

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Unaccompanied Minor Refugees and Asylum Seekers: Placement in Foster care and

Adoption as Durable Solutions.

Mini Thesis Submitted in Partial Fulfilment of the Requirements for the LLM degree

by

Tshegofatso Tracy Mothapo

(Student Number: 324 7010)

Supervisor: Professor J Sloth-Nielsen

Date:

Student number: 3247010

DECLARATION

I hereby declare that the dissertation: Unaccompanied Minor Refugees and Asylum Seekers: Placement in Foster care and Adoption as Durable Solutions, is my own work and that all resources that were used during the research study, are indicated by means of a complete reference and acknowledgement.

Signature: _____ Date: _____



ACKNOWLEDGEMENTS

To the refugee children who cross borders everyday in search of a better life:

May you be heard;

May you be seen.

But most importantly; may you be protected.

Prof Sloth-Nielsen

Khalid Gibran once said that the teacher who is indeed wise does not bid you to enter the house of his/her wisdom but rather leads you to the threshold of your mind.¹ I am truly grateful for your constant guidance during this journey.

You have truly gone above and beyond for me. I am overflowing with gratitude.

Cheryl Pearce

You have truly taken the load of my shoulders this year. I could never thank you enough for your concern and your drive to ensure that opportunities to study further are available to all who need it.

Mother, Father

As Khaled Hosseini has said: for you, a thousand times over.² You have instilled in me values I could never have learnt from anywhere else. Ke ya leboga, thank you.

¹ Gibran K (1923) 'The Prophet' *Global Greye Books*, United Kingdom 34.

² Hosseini K (2003) 'The Kite Runner' *Penguin Books*, New York 45.

KEYWORDS

Adoption.

Durable Solutions

Formal Care

Foster Care.

Kafalah Care.

Informal Care.

Placement.

Unaccompanied Children.



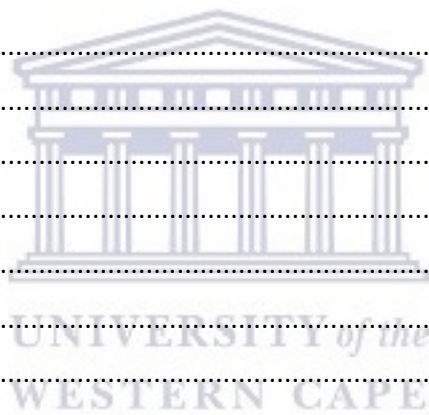
ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
BID	Best Interests Determination
CPO	Child Protection Organisation
CPS	Child Protection System
CYCCs	Child and Youth Care Centres
CRC	Convention on the Rights of the Child
DHA	Department of Home Affairs
DSD	Department of Social Development
IOM	International Organisation Migration
ISS	International Social Services
LHR	Lawyers for Human Rights
NGO	Non-governmental organisation
SAPS	South African Police Service
SOP	Standard Operating Procedure
UAM	Unaccompanied Minor
UNHCR	United Nations High Commissioner for Refugees

TABLE OF CONTENTS

Chapter 1	8
1.1.Introduction	8
1.2. Significance of the Study	10
1.3. Research Questions	11
1.4. Literature Review	12
1.5. Research Methodology	16
1.6. Chapter Outline.	17
Chapter 2: Legislative Framework.....	18
2.1. Introduction	18
2.2. International Legal Framework	19
2.2.1.UN Convention on the Rights of the Child (1989).	20
2.2.2. UN Convention Relating to the Status of Refugees (1951).	23
2.2.3. General Comment 6 Dealing with the Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005).	24
2.2.4. UN Guidelines for the Alternative Care of Children (2009).....	28
2.2.5. UNHCR Guidelines on the Care and Protection of Children (1994).	31
2.3. Regional African Legal Framework	32
2.3.1. African Charter on the Rights and Welfare of the Child (1990).....	32
2.3.2. Southern Africa Strategic Plan of Action to Address Mixed and Irregular Migration.	36
2.3.3. African Committee of Experts on the Rights and Welfare of the Child: The Impact of Conflict and Crises on Children in Africa.	39
2.4. National policies, legislation and guidelines relevant for migrant children.....	40
2.4.1. Constitution of the Republic of South Africa Act 108 of 1996.....	40
2.4.2. The Refugees Act 130 of 1998.	41
2.4.3. The Immigration Act 13 of 2002.	44
2.4.4. Children's Act 38 of 2005.	47
2.4.6. Standard Operating Procedures for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa and Zimbabwe (2011)	50
2.5. Conclusion	51
Chapter 3: Challenges faced by unaccompanied children when accessing South Africa's Care and Protection System	52

3.1. Introduction	52
3.2. The Asylum Seeking Process	54
3.3. Temporary Care	58
3.4. Challenges to accessing the protection system:	60
3.4.1. Identification	60
3.4.2. Documentation	62
3.4.3. Family Tracing and Reunification	65
3.5. Durable or Permanent Solutions.	67
3.6. Conclusion	68
Chapter 4: Foster Care and Adoption as durable solutions for the placement of unaccompanied children.	69
4.1. Introduction.....	69
4.2. Durable solutions.....	72
4.3. Alternative care	72
4.4. Informal Care.....	72
4.4.1. Kinship Care.....	72
4.4.2. Kafalah Care.....	78
4.5. Formal Care	79
4.5.1. Residential Care (CYCC).....	79
4.5.2. Foster care	81
4.5.3. Adoption.....	83
4.6. Conclusion	85
Chapter 5: Recommendations	86
5.1. Introduction.....	86
5.2. Recommendations regarding data collection	87
5.3. Recommendations for workforce.....	88
5.4. Recommendations for cooperation between departments	88
5.5. Recommendations for the DSD	89
5.6. Recommendations for the DHA.....	90
5.7. Conclusion	91
Bibliography	93



Chapter 1

1.1.Introduction

‘You have to understand that no one puts their children on a boat unless water is safer than land. No one burns their palms under trains beneath carriages. No one spends days and nights in the stomach of a truck feeding on newspapers unless the miles travelled means something more than a journey’ ...³

At the age of 15, Nestor Tata watched rebel soldiers in Democratic Republic of Congo (hereinafter DRC) kill his father, and not long afterwards came home from school to find the murdered body of his mother. With no siblings or anyone else to turn to, he took his parents' savings from their hiding place under a mattress, packed a small bag and fled. He was afraid that if he stayed, they would kill him too. He then took a taxi to Kalemie, which is in eastern DRC, a boat across Lake Tanganyika, and a bus to Lusaka in Zambia. He still had no idea where he was going. After a month in Zambia and another two months in Zimbabwe, Tata made his way to South Africa where his youth and lack of English got him across the border despite having no documents.⁴

Moses Re Muleya, a 14-year old Zimbabwean boy, lives in an overcrowded shelter in the South African border town of Musina. His father died, a victim of political violence; his mother

³ Shire W (2011) ‘Teaching my mother how to give birth’ *Flipped Eye Limited Publisher*, United Kingdom 25.

⁴Inside Story on Emergencies ‘Catch 22 for Unaccompanied Child Refugees’ available at <http://www.irinnews.org/report/93546/south-africa-catch-22-unaccompanied-child-refugees> (accessed 16 April 2016).

suffers from HIV. Given Zimbabwe's crippled economy, Moses's mother encouraged him to travel to South Africa to earn money to help support her and his four younger brothers.⁵ In December 2008, he and a friend boarded a train and made the journey to the border. Since arriving, he has been forced to beg and run errands to survive. He has been unable to enrol in school, find steady work, or travel safely to Zimbabwe to visit his family, nor has he had access to a social worker to help him with these problems, something to which he is theoretically entitled under South African law.⁶

Africa, like the rest of the world, is faced with environmental challenges as well as political unrest. As a result, children leave their countries of origins for a variety of reasons.⁷ Some leave due to conflict in their countries and the forced recruitment of child soldiers, or sometimes because of extreme cases of poverty and neglect.⁸

Increasingly, children from countries as far afield as Somalia, the DRC and Zimbabwe are migrating and crossing South Africa's borders without their parents, relatives or care-givers.⁹ These children often have to fend for themselves because they are usually without care once they cross the borders.¹⁰ As a result, these children are easily exploited due to their vulnerability and their state of being without care.

According to the 1951 Refugee Convention a refugee is someone who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular

⁵ Fritsch C et al (2009-2010) 635.

⁶ Fritsch C et al (2009-2010) 634.

⁷ Fritsch C et al (2009-2010) 635.

⁸ Anderson K et al Unaccompanied and unprotected: The systemic vulnerability of unaccompanied migrant children in South Africa in Liefwaard T and Sloth-Nielsen J '25 Years of the UN Convention on the Rights of the Child: Taking stock and looking forward' Brill publishers, The Netherlands, 2016) 4.

⁹ Shreier T (2011) 'Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons learned at the UCT Refugee Rights Unit' Available at http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_4_of_2011.pdf (accessed 04 May 2016) 3.

¹⁰ Ramcharan R (2000) 'African Refugee Crisis: Contemporary Challenges to the Protection of Refugees and Displaced Persons in Africa' 8 *Afr. Y.B Intl'L* 160.

social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to, avail himself of the protection of that country.¹¹

One can only imagine the problems that could arise when a child is unaccompanied and has to prove all these factors in order to qualify for refugee status. The lack of legal documentation poses a number of problems for this group. Once in South Africa, unaccompanied and separated foreign children have extremely restricted access to documentation which would regularise their stay in the country.¹²

The stories of Nestor and Moses is common among foreign children who cross the South African borders on their own, in search of a better future. When placing such children States are tasked with ensuring that the form of care in which they place the child is aimed towards achieving a durable solution.

This study will be examining whether South Africa's approach with regards to the placement of migrant children is in keeping the best interest of the child as outlined in the Constitution, the Children's Act and the International Legal framework.¹³ The inquiry will highlight the manner in which South Africa deals with children once they cross the border, and whether the care of the unaccompanied children complies with international standards.

1.2. Significance of the Study

The primary aim of this study is to show the plight of unaccompanied migrant children who are often stuck in temporary care centres because a long term or durable solution has not been established. Attention is drawn to the issue of whether South Africa is in compliance with international standards regarding the care of children. According to the African Charter on the

¹¹ Article 1 (A) UNHCR.

¹² Anderson K et al (2016) 4.

¹³ Section 9 of the Children's Act 38 of 2005.

Rights and Welfare of the Child (hereinafter ACRWC), where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.¹⁴

The UN Guidelines on the Alternative Care of Children are intended to enhance the implementation of the Convention on the Rights of the Child (1989) and of relevant provisions of other international instruments regarding the protection and wellbeing of children who are deprived of parental care or who are at risk of being so deprived.¹⁵

The UN Guidelines further state that should family reintegration prove impossible within an appropriate period or be deemed contrary to the best interests of the child, stable and definitive solutions, such as adoption or kafalah of Islamic law, should be envisaged; failing this, other long-term options should be considered, such as foster care or appropriate residential care, including group homes and other supervised living arrangements.¹⁶ The discussion of these forms of care is continued in chapter 4 of the study.

This research will enable an understanding of how South Africa is currently managing the alternative care of refugee and asylum seeking children and whether permanent solutions are being found in order to maintain the best interest of the child principle.

1.3. Research Questions

1. What does the international legal framework state regarding the care and placement of migrant children?

¹⁴ Article 23(3) of ACRWC.

¹⁵ This is under the purposes of the UN General Assembly Guidelines for the Alternative Care of Children, A/RES/64/142, 24 February 2010, Available at http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf (accessed 25 May 2015) 2.

¹⁶ Guideline 161 of the Alternative Care Guidelines.

2. Are South African laws, policies and practices in compliance with international standards?
3. Are the placement solutions considered by South Africa durable?

1.4. Literature Review

In her thesis, Swart tackled the issues regarding the treatment of unaccompanied child refugees and their protection under human rights law.¹⁷ Education, healthcare as well as access to food and water were most of the aspects she dealt with. The care and protection aspect of children was not looked into.

The Refugee Rights Unit (hereinafter RRU) at the University of Cape Town has been providing free legal assistance to refugees in Cape Town since 1998.¹⁸ As part of its direct legal services activities, the RRU represents a number of unaccompanied and separated foreign children in the Department of Home Affairs (hereinafter DHA) asylum application process and in Children's Court inquiries (hereinafter CCIs), with the paramount principles of non-refoulement and the best interests of the child guiding each of its activities.¹⁹

In 2011, the RRU published a working paper series focusing on the key challenges that the RRU has experienced in the protection of unaccompanied foreign children in the Western Cape. The unit reviewed some of its cases to highlight various experiences in the course of undertaking this work.²⁰ The key protection gaps that were highlighted include: difficulties with or lack of suitable entry into South Africa's child care and protection system; the unclear interface between the refugee regime and the child protection regime; inability to access legal

¹⁷ Swart S 'Unaccompanied Minor Children and the Protection of their Socio Economic Rights under Human Rights Law' (Unpublished LLM Thesis Submitted at the University of Pretoria, 2008) 2.

¹⁸ Shreier T (2011) 4.

¹⁹ Shreier T (2011) 4.

²⁰ Shreier T (2011)4 .

documentation; and the poor level of knowledge of the legal and protection frameworks by government and frontline service providers.

The impact of this research is quite vital as it was based on day-to-day experiences of the RRU. The working paper drew upon a considerable amount of research that has already been done on the legal framework related to, and the treatment of, unaccompanied foreign children in South Africa. However, where other works have focused on the experiences of migrant children in the country's border regions, in particular the large number of older Zimbabwean children, the RRU's working paper highlighted the experiences of children in the Western Cape.

The study was, however limited to socio-economic and other various human rights violations suffered by the children. It did not touch on the care aspects. It was limited to the experiences of children and the failure of the State to assist in the procedural aspects at borders. There was nothing in the working paper about the foster care or adoption of refugees or migrant children and whether the methods of placement in alternative care were durable.

In 2014, Professor Sloth-Nielsen from the University of the Western Cape and Marilize Ackermann of the Scalabrini Centre in Cape Town conducted a study to determine the number of children in the care of the State in the Western Cape.²¹ One cannot ignore the importance of this study as it seeks attempt to describe the issues surrounding the care and protection of unaccompanied migrant children.

The objective of that study was to find and quantify the number and demographics of foreign children placed in all Child Youth Care Centres (hereinafter CYCCs) across the Western Cape.²² It was also aimed at analysing the efforts made to trace the families of children, whether

²¹ Sloth-Nielsen J & Ackermann M (2016) 'Unaccompanied and separated foreign children in the care system in the Western Cape – A socio-legal study' *PER / PELJ* 21.

²² Sloth-Nielsen J & Ackermann M (2016) 3.

in South Africa or across borders. It is important to note that this study also touched on the issues regarding the documentation of migrant children which is currently very problematic.

Apart from the fact that this study was limited to the Western Cape, one must take note of the fact that it did not touch on the alternative care aspect of migrant children other than their accommodation in CYCCs. The feasibility of the care arrangements in CYCCs and institutionalisation of children as a form of alternative care were also not questioned. The best interest of the child standard was not analysed. That study did not touch on the specifics of the care of the child and whether it was in accordance the best interest of the child principle.

In his article, Landau states that if South Africa is willing to grant someone refugee status, it assumes the full responsibility for protection of that person. The minimalist approach South Africa has adopted offers refugees only partial protection in ways that undermine the country's broader commitments to the universal promotion of human rights and dignity.²³ A particular focus of this mini thesis is the human rights obligations of South Africa with regards to providing basic services to refugees.

Fritch, Johnson, and Juska provide background information on the circumstances that have led to the mass migration of unaccompanied children from Zimbabwe.²⁴ This article goes further by examining the life of unaccompanied children in South Africa, including the barriers and challenges that prevent them from taking advantage of their rights.

However, the only care aspect mentioned in the article was limited to the manner in which children were handled in detention. This was with reference to the children being placed with adults and therefore leaving them vulnerable.²⁵ The feasibility of the State adopting solutions

²³ Landau L 'Protection and dignity in Johannesburg: Shortcomings of South Africa's urban refugee policy' (2006) 3 *J. Refugee Stud* 308.

²⁴ Fritsch C (2009-2010) 635.

²⁵ *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) S 50 (T).

regarding the placement unaccompanied children in institutionalised care was not dealt with at all and the issue as to whether durable solutions are considered was also not addressed.

Mayer et al in their article examined the law relating to migrant children.²⁶ This again, is a point of departure in many of the journal articles. These authors analysed the various frameworks to consider the impact of these policies in practice, asking the following questions: Are they adequate? Are they being enforced? How do other countries ensure the protection of refugee children? In order to obtain an overview of the current treatment of refugee children in South Africa, interviews were conducted in South Africa with a range of organisations and other service providers who engage with refugee children at various levels. Those interviewed included representatives of the Department of Home Affairs (hereinafter DHA), Education Department, the Border Police, refugee forums and organisations, the United Nations High Commission for Refugees, and other non-governmental organisations.²⁷

I am interested in a chapter by Kaime where he touches on alternative care of refugee children and explains the obligation of States to provide alternative family care to child refugees.²⁸ Although very briefly, he explains that durable solutions include local integration, resettlement in a third country or even inter-country adoption.²⁹ In the same chapter he puts forward that this obligation that states have means they must ensure that effective adoption mechanisms and foster care arrangements are in place.³⁰ This is quite a breakthrough as previously much emphasis seems to have been placed on the child's background or nationality in considering placement alternatives.³¹

²⁶ Mayer V (2007) 'Protecting the most Vulnerable with the Existing Policy Framework to Strengthen Protection for Refugee Children' in Mayer V (ed) *Advancing Refugee Protection in South Africa* Berghahn Publishers 187.

²⁷ Mayer V (2007) 188.

²⁸ Kaime T (2004) 'The protection of refugee children under the African human rights system: finding durable solutions in international law' in Sloth-Nielsen J (ed) *Children's rights in Africa: A legal Perspective* 191.

²⁹ Kaime (2004) 191.

³⁰ Article 25, UNHCR.

³¹ Kaime T (2004) 192.

Steinbock in an article sets out the forms of alternative care usually afforded by most States.³² He explains the disadvantages of the various care systems as well as their impact on the development of the children.³³ His research did not include South Africa and his main focus was mostly refugee camps.

Much of what has been written about unaccompanied children relates to socio-economic aspects. This was also evident in the study by Mahati, which showed that care workers had a mixture of concern and fear for these children, treating them as vulnerable at some moment but as criminals at other moments.³⁴ This brings the question of child participation in care arrangements to the conversation.

This mini-thesis is however focused on the care and protection component of the plight of unaccompanied migrant children. It is important to note that in order to do so, consideration will be given to both the international and domestic legal framework that are already in place in the following chapter. This is vital as it will allow an introduction into the gaps that exist. The study also includes the temporary care aspect that the children are afforded whilst seeking refugee status.

1.5. Research Methodology

This is a desktop and library based research. It relies on both published and unpublished material. Internet sources are also widely referred to. The study will also analyse primary sources of data, such as case law. Both domestic and international law instruments with regards

³² Steinbock D (1996) 'Unaccompanied minor children in host country foster families' 8 *Intl' J. Refugee L.* 16.

³³ Steinbock D (1996) 16.

³⁴ Mahati T.S (2012) 'The Representations of Unaccompanied Working Minor Male Children Negotiating for Livelihoods in a South African Border town' in Bourdillon M (ed) *Negotiating the Livelihoods of Children and Youth in Urban Spaces* Council for the Development of Social Science Research in Africa 69.

to placement and care are used. Reliance is placed on the current framework and analysing whether it is being implemented.

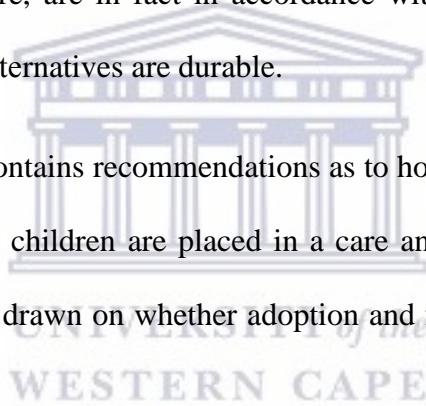
1.6. Chapter Outline.

Chapter 2: This chapter highlights the domestic and international framework regarding the care of migrant children.

Chapter 3: This chapter will address the difficulties and shortcomings experienced by unaccompanied children when accessing the care and protection system

Chapter 4: This chapter deals with the question of whether the placement and care of children as well as their temporary care, are in fact in accordance with international standards and whether South Africa's care alternatives are durable.

Chapter 5: The last chapter contains recommendations as to how South Africa can find ways to ensure that unaccompanied children are placed in a care and protection systems that are durable. A conclusion will be drawn on whether adoption and foster care can be feasible for unaccompanied children.



Chapter 2: Legislative Framework

2.1. Introduction

‘In most African countries, refugees are not welcomed with the sense of regional solidarity... Instead, African states have increasingly followed the lead of European states by closing their borders, deporting those who have made it into their territories or restricting them to camps. Even in those countries where refugees are admitted, their treatment does not meet the Convention’s standards and obligations. Despite South Africa having enacted legislation, the Refugees Act, which is hailed as one of the most liberal domestic refugee protection frameworks in Africa, it has regressed in its refugee protection policy.’³⁵

There are laws regulating the major aspects of the problem of unaccompanied children in emergencies, whether due to wars, natural disasters or refugee situations.³⁶ These laws also govern the placement of unaccompanied children once in the host country. They bear all the phases of the plight of unaccompanied children, from the prevention of family separation through protection, care, and assistance, to permanent placement.³⁷

The laws make it clear that unaccompanied children are the duty of the community; the law stipulates a standard of care and protection that must be provided. This includes the issues of family reunion, adoption, foster care and other forms of permanent solutions.

³⁵ Willie N, Mfubu P (2016) ‘Responsibility sharing: Towards a unified refugee protection framework in Africa’ *AMHR* (2) 542.

³⁶ Boothby N (1988) ‘Unaccompanied children: care and protection in wars, natural disasters, and refugee movements’ 209.

³⁷ Boothby N et al (1988) 209.

The first layer of law that affects unaccompanied children is national law, also known as the domestic framework. It includes statutes, regulations, and Acts of Parliament. In general, the legal situation of unaccompanied children falls within the jurisdiction of the country where they are located. The second tier of law that affects children is international law. These are agreements between nations on certain principles of conduct relevant to the welfare of children. These are found in Conventions, Protocols, Declarations and the laws and practices of states.

The main aim of this chapter is to outline the principal legislative and policy documents governing the care of unaccompanied foreign children in South Africa. The starting point is the International Legal framework followed by a discussion of the African Legal Framework and, lastly, the national laws of South Africa. This mini-thesis will critically examine South Africa's approach to the care and protection of unaccompanied foreign children.

2.2. International Legal Framework

In her article, Bhabha explains that the neglect that is often faced by child migrants is somewhat surprising given the amount of international protection that is afforded to children.³⁸ The law has long recognised the distinctive needs of unaccompanied children because child refugees have been the subject of international concern since the inception of the international refugee regime.³⁹

South Africa has signed and ratified many UN Conventions that create the framework for legislation and policy in keeping with human rights. Whilst some are specific to children, others are specific to migrants. There are also some general Conventions that offer protection to migrant children.⁴⁰ The rights and protection of foreign unaccompanied children in South

³⁸ Bhabha J (2003) 'More than their of sorrows': International migration law and the Rights of children' 22 *St. Louis U. Pub. L. Rev.* 255.

³⁹ Bhabha J (2003) 257.

⁴⁰ Chames C et al (2016) 'Final Report for System Mapping of the Protection of Unaccompanied and Separated Migrant Children in South Africa' *Save the Children* 14.

Africa are prescribed by both international and South African law. The legislative and policy framework for the protection of unaccompanied foreign children in South Africa are quite extensive.⁴¹

The international instruments can be grouped into three different categories. Boothby explains that there are those instruments concerning the human rights of children; those concerning children; and family; those concerning guardianship, placement and adoption of children; and, lastly, those providing for individual rights and State obligations in emergencies.⁴²

This chapter pays attention to the framework regarding the placement and guardianship aspects. At the international level, the primary sources of guidance are derived from the United Nations Convention on the Rights of the Child (CRC), 1989, and the African Charter on the Rights and Welfare of the Child (1990), the 1951 Convention Relating to the Status of Refugees (Refugees Convention) and its 1967 Protocol, and the Optional Protocols on the Rights of the Child.

When referring to the care and long-term placement and durable solutions for children, South Africa has taken a step further by ratifying the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993 (Adoption Convention) as well as the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions of 1993.

2.2.1. UN Convention on the Rights of the Child (1989)

It is important to note that the CRC is considered a critical milestone in the legal protection of refugee and asylum-seeking children,⁴³ the reason being that it is very holistic with regards to

⁴¹ Schreier T (2011) 8.

⁴² Boothby N I (1988) 215.

⁴³ Connelly, H. (2015) 'Seeking the relationship between the UNCRC and the Asylum System through the eyes of the Unaccompanied asylum seeking children and young people' (23) *International Journal on Children's rights* 52 at 55.

the rights of children.⁴⁴ The Convention's main point of departure is the best interests of the child principle.⁴⁵ It continues by stressing on the placement of unaccompanied children.

A child deprived of his or her family environment is entitled to protection and assistance from the State.⁴⁶ Special emphasis is placed by the Convention on States Parties that must also act in accordance with their national laws to ensure alternative care for such a child.⁴⁷ Article 22 goes further by listing the different kinds of placement that should be considered by States i.e foster care, kafalah of Islamic law or even adoption.⁴⁸ Article 21 provides that States parties may consider adoption or inter-country adoption as an option if the child cannot be placed in foster care or institutional care.⁴⁹ One must note that the CRC makes mention of kafalah care as a means for care and protection of children. This is a form of informal care in the Islamic tradition.

Children are eligible for the same protection under international refugee law as adults. Moreover, because of their age and immaturity, it is generally accepted that they are more vulnerable and therefore in greater need of protection than their adult counterparts.⁵⁰ The duty is therefore placed on States in Article 22(1):

‘Parties to the Convention 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

⁴⁴ Anderson K (2016) 18.

⁴⁵ Article 3(1) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁴⁶ Article 20(1) of the CRC.

⁴⁷ Article 20(2) of the CRC.

⁴⁸ Article 22(3): Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

⁴⁹ Article 21(2) of the CRC.

⁵⁰ Bhabha J (1999) ‘Not adults in Miniature: Unaccompanied Child Asylum Seekers and the new US Guidelines’ 11 *Int'l J. Refugee L.* 87.

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 Convention.⁵¹

The same Article provides that 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.⁵² South Africa is obligated to act in accordance with these obligations.

One shortcoming can, however, be the fact that the CRC does not make any reference to unaccompanied children who cross borders for economic reasons.⁵³ They do not fall within the definition of a refugee. The reason for this could be that the drafters did not foresee the possibility of children leaving family voluntarily for reasons, such as looking for employment etc. Magaya states that it could be said that international law fails to strike a balance between child protection and child autonomy.⁵⁴

This view is reiterated by Fritch and several other authors, who explain that unaccompanied children explain that they migrate as a result of starvation and poverty, amongst other reasons,⁵⁵ particularly those who cross the border from Zimbabwe.⁵⁶ This makes placing the children difficult as they are most likely to go back on to the streets if provision is not made for them.

⁵¹ Article 22(1) of the CRC.

⁵² Article 22(2) of the CRC.

⁵³ Magaya I 'The International Law on Unaccompanied Foreign Migrant Children: An evaluation of whether it Reflects Modern Realities of Economic Migrancy in South Africa' (unpublished LLM thesis submitted University of Pretoria, 2015) 27.

⁵⁴ Magaya I (2015) 27.

⁵⁵ Fritch C et al (2009-2010) 634.

⁵⁶ Fritch C et al (2009-2010) 634.

2.2.2. UN Convention Relating to the Status of Refugees (1951)

The 1951, the Refugee Convention is the guiding international treaty that sets out the rights of persons applying for refugee status and the responsibilities of signatory countries that grant asylum.⁵⁷

In the Fourth Working Paper prepared by the UCT RRU, Schreier points out that while the Refugee Convention does not specifically mention the rights of children, many of its Articles and principles are significant for children.⁵⁸ The Refugee Convention defines a refugee in Article 1.⁵⁹

Magaya argues that unaccompanied children are not only excluded by virtue of not being expressly mentioned in the Convention, and that at the crux of the argument is that children are classified together with adults. There is no specific mention of unaccompanied children.⁶⁰

The Convention does, however, recognise the family as the natural and fundamental group unit of society and emphasises that the essential right of a refugee to a family is constantly being threatened.⁶¹ Governments are required to take the necessary measures to protect the family with a view to maintaining the unity of the family where household heads fulfil the conditions for admission to a country.

The Refugee Convention has been criticised for not including age as a ground for seeking asylum, although there are a range of potential claims with an age dimension, which include forcible or underage recruitment into military service, family or domestic violence, infanticide,

⁵⁷ Introductory note of the UNHCR 1951 Convention Relating to the Status of Refugees available at <http://www.unhcr.org/3b66c2aa10> accessed: 13 July 2017.

⁵⁸ Schreier T (2011) 8.

⁵⁹ Article 1 of the 1951 Convention provides that a refugee is 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.'

⁶⁰ Magaya I (2015) 25.

⁶¹ Schreier T (2011) 8.

forced or under-age marriage, female genital mutilation, forced labour, forced prostitution, child pornography, trafficking, poverty, and children born outside of strict family planning rules.⁶²

It is often interpreted that most children are either in South Africa because they are seeking asylum on the grounds listed in the definition of a refugee or as a result of trafficking. The law seems to have a narrow focus on these two elements. Yacub submits that some unaccompanied children are in South Africa for economic reasons i.e to uplift their families from poverty (as mentioned by Magaya). The current narrative is limited to children in a situation where they are dependent, when in fact some of the children see themselves as self-dependent, making it impossible for them to stay in the care system.⁶³

2.2.3. General Comment 6 Dealing with the Treatment of Unaccompanied and Separated Children Outside their Country of Origin (2005)

In addition to the CRC, there are the CRC Committee's General Comments, notably General Comment 6. In her thesis, Van der Burg argues that it is clear that States struggle with the proper implementation of the rights of the Convention, and that this General Comment has served as a benchmark for States to ensure that unaccompanied minors are dealt with appropriately.⁶⁴

In accordance with the accepted practice of the United Nations High Commission for Refugees (UNHCR), the General Comment requires a best interests determination of all separated and unaccompanied children, which, according to paragraph 20, requires a clear and

⁶² Edwards A (2013) 'Age and gender dimensions in international refugee law' in Feller E *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* Cambridge University Press 46.

⁶³ Yacub (2009) 'Independent Child Migrant in Developing Countries: Unexplored links in migration and development' Innocenti Working Paper No. 2009-01 UNICEF 6.

⁶⁴ Van der Burg A 'An examination of the extent to which South Africa is meeting its legal obligations with regard to the protection of undocumented foreign migrant children' (unpublished LLM thesis, University of the Western Cape, 2005) 27.

comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.⁶⁵ This means that when determining prospective homes for the children, their background should also be a determining factor. According to Naik, family reunification, whenever feasible, should generally be regarded as being in the best interests of the child.⁶⁶

Paragraph 33 of the General Comment advises that the appointment of a guardian as expeditiously as possible serves as key protection for the best interests of the child.⁶⁷ In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

Paragraph 39 specifically touches on the placement aspect by emphasising that unaccompanied or separated children are children temporarily or permanently deprived of their family environment and, as such, are beneficiaries of States' obligations under Article 20 of the Convention, and shall be entitled to special protection and assistance provided by the relevant State.⁶⁸ In South Africa, the Department of Social Development (DSD) is responsible for taking measures regarding the placement of unaccompanied children.

States are therefore given the task of providing mechanisms under national laws to ensure the care of unaccompanied minor children.⁶⁹ These laws must encompass the duty of finding durable solutions for the placement of the children. The ultimate aim of addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their

⁶⁵ Paragraph 20 of the UNCRC Committee's General Comment no 6 (2005) dealing with the treatment of unaccompanied and separated children outside their country of origin.

⁶⁶ Naik S (2012) 'Family tracing recent developments in the law and ensuing issues' Paper submitted to ILPA Refugee Children's Project Seminar 6.

⁶⁷ Paragraph 33 of General Comment 6.

⁶⁸ Paragraph 39 of General Comment 6.

⁶⁹ Paragraph 39 General Comment 6.

protection needs, take into account the child's view, and, wherever possible, leads to overcoming the situation of a child as being unaccompanied or separated.

Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated.

Following a rights based approach, the search for a durable solution commences with analysing the possibility of family reunification.⁷⁰ In her article, Sloth-Nielsen explains that when looking for durable solutions or long-term placements for children, States have to consider family tracing.⁷¹

The UNHCR and UNICEF's Safe and Sound Report provides the most up-to-date and exhaustive definition of the term 'durable solution'. The Report defines a durable solution as: a sustainable solution that ensures that the unaccompanied or separated child is able to develop into adulthood, in an environment which will meet his or her needs and fulfil his or her rights as defined by the CRC and will not put the child at risk of persecution or serious harm. Because the durable solution will have fundamental long-term consequences for the unaccompanied or separated child, it will be subject to a best interests determination. A durable solution also ultimately allows the child to acquire, or to re-acquire, the full protection of a State.⁷²

The UNHCR defines durable solutions as voluntary repatriation, local settlement in the country of first asylum, and resettlement in a third country.⁷³ Voluntary repatriation is the durable

⁷⁰ Paragraph 79 of General Comment 6.

⁷¹ Sloth-Nielsen J and Ackermann M (2016): 19.

⁷² Safe and Sound Report: what states can do to ensure for the best interest of unaccompanied and separated children in Europe available at <http://www.refworld.org/pdfid/5423da264.pdf> (accessed: 27 July 2016) 34.

⁷³ Preface of the UNHCR Guidelines on the Care of Protection of Children <http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf> (accessed: 27 July 2016).

solution most desirable as ideally, it allows the child to resume a normal life in the home country, and restores cultural and ethnic bonds within that country.

If voluntary repatriation is not possible, refugees may benefit from assistance towards self-sufficiency and integration into the local community, planned or spontaneous. The main challenge to field staff may be to ensure for refugee children the same access to services as national children.

Resettlement is only sought when repatriation and local integration are considered impossible within an acceptable time frame. This would mean if social workers cannot seem to find any other feasible solutions for the child, resettlement can be the last resort. For individual children, resettlement with his or her parents, a viable guardian or relatives should be the primary consideration. Every effort should be made to promote and facilitate reunification of children with their parents.

In seeking durable solutions, careful attention should be paid to the principles of family unity and the best interests of the child. Children may face specific difficulties in the process of moving and reintegrating. Some children, such as those who are unaccompanied or ill, require special protection and assistance to help them find, and adjust to, more permanent situations.⁷⁴

In its bid to tighten legislation regarding the placement of migrant children, the UNHCR adopted the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally in 1986 (1986 Declaration).

In its preface, the Declaration raises concerns about the large number of children who are abandoned or have become orphans owing to violence, internal disturbance, armed conflicts,

⁷⁴ Preface of the UNHCR Guidelines on the Care of Protection of Children
<http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf> (accessed: 27 July 2016).

natural disasters, economic crises or social problems. The Declaration bears in mind that in all foster placement and adoption procedures, the best interests of the child should be the paramount consideration.⁷⁵

Article 4 provides for appropriate institutions of care or adoption in instances where there is no parental care for the child.⁷⁶ Again, the best interests of the child principle is used as a standard regarding the care and placement of the child.⁷⁷ Foster care is dealt with in Article 10, and States are to ensure that there is legislation regulating it.⁷⁸ In considering possible adoption placements, persons responsible for them should select the most appropriate environment for the child.⁷⁹

One important point is made in article 17 which provides that if a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, inter-country adoption may be considered as an alternative means of providing the child with a family.⁸⁰ States are tasked with safeguarding the mechanisms for such adoptions to take place as a measure of last resort.⁸¹

2.2.4. UN Guidelines for the Alternative Care of Children (2009)

Another instrument includes the UN Guidelines for the Alternative Care of Children adopted in 2009, (Alternative Care Guidelines) which are designed to provide further guidance

⁷⁵ UNHCR Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally. <http://www.un.org/documents/ga/res/41/a41r085.htm> (accessed: 27 July 2016).

⁷⁶ Article 4 states when care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute - foster or adoptive - family or, if necessary, by an appropriate institution should be considered.

⁷⁷ Article 5 provides that in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.

⁷⁸ Article 10 of the 1986 Declaration.

⁷⁹ Article 14 of the 1986 Declaration.

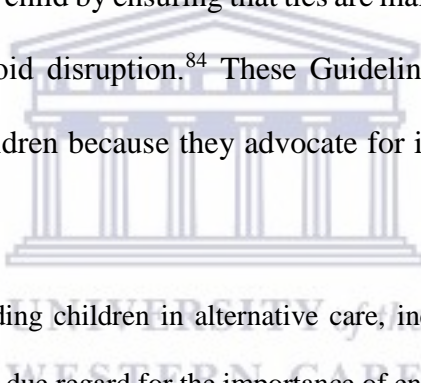
⁸⁰ Article 17 of the 1986 Declaration.

⁸¹ Article 22 states that no inter-country adoption should be considered before it has been established that the child is legally free for adoption and that any pertinent documents necessary to complete the adoption, such as the consent of competent authorities, will become available. It must also be established that the child will be able to migrate and to join the prospective adoptive parents and may obtain their nationality.

regarding the definition of the relationship between parental care and the child's family environment, goals for alternative care, and the criteria for decisions regarding alternative care placements.⁸²

The Guidelines target both policy and practice with specific regard to children who are deprived of a family environment. The Alternative Care Guidelines are intended to enhance the implementation of the CRC and of relevant provisions of other international instruments regarding the protection and wellbeing of children who are, or at risk of being deprived of parental care. Automatically, the Guidelines encompass refugee children.⁸³

Guideline 11 is clear in providing that all decisions concerning alternative care should take into account the best interests of the child by ensuring that ties are maintained as close by as possible with the child's family to avoid disruption.⁸⁴ These Guidelines are also instrumental with regards to unaccompanied children because they advocate for informal care as an alternative care measure:



'Decisions regarding children in alternative care, including informal care, should have due regard for the importance of ensuring children's basic needs for a safe environment are met... continuous attachment to their caregivers, with permanency being a care goal'.⁸⁵

This is emphasised further in Guideline 18 which provides:

Recognising that in most countries, the majority of children without parental care are looked after informally by relatives, States should seek to devise appropriate means consistent with the present Guidelines

⁸²Better Care Network available at <http://bettercarenetwork.org/library/social-welfare-systems/standards-of-care/guidelines-for-the-alternative-care-of-children-english> (accessed 17 July 2017) para 1.

⁸³ UN General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf. (accessed: 27 July 2016).

⁸⁴ Guideline 11 of the Alternative Care Guidelines.

⁸⁵ Guideline 13 of the Alternative Care Guidelines.

to ensure their welfare and protection while in such informal care arrangements...taking into account the best interest of the child'.⁸⁶

Care within a child's own community, including fostering, is preferable, as it provides continuity in socialisation and development. This option is usually preferred. Should family reintegration prove impossible within an appropriate period or be deemed contrary to the best interests of the child, stable and definitive solutions, such as adoption or kafalah of Islamic law, should be envisaged; failing this, other long-term options should be considered, such as foster care or appropriate residential care, including group homes and other supervised living arrangements. An in-depth discussion of informal care follows in Chapter 4 of this mini-thesis.

The Guidelines encourage that children below the age of three be kept in a family setting when in search of alternative care options for them.⁸⁷ Strategies and goals to deinstitutionalise children should be set in motion by State Parties.⁸⁸

As with the CRC, States should take into consideration the ethnic and migratory background or cultural and religious diversity of each child. When an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organisation responsible for his or her care and wellbeing to accompany the child throughout the status determination and decision-making process.⁸⁹

These Guidelines continue to apply in situations of emergency arising from natural and man-made disasters, including international and non-international armed conflicts, as well as foreign occupation.⁹⁰ Individuals and organisations wishing to work on behalf of children without

⁸⁶ Guideline 18 of the Alternative Care Guidelines.

⁸⁷ Guideline 22 of the Alternative Care Guidelines.

⁸⁸ Guideline 23 of the Alternative Care Guidelines.

⁸⁹ Guideline 145 of the Alternative Care Guidelines.

⁹⁰ Guideline 135 of the Alternative Care Guidelines.

parental care in emergency situations are strongly encouraged to operate in accordance with the Guidelines.⁹¹

Magaya argues that it is quite problematic that the law does not recognise the child's autonomy.⁹² The ambitions of unaccompanied migrant children are usually neglected. The interest of the child is often aligned with a family; and should there not be a family, the child is often placed in alternative care without any reference to the child's views. The child's view is not considered.

2.2.5. UNHCR Guidelines on the Care and Protection of Children (1994)

The preface of the UNHCR Guidelines on the Care and Protection of Children (Guidelines on Care and Protection) states that since children are vulnerable, dependent and developing, their care is instrumental to their wellbeing.⁹³

First, the objectives for the care of children include ensuring that each unaccompanied child has a continuous caregiver who is loving and nurturing, and who meets the developmental needs of the child.

Secondly, any placement of children with families other than their own must be consistent with traditional child care practices.⁹⁴ These Guidelines further reaffirm the CRC principles by stating that the preferable option with regards to the placement of unaccompanied children without care, is that placement with a family within the child's own community.

Care arrangements should be made as quickly as possible to meet children's physical and developmental requirements, as children are harmed by living in limbo. Care arrangements

⁹¹ Guideline 159 of the Alternative Care Guidelines.

⁹² Magaya I (2015) 28.

⁹³ Preface of UNHCR Guidelines on the Care and Protection of Children <http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf> (accessed: 27 July 2016)

⁹⁴ This is in line with article 20 (3) of the CRC.

must leave open the possibility of a family reunion. Finding homes for children with persons from the same areas of origin and intended areas of return, in anticipation of voluntary repatriation, and to ensure linguistic and cultural continuity, is desirable.

2.3. Regional African Legal Framework

2.3.1. African Charter on the Rights and Welfare of the Child (1990)

As with the CRC, the ACRWC does not directly make reference to unaccompanied children. Drawing on the CRC, the ACRWC, in its preface, notes that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger; and that on account of the child's physical and mental immaturity, he or she needs special safeguards and care.⁹⁵

Van Baalen explains that the ACRWC focuses on the position and the rights of children in Africa which reflect similar rights to those set out in the CRC. However, some provisions in the ACRWC provide a higher standard of protection for specific rights due to specific vulnerabilities which African children face.⁹⁶

Kaime distinguishes three principles within the African Charter, namely non-discrimination, participation, and the primacy of the best interests of the child.⁹⁷

The Charter includes a non-discrimination clause by stating that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his or her parents' or legal guardians' race, ethnic group, colour, sex, language,

⁹⁵ Preface of the ACRWC available at <http://pages.au.int/acerwc/documents/african-charter-rights-and-welfare-child-acrwc> (accessed 29 July 2016).

⁹⁶ Van Baalen C 'The Rights of refugee children in South Africa' (unpublished LLM thesis North West University, 2012) 29.

⁹⁷ Kaime T (2004) 338.

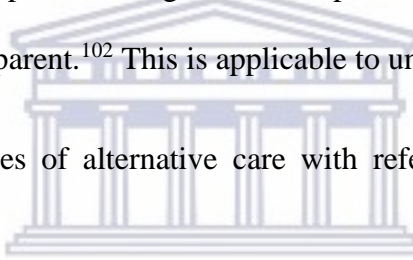
religion, political or other opinion, national and social origin, fortune, birth or other status.⁹⁸

This suggests that there should be no distinction between unaccompanied children and South African children. This again confirms the position of the CRC.

As with the international framework, the Charter also brings in the best interests of the child in all matters regarding the placement of the child.⁹⁹ In her article, Mc Adam argues that this is an umbrella provision that prescribes all actions to be taken concerning children, but it has been given very diverse interpretations and is yet to acquire a specific content.¹⁰⁰

The Charter expressly deals with the importance of the family unit for the protection and full development of the child.¹⁰¹ Article 19(3) addresses the care and protection of children who have been separated from their parents and goes on to explain that it is the duty of the State to assist the child in locating the parent.¹⁰² This is applicable to unaccompanied children.

Article 23(2) tackles the issues of alternative care with reference to refugee children by providing:



States Parties to the present Charter should 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,

⁹⁸ Article 3 of the ACRWC.

⁹⁹ Article 4(1) of the ACRWC provides that in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

¹⁰⁰ Mc Adam J (2010) 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complimentary Protection' in Lambert H *International Refugee Law* 262.

¹⁰¹ Article 18(1) states that the family should be the natural unit and basis of society. It should enjoy the protection and support of the State for its establishment and development.

¹⁰² Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

receive 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 the States are Parties'.¹⁰³

Whilst Kaime is adamant that States are under an obligation to ensure that children deprived of a family environment need to be provided with alternative care in the prescribed forms,¹⁰⁴ Magaya argues brings for a paternalistic view.¹⁰⁵ Chirwa approaches this from an African perspective by stating that children are considered to lack in the capacity to make decisions and therefore should be afforded protection.¹⁰⁶ This explains why their rights are placed in a family context.

In their attempt to find durable or long-term solutions for the placement of refugee children, State Parties are given the duty to ensure that measures are put in place to attempt to reunify the child with family.¹⁰⁷ These measures include attempts to contact other States in order to locate the parents of a child.

Where no parents, legal guardians or close relatives can be found, the child is to be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.¹⁰⁸ Kaime explains that States are tasked with two particular responses in such situations, first the tracing of parents or family members in order to obtain the necessary information for family reunification to occur.¹⁰⁹ and secondly, should

¹⁰³ Article 23(1) of the ACRWC.

¹⁰⁴ Kaime T (2004) 342.

¹⁰⁵ Magaya I (2015) 23.

¹⁰⁶ Chirwa D (2002)16.

¹⁰⁷ Article 23(2) of the ACRWC states parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.

¹⁰⁸ Article 23(3) of the ACRWC.

¹⁰⁹ Kaime T 'The protection of refugee children under the African human rights system: finding durable solutions in international law' in Sloth-Nielsen J (ed) *Children's rights in Africa: A legal Perspective* (2008) 191.

reunification and family tracing prove to be impossible, alternative care arrangements should be made for the child.¹¹⁰

If the child is separated from his or her family, alternative care should be provided by the state. States Parties to the Charter should ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interests cannot be brought up or allowed to remain in that environment, should be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children.¹¹¹

This ties in with the CRC's provisions. States Parties are to ensure that they contact the countries of these children in an attempt to trace, and reunify them with their, families.¹¹² When considering alternative family arrangements for the child, States should ensure that attention is paid to the linguistic and religious backgrounds of the child.¹¹³

States are required to take all possible precautions that this provision for family tracing does not result in trafficking of children.¹¹⁴ The child should be protected from sexual exploitation and abuse including coerced sex, prostitution and involvement in pornographic activities.¹¹⁵ The abduction, sale or trafficking of children should be prevented by all appropriate measures.

The Charter makes it known that adoption may also be considered as an alternative caring solution for unaccompanied children:

¹¹⁰ Kaime T (2008) 191.

¹¹¹ Article 25(2)(a) of the ACRWC.

¹¹² Article 25(2)(b) of the ACRWC.

¹¹³ Article 25(2)(c) of the ACRWC.

¹¹⁴ Article 29: Sale, Trafficking and Abduction

States Parties to the present Charter shall take appropriate measures to prevent: (a) the abduction, the sale of, or traffick of children for any purpose or in any form, by any person including parents or legal guardians of the child (b) the use of children in all forms of begging.

¹¹⁵ Article 27(1)(a)(b)(c) of the ACRWC.

States Parties which recognise the system of adoption should ensure that the best interest of the child shall be the paramount consideration; should establish competent authorities to determine matters of adoption, should ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information; that the adoption is permissible in view of the child's status concerning parents, relatives and guardians; and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling.¹¹⁶

The Charter recognises inter-country adoptions as a last resort to alternative family care. States are to ensure that safeguards are in place for the monitoring of the wellbeing of that child post-adoption.¹¹⁷

2.3.2. Southern Africa Strategic Plan of Action to Address Mixed and Irregular Migration

Established in 2000, the Southern Africa Strategic Plan of Action to Address Mixed and Irregular Migration (MIDSA) initiative is a collaboration between the International Organisation of Migration (IOM) and its partner, the Southern African Migration Project (SAMP).¹¹⁸ Both organisations are the main facilitators of the MIDSA workshops.

These MIDSA workshops aim to bring together senior government officials from Southern African Development Community (hereinafter SADC) countries to discuss and agree on migration-related issues of regional concern.¹¹⁹ This promotes dialogue on issues of concern and how neighbouring countries can work together to tackle these issues.

¹¹⁶ Article 24(a) of the ACRWC.

¹¹⁷ Article 24(c) of the ACRWC.

¹¹⁸ International Organisation of Migration available at <https://www.iom.int/midsa> (accessed: 10 July 2017).

¹¹⁹ International Organisation of Migration available at <https://www.iom.int/midsa> (accessed: 10 July 2017).

In 2015, the third Ministerial level Migration Dialogue for Southern Africa was held at Victoria Falls, Zimbabwe, from 7-9 July 2015. For the first time ever, the dialogue was centred around the protection of the Unaccompanied Migrant Child and the treatment they receive at the hands of governments.¹²⁰ Ministers and Senior Officials responsible for immigration from all 15 SADC Member States participated in the meeting, representing: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.¹²¹

At the conference Professor Mezmur gave a presentation and explained how existing data on child migration, most of which looks at children as part of a migrant family, is often very limited, outdated, and fragmented; however, the quality of relevant literature was increasing.¹²²

Challenges faced by Member States in the SADC region were addressed. Malawi outlined some challenges in addressing the protection needs of unaccompanied children. In particular, the Malawian government stated that it is often faced with difficulties in relation to effectively identifying the children within its borders as many irregular migrants use unofficial routes and are only transiting through the country.¹²³ Mauritius, on the other hand, is without any legal framework regulating unaccompanied children.¹²⁴

¹²⁰ John V 'Improving Protection of Children' *Mail and Guardian* 28 August 2017 available at <https://mg.co.za/article/2015-08-28-00-improving-protection-of-children> para 3.

¹²¹ John V 'Improving Protection of Children' *Mail and Guardian* 28 August 2017 available at <https://mg.co.za/article/2015-08-28-00-improving-protection-of-children> para 3.

¹²² Mezmur B 'Migration Dialogue for Southern Africa Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child' Day one of the conference held at Victoria Falls, Zimbabwe 7- 9 July 2015 available at https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf (accessed: 1 July 2017) 14.

¹²³ Mezmur B 'Migration Dialogue for Southern Africa Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child' Day one of the conference held at Victoria Falls, Zimbabwe 7- 9 July 2015 available at https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf (accessed: 1 July 2017) 14.

¹²⁴ Mezmur B 'Migration Dialogue for Southern Africa Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child' Day one of the conference held at Victoria Falls, Zimbabwe 7- 9 July 2015 available at https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf (accessed: 1 July 2017) 14.

During their presentation at the conference, Van Zyl and Virgili explained that South Africa is a primary destination country in the region, and that the majority of unaccompanied children are not identified nor referred to protection service providers.¹²⁵ Due to the irregular manner in which children enter the country means that many are invisible to social services. For those who are in the system, temporary placement often becomes a long-term solution. A lack of clear procedures regarding documentation limits access to services, such as education, and family tracing and reunification.¹²⁶

The IOM does not have a high caseload for third country resettlement, but there may be a myth that it is a realistic option. The IOM is eager to work with governments to find solutions, such as Assisted Voluntary Return (hereinafter AVR),¹²⁷ for stranded migrants who are not eligible to stay in a country of destination. Supporting the reintegration process is a policy option that helps protect returnees, as coming back ‘empty handed’ can lead to discrimination and stigmatisation in the community.

In August 2016, the Member States once again convened in Botswana and unlike the 2015 conference that was focused on the protection of unaccompanied migrant children, statelessness, alternatives to detention and voluntary return, this time the theme was in relation

¹²⁵ Van Zyl M & Virgili G ‘Migration Dialogue for Southern Africa Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child’ Day one of the conference held at Victoria Falls, Zimbabwe 7- 9 July 2015 available at https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf (accessed: 1 July 2017) 15.

¹²⁶ Van Zyl M & Virgili M ‘Migration Dialogue for Southern Africa Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child’ Day one of the conference held at Victoria Falls, Zimbabwe 7- 9 July 2015 available at https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf (accessed: 1 July 2017) 15.

¹²⁷ AVRR is defined by the IOM as the administrative, logistical and financial support, including reintegration assistance, provided to migrants unable or unwilling to remain in the host/transit country, who volunteer to return to their countries of origin. Available at https://www.iom.int/sites/default/files/our_work/DMM/AVRR/IOM-DMM-MAD-AVRR-Factsheet-2016.pdf (accessed: 10 September 2017) para 5.

to the linking of protection, immigration, border management and labour migration.¹²⁸ The States tackled these issues due to the large mixed migratory groups, driven by war, lack of protection and economic disparity.¹²⁹ This is all in the hope for better living conditions. This often leads to massive influxes of people but lack of infrastructure leads to most of these borders being largely unmanaged.

In 2017, Member States gathered in Swaziland where they continued with the 2016 theme. They addressed border control, irregular migration, documentation, protection of unaccompanied children and statelessness.¹³⁰

2.3.3. African Committee of Experts on the Rights and Welfare of the Child: The Impact of Conflict and Crises on Children in Africa

In 2016, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) published a Study which focused on the conflicts on the continent and the effects they have on children. Apart from being killed, trafficked, and abducted, children were separated from their families during conflicts and Member States are responsible for the placement or reunification of these children should it be possible.¹³¹ The ACERWC is raising awareness with States which are experiencing or have experienced conflict to address the issues surrounding children to prevent lack of protection.¹³²

¹²⁸ The IOM webpage available at <https://www.iom.int/news/sadc-officials-meet-discuss-regions-mixed-and-irregular-migration-challenges> (accessed 10 September 2017) para 5.

¹²⁹ The IOM webpage available at <https://www.iom.int/news/sadc-officials-meet-discuss-regions-mixed-and-irregular-migration-challenges> (accessed 10 September 2017)

¹³⁰ The IOM webpage available at <https://www.iom.int/news/sadc-officials-deliberate-migration-southern-africa-region>.

¹³¹ ACERWC 'Continental study on the impact of conflict and crises on children in Africa' (2016) available at <http://www.acerwc.org/download/continental-study-on-the-impact-of-armed-conflicts-on-children/?wpdmdl=10132> (accessed: 10 September 2017) x.

¹³² ACERWC 'Continental study on the impact of conflict and crises on children in Africa' (2016) available at <http://www.acerwc.org/download/continental-study-on-the-impact-of-armed-conflicts-on-children/?wpdmdl=10132> (accessed: 10 September 2017) x.

The ACERWC Study addresses 13 countries. Seven are countries experiencing active conflict as of the time of writing: Burundi, Central African Republic, Kenya, Libya, Nigeria, Somalia and South Sudan. The remaining six are in fragile post-conflict situations or in major humanitarian crises requiring a system wide response: DRC, Guinea-Bissau, Liberia, Mali, Sierra Leone and Sudan.¹³³

This call by the ACERWC is important because for a very long time children were seen as the casualties and collateral damage of conflict, this led to the neglect in the protection of children by countries.¹³⁴ There are gaps or worse, no frameworks at all, protecting children during war. It is also relevant for this mini-thesis because it means that pressure will be applied to member States to improve on the care and protection of children. According to the ACERWC website, the Committee is planning a continental study of children and migration in the coming months.

2.4. National policies, legislation and guidelines relevant for migrant children

2.4.1. Constitution of the Republic of South Africa, 108 of 1996

Section 28(3) of the Constitution gives protection to children's rights whilst the Children's Act 38 of 2005 gives effect to these rights.¹³⁵ The Constitution states that a child is a person below the age of 18 years of age.¹³⁶ It entitles every child to a name, a nationality, and to family care or parental care which includes alternative care if the child is removed from the family environment.¹³⁷

¹³³ ACERWC 'Continental study on the impact of conflict and crises on children in Africa' (2016) available at <http://www.acerwc.org/download/continental-study-on-the-impact-of-armed-conflicts-on-children/?wpdmdl=10132> (accessed: 10 September 2017) x.

¹³⁴ ACERWC 'Continental study on the impact of conflict and crises on children in Africa' (2016) available at <http://www.acerwc.org/download/continental-study-on-the-impact-of-armed-conflicts-on-children/?wpdmdl=10132> (accessed: 10 September 2017) x.

¹³⁵ Chames C et al (2016) 16.

¹³⁶ Section 28 of the Constitution.

¹³⁷ Section 28(1)(a) of the Constitution.

The Constitution also guarantees a child's right to basic nutrition, health care services and social services.¹³⁸ It grants children protection from maltreatment, neglect and abuse or degradation.¹³⁹ Section 28(1)(d) provides for the protection of children from exploitation.¹⁴⁰ One must note that again this is in accordance the CRC and most of the international frameworks. Children are protected from doing work that is inappropriate for their wellbeing or development.¹⁴¹

This section emphasises that children may not be detained except as a last resort and that should a child be detained, it should be for the shortest period of time and that the conditions must be in keeping with the child's age.¹⁴²

2.4.2. The Refugees Act 130 of 1998

The Refugees Act defines a refugee in accordance with that of the 1951 Refugee Convention:

‘A person seeking asylum owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it’.¹⁴³

¹³⁸ Section 28(1)(b) of the Constitution

¹³⁹ Section 28(1)(c) of the Constitution

¹⁴⁰ Section 28(1)(d) of the Constitution states that children are to be protected from exploitative labour practices.

¹⁴¹ Section 28(1) (e) provides that children may not be required or permitted to perform work or provide services that are inappropriate for a person of that child's age or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

¹⁴² Section 28(1)(f) provides that children may not to be detained except as a measure of last resort, in which case, 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;

¹⁴³ Section 3(a) of the Refugees Act.

This section goes on to include the following instances:

‘Where external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, where a person is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere’.¹⁴⁴

According to Anderson,¹⁴⁵ qualitative data demonstrate that it is very rare for a child migrant to come to South Africa for a single reason, and illustrate that it is often a complex interplay of factors that propel child migrants to enter South Africa. These factors often include experiences of abuse and neglect.¹⁴⁶ As with economic factors, the Act does not make provision for this.

Although section 32 of the Act does not specifically mention unaccompanied children, it is particularly important because it draws attention to the care aspect of children seeking asylum. It 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, must forthwith be brought before the Children's Court for the district in which he or she was found.¹⁴⁷

In their article, Willie and Mfubu mention that the Act makes reference to children who are refugees or who may qualify for refugee status.¹⁴⁸ This brings into question the issue of a child who does not qualify for refugee status and cannot be reunified with family in his or her country of origin.

¹⁴⁴ Section 3(b) of the Refugee Act.

¹⁴⁵ Anderson K (2016) 3.

¹⁴⁶ Anderson K (2016) 3.

¹⁴⁷ Section 32(1) of the Refugee Act.

¹⁴⁸ Willie N & Mfubu P (2016) 433.

They propose that in order to avoid unlawful detentions and arrests, such a child should be placed in temporary care until a Children's Court concludes that the child is indeed in need of care and protection.¹⁴⁹ Their argument is that such children can be documented under section 31(2)(b) of the Immigration Act. This section informs us that the Minister has the discretion to grant a foreigner the status of permanent residence for a specified or unspecified period.¹⁵⁰ This is to avoid children without claims from being undocumented, thereby also denying them access to the care and protection system.

Section 33 provides that a person who qualifies for asylum under the Refugees Act must assist any dependents who have accompanied him or her to South Africa to seek asylum to apply for asylum or apply on their behalf.¹⁵¹ This provision gives effect to the principle of family unity and allows the refugee family to seek protection together in South Africa.¹⁵² A dependent includes the unmarried, dependent child of the main asylum applicant, or a child who was formally placed in the care of the main asylum applicant.¹⁵³

The recent decision in *Mubake v Minister of Home Affairs*¹⁵⁴ has extended this definition to include separated children in the care of other asylum seekers, such as relatives who are not their parents. In terms of the Refugees Act and the Regulations,¹⁵⁵ an unaccompanied or separated child who appears to qualify for refugee status, cannot submit an asylum application without the intervention of a social worker and a Children's Court order.

¹⁴⁹ Willie N & Mfubu P(2016) 434.

¹⁵⁰ Section 31(2)(b) of the Immigration Act.

¹⁵¹ Section 33(1) of the Refugee Act.

¹⁵² Sloth-Nielsen J & Ackerman M (2016) 12.

¹⁵³ See the definition of 'dependent' in section 1 of the *Refugees Act*.

¹⁵⁴ *Mubake v Minister of Home Affairs* 2016 (2) SA 220 (GP).

¹⁵⁵ Section 32 of the Refugees Act and Regulation 3(5) of the Regulations to the Refugees Act promulgated on 6 April 2000 in Regulation Gazette, No. 6779 GN No. R. 366.

2.4.3. The Immigration Act 13 of 2002

The Act provides for admissions and departures. It states that no person shall enter the Republic at a place other than a port of entry.¹⁵⁶ The Act states that a person may only enter the country with a valid passport and the appropriate temporary or permanent residence permit.¹⁵⁷ For people identified as illegal foreigners, it outlines the procedures for arrest and deportation.¹⁵⁸

Johnson points out that while refugee law and immigration law are separate regimes, they do overlap at certain points. One of the most critical junctures is where an asylum seeker receives a final rejection of their asylum claim and becomes what is termed a 'failed asylum seeker', transitioning from the refugee to the immigration system.

UNHCR and the IOM define failed asylum seekers as 'people who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status, nor be in need of international protection and thus are not authorized to stay in the country concerned'.¹⁵⁹

Section 34 of the Immigration Act provides for the detention and deportation of irregular migrants by permitting immigration officers to arrest, deport or cause an irregular migrant to be deported, without the need for a warrant.¹⁶⁰ As a general rule, irregular migrants should be held in detention.

However, the Immigration Regulations state that unaccompanied minors shall not be detained.¹⁶¹ The Immigration Act is however silent on what should happen to unaccompanied migrant children since they are not supposed to be detained.

¹⁵⁶ Section 9(1) of the Immigration Act.

¹⁵⁷ Section 9(4) of the Immigration Act

¹⁵⁸ Without need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department.

¹⁵⁹ Johnson C (2015) 2.

¹⁶⁰ Section 34 of the Immigration Act.

¹⁶¹ Regulation 33(5)(d) of the Immigration Regulations.

In 2017, Lawyers for Human Rights brought an application to the Constitutional Court for confirmation of the High Court's order declaring certain provisions of section 34 to be invalid.¹⁶² These provisions were related to the detention of alleged illegal migrants.

Section 34(1)(b) provides that 'persons arrested may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner'.¹⁶³

The other section that the applicant wanted to have impugned was section 34(1)(d) which provides that a person may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days.¹⁶⁴

The invalidity was said to be to the extent that these provisions permitted the detention of foreigners for a period of 30 days without automatic judicial intervention, and for an extension of the initial period of detention without the detainee appearing in person before the court that grants the extension. This treatment was therefore inconsistent with section 12(1)¹⁶⁵ and section 35 of the Constitution.¹⁶⁶

In his judgement, Justice Japhta explained that during apartheid personal freedoms were the most violated.¹⁶⁷ Arrests and detentions were often used to suppress any opposition against

¹⁶² *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 4.

¹⁶³ Section 34(1) (b) of the Immigration Act.

¹⁶⁴ Section 34(1)(d) of the Immigration Act.

¹⁶⁵ Section 12(1) of the Constitution entitles one to freedom and security of person.

¹⁶⁶ Section 35(1)(d) provides that a person who is arrested for having allegedly committing an offence has a right to be brought to the court as soon as reasonably possible and no later than 48 hours.

¹⁶⁷ *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 1.

laws. He explained that many of the detainees were taken to undisclosed locations and were detained for indefinite periods.¹⁶⁸ As a result, history should not be allowed to repeat itself.

The court first had to determine whether foreigners enjoyed the protection and rights of section 12 and section 35.¹⁶⁹ It was found that the two sections encompassed foreigners. The second finding by the court was related to whether the limitation was justified under section 36.¹⁷⁰ It was held that the reasons put forward by the State fell short of justifying the limitation.¹⁷¹ The court was satisfied with the suspension of the declaration of invalidity by the High Court. Illegal foreigners who were in detention at the time of this order were brought before a court within 48 hours from the date of the order. Parliament was given a period of 24 months to remedy the defect in the legislation.¹⁷²

The absence of any specific provision in this law referring matters to the Children's Court process under the Children's Act leaves a gap for an interpretation that unaccompanied children can be deported without there being a children's court process. Nevertheless, the DHA Passport Control Instruction 1 of 2004 states that unaccompanied minor who are irregular migrants must be reported to a social worker in order for arrangements to be made for the children to be placed in appropriate place of care or place of safety.¹⁷³

¹⁶⁸ *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 1.

¹⁶⁹ *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 30.

¹⁷⁰ Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹⁷¹ *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 62.

¹⁷² *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 69.

¹⁷³ Skelton A et al (2016) 'In Search of a better Future: Experiences of Unaccompanied Migrant Children in Limpopo and Mpumalanga' *Save the children* available at <https://www.savethechildren.org.za/sites/savethechildren.org.za/files/field/file/Case%20Studies.pdf> (accessed: 28 March 2017) 15.

The Immigration Act is applicable in this instance because the law was changed in 2015: children coming across the border were expected to have an unabridged birth certificate. The reason for the change in the law was to prevent child trafficking.

In the Mapping Report, Chames et al, however, indicate that although some countries in the SADC region do use unabridged certificates,¹⁷⁴ most unaccompanied children do not usually have any sort of documentation with them when crossing the border.

2.4.4. Children's Act 38 of 2005

The Children's Act 38 of 2005 was prepared after the realisation that the previous Child Care Act 74 of 1983 was too narrow in focus and failed to live up to the standards of a new South Africa. It was premised on separate services for children based on the colour of their skin; in other words, it racially segregated Blacks, including Indian, Coloured and African, children from the rest of the population.¹⁷⁵

The starting point in the Children's Act would be section 9; this section provides that in all matters concerning a child, the standard is that the child's interests are of paramount importance.¹⁷⁶ A list of factors to be considered when determining the best interests of the child is provided in section 7. When determining the placement of an unaccompanied child, these factors may then be used to determine what would be suitable for the child.¹⁷⁷

Section 150 makes provision for children in need of care and protection. It points out that a child is in need of protection if he or she has been abandoned or orphaned and has no visible means of support.¹⁷⁸ In 2016, an amendment was made to this provision to include instances

¹⁷⁴ Chames C et al (2016) 16.

¹⁷⁵ Sibanda S, Lombard A (2015) 'Challenges faced by Social Workers working in Child Protection Services in Implementing the Children's Act 38 of 2005' Social Work Stellenbosch. Online (51 n.3) 334.

¹⁷⁶ Section 9 of the Children's Act.

¹⁷⁷ Section 7(1)(a) of the Children's Act.

¹⁷⁸ Section 150 (1) (a) of the Children's Act.

where the child does not have the ability to support himself or herself and such inability is readily apparent.¹⁷⁹

The section goes further by stating that a child in need of care can also include a child who lives and works on the streets for a living.¹⁸⁰ A child may also be deemed in need of care and protection if they live in a manner that leaves them exposed to conditions which may harm them physically, mentally or even affect their wellbeing.¹⁸¹ This section includes a child who seems to be living in a state of physical and mental neglect.¹⁸² There is no mention of unaccompanied migrant children, but the criteria are often interpreted widely to include unaccompanied children although authors argue that it is problematic that no mention is made of unaccompanied children.

In their submissions for an amendments to the Children's Act, the UCT RRU argued that it is crucial that unaccompanied refugee and foreign children be recognised as children in need of care and protection in terms of the criteria established in section 150.¹⁸³

The RRU proposed that to ensure that this happens at all times, that an amendment should be made in section 150 (j) to indicate that an unaccompanied child is a child in need of protection and care. This submission was not taken into consideration.¹⁸⁴

¹⁷⁹ Section 150(1)(a) of the Children's Amendment Act 17 of 2016 (published in GG no 40564 of 19 January 2017).

¹⁸⁰ Section 150(1) (b) of the Children's Act.

¹⁸¹ Section 150(1) (f) of the Children's Act.

¹⁸² Section 150(1)(h) of the Children's Act.

¹⁸³ UCT Refugee Law Clinic 'Submission on the Children's Bill: Foreign children' available at <https://www.google.co.za/search?q=children%27s+act+and+unaccompanied+minor+children&oq=children%27s+act+and+unaccompanied+minor+children&aqs=chrome..69i57.14280j0j7&sourceid=chrome&ie=UTF-8> (accessed: 06 July 2017).

¹⁸⁴ UCT Refugee Law Clinic 'Submission on the Children's Bill: Foreign children' available at <https://www.google.co.za/search?q=children%27s+act+and+unaccompanied+minor+children&oq=children%27s+act+and+unaccompanied+minor+children&aqs=chrome..69i57.14280j0j7&sourceid=chrome&ie=UTF-8> (accessed: 06 July 2017).

The Children's Act also sets out the procedure to be followed after having identified a child in need of care. Again it must be reiterated that the Act makes no specific reference to unaccompanied foreign children when identifying a child as being in need of care and protection.

The Mapping Report pointed out that there is a danger in not making mention of unaccompanied children in a sense that it leads to confusion amongst service providers and also to children being denied education and even in some instances health care.¹⁸⁵

According to the Mapping Report, there have been discussions on section 150(c) of the Children's Act be amended to include unaccompanied children as a specific category of vulnerability, and ensure that unaccompanied children are included in the protection system.¹⁸⁶

As mentioned, though, these suggestions did not come to fruition.

2.4.5. Standard Operating Procedures for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa

There seems to be no trace of the abovementioned document online. Contact had to be made with relevant personnel to obtain a copy thereof and there is no indication of the date when the procedures came into operation. In its objectives, the Standard Operating Procedures (SOPs) aim to provide guidance to the DSD and designated Child Protection Organizations (CPOs) in South Africa on procedures to follow when dealing with unaccompanied and separated children.

The SOP are needed to promote uniform service delivery to this very vulnerable group of children.¹⁸⁷ The DSD or the designated CPO should assess whether the child is seeking asylum;

¹⁸⁵ Chames C et al (2016) 19.

¹⁸⁶ Chames C et al (2016) 19.

¹⁸⁷ Department of Social Development Standard Operating Procedures (SOPs) for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa: 'objectives'.

if so, DSD or the designated CPO is to assist the child to seek asylum through the Refugee Reception Officers in the Department of Home Affairs.¹⁸⁸

It is, however, the children's court that will determine whether the child is in need of care and protection and will provide an order to ensure that the child is officially placed in terms of the ensuing sections of the Children's Act.¹⁸⁹

2.4.6. Standard Operating Procedures for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa and Zimbabwe (2011)

These SOP are the result of the large numbers of children from Zimbabwe who are arriving in South Africa as unaccompanied migrants. They deal specifically with the movement of children from Zimbabwe to South Africa. In October 2010, the Zimbabwean delegation, led by the Minister of Labour and Social Services at the time, undertook a fact finding mission to South Africa, which led to the signing of a Memorandum of Understanding between the Zimbabwean Minister and the South African Minister of Social Development, Ms Bathabile Dlamini, on co-operation in the field of social development, particularly to address the plight of undocumented and unaccompanied children.¹⁹⁰

A South African/Zimbabwe Cross Border Sub-Committee was established and has adopted standard operating procedures aimed at formalising processes of offering assistance to unaccompanied and unaccompanied children from Zimbabwe. The problem with these SOP is

¹⁸⁸ Department of Social Development Standard Operating Procedures (SOPs) for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa: paragraph 5.1.

¹⁸⁹ Section 156 of the Children's Act provides for the orders that a children's court can make when a child is found to be in need of care and protection.

¹⁹⁰ Issued by Government Communication (GCIS) (2011) 'The plan to address the Plight of Unaccompanied and Documented Minors from South Africa' Available at http://www.dsd.gov.za/index.php?option=com_content&task=view&id=361&Itemid=106 (Accessed: 10 July 2017).

that there appears to be no copy at the DSD website or anywhere else. Accessing them was quite a challenge at the time of writing.

2.5. Conclusion

South Africa has a progressive legal framework for protecting the rights of children in need of care; this was confirmed by the ACERWC. In their Concluding Observations on South Africa, the ACERWC commended the policies, court judgments and the efforts made to preserve the family unit and even in instances where it is not possible to provide of alternative care.¹⁹¹

One must, however, note that the refugee protection framework, although strong on paper, has suffered from a lack of implementation and has coexisted uneasily with immigration control imperatives.¹⁹² Willie and Mfubu argue that South Africa is moving away from its national, regional and international obligations which require a humanitarian approach to refugee protection.¹⁹³

This is at least partly due to the manner in which unaccompanied children are not expressly mentioned in legislation i.e the Children's Act. Furthermore; there seems to be inconsistency in practice. Children cannot be placed in care because of various, challenges such as lack of documentation. This will be discussed further in the following chapter.

¹⁹¹ Paragraph 27 of the African Committee of Experts on the Rights and Welfare of the Child: Concluding Observations on South Africa (2014) also available at <http://www.ihlda.org/wp-content/uploads/2015/01/South-Africa-CO.pdf>.

¹⁹² Johnson C (2015) 'Failed Asylum Seekers in South Africa: Policy and Practice' AMHR (2) 1.

¹⁹³ Willie N & Mfubu P (2016) 553.

Chapter 3: Challenges faced by unaccompanied children when accessing South Africa's Care and Protection System

3.1.Introduction

Because of the increased numbers of unaccompanied children, the South African social services professionals are under a lot of pressure to ensure that these children are protected and cared for. Social services to these children, however, are multi-sectoral, which means that they are an initiative of both government and non-governmental organisations (NGOs).¹⁹⁴ There are many NGOs that assist both asylum-seeking and refugee children; these include those that are faith-based and others that are community-based.

Unaccompanied children face a significant number of challenges that are hard to ignore. These challenges include their physical safety being compromised, life without a parent or guardian, legal and social discrimination, and a constant struggle to find food, shelter, education, health-care, and employment.¹⁹⁵ That is not all, as accessing the protection and care systems of the country is a problem because of various factors.

In their article, Fritch and several authors put forward that children coming to South Africa through the Zimbabwean border swim across the crocodile-infested Limpopo River.¹⁹⁶ Upon arrival in South Africa, many lead precarious lives, often living on the streets and doing odd jobs in the informal sector, on farms or as domestic workers, where they may be subjected to violence, abuse and exploitation. Their safety is often compromised so as a result, care and protection is a vital component for their survival.

¹⁹⁴ Magqibelo L et al (2013) 'Challenges faced by unaccompanied minor-refugees in South Africa' Social Work/Maatskaplike Werk Vol 52 No 1; Issue 5 73.

¹⁹⁵ Fritsch C et al (2009-2010) 624.

¹⁹⁶ Magqibelo L et al (2013) 73.

A forthcoming study of unaccompanied children in Limpopo and Gauteng Province by Sloth-Nielsen and Ackerman points out that the area in which unaccompanied children are located impacts access to services and social networks and reflects different patterns of migration.¹⁹⁷

So a child in an urban area will have a different experience with the care and protection system compared with a child in a border town. Another factor that makes migrant children difficult to locate is that they are self-settled into either urban areas or border areas, but the conditions are vastly different across these areas.¹⁹⁸

Research indicates that migrants to urban areas are in general more likely to be better off in terms of opportunities for employment and access to social services than those that remain on the border.¹⁹⁹ One must note that although they might be better off for purposes of looking for work, their access to care might be limited because there are more NGOs in border towns. Yet there are still concentrations of migrants in urban areas where, despite better access to services and advocacy groups, there are still pockets of extreme vulnerability among some migrant communities.²⁰⁰

In her thesis, Van der Burgh confirms that migrant children suffer from xenophobia, detention, deportation and abuse at the hands of the South African government.²⁰¹ Irrespective of their reasons for migrating or the means by which they arrive in South Africa, they are particularly vulnerable to violence and exploitation as a result of not having any social or economic

¹⁹⁷ Forthcoming Study by Sloth Nielsen J, Ackerman M (2017) 'Unaccompanied Children in Child Youth Care Centres in Limpopo and Gauteng Province- A Socio-Legal Study' 6.

¹⁹⁸ Centre for Education Rights and Transformation University of Johannesburg (2012) 'The Education Rights of Migrants, Refugees and Asylum Seekers in South Africa)' Report to the Foundation for Human Rights found at https://www.fhr.org.za/files/6713/8598/8897/The_Education_Rights_of_Migrants_Refugees_and_Asylum_Seekers_in_South_Africa_Research_Report.pdf (accessed: 30 March 2017) 21.

¹⁹⁹ Centre for Education Rights and Transformation University of Johannesburg (2012) 21.

²⁰⁰ Centre for Education Rights and Transformation University of Johannesburg (2012) 21.

²⁰¹ Van der Burg A (2006) 'Legal Protection of Undocumented Migrant Children in South Africa: Reality or Myth' Law Democracy and Dev. 10 82.

protection from caregivers, and also due to their means of travel and stay, which often result in their existence outside the scope of national law enforcement.²⁰²

These children are further faced with struggles relating to the shortcomings of the South African migration system. There are a number of key protection gaps that have been identified by the UCT RRU, and these include suitable entry into South Africa's child care and protection system, the unclear interface between the refugee regime and the child protection regime, the lack of access to legal documentation, and the poor level of knowledge of the legal and protection frameworks by government and frontline service providers.²⁰³

The previous chapter examined the legislative framework governing the care and protection of unaccompanied children. In this chapter, the barriers that are often faced by the children when accessing the care system will be highlighted. In doing so, a distinction will be made between what should be happening in terms of current legislation as well as what is evidently occurring in practice. These challenges include identification once having crossed the border, documentation, and temporary care placements amongst other factors. In doing so, a detailed account of the asylum seeking process will be given.

3.2. The Asylum Seeking Process

As mentioned, in order to map out these constraints that the children face, one would have to understand the procedure that is to be followed when applying for asylum. Once having crossed the border, public officials and community members or even NGOs are tasked with the duty of identifying an unaccompanied child.²⁰⁴

²⁰² Van der Burg A (2006) 82.

²⁰³ Schreier T (2011) 4.

²⁰⁴ Guideline 6.1 of the Standard Operating Guidelines on Separated and Unaccompanied Children in South Africa 2009.

The Department of Social Development Guidelines (hereafter DSD Guidelines) further points out that these children who are identified must then be referred to either the police or social workers.²⁰⁵ The reason for involving a public official such as a police officer is to mainly determine the immigration status of the child. And should the child be deemed in need of protection and care, the DSD should be contacted so as to allocate the child to a social worker.²⁰⁶ This social worker is to assist the child with not only accessing the care system but also the asylum seeking process.

The first priority is that the child should be placed in temporary care if necessary. The reason is to ensure that the child's immediate needs are met i.e that the child is provided safety, food, and shelter. In their working paper series, the Legal Resource Centre (hereinafter LRC) and Coram Children Legal Centre (hereinafter CCLC) mention that social workers may seek the advice of a refugee law expert in order to ascertain whether the child is eligible for to apply for refugee status.²⁰⁷

The UCT RRU's Children's Rights report confirms that a social worker only contacts an attorney or refugee law expert if she or he is of the opinion that the child could be a refugee.²⁰⁸

This is to assist the child with the children's court inquiry (CCI). The social worker or anyone who has the child's best interest at heart can, in fact, appear before the children's court to open the CCI.

²⁰⁵Department of Social Development 'Guidelines on Separated and Unaccompanied Children Outside their Country of Origin' were drafted to assist officials at the DSD in dealing with separated and unaccompanied children. These were drafted to supplement the Conventions on the Rights of the Child, Children's Act 38 of 2005 as well as the UN Guidelines on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin (General Comment 6).

²⁰⁶ Guideline 6.1 'Standard Operating Guidelines on Separated and Unaccompanied Children in South Africa' (2009).

²⁰⁷ Legal Resource Centre (2015) 'Guide 4 : Unaccompanied and Separated Children' Working Paper Series 6.

²⁰⁸University of Cape Town Refugee Right Unit 'Children's Rights Manual' available at http://www.refugeerights.uct.ac.za/sites/default/files/image_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf (accessed: 27 March 2017) 20.

Section 32 of the Refugees Act states that any child who appears to qualify for refugee status and is in circumstances which clearly indicate that he or she is a child in need of care under the Children's Act must be brought before the children's court who may order him or her to be assisted in applying for asylum.²⁰⁹

An application for asylum should be made in person according to the Refugee Act, but in the case of children, assistance would be required from social workers.²¹⁰ If the presiding officer at the children's court is of the view that the child in question is in fact in South Africa for refugee reasons, he or she will order that the child be assisted in an application for refugee status to be made at one of the Refugee Reception Offices (hereinafter RRO) in the country. An unaccompanied child must be represented by an attorney or guardian to ensure that the best interests of the child are met.

However, in October 2016, Fatima Chohan, deputy Minister of Home Affairs, tabled before Parliament, the Refugees Amendment Bill²¹¹ which is a third draft proposal which seeks to amend the Refugees Act.²¹² At the time of writing, the Bill had been passed by the National Assembly and has now being sent to the National Council of Provinces (NCOP) for comment.²¹³

Several changes were made in this Bill which might affect asylum-seeking children. The Bill would change the definition of a dependant to cover unmarried minors under the age of 18 who were legally adopted, and spouses who were legally married, in the refugee or asylum-seekers home country. LHR point out that these changes exclude children who were adopted in South

²⁰⁹ Section 32(1) of the Refugees Act.

²¹⁰ Section 21(1) of the Refugees Act.

²¹¹ Refugees Amendment Bill (Published in GG No. 39284 of 12 October 2015).

²¹² Duma N 'Sweeping Changes for Refugee Law in SA' *Mail and Guardian* 2 February 2017 available at http://www.africadaily.co.za/index.php?option=com_k2&view=item&id=607:sweeping-changes-for-refugee-status-in-sa-amid-world-outcry-against-usa (accessed : 15 July 2017) para 4.

²¹³ Duma N (2017) para 4.

Africa, or elsewhere, and could exclude children who are not formally adopted.²¹⁴ This could lead to the separation of children from parents.

The biggest factor that might affect children is the time frame in which to apply for refugee status. Asylum seekers are issued with a non-renewable, asylum transit permit at their point of entry. They then have 14 days in which to apply for refugee status at the nearest RROs. The proposed legislative changes would see the 14 days grace period in which to apply for refugee status reduced to just five days.²¹⁵ The main issue is also that there are currently only three refugee reception offices nationally: in Pretoria, Durban and Musina. Most of these offices also deal with particular nationalities on one specific day of the week.

The imposed time constraints, and the potential cost of travelling to the RROs, could make it more difficult for asylum seekers to fulfil this requirement within the specified time, and could exclude them from gaining refugee status. This proposed time frame might be difficult to meet as there are asylum seekers who will have to travel from as far away as the Western Cape Province. Child asylum seekers also have to be accompanied by a social worker which is practically impossible as social workers can rarely get funds to travel outside of their home province.²¹⁶

South Africa's policy does not allow for encampment; however, one must note that the DHA recently published a green paper²¹⁷ which proposes that asylum seekers stay closer to the northern borders so as to allow for their asylum claims to be processed.²¹⁸ This will restrict the

²¹⁴ Duma N (2017) para 4.

²¹⁵ Claase L 'Factsheet: Why is government proposing amendments to South Africa's Refugees Act and what are they?' *Africa Check* <https://africacheck.org/factsheets/refugee-amendment-bill/> (accessed: 27 March 2017).

²¹⁶ Chames C et al (2016) 16.

²¹⁷ DHA 'Green Paper on International Migration' published in GG no 738 on 24 June 2016.

²¹⁸ Pertsovsky N 'Asylum seekers will have to live near borders if Home Affairs has its way' *Ground Up* Available at <http://www.groundup.org.za/article/asylum-seekers-will-have-live-near-borders-if-home-affairs-has-its-way/> (accessed: 20 July 2017) para 4.

movement of not only adults but children as well. Their access to care and protection might be compromised, especially the children that are nowhere near the border.

3.3. Temporary Care

‘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.’²¹⁹

Because unaccompanied children are vulnerable, after having being identified by either a public official or community member, the first step to be taken is to contact a social worker. The reason for this is that the child is assumed to be in need of a place to stay.²²⁰ An unaccompanied child can be identified to be in need of care and protection under various factors listed under section 150 of the Children’s Act.²²¹ A recently added factor is that the child who has been abandoned must have no ability to support himself or herself and such inability must be readily apparent;²²² Also included are instances where the child begs for a living amongst a few other grounds listed.²²³

The child must then be placed in temporary safe care for a period not exceeding six months. The placement must however needs to be confirmed by children’s court enquiry. This process entails a report from a social worker who has 90 days to compile her investigations.²²⁴ In the midst of these investigations, contact must be made with the child’s guardians and relatives to

²¹⁹ Bhabha (2003) 314.

²²⁰ Legal Resource Centre (2015) 4.

²²¹ Section 150 of the Children’s Act.

²²² Section 150(1)(a) of the Children’s Act.

²²³ Section 150(1)(c) of the Children’s Act.

²²⁴ Section 155(2) of the Children’s Act.

establish if the child can be reunified.²²⁵ If the investigations of the social worker are not concluded within 90 days, the court must then consider placement in alternative care; this can include placement in a Child Youth Care Centre (CYCC).²²⁶ This is not, however, what happens in practice.

A study of the children in the CYCCs in the Western Cape revealed that 61 per cent of the children had lived in South Africa for more than five years. Most concerning was that children spent extended periods of time in care with 41 per cent spending more than five years in care largely because of difficulties in family tracing and financial difficulties of the children.

One must however note that this form of placement cannot be for more than two years.²²⁷ Although this period can be renewed, it has been found that most of the children in the Western Cape Province stay longer than 5 years.²²⁸ However, section 159(b) provides that an order may not be extended for a period longer than two years. This clogs up the system as no durable solutions are being found. Based on the findings of the social worker's report, the children's court then makes a finding on what might be the appropriate solution for the child's placement. Social workers and police officials are also given the option of placing the child in temporary care immediately, if they reasonably hold the belief that the child is in need of care and protection.²²⁹ The officials then have no more than 24 hours to inform parents,²³⁰ the DSD²³¹ as well as the clerk of the court of the placement of the child into temporary care.²³²

²²⁵ Mboyisa N 'The Fragmentation of Social Services: Factors Hindering the Delivery of Social Services to Unaccompanied Child Migrants in Johannesburg, South Africa' (Unpublished MA Thesis submitted at the University of Witwatersrand, 2014)15.

²²⁶ Section 158 (1) of the Children's Act states that a child may only be placed in a CYCC if any other option is not appropriate. Other options may include foster care, informal care or even adoption.

²²⁷ Section 159 (1) (A) Children's Act.

²²⁸ Sloth-Nielsen J & Ackerman M (2016) 15.

²²⁹ Section 152(1)(a) of the Children's Act.

²³⁰ Section 152(2)(a) of the Children's Act.

²³¹ Section 152(2)(b) of the Children's Act

²³² Section 152(3)(a) of the Children's Act.

In their study, Anderson et al observed that the shelters that the children are often placed in experience serious challenges regarding funding.²³³ It was noted that this results in some children disappearing from the shelters to fend for themselves.²³⁴ In addition to challenges at school, a number of children residing at the shelters complained of a lack of food, clothing and access to health care.

Another concerning finding was that children are not being properly cared for in the shelters where they are being housed.²³⁵ There is inadequate supervision, poor physical facilities and no regular provision of food. Amongst the interviewees, researchers found that most of the facilities are poorly managed.²³⁶ At the time of conducting their study, there were some shelters that the DSD had suspended funding for and investigations for various concerns were under way.²³⁷

3.4. Challenges to accessing the protection system:

3.4.1. Identification

Although the DHA has the task of identifying unaccompanied children at RROs and ports of entry, a recently published study points otherwise especially in areas surrounding border towns. In 2016, Save the Children published a report after having completed a study on unaccompanied migrant children in Limpopo and Mpumalanga. In this study, interviews were held with stakeholders in these area to assess the extent to which the child care protection

²³³ Anderson K, et al (2016) 369.

²³⁴ Anderson K, et al (2016)369.

²³⁶ Chames C et al (2015) 3.

²³⁷ The DSD runs checks on the shelters from time to time.

system covers unaccompanied children.²³⁸ In their study they point out that most children are identified by community members who then bring them to shelters in Musina.²³⁹

There seem to be awareness regarding unaccompanied children in the area.²⁴⁰ Officials also bring the children to the shelters with Form 36²⁴¹ as required by the Children's Act Regulations. According to the DSD guidelines, Form 36 must be filled in by police officials or social workers who hold the belief that a child is in need of emergency care .²⁴²

According to Fritsch and several authors, upon entry the children are often faced with the xenophobic attitudes of public officials. This was after a wave of xenophobic attacks swept the country in 2008 leading to children to experiencing beatings and arbitrary arrest by officials and arrests .²⁴³

The Mapping Report, which is a more recent study, found mixed attitudes and treatment experienced by children, however; officials demonstrated varied and contrasting attitudes regarding each other and unaccompanied children.²⁴⁴ These attitudes range from an unwillingness to assist the children, to examples of officials going beyond the call of duty in an attempt to support and serve the children.²⁴⁵

It was pointed out that Musina in Limpopo, has been highlighted as an example of a community with heightened awareness and positive and accepting attitudes towards unaccompanied children and other foreigners.²⁴⁶ This is further substantiated by the Save the Children Case

²³⁸ Skelton A et al (2016) 15.

²³⁹ Skelton A et al (2016) 15.

²⁴⁰ Skelton A et al (2016) 15.

²⁴¹ A Form 36 is an interim authority for placement of child in temporary safe care.

²⁴² Guideline 6.2 of the Department of Social Development 'Guidelines on Separated and Unaccompanied Children in South Africa' (2009)

²⁴³ Fritsch C et al (2009-2010) 631.

²⁴⁴ Chames C et al (2015) 3.

²⁴⁵ Chames C et al (2015) 3.

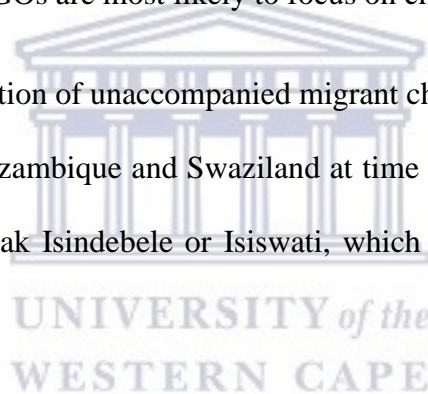
²⁴⁶ Sloth-Nielsen j & Ackerman M (2017) 8.

study conducted by Skelton and several authors, which provides that the communities around the northern borders seem to have an awareness regarding unaccompanied children.²⁴⁷

Schreier notes that unlike children in border towns, there are difficulties in identifying unaccompanied foreign children especially those that are in South Africa's urban areas, meaning that these children are often excluded from national care and protection systems.²⁴⁸ Most times unaccompanied children are fearful and distrust authorities, this then makes them extremely difficult to track especially in areas that are nowhere near borders.²⁴⁹

The study by Skelton et al also points out that the highest number of young people stay in shacks and rent rooms.²⁵⁰ This basically makes it harder to track down some of the unaccompanied children as NGOs are most likely to focus on children that are visible.²⁵¹

In Mpumalanga, the identification of unaccompanied migrant children is said to be even more difficult, as children from Mozambique and Swaziland at time bear names that are similar to South African names and speak Isindebele or Isiswati, which are languages also spoken in South Africa.²⁵²



3.4.2. Documentation

Most unaccompanied child migrants are undocumented as their entry into the country is irregular. This exposes children to additional dangers in transit to reach the country and creates a dependency on adults, who may take advantage of children's vulnerability and dependency to abuse and/or exploit them.²⁵³ In order for the children to access the protection and care

²⁴⁷ Skelton et al (2016) 10.

²⁴⁸ Schreier T (2011) 18.

²⁴⁹ Guideline 6.2 of the Department of Social Development 'Guidelines on Separated and Unaccompanied Children in South Africa' (2009).

²⁵⁰ Skelton A et al (2016) 8.

²⁵¹ Skelton A et al (2016) 8.

²⁵² Skelton A et al (2016) 15.

²⁵³ Mboyisa N (2014): 14.

system, documentation is an integral part of the process. The DSD Guidelines state that children must be documented.²⁵⁴

Sloth-Nielsen and Ackerman put forward that the DSD Guidelines provide no indication of the type of registration that must take place, or which documents are necessary.²⁵⁵ The Guidelines merely state that assessment and documentation should include key personal data and further information to meet specific needs and to plan for the future.²⁵⁶ The DSD Standard Operating Procedures²⁵⁷ for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa are also silent as to what is required to document a child although it touches on other factors pertaining to documentation.

One major risk is the admission of large numbers of people into the country who claim asylum without any form of documentation that enables their identity to be verified. This situation is often exploited by criminal syndicates such as human smugglers and traffickers. The situation directly contributes to corruption, social instability and threats to national security.²⁵⁸ It also compromises budgeting and planning, especially for social services.²⁵⁹

According to the Mappings Report, the biggest gap identified in service delivery is access to identifying documents.²⁶⁰ This was repeatedly mentioned as a barrier to children as they move along each step in the process of care. It has major consequences for the well-being of unaccompanied children including limiting their access to education and other services; the

²⁵⁴ Guideline 6.2 'Guidelines on Separated and Unaccompanied Children in South Africa' (2009) further states that the process must take place in an age appropriate manner and in a language a child understands.

²⁵⁵ Sloth-Nielsen J & Ackerman M (2016) 15.

²⁵⁶ Guideline 6.2 'Guidelines on Separated and Unaccompanied Children in South Africa' (2009).

²⁵⁷ As mentioned in the previous chapter, the DSD SOP were designed to supplement the Children's Act to outline the exact procedure that must be followed regarding the care and protection of unaccompanied children.

²⁵⁸ Green Paper on International Migration Government Gazette 40088 (24 June 2016) 65.

²⁵⁹ Green Paper on International Migration Government Gazette 40088 (24 June 2016) 65.

²⁶⁰ Chames C et al (2015) 3.

lack of documentation increases the risk of deportation when they reach 18 years and heightens the risk of statelessness.²⁶¹

Childhood statelessness in South Africa is generally unaddressed, largely preventable but growing phenomenon in South Africa.²⁶² South Africa is not a signatory to the 1954 Convention on the Status of Stateless and the 1961 UN Convention on the Reduction of Statelessness.

In their research findings, LHR point out that South Africa largely perpetuates statelessness because of the way the collective legal framework is formulated.²⁶³ An example is how section 4(3) of the South African Citizenship Act allows a child born in South Africa to parents with no citizenship or permanent status to apply for South African citizenship,²⁶⁴ but only once the child becomes an adult at age 18 and the birth is registered. This means that such a child will remain stateless until he is an adult and even then the application is subject to the discretion of the Minister.

Another discrepancy can be found in regulations 3, 4 and 5 of the Birth and Deaths Registration Act (hereinafter BDRA), which require that a child's parents produce a valid identity document or passport with a valid permit in order to register a child's birth.²⁶⁵ Regulation 12 of the BDRA allows only mothers to register the births of children born to unmarried parents even if the father is documented. This leaves the children of all undocumented mothers undocumented too, and at risk of statelessness.

²⁶¹ Chames C et al (2015) 3.

²⁶² Article 1 of the 1954 Convention relating to the Status of Stateless Persons, gives the definition: For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

²⁶³ Lawyers for Human Rights 'Childhood Statelessness in South Africa'(2016) Available at http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf (accessed:10 July 2017) 4.

²⁶⁴ Section 4(3) of the Citizenship Act.

²⁶⁵ Regulation 3 of the Birth and Deaths Registration Act. .

In 2007 a large number of children said they migrated to South Africa as a result of a parent having died.²⁶⁶ This becomes a problem if the deceased parent is the mother and the father is a South African citizen. The father cannot get the child registered under the BDRA.²⁶⁷ The same problem arises when a child has an undocumented mother and a documented father.²⁶⁸ Most of the children arrive in South Africa without documents such as birth certificates, which could assist them during the asylum seeking stage.

LHR, together with the Institute for Statelessness and Inclusion, have over the years raised the issue of statelessness among children.²⁶⁹ In particular the practice of requiring parents who wish to register the birth of a child to produce documents deters registration and can later render a child stateless. Finally, the BDRA and its regulations are silent on the procedures on how a child of undocumented or irregular migrants can be registered if the deadline of 30 days has not been met.

3.4.3. Family Tracing and Reunification

Although the Children's Act does not mention family tracing and reunification, according to the DSD SOPs,²⁷⁰ social workers should give preference to reunification with family of unaccompanied children.²⁷¹ Family tracing must happen as soon as possible so as to establish family ties for the child.²⁷² The social worker traces the family by referring the case to the provincial focal point of International Social Services (ISS), which is a component of DSD.²⁷³

²⁶⁶ Centre for Education Rights and Transformation University of Johannesburg (2012)21.

²⁶⁷ Regulation 12 of the BDRA Regulations.

²⁶⁸ Regulations 3,4 and 5 of the BDRA Regulations do not allow for the registration of a child if the parents cannot both produce valid identity documents.

²⁶⁹ LHR (2016) para 1.

²⁷¹ Department of Social Development SOPs 5.3.

²⁷² Legal Resource Centre et al (2015) 4.

²⁷² S150 of the Children's Act.

²⁷³University of Cape Town RRU 'Children's Rights Manual' available http://www.refugeerights.uct.ac.za/sites/default/files/image_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf (accessed: 27 March 2017) 20.

The ISS is to initiate contact with NGOs such as the International Committee of the Red Cross (ICRC) or the IOM in the country of origin of the child so as to find family members of the child. These organizations assist to find the family and to re-establish contact between them.²⁷⁴

Research shows that there is a vast difference in efforts made to reunify children in the different provinces. Social workers in Limpopo are said to be more active and attempts to reunify children had been made; in more than 40 cases in one sample.²⁷⁵ This differs from the outcome in Gauteng where only 5 attempts had been made to reunify children with their families.²⁷⁶

In the Western Cape study, reunification was not possible for most of the children. Efforts were being made by social workers to reunify children with parents who reside in South Africa; however no cross border reunification was being pursued at all.²⁷⁷

Family tracing can be difficult for mainly two reasons. Firstly, children do not always tell the truth about their origins.²⁷⁸ They often provide incorrect information about their families and their home addresses and this makes it impossible for the Zimbabwean Department of Social Services to trace families.²⁷⁹

It is said that some of the children have been known to go home for Christmas and then return again, while having previously claimed not to have a family.²⁸⁰ Secondly, the incorrect information complicates tracing efforts in countries of origin and this then causes a backlog as

²⁷⁴ It is very important to note that family reunification and repatriation should not be pursued if it appears that there is a risk of abuse, or if it is otherwise not in the best interest of the child

²⁷⁵ Sloth-Nielsen J & Ackerman M (2017) 25.

²⁷⁶ Sloth-Nielsen J & Ackerman M (2017) 25.

²⁷⁷ Sloth-Nielsen J & Ackerman M (2016) 24.

²⁷⁸ Skelton A et al (2016) 23.

²⁷⁹ The reason for this is sometimes because the children do not want to be found by authorities as they would like to enter the country and leave when they wish to.

²⁸⁰ University of Cape Town RRU (2014) 22.

it would then take longer to trace family members.²⁸¹ Now one can see that the difficulty in accessing care is also often affected by the child's own plans once having arrived in the country.

The DSD indicates that social workers are able to call Zimbabwe directly to request tracing of children's families and that it is followed by the compilation and sending of a tracing request to the country of origin.²⁸² However, NGO's explain that the family tracing system is mostly failing as the process is rarely started immediately after a child has been identified and almost never concluded during the 90 day period. This could also be due to the lack of documentation. Moreover, there is no systematic approach to tracing and reunification and this is confirmed by the very low numbers of children who are returned to their families.

No consistent effort is made to help children keep contact with their family in the country where appropriate, and many of them have not been in touch with relatives for many months, making any prospect of reunification more improbable. Some NGOs conduct their own family tracing process, but did indicate that it is still difficult because of the aforementioned two reasons as well as resource constraints. There are propositions that tracing and reunification work should be done by local and international NGO's directly, as government departments get tied up in red tape, take too long and children give up on the process.

3.5. Durable or Permanent Solutions

Durable solutions are necessary to provide stability in a child's life and to assist that they develop in an environment that is in their best interests. Section 156 of the Children's Act provides for the orders that a court can make when a child is found to be in need of care and protection and these include: foster care with a suitable foster parent,²⁸³ foster care within a group of persons or an organisation operating a cluster foster care scheme,²⁸⁴ placement in a

²⁸¹ University of Cape Town RRU (2014) 22.

²⁸² Skelton A, et al (2016) 16.

²⁸³ Section 156 (e)(i) of the Children's Act.

²⁸⁴ Section 156(e)(ii) of the Children's Act

CYCC designated in terms of section 158 of the Children's Act that provides a residential care programme suited to the child's needs; and adoption.²⁸⁵ The criterion to be applied by the court must be the child's best interests.²⁸⁶

Whilst cross border collaboration with social workers in Zimbabwe makes it easier for children in Limpopo to access durable solutions, in the Western Cape province the opposite happens. The social workers do not have such relations with foreign countries and this hampers chances of finding durable solutions for the children.²⁸⁷ This is also because the children that are usually in the province are from countries such as Burundi, Congo and Rwanda and they are not within the SADC region. This is expanded on further in the following chapter.

3.6. Conclusion

In conclusion, South Africa has a fragmented approach towards the implementation and realisation of the right to protection and care of foreign migrant children. Lack of documentation seems to be the main stumbling block in regularising children's stay in South Africa.²⁸⁸ Sloth-Nielsen and Ackerman explain this further by pointing out that lack of documentation increases the risk of detention, deportation, blocks access to basic rights and increases the risk of statelessness. The outcomes of children staying for lengthy periods in South Africa include the loss of children's ability to speak home languages, the loss of identity and the loss of sense of belonging in the country of origin.

²⁸⁵ Section 158(1) of the Children's Act.

²⁸⁶Section 158 (2) of the Children's Act provides that the provincial head of social development in the relevant province must place the child in a child and youth care centre offering the residential care programme which the court has determined for the child, taking into account - (a) the developmental, therapeutic, educational and other needs of the child; (b) the permanency plan for the child which was considered by the court, and any instructions issued by the court with regard to the implementation of the permanency plan; (c) any other instructions of the court; (d) the distance of the centre from the child's family or community; (e) the safety of the community and other children in the centre, in the case of a child in need of secure care; and any other relevant factors :the distance of the centre from the child's family or community, (4) The provincial head of social development must, as a general rule, select a centre offering the programme ordered by the court which is located as close as possible to the child's family or community.

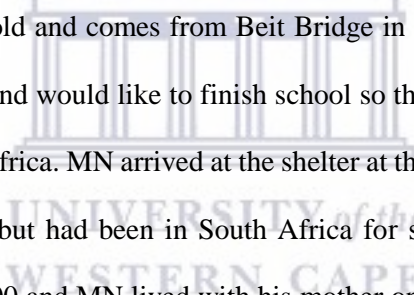
²⁸⁷ Sloth-Nielsen J & Ackerman M (2016) 14.

²⁸⁸ Sloth-Nielsen J & Ackerman M (2017) 26.

The Green Paper on Migration²⁸⁹ did not tackle any of the abovementioned challenges experienced by unaccompanied children. In their study, Skelton et al found that in the midst of it all, there seems to be lack of understanding of the best interest of the child principle and application thereof when planning and dealing with unaccompanied children.²⁹⁰ As mentioned earlier, even once in care, children receive inadequate support as most shelters are full to capacity.

Chapter 4: Foster Care and Adoption as durable solutions for the placement of unaccompanied children.

4.1. Introduction



MN is 17 years old and comes from Beit Bridge in Zimbabwe. He is now in Grade 7 and would like to finish school so that he can join the police in South Africa. MN arrived at the shelter at the beginning 2015 to attend school but had been in South Africa for some time. MN's father died in 2000 and MN lived with his mother on a farm in Venda since the age of 12. MN's mother then died 2012 after which he carried on staying on the farm until his mother's former employer brought him to the Musina shelter as there were no Child and Youth Care Centres in the area they lived in. MN states that although the social worker has launched a CCI, he does not think he has any family in Zimbabwe.²⁹¹

²⁸⁹ DHA 'Green Paper on International Migration' published in GG no 738 21 June 2016 available at <http://www.dha.gov.za/index.php/notices/815-green-paper-on-international-migration> (accessed : 20 July 2017)

²⁹⁰ Skelton A et al (2016)31.

²⁹¹ Skelton A et al (2016) 25.

A child in MN's position will have to be placed in a caring environment and this placement must be a long-term measure. There can be no doubt that a child's need for stability and security, together with his or her need for personal identity, can best be met by returning to permanently live with both or one parent.²⁹² Although reunification of children with their family units is the most preferable, this is not always a possibility.

The previous chapter highlighted the challenges faced by unaccompanied children when accessing the care and protection system. This chapter will be dealing with both adoption and foster care of unaccompanied children and will consider whether these options are durable for the placement of unaccompanied children. In doing so, the best interest of the child together with child participation during the placement process will have to be considered. The different forms of placement orders a court can issue will be highlighted.

In his article, Stein points out that the heart of the problem of refugee assistance in developing countries that has emerged since the mid-1970s, is the massive arrivals of refugees in developing countries where often no durable solutions are at hand.²⁹³ He further says that is usually three key elements; namely the massive arrivals, low-income countries and there were usually no durable solutions regarding placement.²⁹⁴ South Africa would fall under this category.

Although the recent UN Committee's Concluding Observations commended South Africa's development of legal and policy framework for children deprived of a family environment and

²⁹² The child is deemed to have always been better off left with the parents.

²⁹³ Stein B (1986) 'Durable solutions for developing country refugees' *International Migration Review*, Vol. 20 265.

²⁹⁴ Stein B (1986) 265.

its commitment to addressing challenges in foster care, the Committee expressed a number of concerns which will be addressed under the durable solutions heading of this chapter.²⁹⁵

The General Comments of the CRC Committee acknowledge the special care arrangements that are necessary for unaccompanied minors and confirm the importance of article 20(3) of the CRC.²⁹⁶ These concerns included the systematic constraints faced by the alternative care system; the lapsing of foster care orders creating a backlog,²⁹⁷ an increase in the number of children in residential care,²⁹⁸ low quality of care, and the existence of unregistered CYCCs.²⁹⁹

Another barrier to finding durable solutions for unaccompanied children in South Africa could be that there is a need for a proper database and identification system so that the same unaccompanied migrant children do not go through a Children's Court process repeatedly every time they return to South Africa.³⁰⁰

Skelton et al, citing case studies of children in the Limpopo and Mpumalanga region, recently highlighted that the challenge is that currently, social workers sometimes investigate the same case three times over.³⁰¹ The fact that some children migrate again with all the risks shows that repatriation might not be in every child's best interest and that other durable solutions should be considered, such as foster care or independent living programmes.³⁰²

²⁹⁵ Comment 39 (a) of the Committee on the Rights of the Child 'Concluding Observations on the second periodic report of South Africa' accessed at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/ZAF/CO/2&Lang=En on April 2017 11.

²⁹⁶ Article 20(3) of the CRC which states that there is a duty to accommodate such children amongst foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children.

²⁹⁷ Comment 39 (b) of the Concluding Observations 11.

²⁹⁸ Comment 39 (c) of the Concluding Observations 11.

²⁹⁹ Comment 39 (c) of the Concluding Observation 11.

³⁰⁰ Most children from Zimbabwe usually cross into Limpopo and should they be repatriated, they simply return back into the country.

³⁰¹ Skelton A et al (2016) 10.

³⁰² Skelton A et al (2016) 10.

4.2. Durable solutions

Kaime explains that durable solutions are those which positively contribute to the refugee child's survival; these include protection and development of the child and considerations such as the child's need for bodily and mental health care, normal intellectual development, adequate material security, stable and non-superficial interpersonal relationships and a fair degree of liberty.³⁰³

The CRC is, however, silent as to what durable measures are. Although repatriation is the favourable durable solution, it is rarely possible.³⁰⁴ An example of this would be NM's story, which displayed that a child in his position, a child who is likely without ties in his original home country, has no choice but to stay in the country under long term care. Nicholson puts forward that the process is also both complex and lengthy.³⁰⁵

4.3. Alternative care

In her thesis, Spijker points out there is no particular definition for alternative care. The reason for this being that the DSD Guidelines on Alternative Care make a distinction between informal and formal care but they do not define what exactly alternative care is. We could, however, look to the Children's Act which lists the number of ways in which the court can grant alternative care orders aimed at securing permanence or stability to the child's life. South Africa has both formal and informal care. These are both discussed in detail below.

4.4. Informal Care

4.4.1. Kinship Care

A study undertaken by the United Children's Fund (UNICEF) on alternative care in the Southern Africa region defines informal care as a private arrangement in a family environment

³⁰³ Kaime T (2004) 340.

³⁰⁴ University of Cape Town RRU 'UNHCR's 2007 Annual Consultations with NGOs Local Integration: Lesson Learnt and the Way Forward' Paper drafted for discussion on Local Integration.

³⁰⁵ Nicholson C 'A first call on available resources from child refugees in South Africa' 38 De Jure (2005) 71.

whereby a child is looked after on an ongoing or indefinite basis by relatives or friends also known as informal kinship care.³⁰⁶ This arrangement is usually not ordered by administrative or judicial authority or duly accredited body.

In the abstract of her LLM thesis, Assim explains that in African tradition, orphaned and vulnerable children are usually cared for by relatives and close friends.³⁰⁷ This practice continues to date. The reason for this was that it was historically seen as a moral obligation on part of relatives in different ways.

Chirwa puts forward that the issue of children without care was not as prevalent because of the communitarian nature of societies which meant that children belonged to a clan and the village or community as a whole were a central part to the development of a child.³⁰⁸ Pretorius and Ross confirm that not only has this form of care been practised for a while, it is said to also be more advantageous than non-related care.³⁰⁹

Skelton puts forward that the law does not recognise informal or kinship care; the Constitution lays out what she refers to as a labour intensive court ordered foster care process which allows for children to be fostered by persons who are usually not related to the child.³¹⁰

³⁰⁶ Dunn A and Parry-Williams (2008) 'Alternative Care for Children in Southern Africa: Progress, Challenges and Future Directions' United Nations Children's Fund Social Policy and Social Protection Cluster, Nairobi Kenya v. Available at <https://www.crin.org/en/docs/Alt%20Care%20in%20Southern%20Africa.pdf> (accessed: 07 August 2017).

³⁰⁷ Assim U 'Understanding Kinship Care of Children in Africa: A Family Environment or An Alternative Care Option' (Unpublished LLD thesis at the University of the Western Cape, 2013) vi.

³⁰⁸ Chirwa D (2016) 178.

³⁰⁹ Pretorius E & Ross E (2010) 'Loss, Grieve and Bereavement: The Experiences of Children in Kinship Foster Care' *Social Work Journal* 46 470.

³¹⁰ Skelton A (2012) 'Kinship Care and Cash Grants: in Search of Sustainable Solutions for Children Living with Extended Family in South Africa' *Int'l Fam. L.* 334.

In *Mubake v Minister of Home Affairs*, the applicant sought an order declaring children who were separated from their parents, as dependants of their primary care-givers in terms of the definition of dependent in the Refugees Act.³¹¹

The applicants were orphans from the Democratic Republic of Congo (DRC), they were asylum seekers and their parents had either been killed during the conflict or had abandoned them. Most of the adults whom these children were being cared for were their aunts and uncles who had also travelled with them to South Africa.³¹²

At the crux of the plight of the applicants was the fact that although the children were in their care, the children could not receive a section 22 permit under the Refugee Act because proof of guardianship was required.³¹³ Officials requested this document because the people who sought to register the children are not their biological parents.

One of the applicants put forward that he was born in the DRC, and his parents had been killed in the conflict when he just a month old.³¹⁴ He was said to have fled the war with his aunt and they were both asylum seekers. However when they arrived, his aunt was issued with a temporary asylum seekers permit and was told he could not apply for such a permit under the care of his aunt. Social workers would be needed for assistance to apply for guardianship. His aunt had tried several times to obtain guardianship and her efforts were unsuccessful, as result he was indefinitely undocumented and an illegal immigrant.³¹⁵

The Refugees Act defines what a dependant is under section 1 of the Act.³¹⁶ The applicants put forward that the definition in section 1 should be interpreted widely by encompassing

³¹¹ *Mubake v Minister of Home Affairs and others* 2016 (2) SA 220 (GP) para 1.

³¹² *Mubake v Minister of Home Affairs and others* para 1.

³¹³ *Mubake v Minister of Home Affairs and Others* para 5.

³¹⁴ *Mubake v Minister of Home Affairs and Others* para 7.

³¹⁵ *Mubake v Minister of Home Affairs and Others* para 7.

³¹⁶ Section 1 of the Refugees Act provides that a dependent in relation to an asylum seeker or refugee, includes any spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee.

separated children who accompany their caregivers into South Africa. The respondents in the matter argued that the relationship between the adult refugee or asylum seeker and the child had not been formalised or legally recognised and there was no binding responsibility upon the refugee or asylum seeker in respect of the child.

In his judgment, Makgoka J explained that his understanding is that the definition of family in section 1(d) of the Children's Act is not restricted to nuclear family but is rather inclusive of any other person with whom the child has developed a significant bond, based on psychological or emotional attachments.³¹⁷ The court then took a more African approach to the matter. It was put forward that the Children's Act takes a broader, more African view of the concept of family.

In African society, it is customary for other family members to take in a child if they are orphaned.³¹⁸ It would usually be the older brother or sister of the deceased parent who would be morally obligated to take in the child. The main aim of this arrangement is to keep the child within the family. South Africa, particularly because of its high numbers of AIDS orphans together with its history of the breakdown of family structures during apartheid, has this practice entrenched in communities.³¹⁹ Custom and practice proves that children who are without parents are the responsibility of extended family.³²⁰ Such a placement may be the result of migration for better schooling too.

The court in *Mubake* ruled in the applicants favour by providing that section 1 of the Refugee Act should be interpreted to include separated children as dependents of the adult asylum seekers.³²¹

³¹⁷ *Mubake v Minister of Home Affairs and Others* para 20.

³¹⁸ Penyane V (2015) 'The Capacity Needs of Extended Family and Community Members in the Care and Support of Orphans and Vulnerable Children in Umgungundlovu and Uthukela districts' (Thesis submitted at the University of Pretoria) 13.

³¹⁹ Penyane V (2015) 13.

³²⁰ Dunn A and Barry-Williams J (2008)7.

³²¹ *Mubake v Minister of Home Affairs* para 20.

It is not only government policy, but it has through the years become a standardised practice, to consider placement with relatives whenever it comes to finding alternative way of caring for a child. People who foster a relative's child are inclined to see themselves as relatives first and only secondly as foster parents. Steinbock maintains that for children living with other parents other than their own, these relationships should be respected especially if the needs of the child are being met.

Another reason could also be due to the fact that families generally know more about the child than strangers would. So social workers are tasked with ensuring that they consider family relatives before looking beyond. It is in fact advisable to keep unaccompanied children who experienced trauma or hardship closer to people they can relate with.

Placement with relatives can minimise some traumatic effects experienced by children when removed from parental care. People who are familiar with a child's circumstances are able to give the child the necessary support and understanding without asking the child questions during that trying period in a child's life.³²² This could be helpful for the child as it is people that a child is familiar with and this could bring with it some comfort. Placement with relatives enables the child to have natural contact with other members of the extended family who can directly or indirectly give moral or material support. This could also be beneficial to the child as it allows the child to have a link with his or her genealogical background.

By allowing the children in the care of relatives to act as dependents for purposes of the applying for asylum, the court acknowledged that it is custom for children to be cared for by relatives without necessarily having formalised this through courts.

³²² Thoburn J, Davies M (ed) (1988) 'Child Placement: Principles and Practice' Wildwood House Limited, England 34.

This could be an identifiable solution for children who were initially unaccompanied and have relatives that have been traced in South Africa. This form of care is also ideal for children who are much older and for whom adoption is not suitable.

The shortcoming of this as a placement solution is however that for foreign children who are from countries such as DRC which would prove difficult because they mostly might not have family here but informal care within their community could still be viable with safeguard =s and measures.

Governments are in any case under the obligation to recognise *de facto* responsibility of informal carers and encourage all informal carers to register.³²³ Support and access to services should also be provided for by governments.

In their report, Milligan et al also argue that the informal care system has several limitations.³²⁴

The first limitation is that because of their informal and voluntary nature informal care systems are often resource constrained and are more inclined to offer support that does not involve substantial financial costs.³²⁵

The second limitation is that if the informal care systems are not well linked with the formal care protection system and children are entirely left in the care of the community, it could lead to the violations such as child abuse, neglect and exploitation.³²⁶ Communities tend to deal with violations in such a way that could infringe on the child's rights.

The third observation made by Milligan et al is that the capacity of families and communities to report violence has eroded due to the breakdown of family and community cohesiveness.³²⁷

³²³ Dunn A & Barry-Williams J (2008) 9.

³²⁴ Milligan I et al (2016) 20.

³²⁵ Milligan I et al (2016) 20.

³²⁶ Milligan I et al (2016) 20.

³²⁷ Milligan I et al (2016) 20.

South Africa would have to align the informal care system together with the formal system to ensure that children are also monitored just as they are in a formal care environment.

4.4.2. Kafalah Care

Kafalah is of Islamic origins, it allows for a person to enter into a contract committing himself to certain undertakings in favour of another person provided that the person has substantial interests in such undertaking.³²⁸ It is through the principle of kafalah that a family is able to take in an abandoned child or a child whose parents are unable to take care of him.

Unlike with the legal ties of adoption, the child in this case is not entitled to the family name or the right of inheritance, the reason for this is that it is an alternative care provision that does not change the child's kinship status and child's ties with biological parents.³²⁹

Kafalah was first recognised in the 1986 Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration). It was then as an alternative care option in the CRC. Assim and Sloth-Nielsen explain that the inclusion of kafalah care in the CRC is quite significant in that it reflects the role of cultural and religious factors in the drafting of international instruments.³³⁰

Although usually practised in countries where Shariah law³³¹ serves as State law, it is also practiced in the Northern parts of Africa.

³²⁸ Assim U & Sloth-Nielsen J (2014) 'Islamic kafalah as an alternative care option for children deprived of a family environment' 14 *Afr. Hum. Rts. L.J.* 329.

³²⁹ Assim U (2013) 121.

³³⁰ Assim U & Sloth-Nielsen J (2014) 325.

³³¹ Shariah in Islam means 'the way' it is not a body of law but is rather understood as a wide ranging moral and ethical principles drawn from the Quran and sayings of Prophet Muhammad available at <http://theconversation.com/what-sharia-law-means-five-questions-answered-79325> (accessed: 20 July 2017)

Assim explains that kafalah is not only seen as a meritorious deed but as a religious duty as well.³³² Usually, a child is placed in a family that is as closely related to his natural family as possible but the new ‘parents’ do not ‘totally displace the natural parents but will perform their function as an act of personal charity or for compensation, according to the demands of each case’.³³³

This seems to suggest that kafalah would work in cases where a child is without parents and a family had taken him or her in, including where the relatives had travelled with the child to South Africa. Kafalah care seems to embody both features of formal care because of its sense of permanence, as well as informal care because it has not been formalised.³³⁴

On the 12th of April 2014, the ACERWC convened in Ethiopia for an Alternative Care briefing whereby Kafalah care was also listed as an alternative for unaccompanied children in South Africa.³³⁵ This is done through the validation of a court order. This practice is not widely used in South Africa especially pertaining to migrant children.

4.5. Formal Care

4.5.1. Residential Care (CYCC)

The Children’s Act defines a CYCC as a facility that provides residential care to more than six children outside of the child’s family environment according to a residential programme suitable for the children in the facility.³³⁶ Residential care includes children’s homes that are often run with a family type setting and usually accommodate a number of children.

³³² Assim U (2013) 44.

³³³ Assim U (2013) 44.

³³⁴ Assim U (2013) 44.

³³⁵ Better Care Network et al ‘Alternative Care Briefing’

<http://bettercarenetwork.org/sites/default/files/attachments/Alternative%20Care%20Briefing%20-%20African%20Committee%20of%20Experts%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (accessed: 27 November 2017)

³³⁶ Section 191 of the Children’s Act.

These can either be registered or registered.³³⁷ A registered home means that the CYCC is registered as an NGO and it has government approval and recognition. There will therefore be inspections to ensure that requirements and consistency is maintained. It does however appear that there are a growing number of unregistered children's homes in South Africa.³³⁸

Although South Africa has extensive literature on residential care, there seems to be a limited amount of research regarding unaccompanied children. Children are placed in residential care by court order.

Blackie explains that in South Africa, over 900 children who have been registered in CYCCs or living in the streets.³³⁹ Falling within this ambit are unaccompanied children.³⁴⁰

South Africa uses CYCCs as both a temporary and permanent measure for children without any other access to care. This is however problematic because those in temporary care tend to be stuck due to factors such as lack of documentation and this leads to the CYCCs clogging up.³⁴¹

With that said Dunn and Barry-Williams point out that residential care still remains the most prevalent type of alternative care in South Africa.³⁴² Unfortunately many of these placements are often with unregistered children's homes which often lack oversight from DSD.³⁴³

At the end of April 2017, thousands of NGOs did not receive subsidies from the DSD. The Department had failed to negotiate with National Education, Health and Allied Workers' Union (NEHAWU) during a workers' strike, which led to the damaging of Service Level Agreements

³³⁷ Dunn A and Barry-Williams J (2008) 10.

³³⁸ Dunn A and Barry-Williams J (2008) 10.

³³⁹ Blackie D 'Sad, Bad and Mad: Exploring Child Abandonment in South Africa' (Masters of Anthropology thesis submitted at Witwatersrand University, 2014) 7.

³⁴⁰ Sloth-Nielsen J & Ackerman M (2016) 12. This study pointed out that 7% of children in residential care in the Western Cape are unaccompanied children.

³⁴¹ Chames C et al (2016) 38.

³⁴² Dunn A and Barry-Williams J (2008) vii.

³⁴³ Dunn A and Barry-Williams J (2008) 10.

(SLAs) which were meant to be reviewed and signed with NGOs to allow payment of subsidies.³⁴⁴ In the midst of the crisis, were vulnerable children who go to bed hungry whether the crisis was preventable or not. Every province had to find ways to make ends meet.

In a recent commentary by Centre for Child law, it was stated that CYCCs seem to be unable to care for the children they are designed to accommodate and as result the Centre was bringing applications against relevant Departments regarding the quality of care that the children are receiving.³⁴⁵

That is not all; Milligan et al explain that CYCCs are characterised by large numbers of children, untrained and poorly paid staff, absence of care-plans or reviews of children's circumstances, and lack of family tracing or contact.³⁴⁶ Based on these findings, one could conclude that CYCCs should not be used as permanent or long term solutions for the placements of children.

4.5.2. Foster care

According to the DSD, foster care is the temporary placement of a child who is in need of care and protection.³⁴⁷ The child is either placed in the care of a suitable person who is not the parent or guardian of the child or in some instances in the care of a relative.³⁴⁸ Foster care is substitute care provided to children in a family setting.

³⁴⁴ Wolfson Vorster R (2017) 'Into thin air: Thousands of SA's vulnerable at risk as subsidies subside' *Daily Maverick* Available at <https://www.dailymaverick.co.za/article/2017-05-17-into-thin-air-thousands-of-sas-most-vulnerable-at-risk-as-ngos-subsidies-subside/#.WaW2Cz4jGM8> (accessed : 20 July 2017).

³⁴⁵ Skelton A 'Child and Youth Care Centres Under Microscope' available at https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiq14D6gcXWAhUiLMAKHe_0C8oQFgkMAA&url=http%3A%2F%2Fwww.raith.org.za%2Fdocs%2Fproject%2F2017-Centre-for-Chld-Law-Child-and-Youth-Care-Centers-Under-the-Microscope.docx&usg=AFQjCNGDw9NQiKmkJIIP4HMxoU4acxGaiw (accessed: 10 September 2017)

³⁴⁶ Milligan I et al (2016) 31.

³⁴⁷ Definition according to the DSD available at <http://www.gov.za/services/adopt-child/foster-care> (accessed 25 April 2017).

³⁴⁸ Definition according to the DSD available at <http://www.gov.za/services/adopt-child/foster-care> (accessed 25 April 2017).

Dunn and Barry-Williams explain that fostering acquires different meanings in different societies in Africa; in the west, foster care is seen as a temporary care measure until permanent solutions are found such as placement with relatives or adoption.³⁴⁹

The purpose of short term care is to enable the welfare organisation to make more definite arrangements for the child. These would include adoption. It is often used as a tool for planning the provision of suitable intermediate care.

In South Africa, foster care is said to be one of the most widely use form of placements of unaccompanied minors.³⁵⁰ However in a presentation at the Community Law Centre in 2015, Assim explained that there has since been a shift in preference from foster care to kinship care as an alternative for the care of children.³⁵¹

Unlike with foster care, there is much controversy surrounding the status of kinship care in South Africa and its relationship with the child protection system particularly the issue of grants.³⁵² In order for families taking care of the child to receive the foster care grant, they have to formalise their relationship with the child.

There is an increasing number of poverty-stricken families who are caring for orphaned children who are relying on foster care placement as a way to access more substantial financial support offered by the foster care grant.³⁵³ In the 2000s, there was a proposal by the South African Law Reform Commission (SALRC) to make a distinction between foster care, court ordered kinship care and informal kinship care.³⁵⁴

³⁴⁹ Dunn and Barry-Williams (2008)15.

³⁵⁰ Assim U (2015) 'Theoretical framework on foster care: International and Regional Framework' Available at <http://www.cplo.org.za/wp-content/uploads/2015/03/CML-presentation.pdf> (accessed: 20 July 2017).

³⁵¹ Assim U (2015) 'Theoretical framework on foster care: International and Regional Framework' Available at <http://www.cplo.org.za/wp-content/uploads/2015/03/CML-presentation.pdf> Accessed: 20 July 2017.

³⁵² Skelton A et al (2012)335.

³⁵³ Assim U & Sloth-Nielsen J (2014) 337.

³⁵⁴ Assim U & Sloth-Nielsen J (2014) 327.

These foster carers would be screened and carefully selected, and the initial court order would be of limited duration, with the emphasis on family reunification services. Court-ordered kinship care would aim to provide care with relatives for children who were unable to remain in their own homes due to abuse or neglect.³⁵⁵ Although reunification services would often be appropriate in these cases, the court should also have a discretion to make a longer term order from the outset, and to dispense with social work supervision in appropriate cases. These proposals have yet to come to fruition.

All in all, research suggests that 12% of the 449,009 fostered children of South Africa are placed in formal non relative fostering.³⁵⁶ This is a small number of children and could be because most children who have been identified as being in need of care are often stuck in residential care.

4.6. Adoption

According to the Children's Act, the purpose of adoption is to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships.³⁵⁷ An adoptable child is adoptable under the Act, firstly, if the child who has no guardian or caregiver willing to adopt the child;³⁵⁸ secondly, when the whereabouts of the child's guardian or caregiver cannot be established;³⁵⁹ thirdly if the child has been abandoned;³⁶⁰ and lastly, if the child is in need of alternative care.³⁶¹

Because foster care is both a short term and a permanent measure in South Africa, time has proven that children in foster care can be adopted should a social worker find a suitable home

³⁵⁵ Skelton A et al (2012) 337.

³⁵⁶ Dunn A & Parry-Williams (2006): 15.

³⁵⁷ Section 229 (b) of the Children's Act.

³⁵⁸ Section 230(3)(a) of the Children's Act.

³⁵⁹ Section 230(3)(b) of the Children's Act.

³⁶⁰ Section 230(3)(c) of the Children's Act.

³⁶¹ Section 230(3)(c) of the Children's Act.

for them. The adoption of children in foster care is another way of providing a permanent home for a child.

Recently, additional grounds have been raised in the Amendment Act.³⁶² These include cases where a child is a stepchild of the person wishing to adopt.³⁶³ Another instance is when a child's parent or guardian has consented to the adoption unless consent is not required.³⁶⁴

The UCT Refugee Rights manual continues to say that the adoption of unaccompanied refugee children should only be acceptable in instances where there seems to be no other solution for the child: an example would be when reunification measures had been taken and social workers fail and the social worker now looks for a more permanent solution.³⁶⁵

Although the adoption of unaccompanied children would be feasible as an alternative care measure especially for young children, Wolfson-Vorster explains that adoption cases for unaccompanied children often prove to be difficult or impossible because of the lack of documentation.³⁶⁶ This seems to be a huge stumbling block for children who are young and without nationalities.

One must however note that there is very limited research on the adoption of unaccompanied children. Communication with most adoption centres and foster homes state that they had never had cases where unaccompanied children had been adopted.

³⁶² Children's Amendment Act 17 of 2016 published in GG 40564.

³⁶³ Section 230(3)(f) of the Children's Amendment Act.

³⁶⁴ Section 230(3)(g) of the Children's Amendment Act.

³⁶⁵ University of Cape Town 'Children's Rights Manual' available at http://www.refugeerights.uct.ac.za/sites/default/files/image_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf (accessed: 27 March 2017) 9.

³⁶⁶ Wolfson-Vorster 'Undocumented children in SA: Averting the coming catastrophe' *Daily Maverick* 12 June 2017 available at <https://www.dailymaverick.co.za/opinionista/2017-06-12-undocumented-children-in-sa-averting-the-coming-catastrophe/#.WafjJrIjGM8> (accessed: 20 July 2017).

Blackie explains that in her experience in child protection, a factor amongst black parents is that they are often unwilling to enter into a formal legal adoption for children who have been abandoned.³⁶⁷ They would much rather take in a child and take care of them informally.

This is confirmed by Milligan et al, who in their findings point out that although there are legal processes in place in most countries, this does not appear to be compatible with traditional values and cultural practices.³⁶⁸

Recommendations for how South Africa can provide adoption as durable solutions can be found in 5.6. Recommendations for the DHA.

4.7. Conclusion

In conclusion, one realises that the care and protection system is not designed to meet the needs of unaccompanied foreign children and that the law is not equally applied to them.³⁶⁹ The system should be applied in a more effective manner where both formal and informal care are considered for unaccompanied children, depending on their age groups, languages and culture amongst other factors.

It is worth noting that the current policies in practice do not provide durable solutions for the care and protection of foreign unaccompanied children. It appears that most of the children end up stuck in temporary care.

The government stakeholders claim that their own efforts are focused on placing the children in shelters through proper legal processes via the children's court; however, it seems little work on repatriation or access to documentation is being done.

³⁶⁷ Blackie D (2014) 6.

³⁶⁸ Milligan I et al (2016) 41.

³⁶⁹ Skelton A (2016) 27.

Unfortunately, it seems that residential care is mostly used as a long term measure to care for children. Social workers seem to temporarily place children in residential care, only to move on to other cases.

Other durable solutions such as adoption and foster and informal kinship care are not being considered.

Chapter 5: Recommendations

5.1. Introduction

In the previous chapter, I discussed the various ways in which South Africa places unaccompanied children. A discussion was held on the durability of the solutions by the government. This chapter will give recommendations regarding the placement of the children.

As stated previously, children who travel from their country of origins to South Africa often struggle to be placed due to a number of factors including lack of documentation,³⁷⁰ As a result, they remain in short-term care facilities i.e shelters. In his LLM thesis, Essing expresses the urgent need for durable solutions so as to prevent a lost generation.³⁷¹ The ‘lost generation’ refers to a generation of children living in limbo, a generation that is displaced and losing its childhood. This is often characterised by the absence of prospects for the future because of lack of documentation above other factors.

Recommendations regarding how the DHA could improve on ascertaining documentation for unaccompanied children will be put forward. This chapter will also give recommendations on

³⁷⁰ Documentation appeared to be the major obstacle in the Western Cape as well . This was established in a report by Sloth Nielsen and Ackerman. Available at <http://scalabrini.org.za/wp-content/uploads/2016/01/Foreign-children-in-care-in-the-Western-Cape-Province.pdf> (accessed 08 May 2017).

³⁷¹ Essing L ‘International Adoption of Syrian Refugees Children in Turkey: To what extent can Syrian unaccompanied child Refugees be adopted by Turkish citizens’ (unpublished LLM thesis University of Amsterdam’ 7, 2016).

cooperation between government departments as well as how measures in the previous chapter could be implemented.

5.2. Recommendations regarding data collection

The fact that the children enter the country in irregular fashion makes it hard to calculate the exact number of children in the country. It would, however, be helpful to have authorities at the border still take note of the children who are either separated or unaccompanied. It would be more reasonable to have the DSD together with DHA officials at border control. This would not only be useful for recordkeeping purposes but also for the protection of the child.

One could argue that informal kinship care mentioned in **4.4. Informal Care** as a solution for placement, might not be suitable for foreign children who are undocumented and enter the country through irregular channels as they cannot be detected. This could be countered depending on the area in which the children are, as mentioned in the previous chapter, children in the Limpopo and Mpumalanga area are often brought to the attention of officials in the area and they are then usually placed in temporary care until a further solution can be found.

One would also have to take into account that most of the children travel to Zimbabwe as a result of the instability that was in Zimbabwe. Most families and adults have had to relocate too. The task is then heavily placed on social workers to attempt at finding relatives before reunifying children with their families.

The recommendations in the Mapping Report put forward that there should be interviews in a secure space whereby trained professionals ask the children questions to establish their identity immediately instead of interviews being conducted at much later stage, leaving opportunity for children to integrate into communities.³⁷²

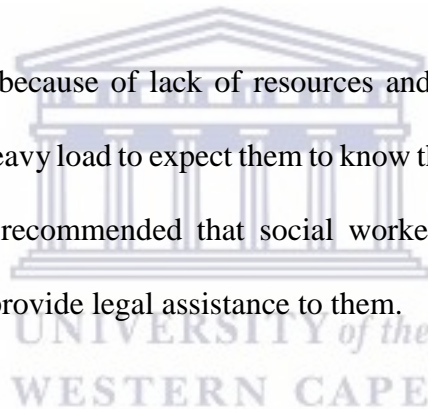
³⁷² Chames C et al (2016) 89.

Another recommendation would be that there be interactions between provinces to ensure that there is coherence and coordinated dealings with unaccompanied children. In this way Departments would be able to keep track of children and in doing so, come up with a permanent solution to placing those children.

5.3. Recommendations for workforce

A review of the manner in which social workers are trained should take place. The aim is that the gaps in the training workshops are isolated and addressed.³⁷³ The complaints regarding lack of knowledge of what procedures regarding unaccompanied children prevail vary from province to province. However, in the Limpopo province, there is a sense of awareness regarding what to do when one identifies an unaccompanied minor.³⁷⁴

However one must note that because of lack of resources and difficulties already faced by social workers, it would be a heavy load to expect them to know the laws regarding immigration and refugees. It is therefore recommended that social workers be made aware of certain organisations that are able to provide legal assistance to them.



5.4. Recommendations for cooperation between departments

When looking at unaccompanied minors, they are in a position vulnerable position and their source of help is government departments. The DSD takes its role as guardian the moment an unaccompanied child is identified, this is until the CCI takes place and it is decided who will be the guardian of the child.

The DHA is also vital in ensuring the child's stay is documented and that they have legal status, enabling them to be placed. Both these Departments are supposed to work together to

³⁷³Chames C et al (2016) 89.

³⁷⁴ Sloth-Nielsen J & Ackerman M (2017) 10.

ensure that children are placed. There should be guidelines in place from both departments with regards to identification, documentation and placement of the children.

5.5. Recommendations for the DSD

When looking at the data presented by Sloth-Nielsen and Ackerman, there is an indication that most of the children in care have been resident in South Africa for more than 5 years, and almost 40 percent have been in care for more than 5 years.³⁷⁵ This is in contradiction with the law that children should be in temporary care for the shortest period possible. The longer the child remains in the care system in South Africa, the harder it is to provide durable alternatives for them.

It was recommended that DSD form a group discussion with all social workers in the Cape Town area who are responsible for the cases of foreign children.³⁷⁶ It is recommended that the national DSD Guidelines on dealing with unaccompanied and separated children be amended to include clear instructions, indicating to whom certain tasks are assigned. There seem to be a lack of procedural steps to be taken in many of the Guidelines already formulated.

One must also note that the BID assessment should be conducted systematically in all cases of foreign unaccompanied children, so that the need for family tracing and reunification efforts are identified as soon as possible.

In cases where family tracing efforts fail, or where reunification is not deemed in the best interest of the child, it is recommended that durable documentation solutions be explored to prevent further abuses and exploitation of children.

³⁷⁵ Sloth-Nielsen & Ackerman (2016) 14.

³⁷⁶ The reason for this being that because they receive a few cases, to ensure that they will be able to deal with issues presented.

It is also recommended that the courts consider adoption in practice as a more permanent and durable solution to dealing with children who should not remain in residential care any longer, particularly those who can still be adopted due to their tender age.

Strong links need to be established for cross border family reunification mechanisms. The DSD will have to improve on the capabilities of the ISS. This is to ensure that there is communication between the ISS and social welfare and other relevant organisations in other countries.

Alternative care in the country of origin should not be ruled out as a solution for some children. This would involve establishment and strengthening of working relations between DSD and appropriate, identified care facilities in the sending country so that the best interest of the child should be followed.³⁷⁷

5.6. Recommendations for the DHA

Children who are identified as unaccompanied at border posts should be referred systematically to the nearest office of DSD. In this regard, it is recommended that interviews with children be conducted by trained staff, in a secure and quiet location. Information around the identities of the parents must be gathered as fast as possible.

The Minister of Home Affairs should write a regulation which will provide guidance and a Form to make it possible for stateless children to apply for, and obtain, citizenship.³⁷⁸ This solution would bring South African practice into compliance with the CRC.³⁷⁹ It has recommended therefore, that migrant sending states remove restrictions on attribution of nationality to children born abroad.

³⁷⁷ Sloth-Nielsen J & Ackerman M (2016) 29.

³⁷⁸ LHR et al (2016) 8.

³⁷⁹ The Committee has urged States Parties to ensure that no child is or risks being stateless, and has deemed that providing safeguards against statelessness is a mutual responsibility of states to which a child has a genuine link.

One way of ensuring that children are documented and that durable placement solutions are found is by ensuring that the Birth and Deaths Registration Act is amended to specifically include foundlings.³⁸⁰ As supported by the Committee and Article 7 CRC,³⁸¹ foundlings should be registered and recognised as South African citizens in terms of section 2(2) of the Citizenship Act which gives citizenship to stateless children.³⁸²

In this way, child trafficking and other violations could be avoided and documentation by the DHA would also now make it possible for the children to be eligible for adoption as a durable solution as discussed in **4.6. Adoption**.

5.7. Conclusion

Because of the nature of informal care and the way in which it is convenient for families, it is often used to care for unaccompanied children who cannot be reunified with their parents. Often times, as stated in the previous chapter, family members would take in a child whose parents have passed on. This process is usually not formalised in any way. This becomes problematic in instances where formal guardianship of the child is required. And because of those instances, it is best to ensure that the care is formalised.

Milligan et al explain that the number of children in informal care is much higher than those in institutions.³⁸³ They mention that the biggest issue is the quality of kinship care, and finding ways to support kinship carers must still be prioritised by States.³⁸⁴

³⁸⁰ These are children whose parentage is unknown, regardless of their age.

³⁸¹ Article 7 of the UNCRC provides that (1) A child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

³⁸² LHR et al (2016) 8.

³⁸³ Milligan I et al (2016) 52.

³⁸⁴ Milligan I et al (2016) 52.

Mahery et al of the Children's Institute put forward that child protection systems cannot simply be 'built out' from the centre and imposed on rural parts of countries, areas which invariably lack the numbers of trained professionals required to operate a formal child protection system i.e. receiving referrals, investigating, assessing, and so on.³⁸⁵

Their study goes on to explain that formal systems are needed in order to sensitise communities to various forms of abuse which communities have traditionally found difficult to challenge and sanction, especially sexual abuse or exploitation.³⁸⁶ These formal systems are needed to engage with the informal care systems. Awareness needs to be raised amongst relatives about the formalisation of the care of unaccompanied children.

Although most communities are not entirely comfortable with the formalisation of informal care through adoption and foster care, awareness from the relevant government departments encouraging relatives to formalise kinship care might be one way of ensuring that communities ensure the wellbeing and protection of unaccompanied children together with States.

In the 4th chapter of this mini-thesis, it was explained that most adoption centres provided that they have been exposed to a limited amount of cases where unaccompanied children were adopted. As explained, this is due to the lack of documentation, which results in most children either stuck in CYCCs or in informal care.

The lack of coordination and solutions from the Department of Home Affairs with regards to the documentation of children has led to statelessness of children and worse, the lack of durable solutions regarding the protection of unaccompanied children.

In conclusion, informal care systems need to be monitored to ensure that permanency is sought in ensuring that unaccompanied children are protected. Unaccompanied children should not be

³⁸⁵ Mahery et al (2011) 'Children's Act guide for child and youth care workers' *Children's Institute* 32.

³⁸⁶ Mahery et al (2011) 32.

considered children of the State if the State is unable to provide durable solutions for them. They should not be stuck in institutions when informal care mechanisms could be monitored and formalised through adoption and foster care; ensuring permanency.

South Africa can follow Rwanda's example whereby most of the children have been deinstitutionalised and placed within family environments. In 2014, the Better Care Network put forward that over 70% of the separated children in Rwanda are being taken care of by close relatives and only 14% of the children were placed in institutions because of poverty. This is a model South Africa could very well look into.



Bibliography

Books

Boothby N, Ressler M, Steinbock D *'Unaccompanied children: Care and Protection in Wars, Natural Disasters, and Refugee Movements'* (1988) Oxford University Press.

Gibran K (1923) *'The Prophet'* *Global Greye Books*, United Kingdom.

Hosseini K (2003) *'The Kite Runner'* *Penguin Books*, New York

Shire S ‘*Teaching my mother how to give birth*’ (2011) Flipped Eye Limited Publishers, United Kingdom.

Stark B ‘*International Family Law: An Introduction*’ (2005) Ashgate Publishers, England.

Skelton A, Carnelley M’ *Family Law in South Africa* (2010) Oxford University Press, Cape Town.

Thoburn J, Davies M (ed) (1988) ‘*Child Placement: Principles and Practice*’ Wildwood House Limited, England.

Chapter in Books

Anderson K et al Unaccompanied and unprotected: The systemic vulnerability of unaccompanied migrant children in South Africa in Liefwaard T and Sloth-Nielsen J *25 Years of the UN Convention on the Rights of the Child: Taking stock and looking forward* Brill publishers, The Netherlands.

Maithuifi ‘The Best interest of the Child and African Customary Law’ in Davel CJ *Introduction to Child Law in South Africa* (2000) Juta, Cape Town..

Edwards A ‘Age and gender dimensions in international refugee law’ in Feller E et al *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2013) Cambridge University Press.

Kaime T ‘The protection of refugee children under the African human rights system: finding durable solutions in international law’ in Sloth-Nielsen J (ed) *Children’s rights in Africa: A legal Perspective* 1 352 (2008) Ashgate Dartmouth.

Mahati T.S ‘The Representations of Unaccompanied Working Minor Male Children Negotiating for Livelihoods in a South African Border town’ in Bourdillon M (ed) *Negotiating*

the Livelihoods of Children and Youth in Urban Spaces (2012) Council for the Development of Social Science Research in Africa.

Mc Adam J 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complimentary Protection' in Lambert H *International Refugee Law* (2010) Oxford University Press, Oxford.

Mayer V, Jacob van Garderen, Handmaker J and de la Hunt L 'Protecting the Most Vulnerable with the Existing Policy Framework to Strengthen Protection for Refugee Children' in Mayer V, Jacob van Garderen, Handmaker J and de la Hunt L (ed) *Advancing Refugee Protection in South Africa* (2007) Berghahn Publishers.

Journal Articles

Beevers K 'Intercountry Adoption of Refugee Children : A Hague Recommendation' (1995) 7 *Child and Family. L.Q* 10 17.

Bhabha J 'Not a sack of Potatoes: Moving and Removing Children Across Borders'(2005-2006) 15 *B.U. Pub. Int. L.J.* 197 214 245.

Bhabha J and Young W 'Not Adults in Miniature: Unaccompanied Child Asylum seekers and the New US Guidelines' (1999) 11 *Int'l J. Refugee L.* 84 125.

Bhabha J 'More than their of Sorrows': International Migration Law and the Rights of Children' (2003) 22 *St. Louis U. Pub. L. Rev.* 253 280.

Carciotto S 'Angolan Refugees in South Africa: Alternatives to Permanent Repatriation?' (2016) *AHMR* (2) 363 390.

Chirwa D 'The merits and demerits of the African Charter on the Rights and Welfare of the Child'(2002) *The International Journal of Children's Rights* (10) 16.

Connelly H 'Seeking the relationship between the UNCRC and the Asylum System through the eyes of the Unaccompanied asylum seeking children and young people' (2015) 23 *Int Jnl on Children's Rights* 52.

Fritsch C, Johnson E and Juska A 'The Plight of Zimbabwean Unaccompanied Minor Children in South Africa: A Call for a comprehensive Legal Framework' 38 (2009-2010) *Denv. J. Int'l L. & Pol'y* 623 646.

Johnson C (2015) 'Failed Asylum Seekers in South Africa: Policy and Practice' *AMHR* (2) 1 15.

Kaime T 'The Struggle for Context in Protection of Children's Rights: Understanding the Core Concepts of the African Children's Charter' 5 (2008) 8 *J. Legal Pluralism & Unofficial L.* 4.

Kuwali D (2013) 'From durable to Holistic Solutions: Prevention of displacement in Africa' *African journal of Legal Studies* 6 .

Landau L 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' (2006) 3 *J. Refugee Stud.* 308 327.

Mezmur B 'Intercountry Adoption as a measure of Last resort in Africa: Advancing the Right of the Child rather than the Right to a child' (2009) *International Journal on Human Rights* 83 103.

Magqibelo L, et al 'Challenges faced by unaccompanied minor-refugees in South Africa' (2016) *Social Work/Maatskaplike Werk* Vol 52 No 1; Issue 5 73 89 .

Ramcharan R 'African Refugee Crisis: Contemporary Challenges to the Protection of Refugees and Displaced Persons in Africa' (2000) 8 *Afr. Y.B Intl'L* 119 160.

Sloth-Nielsen J & Ackermann M 'Unaccompanied and Separated Foreign Children in the Care System in the Western Cape – A Socio-Legal Study' (2016) *PER / PELJ* 1 27.

Forthcoming Study by Sloth Nielsen J & Ackerman M 'Unaccompanied Children in Child Youth Care Centres in Limpopo and Gauteng Province- A Socio-Legal Study' Draft on file with the author.

Stein B 'Durable Solutions for Developing Country Refugees' (1986) *International Migration Review*(20) 264 284.

Nicholson C 'A first call on available resources for Child Refugees in South Africa' (2005) 38 *De Jure* .

Pretorius E & Ross E Loss, Grieve and Bereavement: The Experiences of Children in Kinship Foster Care' (2010)' *Social Work Journal* 465 489.

Steinbock D et al 'Unaccompanied Minor Children in Host Country Foster Families' (1996) 8 *Intl' J. Refugee L.* 16 48.

Swart S 'Unaccompanied Minor Refugees and the Protection of their Socio Economic Rights Under Human Rights Law' (2009) 9 *Afr. Hum. Rts. L.J.* 103 127.

Willie N & Mfubu P 'Responsibility Sharing: Towards a Unified Refugee Protection Framework in Africa'(2016) *AMHR* (2) 542.

Van der Burgh A 'Legal Protection of Undocumented Migrant Children in South Africa: Reality or Myth' (2006) *Law Democracy and Dev.* 10 82 100.

Case law

C and Others v Department of Health and Social Development Gauteng and Others 2012 (2) SA 208 (CC)

Centre for Child Law and Another v Minister of Home Affairs and Others 2005 (6) S 50 (T).

Mubake v Minister of Home Affairs and others (72342/2012) [2015] ZAGPPHC 1037; 2016 (2) SA 220 (GP) (9 July 2015)

Legislation

Child Care Act 74 of 1983.

Children's Act 38 of 2005.

Children's Act Amendment Bill 13 of 2015 (published in GG 38703 of 17 April 2015)

Children's Act Second Amendment Bill 14 of 2015 (published in GG 38703 of 17 April 2015)

Immigration Act 13 of 2002

Refugees Act 130 of 1998

Refugees Amendment Act 33 of 2008 in GG 31642 of 26 November 2008

Regulations to the Refugees Act Gen Not R366 in GG 21075 of 6 April 2000

International Instruments

African Charter on the Rights and Welfare of the Child (1990) Convention on the Rights of the Child (1989)

UN Committee on the Rights of the Child *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6 <http://www.refworld.org/docid/42dd174b4.html> Accessed: 20 May 2015

UN General Assembly *Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf Accessed 25 May 2015

United Nations High Commissioners for Refugees 1994 *Guidelines on the Protection and Care of Refugee Children* <http://www.refworld.org/docid/3ae6b3470.html> Accessed: 20 May 2016.

UN Committee on the Rights of the Child 'Concluding Observations on the second periodic report of South Africa' accessed at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/ZAF/CO/2&Lang=En Accessed: April 2017.

Government Publications

Government of the Republic of South Africa, Department of Social Development *Guidelines on Separated and Unaccompanied Children Outside their Country of Origin in South Africa* 2009

Government of the Republic of South Africa, Department of Social Development *Standing Operating Procedures for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa* 2015

Department of Social Development (nd). *Standard Operating Procedures (SOPs) for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa and Zimbabwe*. Pretoria: Department of Social Development.

Internet sources

Assim U 'Theoretical framework on foster care: International and Regional Framework' (2015) Available at <http://www.cplo.org.za/wp-content/uploads/2015/03/CML-presentation.pdf> Accessed: 20 July 2017.

Duma N 'Sweeping Changes for Refugee Law in SA' *Mail and Guardian* 2 February 2017 Available at http://www.africadaily.co.za/index.php?option=com_k2&view=item&id=607:sweeping-changes-for-refugee-status-in-sa-amid-world-outcry-against-usa Accessed : 15 July 2017

Mezmur 'Migration Dialogue for Southern Africa Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child' Day one of the conference held at Victoria Falls, Zimbabwe 7- 9 July 2015 available at

https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf Accessed: 1 July 2017.

Naik S 'Family tracing recent developments in the law and ensuing issues' (2012) Paper submitted to ILPA Refugee children's Project Seminar 6.

International Organisation for Migration (2013) Children on the Move
<https://publications.iom.int/books/children-move> Accessed 20 April 2016.

University of Cape Town Refugee Right Unit 'Children's Rights Manual' found on
http://www.refugeerights.uct.ac.za/sites/default/files/image_tool/images/248/14583%20childrens%20rights%20manual.proof%205.pdf Accessed: 27 March 2017.

UCT Law Clinic 'Submission on the Children's Bill: Foreign children' available at
<https://www.google.co.za/search?q=children%27s+act+and+unaccompanied+minor+children&oq=children%27s+act+and+unaccompanied+minor+children&aqs=chrome..69i57.14280j0j7&sourceid=chrome&ie=UTF-8>

Accessed: 06 July 2017.

Wolfson Vorster 'Undocumented children in SA: Averting the coming catastrophe' (2017) *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2017-06-12-undocumented-children-in-sa-averting-the-coming-catastrophe/#.WafjJrIjGM8> Accessed: 20 July 2017.

Wolfson Vorster R 'Into thin air: Thousands of SA's vulnerable at risk as subsidies subside' (2017) *Daily Maverick* Available at <https://www.dailymaverick.co.za/article/2017-05-17-into-thin-air-thousands-of-sas-most-vulnerable-at-risk-as-ngos-subsidies-subside/#.WaW2Cz4jGM8> Accessed : 20 July 2017.

Wolfson Vorster R 'All the want for Christmas : A sunny day, the right documents and maybe a parent or two' (2016) *Daily Maverick* Available at <https://www.dailymaverick.co.za/opinionista/2016-12-20-all-they-want-for-christmas-a->

[sunny-day-the-right-documents-and-maybe-a-parent-or-two/#.WaWL7D4jGM8](#) Accessed: 20 July 2017.

Van Zyl ,Virgili ‘ Migration Dialogue for Southern Africa Addressing Mixed and Irregular Migration in the SADC Region: Protection of the Unaccompanied Migrant Child’ Day one of the conference held at Victoria Falls, Zimbabwe 7- 9 July 2015 available at https://www.iom.int/sites/default/files/our_work/ICP/RCP/English-Final-Report-MIDSA-2015.pdf (Accessed: 1 July 2017) pg 15.

Issued by Government Communication (GCIS ‘The plan to address the Plight of Unaccompanied and Documented Minors from South Africa’) (2011) Available at http://www.dsd.gov.za/index.php?option=com_content&task=view&id=361&Itemid=106 (Accessed: 10 July 2017).

Reports

Centre for Education Rights and Transformation University of Johannesburg ‘ The Education Rights of Migrants, Refugees and Asylum Seekers in South Africa’ (2012) *Report to the Foundation for Human Rights* found at https://www.fhr.org.za/files/6713/8598/8897/The_Education_Rights_of_Migrants_Refugees_and_Asylum_Seekers_in_South_Africa_Research_Report.pdf 21 Accessed: 30 March 2017.

Chames C et al ‘Final Report for System Mapping of the Protection of Unaccompanied and Separated Migrant Children in South Africa’(2016) *Save the Children* copy on file.

Dunn A and Parry-Williams ‘Alternative Care for Children in Southern Africa: Progress, Challenges and Future Directions’(2008) *United Nations Children’s Fund Social Policy and Social Protection Cluster*, Nairobi Kenya v. Available at <https://www.crin.org/en/docs/Alt%20Care%20in%20Southern%20Africa.pdf> Accessed: 07 August 2017.

Lawyers for Human Rights ‘Childhood Statelessness in South Africa’ (2016) Available at http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf

Accessed: 10 July 2017.

Schreier T ‘Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the UCT Refugee Rights Unit’ *University of Cape Town Refugee Rights Unit* (2011)

http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_4_of_2011.pdf Accessed 24 May 2016.

Skelton A et al ‘Guide 4 : Unaccompanied and Separated Children’ Working Paper Series *Legal Resource Centre, Coram Children’s Legal Centre , Scalabrini Centre* found at http://www.probono.org.za/Manuals/RefugeeManual/2015_Asylum_seeker_guide_Unaccompanied_Separated_foreign_children.pdf Accessed : 20 July 2017.

Yacub ‘Independent Child Migrant in Developing Countries : Unexplored links in migration and development’ Innocenti Working Paper No. 2009-01 UNICEF.

Unpublished thesis

Mboyisa N ‘The Fragmentation of Social Services: Factors Hindering the Delivery of Social Services to Unaccompanied Child Migrants in Johannesburg, South Africa’ (M.A Thesis submitted at the University of Witwatersrand, 2014).

Magaya I ‘The International Law on Unaccompanied Foreign Migrant Children: An evaluation of whether it Reflects Modern Realities of Economic Migrancy in South Africa’ (Unpublished LLM thesis , 2015).

Van Baalen C 'The Rights of Refugee Children in South Africa' (Unpublished LLM thesis North West University, 2013).

Thesen E 'Challenges Faced by Child and Youth Care Workers with Regards to the discipline of Children with Challenging Behaviour in Residential Child and Youth Care Centre' (MA Thesis in Child and Family Studies submitted at the University of the Western Cape, (2014).

Blackie D 'Sad, Bad and Mad: Exploring Child Abandonment in South Africa' (Masters of Anthropology thesis submitted at Witwatersrand University, 2014).

Penyane V 'The Capacity Needs of Extended Family and Community Members in the Care and Support of Orphans and Vulnerable Children in Umgungundlovu and Uthukela districts' (Thesis submitted at the University of Pretoria,2015).

Assim U 'Understanding Kinship Care of Children in Africa: A Family Environment or An Alternative Care Option' (An LLD thesis at the University of the Western Cape, 2013).

Spijker A 'The Placement of Children in need of care and protection : A comparative study between South African law and Dutch law in light of International Standards' (An LLD thesis submitted at University of Pretoria, 2013).