No Future for our Children: Challenges faced by foreign minors living in South Africa

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Abstract

The intensification of international migration and continued conflicts in Africa have resulted in growing numbers of child migrants. Children are increasingly becoming mobile and crossing international borders unaccompanied. The movement of unaccompanied or separated minors triggers international obligations on all states that are party to the Convention of the Rights of a Child to take all available measures to ensure that children's rights are respected, protected and fulfilled. South Africa has arguably the most progressive child protection mechanisms in Africa. Those mechanisms are conferred and extended to foreign minor children within its borders. However, due to a lack of coordination between the various state departments entrusted with matters concerning foreign minors, the state has failed to fulfil its duties as required by national and international law. This paper highlights the difficulties faced by foreign minors and how the gaps in law leave them undocumented, vulnerable and unable to access social services. This paper also discusses how South Africa's approach to accompanied and unaccompanied foreign minor children provides no durable long term solutions for these children, effectively leaving them in a legal lacuna once they reach the age of majority. Drawing on our experience as refugee attorneys, we demonstrate that there are disparities between the law and the implementation of the law. We conclude with recommendations on possible policy and legislative reforms that can be implemented in order to ensure that South Africa develops a comprehensive and meaningful long-term approach for migrant children living in South Africa.

Keywords Separated foreign children, durable solutions, refugees, foreigners, asylum seekers, non-refoulement.

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Introduction

Up until the early 1990's migration was largely perceived as an act primarily undertaken by adult males. Children were commonly viewed as migrating within family units. Recent studies into independent child migration reveal that a large number of children migrate independently either unaccompanied or separated from their families. It is estimated that there are 250 million child migrants globally (UNHCR 2015). Save the Children, a non-government organisation, estimates that 25% of all migrants are children (Victoria 2015). This high number of child migrants necessitates the need to formulate laws and policies that comprehensively protect children in receiving countries. South Africa is the third largest economy on the continent and is absorbing a substantial number of unaccompanied child migrants (KPMG South Africa 2016). As a result of the protracted conflicts in parts of the continent (Gouden 2002) and growing economic instability in neighbouring countries such as Zimbabwe, South Africa will continue receiving accompanied and unaccompanied minors (Palmary 2009). The South African government therefore needs a comprehensive approach to child migrants; an approach informed by its international legal obligations and with the principles of the Constitution of South Africa which states that the "best interests of the child are paramount."

This paper analyses how South Africa gives effect to its national and international obligations towards child migrants. Although South Africa has passed laws which provide child migrants with legal protection, the implementation of these laws reveal a lack of coordination between the various relevant departments in dealing with migrant children. This results in a failure to fulfil their respective mandates and duties as required by the Convention of the Rights of a Child (1989) as well as the South African Children's Act (2005). In this paper we discuss the various legal barriers to documentation faced by migrant children in South Africa and argue that the gaps in law have left many migrant children without documentation, vulnerable and unable to access social services. Furthermore, we contend that South Africa's approach to foreign children provides no durable long term solutions for minors, a situation that leaves them in a legal lacuna once they reach the age of majority. The paper is organised as follows: we begin with a broad outline of the legal instruments pertaining to children in South Africa. We then analyse the departmental procedures used in assisting unaccompanied and separated foreign children. Thirdly, we place foreign child

migrants into four legal categories; unaccompanied foreign children with refugee claims, separated foreign children with refugee claims, unaccompanied and separated foreign children with no refugee claims and accompanied refugee children with refugee claims. We critically examine the legal protection afforded to these categories. We conclude with recommendations in an effort to fill the legislative gaps within South Africa's foreign child protection framework.

Child protection in South Africa: The legal framework

The Convention of the Rights of a Child (1989) lays the foundation for international child protection law. This Convention places a duty on states to ensure, through the passing and implementation of national laws, that the best interests of a child are always paramount. South Africa gives effect to this international obligation through a number of national legal instruments; firstly the rights of a child are enshrined in the South African Constitution (1996), which is the supreme law of the land. Section 28 of the Constitution places a duty on the state to respect, protect, fulfil and promote the rights of a child. Secondly, the Children's Act (2005) gives meaning and effect to the rights set out in the Constitution and both the Constitution and the Children's Act make no distinction between children based on nationality; care and protection is afforded to all children in South Africa regardless of nationality. The only Act that contains particular provisions which apply to certain categories of children is the Refugees Act (1998) which seeks to protect children who are or may be refugees. In addition to these laws, the Department of Social Services/Development (DSD) has Standard Operating Procedures (SOPs) designed to aid in the practical implementation of the rights set out in the Constitution and the Children's Act.

According to the United Nations High Commission for Refugees (UNHCR 1996) "an unaccompanied child (also referred to as an unaccompanied minor) is a child who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so." Whereas a separated child is a child who has been separated from both parents, or from his or her previous legal or customary primary care-giver, but not necessarily from other relatives (Separated Children in Europe Programme 2009). Conceptually, a separated child is slightly different from an unaccompanied minor in that the separated child may not be in need of care and protection as he or she might be cared for by an accompanying adult such

as an aunt or uncle. This is often the case with refugee children who are forced to flee due to conflict.

As stated above, child migrants fall into various legal categories, however it is clear that once it is established that a child is unaccompanied or separated from his or her parent, care-givers or guardian, an inquiry has to be conducted to ascertain whether the child is in need of care and/or protection as is required by the Children's Act. Unaccompanied and separated children are therefore assisted by various government departments; generally speaking all unaccompanied or separated children who are suspected of being in need of care and protection should be referred to the DSD. The DSD is the main governmental department entrusted with giving effect to the rights of the child as provided in the Children's Act. Unaccompanied and separated children may also fall within the ambit of the South African Police Services (SAPS) particularly where such children have been abused, smuggled, neglected or trafficked. The Department of Home Affairs (DHA) usually encounters children at the initial undocumented stage.

Brief overview of the child protection process in South Africa

What follows is a broad overview of the processes that should be taken by government departments when assisting unaccompanied or separated children. These guidelines are set out in the Children's Act and have been translated into Standard Operating Procedures by the DSD. These guidelines for care and protection entails a five step process, namely: identification; assessment and documentation; family tracing; durable solutions; and repatriation.

Assessment and statutory intervention

Given that unaccompanied and separated children are often vulnerable to social pathologies, they are always presumed to be in need of care and protection. With regards to child protection, the same procedures govern unaccompanied children and separated children. The SOPs (2013) for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa state that: "upon becoming aware of an unaccompanied or separated minor child at risk, DSD, SAPS or the designated Child Protection Organization (CPO) are obligated to take steps to ensure the immediate safety and well-being of the child." The DSD's SOP states that the procedure laid out in section 110(5) of Children's Act should be followed. Where the child faces immediate danger, the DSD may remove the child

without a court order to a temporary safe care facility pursuant to section 152 of the Children's Act, for a duration not exceeding six (6) months. Once the child has been removed and placed in a temporary safe care facility, without a court order, the case must be reported to the Children's Court by no later than the following court day. If the child is not in immediate danger, he/she may remain where he/she is as a temporary safe care placement, pending investigations. The investigation should be completed and a report compiled for the court within 90 days.

Where the child is undocumented, section 48(2) of the Children's Act stipulates that the Children's Court can estimate the age of the child, aided by the written motivation of a designated social worker, an investigation into the circumstances of the child, including any abuse, neglect or exploitation must be conducted and recorded and the findings together with a recommendation presented to the Court. The DSD or the designated CPO should assess whether the child is seeking asylum and if so, assist the child to seek asylum through the Refugee Reception Officers in DHA. Once the investigation has been completed the social worker should present the findings and make recommendations to the court regarding the most suitable solution for the minor child.

The Children's Court is to determine whether the child is in need of care and protection. If in need of care, the Court must make an order to ensure that the child is officially placed in terms of either sections 156 or 157 of the Children's Act. Section 156 pertains to orders made when a child is found to be in need of care and protection, it provides five options for the type of order that the Court can make in respect of a child with no parent or caregiver: to be placed in foster care, cluster foster care, to be taken to a temporary safe care pending the finalisation of an application for adoption of the child, shared care with different care-givers at different times or periods or placement at a Child and Youth Care Centre. The main objective of Section 157 is the securing of stability in a child's life.

Family Tracing

Once the temporary safety of the child has been secured, the social worker has to establish why the child has left home and why she is alone. The CPO or social workers need to determine if there are any parents, caregivers or extended families of the unaccompanied or separated minor, their current living circumstances and whether they are in a position to care for and protect the

child. In doing so the social worker may elicit the assistance of other social workers in the child's country of origin if and when it is appropriate. Once family members have been traced, the social worker may request an assessment of the family and its circumstances through their national International Social Services (ISS) office. An inter-country report will be provided through the national ISS and made available to the local social worker responsible for the case. The cross border assessment may also be done by non-government organisations such as the UNHCR, the International Red Cross or International Organization for Migration. The DSD can also approach the respective embassy of the child's country of origin to obtain information such as birth certificates or travel documents provided that such a child is not an asylum seeker. If the child was born in South Africa, the DHA should have a record of the child's birth because all children born to foreign parents in South Africa are provided with a notice of birth by the hospital where they were born which allows them to apply for a birth certificate at the DHA or in their country of origin upon their return. The birth certificate issued to foreign children is merely to document the birth. Thus, the foreign child is not listed in the South African population registry.

Reunification or placement

If the information gathered from the country of origin is favourable in terms of the family's ability to take care of the child and it is perceived to be in the child's best interests to be returned to the family, the child may be reunited with her family. There is a procedure to be followed when returning such children. The DSD's SOPs provide that the return of a child to her country of origin should be considered on a case by case basis. However, the following needs to be taken into account: the repatriation should be in the best interests of the child and arrangements must be made to ensure the safety of the child. In practice, a social worker is usually appointed to accompany the child to the border where the child is subsequently handed over to their family or the relevant authorities and the person receiving the child signs a receipt acknowledging receipt of the child. Travel documents are arranged with the relevant embassies and the DSD in principle should take cautionary measures in handing the child over so as to avoid trafficking and exploitation. A statutory document discharging the child from South Africa's statutory system is produced and handed over to the agency receiving the child. The individual receiving the child has to be pre-identified and verified by the person accompanying the child to the country of origin.

Alternative care placements

Some children cannot be reunified with their families either because their families cannot be traced or because it is not in the best interests of the child to be reunified with them. An alternative care arrangement which is suitable for the child needs to be recommended to the presiding officer of the Children's Court. The relevant considerations to be made are again highlighted in the SOPs.

Unaccompanied foreign minors with refugee claims

One of the biggest hurdles faced by unaccompanied and separated foreign children is access to documentation that regulates their continued stay in South Africa. These documents can be obtained either through the Immigration Act or the Refugees Act.

The laws governing the right to seek asylum in South Africa are contained in the Refugees Act. Section 3 of the Act defines what or who a refugee is and provides three categories of people who qualify for refugee status. A refugee is a person who is compelled to leave her country of origin, owing to a well-founded fear of persecution on a number of listed grounds and whose country is either unable or unwilling to protect her. A refugee can also be someone who fled her country of origin owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order or someone who is a dependent of such a person. The Act specifically provides for unaccompanied children seeking asylum but is silent on separated children. Therefore, we will analyse the rights of unaccompanied foreign children within the ambit Refugees Act. Section 32(1) of the Refugees Act provides that:

Any child who appears to qualify for refugee status in terms of section 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, must forthwith be brought before the Children's Court for the district in which he or she was found. […] The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act.

While subsection 2 provides that a Children's Court may order that a child who appears to qualify for refugee status be assisted in applying for asylum in terms of the Act, the reality is that documentation for unaccompanied children in the asylum process remains a major barrier. This is irrespective of the fact that refugee law allows children with refugee claims to be documented under

the Act. A large number of these children remain undocumented because the relevant authorities refuse to grant them access to the asylum process without the assistance of a parent or guardian.

Bhabha (2003) notes that "all unaccompanied children face legal impediments and legal limitations as the law mainly recognises them as objects of the law and not as subjects of the law)." This is mainly because children under the age of eighteen are normaly considered by South African law, in general, as lacking full legal capacity and therefore can only interact with the law when duly assisted by a parent or guardian. This is the case even in instances where children are legally permitted to engage directly with the law.

This legal approach to children places child migrants who are seeking asylum in a vulnerable position as refugee status determination officers are unwilling to allow them to lodge independent asylum claims. It is presumed that children can only be dealt with under the procedures directed at families – the refugee status determination officers only view children as dependents of an adult and therefore only grant them asylum under section 3(c) of the Refugees Act (Bhabha 2003). Where the child is not accompanied by a parent, she is simply refused assistance on the grounds of being a minor.

Irrespective of whether the child has an independent refugee claim or not, this approach fails to take cognisance of child-specific claims and fails to see that children can be persecuted and that any of the grounds for asylum in section 3 can be applicable to children (Bhabha 2003). In particular, children often have child-specific claims such as forced conscription as child soldiers or forced marriage as child brides who are often forced into marriages by their own parents. Thus, there is a need to provide for child specific refugee protection as there is no minimum age limit to the international right to seek asylum. This is evident from articles 32 and 33 of the Convention Relating to the Status of Refugees (1951: Article 29) and paragraphs 213-219 of the UHNCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (2011: 41). Both provide guidelines on how unaccompanied minors may be assisted when applying for asylum. They state that where an unaccompanied minor seeks to apply for asylum, the relevant authorities need to ensure that the interests of the child are fully safeguarded (2011: 50). Furthermore, the South African Refugees Act states that children must be assisted in applying for asylum.

The Children's Act provides a legal mechanism that could potentially be used in enforcing children's right to seek asylum. But as Bhabha (2003) argues, children are often only viewed as victims of malfunctioning family networks and not as victims of persecution. Many CPO and social workers dedicate themselves to removing children from harmful environments and placing them in spaces of care and safety, however, once they obtain a court order from the Children's Court and secure the child's safety, they seem to believe that their work is complete (Bhabha 2003). They are often unaware of the need for obtaining documentation for these children and where they are and they often lack the knowledge necessary to assist the child in obtaining the documents. As a result, unaccompanied children with refugee claims are placed in places of care and protection without legal documentation and once they reach the age of majority are removed from these places of safety because they fall outside the protection and ambit of the Children's Act and are rendered vulnerable to arrest, detention and deportation as they are factually illegal migrants. In this way, social workers and CPO are only concerned with the temporary care of these minor children and they give little or no consideration to long term durable solutions for when these children attain majority. While police officers, immigration officers and refugee status determination officers only consider legal status and fail to consider the social welfare of the child. In addition social workers, family advocates, presiding officers and refugee status determination officers are not abreast with children's rights in terms of the Refugees Act. This is also indicative of the current discourse which only seeks to engage with children in a welfare and humanitarian manner as opposed to a legal approach.

Separated foreign children with refugee claims

Separated children with refugee claims are slightly complex because the Refugees Act makes no mention of them. Prior to the Mubake and Others v Minister of Home Affairs and Others ZAGPPHC 1037 judgement, South African refugee law was silent as to how separated refugee children with refugee claims should be treated. In this case, the court was called upon to determine when separated children should be documented. The applicants in Mubake argued that a child should automatically be regarded as a dependent of the accompanying adult and therefore documented with the adult. The respondents argued that separated children should only be documented once a Children's Court inquiry has been conducted and the court has lawfully placed the children in the care of the accompanying adults. The court agreed

with the applicants' interpretation of the law and argued that it cannot be in the best interests of the child to leave them undocumented pending the inquiry and thus vulnerable to arrest and detention. The court thus found that children should be documented with the accompanying adult and need not wait for the conclusion of the Children's Court inquiry.

This case clarified that when dealing with children who are separated from their biological parents and who appear to qualify for asylum, the DHA needs to issue the children with at least an asylum permit pending the DSD investigation as to whether the children are in need of care and protection. The Court stated that this is essential because leaving the children undocumented renders them susceptible to various social ills. The Court highlighted that pending the DSD investigation, if left undocumented the children are rendered invisible to immigration officials, untraceable and left in an uncertain and precarious position. The Court drew a distinction between the inquiry conducted by the DSD and the inquiry conducted by DHA by stating that the former pertains to the social welfare of the child while the latter pertains to the legal status of the child in terms of human rights law. Given that these two processes are not mutually exclusive, the judge saw no compelling reason why they cannot occur concurrently. The judge reasoned that the outcome of the one does not necessarily influence the other. The Children's Court inquiry can find that the adult asylum seeker is fit and proper and may continue to care for the child while the asylum inquiry may determine that the child and/or the adult cannot be issued with refugee statuses as they do not meet the requirements of the Act. In this situation they would both have to depart from the country. This case set the precedent that every separated child should be documented as soon as possible and that the DHA need not wait for the conclusion of the Children's Court before assisting the child with making the application. However, in our experience we have found that the DHA continues to leave many children undocumented pending the Children's Court inquiry.

Unaccompanied and separated foreign children without refugee claims

Refugee protection is only applicable to people who have a refugee claim, in terms of the Refugees Act. Consequently, those who do not have prima facie refugee claims are dealt with in terms of the Immigration Act. Unaccompanied children who do not fall within the ambit of the Refugees Act have limited mechanisms for obtaining legal status as the Immigration Act of South Africa does not provide any concrete mechanism for these children. The permits provided for in the Immigration Act require passports and birth certificates

which, as stated earlier, many foreign children do not have. Moreover, the Immigration Act bears no reference to children as independent migrants; children are only envisioned as *travelling within a family unit where they are* dependent on an adult. They do not have the capacity to apply for any of the permits under this Act without the assistance of a legal guardian.

Children who fall under this category are afforded temporary protection while they are legal minors as the law provides that foreign minors should not be arrested for lacking legal documents. Though there is contemporary case law reflecting this, foreign minors are still subjected to arrest and detention. The Centre for Child Law and Another v Minister of Home Affairs and Others 2005 (6) SA 50 (T) is a prime example of the lack of knowledge and application of children's rights to foreign children. In this case, over a hundred foreign children were arrested and detained at the Lindela Repatriation Centre which is South Africa's main deportation and repatriation holding facility. It was reported that some of the children were even housed in cells with adult inmates in clear violation of section 27(1)(a) of the Child Justice Act which specifically provides that children should be detained separately from adults. An urgent application was brought by the Centre for Child Law asking for the immediate release of the children, the application was granted. The court declared the arrest of the minors unlawful and furthermore stated that the respondents' behaviour constituted a serious infringement of the children's fundamental rights. The court confirmed the unlawfulness of arresting undocumented foreign minors. Nonetheless, once a child reaches the age of majority they too face the danger of being arrested, detained and deported. There are no durable long term solutions for such children. As stated before, social workers and presiding officers view it as sufficient to obtain a court order placing children in a place of care, hardly going beyond catering to the legal documentation needs of the children. Consequently, a Children's Court inquiry does not guarantee any document to legalise a foreign child's stay in South Africa. This is particularly so when the child is not a refugee.

It can be argued that these children could be dealt with and documented in terms of section 31(2)(b) of the Immigration Act which grants the Minister of Home Affairs special powers to grant a foreigner the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision without them having to satisfy the requirements of the Immigration Act. This is what we commonly refer to as a Ministerial exemption; it is an application which is made to the Minister of

Home Affairs. The Minister has discretionary powers to grant or deny the application.

To avoid leaving foreign children who do not have refugee claims undocumented we propose that once the Children's Court concludes that the child is in need of care and protection and it is clear that the child does not fall within the ambit of the Refugees Act or that his or her application for asylum has been rejected, it (the Children's Court) should also order the child's legal representative or appointed social worker to make an application for documentation for the child in terms of section 31(2) of the Immigration Act. This should ensure that every unaccompanied foreign child is provided with temporary legal documentation. This is a suitable solution as the child may be granted temporary residence due to the special circumstances of being in need of care and protection. Should these circumstances change, or should the child's parents be located, the Minister has the power to withdraw the exemption. In this way, the exemption will only be used for children who are in need of care and protection.

Accompanied foreign children with refugee claims

Accompanied foreign children are also denied the opportunity to apply for asylum in their own names; they are automatically placed into their parents' files as dependents pursuant to section 3(c) of the Refugees Act. This section of the Act recognises the right to family unity and allows those married to refugees or dependent on them to be permitted to remain in the country by obtaining derivative refugee status by virtue of being spouses or dependants of a recognised refugee. The spouse or dependent is required only to prove that he or she is a dependant or spouse of a recognised refugee. Once the dependency or spousal relationship is established, the person is granted a derivative status. The Regulations of the Refugees Act define a dependant as an applicant's spouse, unmarried dependent child under the age of 18 years, or any destitute, aged or infirmed member of the principal applicant's family.

The Act therefore envisioned a person dependant on a recognised refugee in South Africa who does not have an individual claim in terms of section 3(a) or (b) of the Refugees Act. In order to allow such a person to lawfully reside in the country and thereby maintain family unity, the law provided for derivative refugee statuses. Therefore, the legislation is meant to give protection to family members of a recognised refugee who may not have a claim without the principal applicant but also flee with the principal applicant in order to

maintain their family nucleus. However, this provision has been interpreted by officials to mean that whenever an adult is accompanied by a minor child, the minor child must be dealt with in terms of section 3(c). In this way, refugee children are perceived as dependents that are only eligible to apply for derivative status.

This is unlawful and prejudicial to the minor. It is unlawful because it is an unjustifiable limitation of foreign children's rights to have their asylum applications heard. It is also procedurally unfair and often results in the child being severely prejudiced. This is particularly so where the child has a strong independent refugee claim stemming from his or her status and the parent has a particularly weak refugee claim, an example would be young boys who are usually forced to become child soldiers in times of conflict and war or young girls who are often forced into sex slavery or child marriage. The child is thus left to the mercy of the outcome of the adult's claim.

This could result in the violation of the principle of non-refoulement which prohibits the return or expulsion of a person to a territory where his/her life or physical liberty would be threatened (UN Convention Relating to the Status of Refugees 1951: Article 33(1)). Secondly, denying the minor child an opportunity to have his or her own asylum application adjudicated is procedurally unfair and prejudicial because it only affords the child temporary legal protection. This is because once the child attains the age of majority, which is 18 years of age, she ceases to be a dependant as defined in the Refugees Act. According to section 33(2) and (3) of the Act and section 16(6) of the Regulations of the Act, a person who obtains majority and thereby ceases to be a dependant may remain in the country if the person has a valid asylum permit and will be given an opportunity to apply for asylum pursuant to section 3(a) and/or (b) of the Refugees Act.

In reality this means that a minor who had a prima facie refugee claim when she entered South Africa but was not given the opportunity to apply for her own status in terms of section 3(a) or (b) and was erroneously documented in terms of section 3(c), will lose her derivative status upon attaining the age of majority. She will then be required to make a new asylum application based on a claim she had when they first arrived in the country. The reality for most of these children is that by the time they reach majority age, their claims have elapsed and they can no longer rely on them. Some of their claims are age-based claims and as young adults they can no longer rely on them. Others left their home countries at a tender age and cannot be reasonably expected to

accurately remember the events that occurred when they were young. Moreover, the DHA also withdraws refugee permits of abandoned children. This is because when the abandoned children attempt to extend their expired permits, they are required to attend the Refugee Reception Office with the principal applicant, where the child is unable to produce the principle applicant, the DHA refuses to extend the permit. In essence, by refusing to extend, the DHA is withdrawing their refugee status which is unlawful. Only the Standing Committee for Refugees established in terms of section 9 to 11 of the Refugees Act is empowered to withdraw the status of a refugee. This is also the case for children with deceased parents.

The "aging-out" practice adopted by the department and the resultant unlawful withdrawal of derivative status of children who reach the age of majority is prejudicial to these children as it denies them the opportunity to obtain long term durable solutions. It also denies the right to family unity to accompanied minor children who at the age of majority find themselves with the undesirable legal status of being an illegal foreigner.

The withdrawal of the refugee status of a person who has ceased to be a minor is problematic in two ways; firstly, some minors initially attempt to make independent claims when they first arrive in South Africa but are prohibited by DHA officials with a flawed and unlawful interpretation of the asylum laws. They are then issued with derivative status and their own claims are allowed to lapse or become irrelevant. Therefore, it is unduly harsh, procedurally unfair and prejudicial to expect someone to recall events that caused her to flee their home country as a child when the person has now obtained majority years later.

Moreover, the withdrawal of the derivative status upon reaching majority is equally prejudicial to accompanied minors who entered South Africa in pursuit of family reunification and were either subsequently abandoned or lost their parents after documentation. In this scenario where the child did not have an independent claim when they first arrived, they surely will not have a claim after attaining the age of majority. It is cruel and inhumane to allow a child to reside in a country for many years, get accustomed to the culture and language, and then expect her to return to a country of origin where she does not know anyone nor have any social ties. The law needs to guard against this by considering what is in the best interests of the child with a more forward-looking approach. Providing short-term solutions is not in the best interests of the child. The best interests of the child approach should not only be looking

at the present but should be forward-looking, thereby securing stability in the child's life not only presently but in a long term, durable sense.

Policy reform and recommendations

We have highlighted the trend of focusing on only social welfare as being prevalent in dealing with foreign minor children in South Africa. The dangers of this practice are that undocumented children are often denied access to social services such as health care, education and other public services and they are rendered vulnerable to arrest and deportation. Moreover, the tendency to focus only on social welfare without considering documentation when dealing with unaccompanied minors is exacerbated by the fact that the Children's Act makes no specific reference or mention of foreign children. The Children's Act does not recognise specific vulnerabilities of certain categories of foreign children such as unaccompanied foreign minors and separated refugee children. Though the Children's Act seeks to protect all children irrespective of nationality, foreign children are not afforded the full extent of the state's child protection system on the basis of their nationality. This is because many presiding officers, social workers and other officials do not know that foreign children should be given equal protection. This lack of knowledge of children's rights was displayed by various government officials in the Centre for Child Law case where a magistrate in the Children's Court refused to conduct inquiries in respect of foreign unaccompanied minors on the basis that the foreign children fall outside the ambit of the Child Care Act. This crass display of methodological nationalism is commonly seen in matters where foreign children are denied basic socio-economic rights on the basis of their nationality. To combat this, the Refugee Rights Unit has always advocated for the amendment of the definition of a child in the Children's Act to include the words: "irrespective of nationality" (Machingambi & Ralekwa 2015). The definition would therefore read as follows: "'child' means any person under the age of 18, irrespective of nationality." The Act should also make explicit mention of unaccompanied foreign and separated children and should define the terms expressly stating the different legal categories that such children fall into and how they should be dealt with taking into account their specific needs.

It is thus crucial for the DSD, when identifying whether a child is in need of care and protection, to also determine whether the child is a separated or unaccompanied foreign child, as this triggers the need to inquire as to whether the child needs legal documents to reside lawfully in the country. This will also ensure that those dealing with children do not only focus on the social welfare

issues faced by all children but that they are aware of the nuanced needs of foreign children that render them vulnerable to exploitation and unlawful detention as a result of not being properly documented. The DHA needs to fulfil its role by identifying foreign unaccompanied and separated children at the Refugee Reception Offices and ports of entry. When dealing with children, Refugee Reception Offices should, as a matter of practice, ascertain first and foremost if a child has an independent refugee claim and should document the child and provide them with an asylum or refugee status document.

It is also important for the DHA to note the difference between a separated foreign child and an unaccompanied foreign child. This is because some children become separated from their parents after entering the country. For example, children whose parents have died or resettled in a third country without the child may turn an accompanied child into a separated child. As such, it is crucial that the DHA establishes proper mechanisms that will enable officials to properly identify separated children from unaccompanied children. So that where a child is accompanied by an adult, it becomes necessary to establish the nature of the relationship between the child and the adult in order to establish whether or not the adult is in fact the child's primary care-giver. This will assist the state in combating child trafficking.

The Children's Court should play a greater role in determining whether the child is in need of care and protection, the court should decide with the assistance of a legal opinion of an expert refugee attorney or UNHCR whether the child appears to have a refugee claim. If the child appears to qualify for refugee status, the court should order that the child be assisted in making the application for asylum and accordingly be documented as an asylum seeker or refugee.

There is, thus, a need for a provision in the Refugees Act and its Regulations that develops a clear delineated role for DHA, DSD, SAPS, Border Control and the Children's Court, when dealing with unaccompanied foreign children in order to ensure that such children are properly dealt with and are not left legal undocumented. This would require that Refugee Status Determination Officers be adequately trained in determining the refugee status of unaccompanied children.

Furthermore, the Refugees Act and its Regulations should clearly set out the procedure for referring unaccompanied or separated foreign children by the DHA to the DSD. The referral system should invariably include a mechanism

for the recording by the DHA of each child referred indicating a note on the circumstances under which the child was found, the DSD official to whom the child was referred and the name of the DHA official who made the referral.

There needs to be a more coordinated policy between the various government departments working with unaccompanied and separated foreign children. Thus, the gap between child-protection and welfare departments and migration departments needs to be breached as children often fall through the bureaucratic cracks. The fact that a different department determines the immigration status of children and an entirely separate one deals with the overall responsibility for welfare and access to rights poses a significant inconsistency between how separated children's cases are comprehensively considered. The lack of one central department in facilitating greater coherence and a greater focus on the best interests of children also presents a barrier to the development of a durable solution. There should be synergy between section 32(2) of the Refugees Act and the chapter 9 of the Children's Act. Section 32 of the Refugee's Act provides for the referral of unaccompanied refugee children to the Children's Court through the Children's Act. The Children's Act needs to reflect this provision by empowering the magistrate with the powers to make such an order. Identification and documentation of the child should be a priority after the child has been removed from any immediate danger. Where the Department of Home Affairs is the first department to encounter a child who appears to qualify for refugee status and seems to be in need of care and protection, the child must be documented without delay and should not have to wait for the conclusion of a Children's Court inquiry as contemplated by section 32(2) of the Refugees Act. This is because section 32(2) of the Refugees Act when directing Refugee Reception Officers to first refer a child who falls within the ambit of the Refugees Act and who appears to be in need of care and protection fails to take into consideration sections 150(2) and 155(2) of the Children's Act which states that before opening a Children's Court inquiry a social worker must investigate the matter and within ninety (90) days compile a report on whether the child is in need of care and protection. During this investigation period which may last up to ninety days, the child will be undocumented, vulnerable to arrest, detention and possible deportation. Furthermore, it becomes easier for trafficked children to slip back into the hands of traffickers and without documentation they are unable to access social services and are at risk of exploitation. The initial documentation of the child renders the child legally

visible and easier to track and trace. Consequently, the precedent set in the Mubake judgement stating that separated minors should be documented as soon as possible should be extended to unaccompanied children.

The Centre for Child Law case clearly outlined how foreign unaccompanied minor children should be dealt with. The court recognised the crucial role that the Children's Court should play in these matters and noted that there is a legal duty on the various government departments in South Africa to draft a policy framework which lays down the processes and procedures of dealing with unaccompanied foreign children. Furthermore, the court laid the precedent which requires the court to play a central role in determining the child's legal status.

When assessing the best interests of the child, authorities need to appreciate the fact that the best interests of a child and the durable solution assessment are inextricably linked. The best interests of a child are the avenue through which a durable solution is made and should not be discarded. Children should be provided with a secure, stable life throughout their childhood and beyond. We are of the view that the South African government only deems repatriation as the only durable solution after a child attains majority. The local integration and naturalisation of the child is not pursued to its full extent because if it was, it would entail considerations as to how to secure a child's permanent legal stay in the country.

By neglecting to ensure the legal documentation of foreign minors, authorities fail to understand that the ultimate goal of safeguarding the rights and protection of foreign children is the implementation of a durable solution. In most cases, this can only mean integration into the local society. Social workers and presiding officers when determining what is in the best interest of a child should include considerations for long term durable solutions, particularly for children who cannot be reunited with their parents. These long term solutions will centre on the securing of permanent stay in the country. A framework of legal permanence that provides children with a sense of security, continuity and identity is consequently called for. Furthermore, the DHA should incorporate the best interests of the child whenever they deal with minors. They should always conduct extensive status determination interviews to determine whether a child has a refugee claim or not. A child's age should never be seen as a deterring factor.

Conclusion

From the above, we can conclude that despite South Africa having a well-developed legal and policy framework for securing the rights of foreign children, a number of protection gaps, especially in terms of implementation of these frameworks, still exist. A consistent theme in this paper has been the lack of sufficient legal paths for the documentation of foreign minors. Where they do exist, children face exclusion because those entrusted with assisting them do not know the full extent of their obligations or how to fulfil these obligations. Furthermore, the bifurcation of competencies and the lack of a jointed approach to the needs of foreign migrant children exacerbates the problem. Where children are documented, they are often provided with temporary legal status that expires at the age of majority leaving the children with no real long term durable solutions. Documentation is essential in South Africa and forms a significant part of the protection of foreign children. True child protection can only be achieved by considering the best interests of the child from childhood and beyond. An approach which fails to take a child's future into account, fails to meet the best interests of the child. We therefore call upon the Children's Court to play an active role in determining the best interests of a child and consider long term solutions for children who cannot be repatriated.

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