

# Legal protection of undocumented foreign migrant children in South Africa: Reality or myth?

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## 1 INTRODUCTION

The United Nations High Commissioner for Refugees estimates that at the beginning of the 21st century some 10 million of the world's 23.3 million refugees were children.<sup>1</sup> The United Nations High Commissioner for Refugees 2005 Global Appeal reports 4.2 million adults and children of concern in Africa alone. The main countries from which these migrants originate include Sudan, Angola, Burundi and the Democratic Republic of Congo.<sup>2</sup> Some of the key factors which influence the migration of children include trafficking and smuggling, war and poverty, as well as lack of access to socio-economic rights in the countries of origin.<sup>3</sup>

Children of foreigners are often turned away from public schools and experience xenophobia in one form or another.<sup>4</sup> In addition, it is often alleged that government officials and members of the South African Police Service maltreat foreigners in South Africa.<sup>5</sup>

When I speak of 'undocumented foreign migrant children' in this article, I include in this definition children of 'illegal aliens', asylum seekers, immigrants, and accompanied and unaccompanied children. 'Accompanied children' refers to children who find refuge in South Africa with their parents or family members, whereas an 'unaccompanied foreign migrant child' is a child who seeks refuge in South Africa on her or his own without any family company.

'Undocumented foreign migrant children' include accompanied as well as unaccompanied minors. This group of children however, refers to the

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1 Hodgkin R and Newell P *Implementation handbook for the Convention on the rights of the child United Nation's Children's Fund* (2002) 305.

2 Nicholson C 'A first call on available resources for child refugees in South Africa' (2005) 1 De Jure 70.

3 Bhabha J 'Demography and rights: Women, children and access to asylum' (2004) 16 *International Journal of Refugee Law* 227 243.

4 Harris B 'Foreign experience: Violence, crime and xenophobia during SA's transition' (2001) 5 *Violence and Transition* series 15.

5 'Corrupt Joburg cops caught on camera' 13 September (2005) *Mail and Guardian*.

group which has entered South Africa and has not received formal refugee status.

### 1.1 South African case study

A critical case involving undocumented foreign migrant children in South Africa is the rape and subsequent imprisonment in June 2004 of two Rwandan teenage asylum seekers.<sup>6</sup> The two teenage girls fled the Rwandan genocide and, during their journey to South Africa, they were raped by a truck driver with whom they were travelling. The truck driver had promised them documentation and accommodation. However, on arriving in South Africa, neither of these was forthcoming. Instead, the truck driver demanded sexual favours and threatened to abandon the children if they did not comply.

According to reports, various attempts were made by the teenagers to obtain assistance from local authorities including the police, a magistrate's court and the Department of Home Affairs. The teenagers were imprisoned and later sent to a place of safety.

The Centre for the Child Law and Lawyers for Human Rights, two non-governmental organisations, were appointed to provide legal representation to the teenagers. However, shortly after the appointment of the attorneys, the teenagers disappeared and were never found.

The attorneys from the Centre for Child Law and Lawyers for Human Rights indicated that, had the girls been found, they would have ensured that the State considered the girls' application for asylum. The attorneys advised that the teenagers should immediately have been identified as children in need of care and legal representation should have been made available to them. However, none of the government departments identified the teenagers accordingly, nor was legal representation afforded to them.

An additional problem was the imprisonment of the teenagers, which seems to be in direct contravention of the provisions of the South African Constitution<sup>7</sup>. *The Sunday Times* stated that the case of these teenage girls illustrates the urgent need to provide a suitable protection regime for children in South Africa to ensure respect for their constitutional rights.<sup>8</sup>

It is my submission that the aforementioned case illustrates the lack of procedural guidelines, interdepartmental strategies, implementation mechanisms, application of Constitutional imperatives and provision of appropriate legal representation for undocumented foreign migrant children in South Africa. These procedural gaps occur despite the existence of the relevant international and South African legal framework which should ensure protection of undocumented foreign migrant children in South Africa.

6 Rickard C 'Shameful truth about SA's treatment of refugees' 6 June (2004) *The Sunday Times*.

7 S 28(1)(g) of Act 108 of 1996.

8 See Rickard C (fn 6 above).

## 2 INTERNATIONAL LEGAL FRAMEWORK

South Africa has ratified and is legally bound by several of the relevant international instruments and is therefore obliged to ensure that the human rights standards contained therein are upheld.

There are various articles in the Convention on the Rights of the Child which relate to the rights of undocumented foreign migrant children. The most pertinent article as far as undocumented foreign migrant children are concerned is article 22. It provides as follows:

- (1) States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
- (2) For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.<sup>10</sup>

This is the only provision in the Convention which speaks directly to the protection of undocumented foreign migrant children. The protection and benefits referred to should be interpreted to include access to identity, social security and non-discrimination.

### 2.1 General Comment Number 6

In 2005, the Committee on the Rights of the Child gave considerable guidance on issues pertaining to the protection of undocumented foreign migrant children by virtue of its General Comment 6. In this Comment, the Committee stated that the most critical concerns relating to such children were that they are at far greater risk of sexual exploitation and abuse; of military recruitment; and of being subject to child labour and detention.<sup>11</sup>

9 Article 22 (1) of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with article 49. [www.unhchr.ch/html/menu5/b/k2crc.htm](http://www.unhchr.ch/html/menu5/b/k2crc.htm) (accessed 27 September 2006).

10 *Ibid* Article 22 (2).

11 Committee on the Rights of the Child *General Comment No.6* (2005) 39th session at 2: 'They are often discriminated against and denied access to food, shelter, housing,

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The General Comment defines 'unaccompanied children' in article 1 of the Convention on the Rights of the Child as 'children who have been separated from both parents and other relatives and are not cared for by an adult who, by law or custom, is responsible for doing so'.

### **2.1.1 Legal obligations of States Parties**

The General Comment places emphasis on the fact that the enjoyment of rights set out in the Convention is not limited to children who are citizens of a state party and must also be available to all children.<sup>12</sup> It also makes clear that states have both positive and negative obligations in this regard and are thus required to refrain from measures infringing on this group of children's rights and, in addition, are required to ensure the enjoyment of these rights without discrimination.

### **2.1.2 Best interests, non-discrimination, survival and the right to be heard**

The General Comment gives meaning to the 'best interests' principle as it relates to unaccompanied or separated children, stating that:

[a] determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.<sup>13</sup>

In this way, the General Comment has clarified the child's best interests in this particular context.

The General Comment clearly sets out the steps which states are required to take to ensure that the child's best interests are taken into account. These steps include, firstly, the need to appoint a competent guardian for such children, as this will serve as a key safeguard to ensure the best interests of the child are indeed taken into account. Only upon the appointment of this guardian should the child be referred to the initial assessment process and a legal representative appointed if the circumstances require such appointment.

The principle of non-discrimination furthermore prohibits any unfair discrimination against the child based on the child's status as an unaccompanied or separated minor, refugee, asylum seeker or migrant. It is, however, important to note that the General Comment acknowledges the fact that children of different ages will be vulnerable to a different degree and that their need for protection will therefore vary accordingly.<sup>14</sup>

It is noteworthy to see meaning being given to the rights in the Convention on the Rights of the Child in respect of the best interests of the

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health services and education. Unaccompanied and separated girls are at particular risk of gender based violence, including domestic violence. In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, and guardianship systems of legal advice.

12 *Ibid* 3.

13 *Ibid* 5.

14 See General Comment No 6 (fn 11 above) 5.

child, non-discrimination, survival and the right to be heard. These four cornerstone rights are often the ones which are violated in the case of unaccompanied minors. The challenge is for states to take cognisance of the guidance provided by the General Comment and to ensure that unaccompanied minors are treated in the manner set out in the General Comment.

### 2.1.3 *Initial assessment and measures*

Apart from the general guidelines set out in the previous section, General Comment 6 also provides more specific instructions to states on how to treat such children during the initial assessment stage. According to the Comment, states have a duty to prioritise the identification of separated or unaccompanied children immediately upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities. States also have a duty to undertake prompt registration by means of an initial interview conducted in an age-appropriate and gender sensitive manner. States should provide identity documents to children, and the tracing of family members should begin as soon as possible.<sup>15</sup>

The General Comment adds that unaccompanied or separated children should have appropriate guardianship and, in cases where such children are involved in asylum seeking procedures, the child should be provided with legal representation.<sup>16</sup> In commenting on these provisions Goodwin-Gill argues that the legal responsibility for unaccompanied refugee children rests with the government of the country of asylum. An unaccompanied child should have a legal guardian with respect to involvement in any legal proceedings and may need a legal guardian to advocate for the child's interests or to make decisions on behalf of the child in other situations.<sup>17</sup>

### 2.1.4 *Care and accommodation arrangements*

The General Comment acknowledges the special care arrangements that are necessary for unaccompanied minors and confirms the importance of article 20(3) of the principal Convention, which states that there is a duty to accommodate such children '*inter alia* [through], foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children'. The General Comment suggests that, when a state is selecting from these options, the particular vulnerabilities of the child who has lost his or her family connections, as well as gender and age needs, must be taken into account. The General Comment comprehensively sets out the guidelines that a state is required to follow when making decisions regarding the care and accommodation of such children. These guidelines state, amongst other things, that the child should

<sup>15</sup> *Ibid* 7-8.

<sup>16</sup> *Ibid*.

<sup>17</sup> Goodwin-Gill G *Children on the Move, How to implement their right to family life, Protecting the human rights of refugee children. Some legal and institutional possibilities*, Martinus Nijhoff Publishers (1996) 97 100.

not be deprived of liberty; that the care be considered to be in the best interests of the child; and that the notion of the family unit should as far as possible be adhered to.<sup>18</sup>

Regarding the question whether and under what circumstances an unaccompanied minor can be deprived of his or her liberty, General Comment 6 refers to article 37 of the Covenant and points out that the state is to make special arrangements in order to provide living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. The underlying approach should be 'care' and not 'detention'. Children who are kept in institutions are entitled to medical treatment, education, play and legal advice.<sup>19</sup>

The care and accommodation arrangements of undocumented foreign migrant children have been a matter of grave concern internationally. States do not seem to have effective procedures and facilities in place to adhere to the requirements as set out above. However, the recent General Comment will go a long way towards providing the framework within which the international community should work regarding the accommodation of these children.

### 2.1.5 Procedural issues

The General Comment reiterates the fact that unaccompanied minors should receive access to the necessary asylum procedures, but should always be protected by child welfare legislation in a particular country.

The General Comment suggests that it is important that specialised training be provided to legal representatives, guardians, interpreters and others dealing with separated and unaccompanied children. In addition, the General Comment recommends the development of a detailed and integrated system for the collection of data on unaccompanied and separated children with a view to the development of effective policies for the implementation of the rights of such children.<sup>20</sup>

## 2.2 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child<sup>21</sup> (ACWC) reflects the same minimum acceptable standards for the treatment of children as the Convention on the Rights of the Child. However, many of the provisions of the ACWC offer a higher standard than that provided in the Convention. The ACWC thus both complements the Convention on the Rights of the Child and ensures a higher threshold for the promotion and protection of children's human rights in Africa.<sup>22</sup>

18 See General Comment No 6 (fn 11 above) 9.

19 *Ibid* 12-13.

20 *Ibid* 19.

21 African Charter on the Rights and Welfare of the Child, OAU Doc.CAB/LEG/24.9/49 (1990), entered into force Nov.29, 1999. <http://www1.unn.edu/humanrts/Africa/afchild.htm> (accessed 27 September 2006).

22 Lloyd 'A regional developments on the rights and welfare of children in Africa: A general report on the African Charter on the rights and welfare of the child and the African

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Article 23 of the ACWC deals specifically with refugee children and states that:

States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receives appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which States are Parties.

Notably, the reference in the Convention is to 'special protection' compared to the reference in the Charter to 'appropriate protection' which denotes a clear difference in the intention of the drafters of the two instruments.

### 2.3 1951 UN Convention relating to the status of refugees

Refugee status is regulated in international law by the 1951 UN Convention on the Status of Refugees.<sup>23</sup> South Africa ratified this Convention in 1996 and agreed to develop a specific refugee policy.<sup>24</sup> The 1951 Convention has a widely accepted definition of who a refugee is. It provides that a refugee is:

any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or owing to such fear, is unwilling to return to it.<sup>25</sup>

The 1951 Convention does not pay significant attention to the needs and special circumstances of refugee children as its definition of what constitutes a refugee does not make a distinction between different kinds of refugees based on their age. Although undocumented foreign migrant children are entitled to the same protection under the Convention as adults, their special vulnerabilities are not taken into account. This omission is particularly problematic because it ignores the specific needs of children and exposes vulnerable children to the risk of child-specific forms of persecution.<sup>26</sup>

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Committee of experts' (2003) *Centre for Legal Research, Faculty of Law, University of the West of England* at 1 (unpublished). Report accessed at <http://www.uwe.ac.uk/law/research/lacr/report.htm> (accessed 30 September 2004).

23 Convened under General Assembly resolution 429(v) of 14 December 1950, entry into force 22 April 1954, in accordance with article 43, [http://www.unhcr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_c_ref.htm) accessed 27 September 2006.

24 Van Garderen J & Winterstein S 'Chapter 12' in Padayachee S ed *Children and the law: Manual 2ed* (2005) 208.

25 Article 1(2) of the UN Convention on the Status of Refugees, see also Van Bueren G *The international law on the rights of the child* (1995) 360.

26 Edwards A *Age and gender dimensions in international law* (2003) 57.

The requirement that the fear must be 'well-founded' implies that the state of mind must be supported by objective criteria. This does not give rise to problems for accompanied children, but it does give rise to problems when making a determination about the status of unaccompanied minor children.<sup>27</sup>

In sum, the 1951 Refugee Convention is inadequate in providing for the needs of children. In instances like this, relevant provisions are to be sourced from children-specific conventions, such as the Convention on the Rights of the Child and the ACWC, to reinforce the need to provide adequate protection to undocumented foreign migrant children.

## 2.4 The 1969 OAU Convention governing specific aspects of the refugee problems in Africa

South Africa acceded to the 1969 Organisation of African Unity (OAU) Convention on Specific Aspects of Refugee Problems in Africa on 15 December 1995.<sup>28</sup> This Convention seeks to find ways of alleviating the misery and suffering of refugees in Africa by providing them with a better life and future. The Convention therefore specifically recognises the increasing concern for refugees in African states and seeks to eliminate or alleviate any disputes that may arise between African countries in this respect.

The OAU Convention endorses the definition of refugee found in the 1951 Refugee Convention but goes further by stating that the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside their country of origin or nationality.<sup>29</sup>

The exact scope of the definition of a refugee as well as status determination issues have been widely debated. Some writers argue that there seems to be a 'consensus' that the OAU definition is much wider than the

27 See (fn 25 above) at 363.

28 See <http://www.africa-union.org/root/AU/Documents/Treaties/List/Convention%20on%20Refugees.pdf> (accessed on 27 September 2006).

29 Article 1(1) states:

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

Article 1(2) states:

The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.



1951 definition and others argue that the OAU definition, as it stands, has been ill defined and therefore leaves much to interpretation by states having to decide on refugee status.<sup>30</sup>

Gorlick notes that the two documents provide for different needs and requirements which are applicable to child claimants, and states that a legal representative has to be appointed to assist a child through the determination procedures.<sup>31</sup>

## 2.5 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002 (OPCAT)

The Optional Protocol was adopted in 2002 by the UN General Assembly. The principal Convention against Torture was ratified by South Africa in 1998. South Africa has still not signed the Optional Protocol, but is expected to do so.<sup>32</sup>

Article 1 of the Protocol states that the objective is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

For the purposes of this discussion, 'detention' refers to the deprivation of liberty of children and 'detention facilities' include prisons and places of safety. The places of detention referred to in the Protocol include police stations, security force stations, pre-trial centres, remand prisons, prisons for sentenced persons, centres for juveniles, immigration centres, international transit zones, centres for detained asylum seekers, psychiatric institutions and places of administrative detention.<sup>33</sup> It is therefore clear that any detention facility where undocumented foreign migrant children are held will fall under the jurisdiction of this Protocol.

In countries where OPCAT has been ratified, members of a sub-committee will undertake regular visits to places of detention. This sub-committee will consist of 10 independent, multi-disciplinary experts. OPCAT places a duty on all state parties who have ratified it to put in place one or several national preventive mechanisms within one year

30 Rankin M 'Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on' (2005), Working Paper No.113.4. UNHCR Sourced from <http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=research&id=3bbc18ed5&skip=15&list2> (accessed 23 September 2006).

31 Gorlick B 'Human rights and refugees: Enhancing protection through international human rights law' (2000) 7, sourced from <http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=research&id=3bbc18ed5&skip=90&list2> = (accessed 23 September 2006)

32 Sloth-Nielsen J 'Optional protocol against torture and similar treatment or punishment' (2003) *Article 40* 1.

33 Association for the Prevention of Torture 'The optional protocol to the UN Convention against torture: Frequently asked questions'. Sourced from <http://www.apr.ch/index1b.5html> (accessed 23 September 2006).

of ratification. The local Human Rights Commission, Ombudsman, Parliamentary Committees or NGOs could carry out this function within their respective states. Following their visits to detention centres, these bodies would make recommendations with the aim of improving the treatment of detainees and the conditions under which detainees are held. This framework would seek to address at least some of the concerns related to the accommodation of children.

Given the human rights abuses which arise when undocumented foreign minor children are detained, and the obvious protection which OPCAT could provide as a measure of clear oversight over detention facilities, it is imperative for South Africa to ratify this Protocol soon.

### 3 THE SOUTH AFRICAN LEGAL FRAMEWORK

#### 3.1 Detention and legal representation

Section 28(1)(g) of the South African Constitution<sup>34</sup> states that

[e]very child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be: (i) kept separately from detained persons over the age of 18 years and (ii) treated in a manner, and kept in conditions, that take account of the child's age.

The wording of this right is similar to the wording of article 37 of the Convention on the Rights of the Child and thus provides similar protection for children regarding detention. It is important to note that section 28(1)(g) does not prohibit the detention of children completely because it provides for the detention of children as a last resort. Nevertheless, in instances where children are detained, section 28 places a duty on the relevant authorities to ensure that they are treated in a manner and kept in conditions that take account of the child's age. Children also have a right to be kept separate from detained persons over the age of 18.

Section 28(1)(h) also provides that every child has the right to be assigned a legal practitioner by the state, at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. Section 8A(1) of the Child Care Act,<sup>35</sup> which was passed many years before the introduction of the Bill of Rights, states that a child is entitled to legal representation at any stage of the relevant proceedings.<sup>36</sup> This right is made applicable to a range of civil proceedings affecting the child, including Children's Court proceedings. Section 8A<sup>37</sup> has, however, never been

34 Constitution of South Africa Act 108 of 1996.

35 Act 74 of 1983.

36 Bekink B and Brand D in Davel CJ *Introduction to child law in South Africa* (2000) 193.

37 S 8 A (1) of the Child Care Act states that: 'A child may have legal representation at any stage of a proceeding under this Act.' S 8 A (3) states that children are entitled to 'a right to request representation at any stage of the proceedings if they are capable of understanding this right.' S 8 A (5)-(6) states that the costs of representation for a child in children's court proceedings will, if necessary, be borne by the state.

promulgated. A key reason for the failure of the state to promulgate this section has been the expenditure which would occur if it was ever to be brought into operation.

The failure to bring this provision into operation and to give legislative effect to section 28(1)(h) of the Constitution has been implicitly criticised by several authors. The Constitution demands that a child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child. Sloth-Nielsen<sup>38</sup> argues that the rights should be understood even more broadly to include a right to legal representation in deportation cases of non-nationals. Commenting on the 'substantial injustice' set out in the Constitution, Sloth-Nielsen argues that, in applying this test, the relevant authority should take into account the complexity of the case, the age of the child and the ability of the child to express his or her views. Undocumented foreign migrant children are always entitled to appear before the Children's or other court to determine their status or where they should be placed, and they are equally entitled to legal representation.

As a practical matter, Skelton and Zaal<sup>39</sup> argue that if the necessary resources are acquired, more lawyers can be trained to represent children specifically. They argue, however, that the right to representation is not enough. Specialised training is required to ensure that children receive effective legal representation in South Africa.

It is clear from the foregoing that undocumented foreign children have the right to legal representation in all legal proceedings which affect them and that this right should be exercised.

### 3.2 Arrest, detention and deportation of children

Section 29(2) of the Refugees Act<sup>40</sup> and Section 34 of the Immigration Act<sup>41</sup> provide for the protection of children in detention. Section 32 of the Refugees Act<sup>42</sup> furthermore provides for the protection and care of any child who appears to be in need of care and who qualifies for refugee status.<sup>43</sup>

The Children's Court is required to place a child in foster care, a children's home or a school of industries.<sup>44</sup> The Court protects the rights of

38 Sloth-Nielsen J *Children* (2005) in Cheadle H, Haysom N and Davis D eds *South Africa Constitutional Law: The Bill of Rights* 535.

39 Skelton A and Zaal N 'Providing effective representation for children in a new constitutional era: Lawyers in the Criminal and Children's Courts' (1998) 14 *SAJHR* at 559.

40 Act No. 9 of 1998.

41 Act No. 13 of 2002.

42 S 32(1) Any child who appears to qualify for refugee status in terms of s 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983, must forthwith be brought before the Children's Court for the district in which he or she was found. S 32(2). The Children's Court may order that a child contemplated in ss (1) be assisted in applying for asylum in terms of this Act. S 32(3), Any mentally disabled person who appears to qualify for refugee status in terms of s 3 must be assisted in applying for asylum in terms of this Act.

43 See (fn 24 above) at 215.

44 *Ibid* at 217.

foreign children, especially in relation to the departure and removal of children who have been declared illegal aliens in terms of the Immigration Act. The Children's Court enquires into the reasons for the child's presence in South Africa to determine whether the unaccompanied child has refugee status and whether he/she should be assisted in making the application. Ultimately, the Children's Court should oversee the deportation process to ensure that it is sensitive towards the rights and needs of child deportees and upholds 'the best interest of the child' principle.

### 3.3 The Children's Act

The new Children's Act<sup>45</sup> was finally passed towards the end of 2005 to protect the rights of children in South Africa. Unfortunately, at the time of publication, no date had been set for the commencement of this Act. Even when it becomes operational, the Act will not cure all the problems relating to the wellbeing of children in South Africa. Most pertinently, for this article, the Act fails to include a specific section on refugee children.

## 4 SOUTH AFRICAN JURISPRUDENCE

This section deals with South African case law which looks at the rights of undocumented foreign migrant children and how these rights have been interpreted by the South African courts. It is important to note that South African Courts have dealt with this matter in several cases and that they have found that South Africa's international law and Constitutional Law obligations require the state to take several steps to protect undocumented foreign children.

### 4.1 *Coco, Musenge, Maulu v Minister of Social Development and Others*

The rights of undocumented foreign minors were recently addressed in the unreported High Court case of *Coco, Musenge, Maulu v Minister of Social Development and Others*.<sup>46</sup> This case concerned a High Court application by political refugees seeking immediate access to foster care grants for children in their care. Three refugees from the Democratic Republic of Congo lodged an application for access to government's R570 monthly foster care grant, for each of the nine children in their combined care.<sup>47</sup>

The case was brought in the form of a class action on behalf of all refugees experiencing problems accessing the grant in South Africa. The children on behalf of whom the applicants were seeking foster care grants were aged between four and sixteen years. In their founding affidavits, the applicants stated that they had been trying to access the foster grant for one and two years respectively. The government's computer systems

45 Act 38 of 2005.

46 Transvaal Provincial Division, Case Number 9841/2005, unreported judgment.

47 [http://www.lrc.co.za/Features\\_Articles/Articles\\_Detail.asp?art\\_ID=148](http://www.lrc.co.za/Features_Articles/Articles_Detail.asp?art_ID=148) (accessed 23 September 2006)

rejected their identity numbers and the Department was therefore unable to process their applications. The applicants sought an order compelling the government to put mechanisms in place to allow their applications to be processed and for the grants to become payable within 10 days of the court's judgment. In addition, they sought R66 100 in arrears payable since their applications were first made.

On 7 September 2005, the Transvaal Provincial Division ordered the Department of Social Development to adjust its administrative and computer infrastructure so that it would be able to process the foster care grant applications and similar applications brought by refugee parents in terms of the Social Assistance Act of 1992.<sup>48</sup>

The court ordered that, pending such adjustment, the Department should pay R530 to second and third applicants per month in respect of each of their foster children. The court ordered that the arrear amounts be paid from the date of first application to the date of payment to the applicants.<sup>49</sup> This case illustrates the court's willingness to implement access to social security and sets a precedent for future access to foster care grants for foreign children.

#### 4.2 Centre for child law case

In *Centre for Child Law v Minister of Home Affairs & Others*,<sup>50</sup> the applicant brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at Lindela Repatriation Centre. At the time of the application in March 2004, the children were being held together with adults detained at Lindela Repatriation Centre and were facing deportation. The Transvaal Provincial Division of the High Court granted an interdict preventing the Minister of Home Affairs from proceeding with the deportation of the children, and appointed a *curator ad litem* for the children. The *curator ad litem* was required to investigate the circumstances under which the children were being detained, in order to make recommendations to the Court regarding steps to be taken to improve their treatment and to institute legal proceedings to ensure the enforcement of their rights.<sup>51</sup> The curator recommended that the children be moved immediately to a place of safety known as Dyambu, and that Children's Court inquiries<sup>52</sup> should be held in respect of each of them. The

48 Transvaal Provincial Division, Case Number 9841/2005, unreported judgment 1.

49 *Ibid* 2.

50 2005 (6) SA 50 (T).

51 *Ibid* 55 par 4-6.

52 These courts are supposed to protect children. If the child is transferred from the criminal (juvenile) court to the Children's Court, the criminal case must wait until the Children's Court comes to a decision. If the Children's Court decides that the parents are fit and able to look after the child, then the case is referred back to the criminal court and the trial will continue. If the Children's Court finds that there are no parents or guardian, or that the parents or guardian are not fit or able to look after the child properly, then the court may order that the child be removed to a 'place of safety'. See <http://www.paralegaladvice.org.za/docs/chap03/02.html#children> (accessed on 27 September 2006).

children were then moved from Lindela to Dyambu Youth Centre on 2 April 2004.<sup>53</sup>

During May 2004, the Krugersdorp Commissioner of Child Welfare refused to conduct Children's Court inquiries in respect of these children and argued that foreign children fell outside the ambit of the Child Care Act of 1983. On 21 May 2004, the High Court set aside the Commissioner's refusal to conduct Children's Court proceedings, and ordered him to conduct such inquiries.<sup>54</sup>

The Transvaal Provincial Division relied on section 28(2) of the Constitution which states that the 'best interests of the child' are of paramount importance in every matter concerning a child. In considering the socio-economic rights of children,<sup>55</sup> the Court held that the State is under a direct duty to ensure basic socio-economic provision for children who lack family care as do unaccompanied foreign children.<sup>56</sup>

The court referred to chapter 3 of the Child Care Act of 1983 and stated that the Act provides the necessary mechanisms for the protection of children.<sup>57</sup> The Court further referred to section 12(2)(c)<sup>58</sup> of the Child Care Act as another relevant provision in this particular case. The Court found that policemen, social workers and authorised officers had not done what they were required to do in terms of section 12(2)(c), and thereby infringed upon the children's rights as protected in the Constitution and the Child Care Act. The court highlighted the fact that foreign citizens have the right to legal representation as was decided in *S v Thomas*.<sup>59</sup>

In respect of the legal representation for children the Court found 'that in the circumstances of this case all unaccompanied children that find

53 *Ibid* par 8.

54 *Ibid* par 2.

55 See section 28(1)(b)-(d).

56 *Ibid* 57 par 17.

57 *Ibid* 57 par 18: Chapter 3, s 13 of the Child Care Act provides that any child who has no parent or guardian must be brought before the Children's court for an inquiry to determine whether the child is a child in need of care and whether that child should be removed to safety.

58 *Ibid* 58 par 21: S 12 (2) (c) of the Child Care Act provides for policemen, social workers or authorized officers to remove a child to be placed into safe care.

59 2001 (2) SACR 608. In this case the court decided that 'Everyone' in s 9 of the Constitution establishes that everyone within the borders of South Africa is entitled to the protection of the Bill of Rights and in particular the equality provisions thereof. It protects everyone against unfair discrimination in particular based upon their ethnic or social origin which is relevant to the present matter where the accused is an Angolan citizen. In addition to these equality rights, s 35(3) is also relevant. It provides: (3) Every accused has the right to a fair trial which includes the right: (f) to choose, and be represented by, a legal practitioner, and to be informed of this right; (g) to have a legal practitioner assigned to the accused by the State, and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly,' Claasen J held that 'it would seem abundantly clear to me that the equality provisions read jointly with the right to legal representation afforded "every accused", would also accrue to foreigners accused of criminal conduct within the borders of South Africa.' 609 pars 4 and 5.

themselves in South Africa illegally should have legal representation appointed to them by the State'.<sup>60</sup> The court continued:

The order granted is merely the first step towards finding proper solutions to the problem presently faced by unaccompanied foreign children in South Africa. To my mind, the respondents have a duty to liaise with each other, to find a solution and to work on detailed practical arrangements to ensure that unaccompanied foreign children are dealt with in accordance with the principles already set out above.<sup>61</sup>

The Minister of Social Development, the Director General of the Department of Social Development and the Member for the Executive Committee of the Gauteng Department of Social Development were directed to move the thirteen unaccompanied foreign children, detained at Dyambu Youth Centre, within 5 days from the date of the order, to the Krugersdorp Children's Court to ensure that enquiries are conducted in terms of section 14 of the Child Care Act.<sup>62</sup>

It was further ordered that the Centre for Child Law, the *curator ad litem* and Lindela Repatriation Centre work together and compile a list containing: the names, ages, sex, gender and countries of origin of all foreign children in detention at Lindela. The parties were requested to assist the Social Development departments to immediately remove these children and place them in an appropriate place of care or place of safety.<sup>63</sup>

The Court ordered that the Minister of Safety and Security and the National Commissioner for the South African Police Services comply with section 12(2)(c) of the Child Care Act and to ensure that foreign children appear before a Children's Court prior to being arrested.<sup>64</sup>

I contend that this case clearly illustrates that the South African authorities sometimes fail to treat undocumented foreign migrant children in a manner that conforms to the requirements of the Constitution and existing legislation. It is clear that there are often problems relating to the appointment of a guardian; the provision of legal representation; the requirement to bring the children before the children's court; and the requirement to provide children with proper care and accommodation. The judgment furthermore clearly illustrates that the various government departments often fail to work together to solve these problems. This leads to a violation not only of domestic law, but also of South Africa's international law obligations as set out in the first part of this article.

### 4.3 Implications of the Centre for child law case

Ann Skelton, who was involved in the litigation on behalf of the Centre for Child Law, provides an overview of key and critical gains which this case has made in respect of the treatment of unaccompanied foreign minor

60 See (fn 62 above) 59 par 29.

61 *Ibid* par 31.

62 *Ibid* 60 par 2.

63 *Ibid* par 4.

64 *Ibid* par 7.

children.<sup>65</sup> She states that under South African law, a Children's Court inquiry is governed by the Child Care Act and the inquiry is held in matters where there are reasons to believe that a child is in need of care and protection. The rationale in requiring that a Children's Court inquiry be held in respect of unaccompanied foreign children arises from the fact that they are not living with a parent or legal guardian. Indeed, the judgment places an obligation on government officials to ensure that foreign children appear before a children's court as a point of initial enquiry.

One of the spin-off of the case, according to Skelton, is the fact that an agreement has been entered into between the Legal Aid Board and a group of legal practitioners from around the country who will be trained to provide legal representation for unaccompanied foreign children. Notably, undocumented foreign migrant children require specialised legal assistance, given firstly the fact that they are children and, secondly, the fact that they are at a distinct legal disadvantage upon their arrival in a foreign country. Hence, specialised legal training is crucial in optimising the legal protection of foreign children in South Africa.

In another analysis of the judgment, Abeda Bhamjee critically reflects on the role of the *curator ad litem* in the proceedings.<sup>66</sup> Bhamjee states that the children were removed from Lindela and taken to Dyambu Youth Centre which hosts awaiting trial juvenile offenders. She states that the placement of unaccompanied foreign minors with juvenile offenders flies in the face of international norms.<sup>67</sup> I agree with this view as international law prescribes that unaccompanied foreign minors should be placed in appropriate accommodation taking into account their specific needs. Unaccompanied foreign minors are not on trial or accused persons and therefore should not be accommodated with those accused of criminal offences. In addition, the South African Constitution clearly stipulates that children should only be detained as a last resort and for the shortest possible period of time.

Bhamjee concedes that the case has succeeded in highlighting the issue of unaccompanied minors in detention and forced government to face this issue. However, she states that the weakness in the case is that it has not provided an example of best practices to the extent that the law demands.<sup>68</sup> In this regard she states that the deportation of children with no Children's Court proceedings has been highlighted. She contends that despite the judgment, children are being detained in a facility for awaiting trial juveniles and as a result, minors are now being released by police to fend for themselves as a result of Lindela turning them away.<sup>69</sup> She

65 Skelton A 'No dumping: Litigating for the proper treatment of unaccompanied foreign children in South Africa' (2005) *A paper presented at the 4th World Congress on Family Law and Children's Rights* 20th-23rd March, Cape Town at 1 (unpublished paper).

66 Bhamjee A 'Aiding the least and loneliest: Developing law and best practice for the detection, treatment and deportation of undocumented foreign unaccompanied minors in South Africa' (2005) A booklet published by the University of Witwatersrand, 17.

67 *Ibid* at 17.

68 *Ibid* 23.

69 *Ibid* 23.



suggests that no meaningful alternative has been found to accommodate these children in the future.

In 2000, a report on Lindela Repatriation Centre recommended that children under 18 years be detained as a measure of last resort, be kept separate from adult detainees and be treated in a manner and kept in conditions that take account of the child's age.<sup>70</sup> The report had proposed the introduction of a separate judicial inspectorate for undocumented migrants arrested and held in detention at correctional services, police stations and other facilities such as Lindela and that such inspectorate should be accountable to the South African Human Rights Commission.<sup>71</sup> Despite these recommendations, unaccompanied foreign minor children still experience problems upon their arrival in South Africa which clearly indicates that the recommendations were never implemented.

## 5 CONCLUSION AND RECOMMENDATIONS

This article has highlighted the practical challenges faced by South Africa in its dealings with undocumented foreign migrant children. The media reports in the last two years clearly indicate that issues of xenophobia, physical abuse and corruption by government official influence the treatment of refugees generally and children specifically in South Africa.

In respect of children's rights, international law has provided ample guidance in the form of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The United Nations High Commissioner for Refugees has prioritised the needs of children and drafted guidelines aimed at assisting States to ensure the protection of this marginalised group of children. In addition, the recently released General Comment Number 6 by the Committee on the Rights of the Child provides recommendations in respect of specialised training for legal representatives, guardians, interpreters and others dealing with foreign children.

The greatest failing in South Africa is in respect of the accommodation of undocumented foreign migrant children. Article 37 of the Convention on the Rights of the Child stipulates that detention should only occur as a last resort and for the shortest possible time. The *Centre for child law* case and the case of the Rwandan teenagers clearly demonstrate a violation on the part of South African authorities to adhere to this rule which has also been domesticated into the South African Constitution. In addition, South Africa has to date failed to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.

The ratification of this Protocol by South Africa will place an obligation on government authorities to monitor the conditions of correctional facilities

70 Kollapen J and Majodina Z, Lindela at the Crossroads for detention and repatriation, an assessment of the conditions of detention by the SAHRC (2000) <http://www.info.gov.za/otherdocs/2000/lindela2.pdf> (accessed on 23 September 2006), 71.

71 *Ibid* at 76.

as well as detention centres such as Lindela Repatriation Centre and in this way ensure that children are not held with adult detainees and if held in such centres, that their basic human rights are not violated in any way. It is my submission that, currently in South Africa, the Office of the Judicial Inspectorate is well placed to take on the responsibility of monitoring the conditions of accommodation facilities and safe houses which could house undocumented foreign migrant children. By ratifying this Protocol, South Africa would be adhering to the fundamental principles of openness, fairness and transparency as is guaranteed by the Constitution.

The South African government needs to ensure that the Department of Home Affairs specifically leads the establishment of a policy and procedural framework to ensure that undocumented foreign migrant children's needs are addressed. Training across government departments including Home Affairs, police, social workers, magistrates, interpreters and legal practitioners needs to be prioritised and the training needs to ensure that those who work with foreign children understand their specific needs as children first and as foreigners.

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