child who enters with an adult spouse. In this case, the child would not be unaccompanied, unless s/he were able to leave the adult spouse either prior to entry into South Africa or after entry. Thus, there are two possible scenarios: i) an accompanied child enters South Africa with her adult spouse ii) the child “flees” from her adult spouse resulting in an unaccompanied status.

i) Accompanied minor enters with adult spouse:

There is nothing to suggest that a child entering with her adult husband would be removed by the South African government and placed in its care. The most likely scenario would be that such a child would obtain an asylum seeker permit in terms of section 22 of the Refugees Act and would undergo the same process that any other asylum seeker would undergo. Should the minor child approach legal counsel or police and allege any form of abuse such as trafficking, underage marriage, domestic violence etc. then the processes that would come into play would be similar to that of an unaccompanied minor.

The Department of Home Affairs recently passed a new regulation relating to minors entering and leaving the country and it is now a requirement that all minors travelling with their parents produce a valid passport and unabridged birth certificate and those travelling with one or no parent, produce an affidavit from the parent/s authorising that minors travel.<sup>237</sup> Whether or not this applies to asylum seekers is unclear, though given the circumstances of those seeking asylum and the fact that most applicants flee their homes

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<sup>236</sup> See point made below on the new regulations relating to minors travelling in or out of South Africa

<sup>237</sup> Department of Home Affairs, Republic of South Africa. ‘*Advisory: New Requirements for Children Travelling Through South African Ports of Entry – Effective 1 June 2015*’, available at <http://www.home-affairs.gov.za/index.php/statements-speeches/621-advisory-new-requirements-for-children-travelling-through-south-african-ports-of-entry-effective-1-june-2015> (last accessed on 2 July 2017)

without any adequate documentation, for the government to refuse entry on this ground would be a violation of their domestic and international refugee law obligations. Further, asylum seekers don't often enter the country through the immigration borders.

These regulations define a minor as anyone below the age of 18. It makes no reference to married or emancipated minors being excluded from the definition of a minor. Theoretically, therefore, insofar as this regulation is concerned, a child entering with her adult spouse would still require permission from his or her parent in the form of an affidavit and there is nothing to suggest that an immigration official can overrule this directive purely because the child is married, as the wording of the regulation refers to all children under the age of 18. What might happen where no such affidavit is presented is unclear, though one would hope that officials would be well placed to determine that an investigation into the lawfulness of that marriage take place and that the child would require interim protection. This is particularly important the younger the child is.<sup>238</sup> No practical examples of such cases were found.

ii) Accompanied minor becomes unaccompanied

Insofar as an accompanied married minor is concerned, it is unclear whether the South African government would recognise the marriage of a young child as valid. It could certainly be argued that it is not in the best interests of the child to be married at a young age and an ensuing court hearing could determine such validity as conflicting with domestic, regional and international obligations in protecting the child, however, case law demonstrating this was not found. Further, it is also unclear if that accompanied child is considered emancipated upon marriage, and therefore a major and no longer subject to the same protections a child is. However, should an accompanied married minor leave

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<sup>238</sup> As was mentioned before, South African law prohibits the marriage of a boy under the age of 14 and a girl under the age of 12, thus if a married child under the specified age enters the country, there is an argument to be made in favour of the state not recognising that marriage and thereafter treating that child as an unaccompanied minor in need of care.

her marriage, theoretically those protections provided by the Department of Social Development would apply to that child regardless of marital status, though again no case law, regulations or legislation speaking directly to this matter was found.

## **4. FAMILY REUNIFICATION**

### **4.1. Family Tracing**

The UNCRC's General Comment 6<sup>239</sup> states that "all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child"<sup>240</sup> and stipulates that family tracing commence as soon as possible. The Children's Act, section 106 states that national norms and standards for child protection are required, which relate, inter alia, to family reunification and reintegration.<sup>241</sup> Section 155(2)<sup>242</sup> stipulates that the designated social worker investigate and compile a report determining if a child is in need of care and protection, which investigation must include family tracing. Concern exists, however, that the time frame of 90-days within which to undertake the investigations and to compile the report, is insufficient<sup>243</sup> given the complexities surrounding family tracing. Such complexities include the provision of incorrect personal details required to trace families despite reports indicating that "[s]ome children have been known to go home for Christmas and then return again, while having claimed not to have a family"<sup>244</sup>, which in turn thwarts efforts made for reunification. Despite the practical challenges, the Department of Social Development's Guideline on Separated and Unaccompanied Minors<sup>245</sup> specifies that where it is in the best interests of the child concerned, reunification

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<sup>239</sup> (n75), section 31 (E)

<sup>240</sup> (n75), section 81

<sup>241</sup> (n10), s106

<sup>242</sup> (n10), s155(2)

<sup>243</sup> Skelton A, Ozah K, Batley M Zacarias, S Virgilli G, 'In Search of a Better Future: Experiences of Unaccompanied Migrant Children in Limpopo & Mpumalanga in South Africa' 2016, available at [https://resourcecentre.savethechildren.net/node/10229/pdf/in\\_search\\_of\\_a\\_better\\_future.pdf](https://resourcecentre.savethechildren.net/node/10229/pdf/in_search_of_a_better_future.pdf) (accessed 25 March 2018) pg. 23

<sup>244</sup> (n244), pg. 23

<sup>245</sup> (n76)

with family in the country of origin should be pursued, in collaboration with the International Social Services and other relevant organisations within the country of origin.<sup>246</sup> Social workers are required to contact local authorities in the child's country of origin, through the International Social Services in order to attempt family reunifications. However, research has shown that while communication with developed nations is most often speedy, providing social workers with feedback timeously, those from African nations can oftentimes result in frustration and delays.<sup>247</sup> Furthermore, the ISS only functions in a number of African states, leaving a notable gap with respect to information sharing between African states.<sup>248</sup> Finally, this guideline is subject to the principle of non-refoulement which emphasises that anyone claiming persecution not be returned to the country they are fleeing from. It also assumes that the unaccompanied minor is effectively received by the system, which most often is not the case.

#### **4.2. Reunification in host country or resettlement**

According to the UNHCR, resettlement is 'the selection and transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them - as refugees - with permanent residence status'.<sup>249</sup> Within South Africa, it appears that efforts at reunification and resettlement are not systematically and consistently applied across the country. For instance, social workers in Limpopo appear to be "more active"<sup>250</sup> and have attempted to locate the family of minors more often compared to those in Gauteng province.<sup>251</sup> The majority of cases in Limpopo resulted in reunification in the country of origin, while the minority were successfully reunited with family in South

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<sup>246</sup> (n76), 6.4.1

<sup>247</sup> Researchers' personal notes taken at a meeting with social workers at an adoption agency.

<sup>248</sup> Ackerman, M, 'Unaccompanied and Separated Children in South Africa: is Return the Only Option?', [nd], available at <http://sihma.org.za/wp-content/uploads/2018/02/Marilize-Ackermann.pdf> (accessed 1 October 2018), pg. 989

<sup>249</sup> UNHCR, The UN Refugee Agency, 'Information of UNHCR Resettlement', available at <http://www.unhcr.org/uk/information-on-unhcr-resettlement.html> (accessed 1 October 2018)

<sup>250</sup> International Organization for Migration, 'Study on Unaccompanied Migrant Children in Mozambique, South Africa, Zambia and Zimbabwe' 2017 available at <http://scalabrini.org.za/wp-content/uploads/2017/09/IOM.pdf> (accessed 20 February 2018) pg. 44

<sup>251</sup> (n250), pg. 44

Africa.<sup>252</sup> Despite these limited statistics, however, the option of reunification to the country of origin doesn't seem to be one that is often exercised by social workers in South Africa.

Generally, it appears that referral to the resettlement programme in South Africa requires greater concerted effort, as research shows that since 2011, only approximately 1400 referrals for resettlement have taken place.<sup>253</sup> Collaboration between NGOs, on the one hand, and the UNHCR and resettlement countries, on the other, is weak resulting in a heavy reliance on government to resettle refugees and unaccompanied minors. While it is clear that "South Africa [is] receiving an increasing number of [children]"<sup>254</sup>, it has yet to establish a system to effectively address basic reception level matters such as documentation<sup>255</sup>. It is unsurprising, therefore, that the resettlement route is not successfully realised. "Indeed, our assessment was that when faced with cross-border family tracing and reunification of foreign children to the countries of origin of children...residential social workers generally found themselves at a loss as to how to proceed, as they had no networks or links in those countries to draw upon."<sup>256</sup>

#### **4.3. Reunification with other relatives**

Where an unaccompanied minor claims to have family within South Africa, the designated social worker will investigate those family ties<sup>257</sup> and determine whether such reunification is in that child's best interests. A court could, where requested, issue a foster care order to the relatives concerned, though as mentioned previously, guardianship for non-South

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<sup>252</sup> (n250), pg. 44

<sup>253</sup> Douglas, M, Levitan, R & Kiama LW, 'Expanding the Role of NGOs in Resettlement', *Forced Migration Review* 54, February 2017, 34, 37, available at <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/resettlement/douglas-levitan-kiama.pdf> (accessed 2 October 2018)

<sup>254</sup> IRIN Africa, 'South Africa: Catch 22 for Unaccompanied Child Refugees', 19 August 2011, available at <http://www.irinnews.org/report/93546/south-africa-catch-22-unaccompanied-child-refugees> (accessed 4 November 2018)

<sup>255</sup> (n255)

<sup>256</sup> (n91), pg. 15

<sup>257</sup> (n76), 6.4.3

African residents is challenging.<sup>258</sup> Insofar as relatives in the child's country of origin are concerned, see the process referred to in 4.1 above.

#### **4.4. Grounds for refusal**

Given that the best interests of the child are given such importance, family reunification may be refused on the grounds that it conflicts with the best interests of the child. No further information regarding potential grounds for refusal was found.

### **5. PLACEMENT OF MIGRANT CHILDREN**

Children entering the country accompanied by parents do not go through the system in the same way that unaccompanied minor children do. The provision of social services in South Africa is limited and most who need it do not have access to benefits such as housing, education and health in a manner that effectively protects their socio-economic rights. Asylum seekers with or without children are expected to fend for themselves and will be permitted to take up employment once their asylum permits have been issued. While the Refugees Act only refers to the rights of recognised refugees to work and study, the Refugees Amendment Act<sup>259</sup> refers to this right in the context of asylum seekers but provides that asylum seekers who are self-sufficient are not permitted to work<sup>260</sup>. Those who are not self-sufficient are required to provide the necessary proof to the relevant authorities of their employment or study opportunities. In practice, however, those with asylum permits are granted permission to study and/or work with relative freedom. Once they are recognised as refugees, they are entitled to the same protections set out in the Bill of Rights that South Africans are entitled to<sup>261</sup>, apart from those that are exclusively reserved for citizens such as the right to vote. The Act specifies the right to take up

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<sup>258</sup> See section 3.2 of this paper

<sup>259</sup> Refugees Amendment Act No. 11 of 2017, s18

<sup>260</sup> (n259), s18(8)

<sup>261</sup> (n5), s27(b)

employment, to basic healthcare and basic primary education.<sup>262</sup> Unlike countries such as Britain, asylum seekers and refugees are expected to fend for themselves and are not provided with housing by the state. Thus, as noted below, the protection measures available to unaccompanied children are far more extensive than for those who are accompanied. Accompanied children are not automatically deemed in need of care and protection, though where necessary an investigation by a social worker, in the same manner as those undertaken with respect to unaccompanied minors, will take place. Section 150 of the Children's Act refers to instances where a child is in need of care and protection and includes those abandoned or orphaned, exploited or addicted to drugs, to name a few. Without a court order, children will not ordinarily be separated from their parents. In the context of detention, as a general rule, children should not be separated from their parents, even where detained. They are to remain with their parents, though separate from other adults.<sup>263</sup>

### **5.1. Temporary shelter/1st reception centres**

Unaccompanied children should, theoretically, be considered in need of care and protection, simply by virtue of their status as unaccompanied. Such a categorisation has implications for the manner in which that child is cared for. It sets in motion a series of steps that the Children's Act deems are necessary to ensure the safety and protection of that child, the first being that the designated social worker investigate the matter within 90 days and provide the Children's Court with a report.<sup>264</sup> Thereafter, the Children's Court will, in the case of unaccompanied children, order that the child be placed in foster care or temporary safe care.<sup>265</sup> Asylum seeker children in such situations will benefit from such a court order, though what happens to them in terms of care prior to the court order is

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<sup>262</sup> (n5), s27(f) & (g)

<sup>263</sup> Legal Resources Centre, Scalabrini Centre, CORUM Children's Legal Centre, 'Guide 5: Immigration Detention', [nd], available [http://www.probono.org.za/Manuals/Refugee-Manual/2015\\_Asylum\\_seeker\\_guide\\_Immigration\\_Detention.pdf](http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Immigration_Detention.pdf), pg. 5

<sup>264</sup> (n10), s155(2)

<sup>265</sup> (n10), s156(e)

uncertain.

As mentioned earlier, designating a child as in need of care and protection elicits several protection measures. However, research has shown that despite the Department of Social Development's own policy document<sup>266</sup> advising that unaccompanied foreign children be deemed in need of care and protection, "numerous blockages or refusals by social workers to open up [Children's Court Inquiries] on behalf of unaccompanied or separated children"<sup>267</sup> were recorded. This has implications for the care they receive, in particular those relating to the placement of unaccompanied children.

In circumstances where a court order categorising a child as in need of care and protection does not exist, the Children's Act empowers social workers and the police to remove a child and place him/her in temporary safe care. Such social workers are given the discretion to determine whether reasonable grounds exist for believing that the child is indeed in need of care and protection, requires immediate protection and that a delay in waiting for a court order providing for the placement of that child in temporary safe care may prove detrimental to the safety of the child.<sup>268</sup>

According to the Western Cape Government website, there are three categories of short-term accommodation for children in need of care and protection.<sup>269</sup> These include shelter's, children's homes and temporary safe care. Shelters make provision for children on the street while children's homes are for those who have a court order placing them in short-term residential care. Temporary safe care "offer short-term care for both children who have been found in need of care and protection due to abuse, negligence or have

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<sup>266</sup> (n76), para 6.1

<sup>267</sup> (n161), pg. 18

<sup>268</sup> (n10), s151(1)

<sup>269</sup> Western Cape Government, 'Child and Youth Care Centres' available at <https://www.westerncape.gov.za/service/child-and-youth-care-centres> (accessed 4 October 2018)

been exploited, as well as children who have violated the law and are awaiting trial or an inquiry.”<sup>270</sup>

Foster care options are considered a better alternative to placement in children’s homes and other institutions, a position supported by legislation and international law. “[I]nstitutional placement of children should not only be a last resort but that it should preferably be temporary whilst family-based solutions are sought.”<sup>271</sup> This exposes South Africa to the stark reality that unaccompanied minors are often placed in institutions long-term rather than placed with foster families or reunited with their own family, with many often remaining in institutional care.<sup>272</sup> This despite international law obligations requiring routine re-evaluation of institutional care placements.<sup>273</sup> The UN Committee on the Rights of the Child in their 2016 report raises concerns over the “systemic constraints faced by the alternative care system due to the increase in foster care, including a substantial backlog and lapses of foster care orders”.<sup>274</sup>

A report by Save The Children<sup>275</sup> indicates that the children are not, in practice, provided with adequate care, food provision is poor, as are the facilities.<sup>276</sup> The overall monitoring of the centres’ ability to provide legislatively mandated care, with the basic minimum required standards, is lacking and often funding is cut off by the government,<sup>277</sup> resulting in children leaving the centres in an attempt to fend for themselves.<sup>278</sup> This despite legislation stating that children who leave (or abscond as the act phrases it) are liable to a social worker or police apprehending them.<sup>279</sup> Children are kept in these centres well

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<sup>270</sup> (n269)

<sup>271</sup> (n91), pg. 3

<sup>272</sup> (n91), pg. 15

<sup>273</sup> (n9), Article 25

<sup>274</sup> UN Committee on the Rights of the Child (CRC), *Concluding observations on the second periodic report of South Africa*, 27 October 2016, CRC/C/ZAF/CO/2, available at:

<http://www.refworld.org/docid/587ce86b4.html> [accessed 31 October 2018], pg. 11

<sup>275</sup> (n243), pg. 22

<sup>276</sup> (n243), pg. 22

<sup>277</sup> (n243), pg. 22

<sup>278</sup> (n79)

<sup>279</sup> (n10), s170

beyond the six months set out in the Children’s Act and children often lack any clarity regarding the direction that their future may take.<sup>280</sup> The UNCRC has noted its concerns, in its 2016 report, over the increasing number of children placed in alternative care and their “prolonged stays”<sup>281</sup> as well as the low quality of care children receive and the funding disparity of centres across the country.<sup>282</sup> It appears that some centres remain unregistered, eliciting concern from the UN Committee on the Rights of the Child.<sup>283</sup>

## **5.2. Placement of migrant children**

According to chapter 11 of the Children Amendment Act 41 of 2007, alternative care includes foster care, care of a child in child and youth centres and temporary safe care.<sup>284</sup> The Act further provides that a child may not remain in temporary safe care or an institution for longer than six months without a court order.<sup>285</sup> A child may only remain in care until the end of the year in which they turn 18, though an application may be made to the provincial head of social development to allow that person to remain in care until the age of 21 if the care giver consent and if stay is necessary to complete education or training.<sup>286</sup>

Foster care is considered a separate form of alternative care and entails placing a child in the care of someone other than a parent. A child will be placed in foster care by the court once it has considered the report of the social worker regarding the cultural, religious and linguistic background of the child, as well as on the availability and suitability of foster parents. Only where no foster parent with the same cultural, religious and linguistic background can be found or if that foster parent is unwilling, may placement with another foster parent with no similar backgrounds be made. Placement with such a foster parent

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<sup>280</sup> (n243), pg. 22

<sup>281</sup> (n274)

<sup>282</sup> (n274), pg. 11

<sup>283</sup> (n274), pg. 11

<sup>284</sup> Children’s Amendment Act No. 41 of 2007, s167

<sup>285</sup> (n284), s167(2)

<sup>286</sup> (n284), s176

may also be made where a special bond exists between the child and prospective foster parent.<sup>287</sup>The South African Legal Aid website stipulates that the only foreign national permitted to foster are refugees and provides that migrant children in need of care and protection can be fostered, regardless of their documentation or refugee status.<sup>288</sup> Grants are available to those who qualify in terms of a means test to support the child in foster grant.

Child and Youth Centres are provided for in the Act, and stipulates their functions as including, inter alia, reception of street children. Thus, there should not be any homelessness as far as unaccompanied minors are considered, though whether these children have access to centres or are aware of their right to approach such centres is unclear.<sup>289</sup>

In addition to foster care, care in child and youth care centres and temporary safe care, provision is made for the adoption of unaccompanied minors, partial care orders instructing the parent or caregiver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night for a specific period<sup>290</sup>, supervision orders which involve placing a child or both child and parent under the supervision of a social worker or another person designated by the court<sup>291</sup> and, amongst others, orders subjecting a child, parent or caregiver of any child or any person who has parental rights and duties in respect of the child to early intervention services, family preservation programmes or both.<sup>292</sup>

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<sup>287</sup> (n284), s184

<sup>288</sup> Legal Aid South Africa, 'Self-help', available at <http://www.legal-aid.co.za/selfhelp/?p=166> (accessed 5 October 2018)

<sup>289</sup> (n284), s191(k)

<sup>290</sup> (n284), s46(1d)

<sup>291</sup> (n284), s46(1)(f)

<sup>292</sup> (n284), s46(1)(g)

Insofar as consideration of a child's views is concerned, a general provision in the Children's Act exists relating to participation rights<sup>293</sup>, echoing the UNCRC right. Further, in relation to children's courts, the Act stipulates the need for hearings to be conducted in rooms that allow for informality as well as the participation of those involved in the proceedings.<sup>294</sup> Nothing was found in the relevant legislation with regards to the participation of the children when making determinations as to their placement, though an entire section exists in the Children's Act relating to the participation of children generally and states that a presiding officer is obliged to allow a child to express his/her views, taking into consideration that child's age and maturity<sup>295</sup>

### **5.3. Detention/Retention**

The Immigration Act<sup>296</sup> as well as the Refugees Act<sup>297</sup> both govern detention, though often the actions of officials fall beyond the permitted legal parameters. Section 29(2) of the Refugees Act specifically states that detention of children may only occur as a measure of last resort, and in such cases for the shortest appropriate period of time.<sup>298</sup> The Immigration Act's Regulations<sup>299</sup> further state that no unaccompanied child is to be detained.<sup>300</sup> Any person deemed an illegal foreigner may be arrested and detained for the purposes of deportation, though such deportation requires confirmation by a court order within 48 hours if the illegal foreigner makes that request, failing which immediate release must take place. Further, a detainee may not be detained for more than 30 calendar days without a warrant of a court and such warrant may not extend detention beyond 90 calendar days.<sup>301</sup> Section 34(1)(e) further qualifies that any detention must comply with the minimum standards imposed, which are set out in the Regulations. Thus, while these

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<sup>293</sup> (n10), s10

<sup>294</sup> (n10), s42(8)(b)

<sup>295</sup> (n10), s61

<sup>296</sup> (n120)

<sup>297</sup> (n5)

<sup>298</sup> (n5), s29(2)

<sup>299</sup> (n120), Immigration Regulations, available at <http://www.vfsglobal.com/dha/southafrica/pdf/final-Immigration-Regulations-2014-1.pdf> (accessed 19 November 2017)

<sup>300</sup> (n120) & (n299), Annexure B, Minimum Standards of Detention, s1(d)

<sup>301</sup> (n120), s34(1)

provisions exist for illegal foreigners generally, the regulations specifically prohibit the detention of unaccompanied minors.

Research shows that asylum seeking children often fear the risk of deportation<sup>302</sup> and that a large number of children are “illegally deported by the police, who are not authorised to deport anyone.”<sup>303</sup> In *Bula*<sup>304</sup>, the court held that once an intention to make an asylum application is manifested, that person should be “set free”<sup>305</sup>. *Ersumo*<sup>306</sup>, just as in *Bula*, finds that once any migrant expresses the wish to apply for asylum and that wish goes unheeded, continued detention is unlawful.<sup>307</sup> While these cases dealt with adults, the principle applies to minor children equally.

In *Centre for Child Law*<sup>308</sup>, the court considered the constitutionality of the detention of unaccompanied foreign children at the Lindela Repatriation centre. Pursuant to an urgent application brought before the High Court, deportation was halted and the appointed curator suggested the children be moved to a place of safety immediately pending finalisation of the children’s court enquiry.<sup>309</sup> The children were then brought before the children’s court where the commissioner refused to consider any enquiries as he felt that foreign children fell beyond the scope<sup>310</sup> of the Child Care Act.<sup>311</sup> Subsequent to overturning the commissioner’s decision, the Department of Social Services still failed to return the children to the children’s court for the relevant enquiries. The court in this case held that “insufficient resources, inadequate administrative systems and procedural oversights in handling of children, as well as the inaccessibility of legal representation in

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<sup>302</sup> (n163), pg. 629

<sup>303</sup> Consortium for Refugees and Migrants in South Africa (CORMSA), ‘Protecting Refugees, Asylum Seekers and Immigrants in South Africa’, 18 June 2009, available at [https://reliefweb.int/sites/reliefweb.int/files/resources/CA04AA2E2ED83CF8492575DF002060A1-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/CA04AA2E2ED83CF8492575DF002060A1-Full_Report.pdf) (accessed 19 November 2017), pg. 18

<sup>304</sup> *Bula & others v Minister of Home Affairs & others* (589/11) [2011] ZASCA 209 (29 November 2011)

<sup>305</sup> (n304), para 80

<sup>306</sup> *Ersumo v Minister of Home Affairs* (69/2012) [2012] ZASCA 31 (28 March 2012)

<sup>307</sup> (n306), para 21

<sup>308</sup> (n12)

<sup>309</sup> (n12), para 7

<sup>310</sup> (n12), para 8

<sup>311</sup> (n69)

the adjudication process, have further exacerbated the crises now existing in the treatment of unaccompanied foreign children.”<sup>312</sup> It further held that the actions of the respondents violated the rights of the children as set out in various sections of the South African Constitution and provisions of the Child Care Act.<sup>313</sup>

If one looks at the facts placed before me and the facts set out in the report filed by the *curator ad litem*, the only conclusion one can reach is that the children are currently being treated in a manner which is horrifying in the extreme. It would be horrifying in the most abject society. In a society like ours, which prides itself on its noble sentiments, it is shameful. As South Africans, we are justifiably proud of our country and of our democracy, which has just celebrated its tenth birthday. We are proud of those policies that are enshrined in the Constitution, a constitution which is unparalleled in Africa, and, indeed, equals those of the most advanced countries in the world in terms of liberality and compassion. We have Nelson Mandela, who has become an icon world-wide because of, amongst other things, his love for all children and continued efforts towards caring for those in need. We subscribe to the principles contained in the international treaties already mentioned. We claim to enforce the laws put in place to protect the rights of illegal immigrants, and especially those pertaining to children. Yet all these lofty ideals become hypocritical nonsense if those policies and sentiments are not translated into action by those who are put in positions of power by the State to do exactly that; who are paid to execute these admirable laws, and yet, because of apathy and lack of compassion, fail to do so.<sup>314</sup>

In this case, and in others, children are often detained with adults at Lindela Repatriation Centre<sup>315</sup> despite the Immigration Regulations stating that minor children are to be kept

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<sup>312</sup> (n12), para 14

<sup>313</sup> (n12), para 22

<sup>314</sup> (n12), para 30

<sup>315</sup> Lawyers for Human Rights, ‘Monitoring Immigration Detention in South Africa’, December 2008, available at <http://cmr.jur.ru.nl/cmr/docs/South%20Africa.pdf> (accessed 19 November 2017), pg. 6

in separate accommodation to adults.<sup>316</sup> Additionally, detainees are often kept in prison cells awaiting transport to Lindela,<sup>317</sup> though it is unclear how many of those are minors.

In terms of access to legal counsel, the Legal Aid Board, together with legal practitioners throughout the country have agreed to providing children with the specialised legal assistance unaccompanied minors require.<sup>318</sup>

As mentioned above, the Immigration Regulations provide that certain minimum standards of detention must be met, such as accommodation with adequate lighting and space, a bed, mattress and at least one blanket, that detainees are provided with a balanced diet which takes into account the special nutritional needs of children, clean drinking water and the provision of means needed to ensure adequate hygiene and cleanliness.<sup>319</sup> Research indicates that despite the previous prevalence of unlawful detention of unaccompanied minors, the practice of doing so has steadily declined over time<sup>320</sup> and is attributable to the work done by NGOs and human rights advocates.<sup>321</sup> “Nevertheless, (unlawful) detention of child migrants remains an issue of concern.”<sup>322</sup>

The UN Committee on the Rights of the Child, in its 2016 Concluding Observations raises concerns over the risk of deportation faced by unaccompanied minor children, asylum seekers and refugee children, and South Africa’s “lack of legislation to allow permanent settlement” in the country. Furthermore, it states concern over the “arrests and detention of children on account of their immigration status.”<sup>323</sup>

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<sup>316</sup> (n299), s1(d)

<sup>317</sup> (n315), pg. 11

<sup>318</sup> Van den Burg, A, ‘Law, democracy and development – Legal Protection of Undocumented Foreign Migrant Children in South Africa: reality or myth?’, *Law, Democracy and Development*, 10(2), 2006, 82, 97

<sup>319</sup> (n299)

<sup>320</sup> (n79), pg. 371

<sup>321</sup> (n79), pg. 371

<sup>322</sup> (n79), pg. 371

<sup>323</sup> (n274)

## 6. ACCESS TO FUNDAMENTAL RIGHTS

### 6.1. Education

The South African Constitution guarantees the rights of all to basic education<sup>324</sup>, while the Refugees Act stipulates that a refugee is entitled to the same basic education inhabitants of South Africa receive.<sup>325</sup> Thus, migrant children have access, on equal footing, to nationals in South Africa to primary education. In fact, the Schools Act<sup>326</sup> stipulates that every parent must ensure that every learner for whom they are responsible attends school between the ages of 7 and 15<sup>327</sup> and that no school may unfairly discriminate against learners in its admission procedures.<sup>328</sup> The Admissions Policy<sup>329</sup> further states that the Schools Act and the Policy applies to non-South Africans in possession of the relevant documentation, failing which they must show proof that the relevant application to regularise their stay has been made.<sup>330</sup> Undocumented children are not to be denied education, though parents or caregivers should be in the process of arranging for formal documentation. This is presumably also the case where undocumented minors are assisted by a social worker. Despite these provisions, however, schools often turn foreign children away for lack of documentation.<sup>331</sup> Further, fee exemptions exist to migrant children in the same way as they are to nationals and are waived if the children meet the requirements for such waiver.<sup>332</sup> These fee waiver requirements apply to migrant children in the same way they do to nationals.

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<sup>324</sup> (n1), s29

<sup>325</sup> (n5), s27(g)

<sup>326</sup> Schools Act No. 94 of 1996

<sup>327</sup> (n326), s3

<sup>328</sup> (n326), s5(1)

<sup>329</sup> National Education Policy Act No 26 of 1996, 'Admission Policy for Ordinary Public Schools', 19 October 1998, available at

[https://www.education.gov.za/Portals/0/Documents/Legislation/Gov%20Not/Ordinary%20public%20schools%20\(Notice%202432%20of%201998\).pdf?ver=2008-07-02-152003-477](https://www.education.gov.za/Portals/0/Documents/Legislation/Gov%20Not/Ordinary%20public%20schools%20(Notice%202432%20of%201998).pdf?ver=2008-07-02-152003-477) (accessed 19 November 2017)

<sup>330</sup> (n329), s19

<sup>331</sup> SECTION27, 'Basic Education Rights Handbook', [nd], Chapter 6, available at

<http://section27.org.za/wp-content/uploads/2016/04/S27-BE-2017-ch6new.pdf> (accessed 19 November 2017), pg. 137

<sup>332</sup> Legal Resource Centre (LRC) Coram Children's Centre, Scalabrini Centre of Cape Town 'Guide 3: Rights and Duties of Asylum Seekers and Refugees in South Africa' 2015, available at <http://www.probono.org.za/Manuals/Refugee->

Insofar as the opportunities to pursue higher education is concerned, migrant children are entitled to the same opportunities as nationals, however the state is not required to provide further education in the same way as they do for primary education. Skills and language training exists for asylum seekers and recognised refugees to “help them better integrate into South African society and provide them with the skills necessary to find work and support themselves and their families in South Africa”<sup>333</sup> though these are provided by organisations rather than the state. In terms of further education, organisations, such as the United Nations High Commissioner for Refugees, assist refugees to continue their studies. These, however, are exclusive to recognised refugees. If a migrant child (or by that time a major child) does not have the status of a recognised refugee, unless they have the means to continue their education beyond primary education, they will not have access to further education. This is true, too, of minor children entering South Africa after the primary education age as the state is only constitutionally mandated to make higher education progressively available and accessible.<sup>334</sup>

Children with special needs face additional challenges in that the South African government is failing in meeting its obligations to provide basic education to such children.<sup>335</sup> Statistics show that in 2015, 489 036 children with disabilities were not attending school.<sup>336</sup> While special needs schools exist, reports suggest that greater “systemic challenges”<sup>337</sup> exist, for example shortage of staff, preventing children with

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Manual/2015\_Asylum\_seeker\_guide\_Rights\_and\_Duties\_of\_asylum\_seekers.pdf (accessed 25 April 2017) pg. 3

<sup>333</sup> University of Cape Town, Refugee Rights Unit, ‘Information Manual’, [nd], available at [http://www.refugeerights.uct.ac.za/sites/default/files/image\\_tool/images/248/14583%20information%20manual.proof%204.pdf](http://www.refugeerights.uct.ac.za/sites/default/files/image_tool/images/248/14583%20information%20manual.proof%204.pdf) (accessed 19 November 2017)

<sup>334</sup> (n1), s29(1)(b)

<sup>335</sup> Khumalo, S & Fish, T, ‘The Right to Education for Children with Disabilities in South Africa: SECTION27’s action from national research and litigation strategies to international advocacy’, 14 April 2015, available at <http://www.right-to-education.org/blog/right-education-children-disabilities-south-africa-section27-s-action-national-research-and> (accessed 19 November 2017)

<sup>336</sup> (n335)

<sup>337</sup> (n335)

disabilities from attending school, as well as a “laissez faire” attitude towards the right to basic education afforded to children with disabilities, which is counter to state obligations to ensure the “immediately realisable”<sup>338</sup> right to education for children with disabilities.

## 6.2. Healthcare

Section 27 of the Constitution provides that “[e]veryone has the right to have access to [ ] health care services, including reproductive health care”<sup>339</sup> and that the state is required to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of”<sup>340</sup> this right to health. It further prohibits the refusal to provide anyone with emergency medical treatment.<sup>341</sup> Section 28, which relates specifically to the rights of children, states that children have the right to basic health care.<sup>342</sup> The National Health Act<sup>343</sup>, which aims to legislate on this constitutional right, provides as one of its objectives, the provision of the “best possible health services that available resources can afford”<sup>344</sup>, in an equitable manner to those in South Africa. Asylum seekers and refugees are entitled to the same basic health services as South African citizens and this was affirmed in the case of *Khosa*.<sup>345</sup> Whereas certain constitutional provisions do in fact restrict rights to citizens of South Africa<sup>346</sup>, the provision in question, section 27, refers to “everyone” and its silence with respect to restricting its application to non-citizens can only lead to the purposive interpretation that the provision grants rights to all, citizens or not.<sup>347</sup> This is justified further by section 7, stating that the Bill of Rights “enshrines the rights of all people in our country”.<sup>348</sup>

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<sup>338</sup> (n336)

<sup>339</sup> (n1), s27(1)

<sup>340</sup> (n1), s27(2)

<sup>341</sup> (n1), s27(3)

<sup>342</sup> (n1), s28(1)(c)

<sup>343</sup> National Health Act No. 61 of 2003

<sup>344</sup> (n343), s2(a)(2)

<sup>345</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC)

<sup>346</sup> For instance, the right to vote and leave or enter the country freely

<sup>347</sup> (n345), para 47

<sup>348</sup> (n345), para 47

In the case of *Centre for Child Law v Minister of Home Affairs*<sup>349</sup>, the court was of the opinion that a duty exists on the state to provide basic socio-economic “provision” for children with no family structure or care and that this includes unaccompanied foreign children.<sup>350</sup> This view came about as a result of the constitutional court’s remarks in *Grootboom*<sup>351</sup>, that the obligation to provide shelter in terms of section 28 of the constitution rests on the parents and not on the state<sup>352</sup>, thereby implying that an unaccompanied child is directly entitled to the right to shelter, and arguably other socio-economic rights contained in the constitution purely because they have no parents to provide them those rights.

As far as children with special needs are concerned, the National Health Act aims to regulate national health by “protecting, respecting, promoting and fulfilling the rights of...vulnerable groups such as women, children, older persons and persons with disabilities”<sup>353</sup>. Thus, theoretically, those with special needs, including non-citizens, fall within the scope of the state’s commitment to realising the right to health.

While everyone has the right of access to health, there are limitations to that right. Such a limitation includes the notion of the progressive realisation of the rights within the available resources of the state. This acknowledges the practical resource constraints within which state’s operate while at the same time ensuring the state is not relieved of its obligation to continually work towards ensuring such realisation. Thus, the National Health Act stipulates that the Minister of Health is to determine the groups of people eligible for free health care<sup>354</sup>, and by implication, those who are not. No matter your

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<sup>349</sup> (n12)

<sup>350</sup> (n12), para 17

<sup>351</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46

<sup>352</sup> The court, however, emphasises that this does not absolve the state of its responsibilities in respect of children cared for by parents but that the state has a responsibility to put mechanisms in places to help realise these rights.(at para 78)

<sup>353</sup> (n343), s2(c)(iv)

<sup>354</sup> (n343), s4

eligibility, however, no one may be refused emergency medical treatment.<sup>355</sup> Pregnant and lactating women and children under 6 are eligible for free health care, provided they are not on private medical insurance<sup>356</sup>, as do those on government grants.<sup>357</sup> This applies to nationals and non-nationals equally, particularly to asylum seekers and refugees who do not possess the requisite paperwork. They may not be denied access based on the lack of paperwork. Additionally, everyone without access to private insurance, has the right to free access to anti-retroviral treatment for AIDS, treatment for tuberculosis and for treatment of malaria. For women, termination of pregnancy, within the legal limits prescribed by law, is always free of charge as is treatment for rape.<sup>358</sup> For all other treatment, the hospital may charge a fee, and the amount is determined by a means test. As of April 2002, the Department of Health established criteria for full-paying patients, subsidised and partially subsidised patients<sup>359</sup>, the details of which are complex and beyond the scope of this paper. A more recent classification of patients for the determination of fees was not found, though reports suggest that a more recent version does exist.<sup>360</sup> Further limitations exist regarding organ transplantations and the National Health Act stipulates that organ transplants are exclusively available to South African citizens or permanent residents, subject to approval of the Minister of Health.<sup>361</sup>

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<sup>355</sup> (n343), s5

<sup>356</sup> (n343), s4(3)(a)

<sup>357</sup> International Organisation for Migration, 'Your Guide to Government Health Services', 2012, available at <http://www.hivsharespace.net/system/files/2012%20IOM%20Health%20info%20guide%20for%20migrant%20s.pdf> (accessed 26 November 2017), pg. 14

<sup>358</sup> (n257), pg. 26-30

<sup>359</sup> Department of Health, 'Explanation of the Current Policy Regarding the Classification of Patients for the Determination of Fees', 2002 available at <http://www.health.gov.za/index.php/shortcodes/2015-03-29-10-42-47/2015-04-30-09-10-23/uniform-patient-fee-schedule/category/108-u2012?download=906:uniform-patient-fee-schedule-classification-of-patients-appendix-h>. (accessed 28 January 2017)

<sup>360</sup> Medical Brief, Africa's Medical Media Digest, "DoH adjusts SA public hospital means test". August 2017, available at <https://www.medicalbrief.co.za/archives/doh-adjusts-sa-public-hospital-means-test/> (accessed 28 January 2017).

<sup>361</sup> (n343), s61(3)

## **7. EXPULSION**

### **7.1 Exclusion Clauses**

In South Africa the exclusionary causes are found in s4 of the Refugees Act echoes those exclusions found in the Refugee Convention. The Refugees Act, however, also excludes applicants who enjoy the protection of another state. No mention of exclusionary clauses relating to migrant children exists in the Refugees Act and it is unclear if any special considerations are made when considering their applications.

### **7.2. Internal relocation/expulsion to country of origin**

The Department of Social Development (DSD) is entrusted with looking into the safety, security and socio-economic environment the child will be placed in. In doing so the Department must take into account the best interest of the child, as required by article 10 of the UNCRC. The DSD guidelines<sup>362</sup> clearly state that a child will only be reunited with his or her family if it is in the child's best interest.<sup>363</sup> Prior to any family reunification efforts being, certainty must exist that the child will not be subject to abuse or exposed to danger.<sup>364</sup> The DSD is required to follow up with the child and family following reunification to ensure that that the child is well cared for.<sup>365</sup> In the event that no parents or relatives are available to care for the child in the country of origin, the return of child should not take place without secure arrangements made, keeping in mind the principle of non-refoulement and the best interests of the child.<sup>366</sup> Should the unaccompanied child exhibit an interest in applying for an asylum seekers permit in terms of section 22 of the Refugees Act, that option must be given to the child, and returning that child to his or her country of origin is not an option unless the asylum application is rejected. International Social Services, in collaboration with organisations such as Red Cross or Red Crescent

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<sup>362</sup> (n76)

<sup>363</sup> (n76), guideline 6.4.1

<sup>364</sup> (n76), guideline 6.4.1

<sup>365</sup> (n76), guideline 6.4.1

<sup>366</sup> (n76), guideline 6.4.2

societies or the International Organisation for Migration in the child's country of origin will assist in determining if the child can be returned to the country of origin.<sup>367</sup>

Should a child have family in South Africa, they may request placement with that family member. This will require the intervention of a social worker who will ensure that the conditions for internal relocation serve the best interests of the child.

## **8. DATA COLLECTION**

In her article, Anderson explains that “[d]ue to scarce and poorly maintained migration data, the prevalence of informal border crossing and lack of documentation among migrants, little is known about the reality of migration into South Africa, in particular the situation of unaccompanied child migrants.”<sup>368</sup>

In 2016, Sloth-Nielsen and Ackermann conducted a study focused on children within the Western Cape in which they explain that:

No comprehensive study of separated and unaccompanied foreign children in South Africa exists, nor would such a study be feasible to undertake. This is because South Africa does not have an encampment policy for asylum seekers (like for instance Zambia and Zimbabwe), resulting in foreign adults and children alike being accommodated in communities throughout the Republic.<sup>369</sup>

From the above-mentioned text, one can conclude that it appears that the DHA has difficulties relating to the capturing of data of unaccompanied children.

Research conducted by Save the Children included a number of case studies of children in Limpopo as well as Mpumalanga in which it found that :

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<sup>367</sup> (n76), guideline 6.4.1

<sup>368</sup> (n79), pg. 361-2

<sup>369</sup> (n91), pg. 4

the highest number of young people surveyed live in rented shacks or back rooms in residential areas alongside the towns. This means that the majority of unaccompanied and separated children are never identified and referred to protection services and that most interventions conducted by government or NGOs have focussed on the visible children...<sup>370</sup>

### **8.1. Is the data regarding children kept confidential?**

South Africa has a strictly confidential National Child Protection Register, which records “vulnerable children, under the age of 18 years, who are in need of care and protection. The register is maintained by a social worker within a local Department of Social Development and designated child protection organizations.”<sup>371</sup> The Children’s Act, s112, provides for the confidentiality of all information recorded in the National Child Protection Register and provides that only certain professionals involved with child protection may access the information contained therein.<sup>372</sup> These include officials from the Department of Social Development.

## **9. INTERNATIONAL RELATIONS**

### **9.1 Foreign Aid that addresses the root causes of migration**

No information was found to address points set out in 9.1.

### **9.2 Cooperation with Civil Society**

South Africa has numerous organisations which assist migrant children in different ways. These organisations perform various tasks relating to migrant children and aim to raise

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<sup>370</sup> (n243), pg. 17

<sup>371</sup> Department of Social Development, “Child Protection Register” available at <http://www.justice.gov.za/vg/children/dsd-cpr-pamphlet-2009.pdf> (accessed 28 March 2018), pg. 2

<sup>372</sup> (n10), s115(b)

the awareness of communities by defining the steps to be taken when encountering a migrant child.

According to a recent case study conducted by Save the Children, collaboration between the state civil society, specifically UNICEF, UNHCR, IOM and Save the Children exists insofar as it relates to “documenting these international problems and ... find[ing] solutions.”<sup>373</sup> However, collaboration between civil society and the state could certainly do with significant improvement. State perception of migration as a whole is somewhat negative, and any steps towards ensuring that migrant children are adequately taken care of are often slow. Indeed, the recurrent demonstration by the Department of Home Affairs of the contempt they hold for court orders is indicative of a lack of apathy towards migrants as a whole, never mind children. The study alleges further that state response to migrant children is “inadequate”<sup>374</sup> and that insufficient protection is afforded to unaccompanied migrant children<sup>375</sup> while collaboration between the state and civil society in providing for these children remains uncoordinated.<sup>376</sup> The public, however, have demonstrated, at least in one locality in South Africa, an ability to identify unaccompanied minor children and assist them with finding shelters in that area.<sup>377</sup> This example remains an exception though and most often identifying these children is the biggest hurdle to providing them with the required protection. Unidentified migrant children will, therefore, never have the opportunity to enjoy the protections offered by the state, however limited or dysfunctional those might be, and studies have shown that efforts by NGOs are primarily directed towards “visible” children.<sup>378</sup>

### **9.3 Visa Policies**

South Africa does not make provision for humanitarian visas

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<sup>373</sup> (n243), pg.10

<sup>374</sup> (n243), pg. 10

<sup>375</sup> (n243), pg. 10

<sup>376</sup> (n243), pg. 10

<sup>377</sup> (n243), pg. 17

<sup>378</sup> (n243), pg. 17

## 10. ADDITIONAL REMARKS

South Africa is very proud, and rightly so, of its advanced, human rights focussed constitution, which comes as a result of the suffering the country endured during Apartheid. It has come a long way since the days when the majority population were stripped of their rights and dealt with in the most abject of manner, however, it has much to improve on, as do many states. On paper, South Africa does well to protect children, particularly those who are unaccompanied and even consider a child's best interests as of "paramount importance", which already goes a step beyond international law obligations with respect to children. As is evidenced by the UN Committee on the Rights of the Child, however, there are numerous concerns in relation to migrant, asylum-seeking and refugee children. The Committee notes the challenges these children face, which include "a) the increasing number of unaccompanied children migrating...and the heightened risk of destitution, exploitation, violence and abuse faced...;b) the lack of accurate and disaggregated data...including those...on child victims of trafficking; c) The ineffective implementation of relevant laws and policies; d) the definition of "dependants" and "family" under the Refugees Amendment Bill., which may not fully protect the right to family reunification that is provided in the Convention; 3) The risk of deportation ...due to the lack of legislation to allow permanent settlement in the State part as a durable solution; f) The arrests and detention of children on account of their immigration status."<sup>379</sup>

Until such time that South Africa demonstrates through action the benefit of these lofty legislative provisions, they are nothing more than lofty ideals.

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<sup>379</sup> (n274), pg. 19

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