

**THE IMPORTANCE OF DOCUMENTATION FOR THE PROTECTION
OF UNACCOMPANIED AND SEPARATED MIGRANT CHILDREN AND
THE REALISATION OF ACCESS TO SOCIO-ECONOMIC RIGHTS: AN
ASSESSMENT OF THE PARTICIPATION AND ROLES OF
STAKEHOLDERS**

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DECLARATION

I hereby declare that the mini-thesis: ‘The importance of documentation for the protection of unaccompanied and separated migrant children and the realisation of access to socio-economic rights: an assessment of the participation and roles of stakeholders’, is my own work. All the resources that were used during the research study, are indicated by means of a complete reference and acknowledgement.

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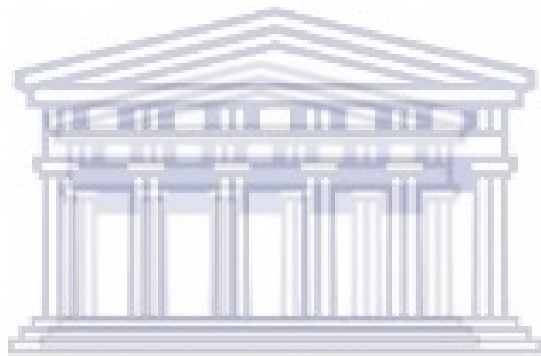
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DEDICATION

Thank you, my Abba Father, it is not by power nor by might, but by Your Holy Spirit. For Your love for me, Your Grace; Thank you my Lord.

Thank you to my Supervisor, Doctor Usang Maria Assim, for your encouragement and your help. I literally stopped working for a while, giving up. Then you called and told me I can do it. Thank you for that.

This paper is dedicated to my handsome 15-year-old son, Daniel Thomas. Thank you for being there for me during this time. You had to take the backseat between my long working hours and attending to my mini thesis. research paper. Thank you for going with me to UWC, waiting in the car while I am in the library. Thank you for eating whatever I made for us for supper due to limited time; sorry I could not give you a cooked meal daily. You are my inspiration and my special boy. I love you so much.

Thank you to my friend, Brilaine Manase who was always willing to support, assist, and encourage me to continue.

Keywords and Phrases

1. Separated and unaccompanied (undocumented) migrant children
2. Documentation
3. Socio-economic rights
4. Stakeholders
5. Child protection
6. Children's rights
7. Participation
8. Non-Governmental Organisations
9. Education and Health
10. Convention on the Rights of the Child
11. African Charter on the Rights and Welfare of the Child



ABSTRACT

This paper reports on the findings of a study on the importance of documentation for unaccompanied separated migrant children on South African soil. The objectives of the study is to identify what the international and national laws and policies state about protecting children's rights, particularly, their socio-economic rights, in the context of irregular migration. Their rights to have legal documentation, their right to education as well as health care, among others. Most importantly, the paper attempts to gain an understanding of the role and obligations of South African stakeholders in terms of the requirements of documentation and the implementation of the relevant laws and policies. To understand what the relevant stakeholders such as NGO's, DE, Health, DSD and DHA do to protect USMC's socio-economic rights. Their right to documentation, their right to education, to health care, to the justice system and child protection systems. Are the stakeholders working together and effectively in a multidisciplinary manner? How does the DHA refusal to assist with documentation affect the chain of multidisciplinary process among the other stakeholders. This paper will discuss the legal and protection framework, the challenges towards documentation with case studies that will elaborate on it.

ACRONYMS/ABBREVIATIONS

Acronyms/Abbreviations	Description
ACRWC	African Charter on the Rights and Welfare of the Child
CA	Children's Act (South Africa)
CPO	Child Protection Organizations
CRC	Convention on the Rights of the Child
DHA	Department of Home Affairs
DOJCD	Department of Justice and Constitutional Development
DSD	Department of Social Development
GC	General Comment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOM	International Organization for Migration
LHR	Lawyers of Human Rights
NGO	Non Governmental Organisation

RRO	Refugee Reception Office
SOP	Standing Operating Procedures
USMC	Unaccompanied and separate migrant children
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
UNHCR	United Nations High Commissioner for Refugees



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CHAPTER ONE

INTRODUCTION

Migration is a worldwide phenomenon, either by forced displacement or, predominantly by abandonment, poverty, or violence/conflict, in the case of children.¹ South Africa has been one of the main destinations for hundreds and thousands of foreign nationals, crossing its borders from neighboring countries.² The number of migrant and refugee children fleeing from their home countries and moving across international borders in search of asylum in South Africa has dramatically increased over the years.³ 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.⁴ Once in South Africa, unaccompanied and separated foreign children have extremely restricted access to documentation which would regularize their stay in the country. Some of the unaccompanied and separated children (USMC) might be children born from parents or other caregivers who do not have any form of legal documentation to legalize their stay in South Africa. The parents might out of fear of deportation not come forward and it may result in them leaving the children at a church, a place of safety or at police station. In which ever

¹ UNICEF (2020) Office of Research-Innocenti, 'Migration and Children', available at <https://www.unicef-irc.org/article/606-migration-and-children.html> (accessed 02 March 2020).

² The South African 2011 Census found that there were 2.2 million immigrants in the country of 52 million in 2011. While it is possible that some undocumented migrants were not counted in the 2011 Census, this was corrected for by Statistics South Africa in the final figure using the weighting factor that adjusts for possible undercount. Thus, the 2011 Census figure of 2.2 million foreign-born people in South Africa is supposed to include both documented and undocumented foreigners. <https://africasacountry.com/2018/10/how-many-immigrants-live-in-south-africa> (accessed 29 August 2019).

³ In 2014, Statistics South Africa reported that over 65 500 refugees and 230 000 asylum seekers were recorded in the country, the majority moving in from the Democratic Republic of Congo, Angola, and Ethiopia. By 2017, South Africa was home to 4 million immigrants. The exact number of children, however, cannot reliably be established, because so many of them are undocumented. <http://www.statssa.gov.za/publications/P0302/P03022019.pdf> (accessed 29 August 2019).

⁴ 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

manner the children become unaccompanied and separated in South Africa, they are in need of care and protection and durable protection solutions must be established and implemented. In the case of South Africa, the exact number of children who enter South Africa daily is undetermined. In order for these children to have access to relevant services and to be protected, they need proof of identification of their existence and presence in the country in the form of legal documentation.⁵ Although the aim of the UNHCR was to establish and build the futures of displaced and stateless people by protecting their human rights.⁶ However, an Non-Government Organization (NGO) called Scalabrini reported, that USMC still have major barriers with the attainment of documentation, it is almost impossible to have any legal status.⁷ Subsequently, the absence of such documentation results in USMC's socio-economic rights being infringed upon, such as access to education and health services thereby affecting their rights and protection generally. Having no documentation or means of obtaining documentation will not allow the USMC in South Africa to claim any nationality.⁸

Children⁹ are the most affected by this refugee crisis with harmful consequences such as sexual abuse, physical abuse, turmoil, human trafficking, and detention in the face of failing state

⁵ Sloth-Nielsen, J. and Ackermann, M (2016) (19) *This includes, among other things, a copy of the child's birth certificate or identity document and, in the case of a migrant pupil, a copy of their legal residency permit. "Unaccompanied and separated Foreign children in the care system in the Western Cape- A Socio-Legal study". PER / PELJ 2016(19) - DOI <http://dx.doi.org/10.17159/1727-3781/2016/v19i0a1207>.*

⁶ The Statute of the Office of the High Commissioner for Refugees [hereafter the Statute], as revised by General Assembly [hereafter GA] resolution 58/153, 22 December 2003.

⁷ Foreign Children in Care: *South Africa a Comparative Report of Foreign Children placed in Child and Youth Care Centres in Gauteng, Limpopo, and Western Cape Provinces of South Africa* July 2019

⁸ Paragraph 1 of the Statute provides "The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities. In the exercise of his functions, more particularly when difficulties arise, and for instance about any controversy concerning the international status of these persons, the High Commissioner shall request the opinion of an advisory committee on refugees if it is created.

⁹ For this research paper, a child is a person under the age of eighteen, as described in section 28(3) of the Constitution of South Africa, 1996 (The South African Constitution).

interventions.¹⁰ The lack of legal documentation can cause children to become stateless which has become a growing phenomenon that can be preventable. Statelessness of children can occur either by being born to irregular migrants or children themselves, this is another migration risk that children face.¹¹ According to Human Rights report an estimate 12 million people may be victims of statelessness globally and it was further echoed by United Nations High Commissioner of Refugee (UNHCR) the Chief Fillippo Grandi, who appealed for decisive action from government to eliminate the problem, noting that it is the right thing to do, humanly, ethically, and politically. Even when migrant children are stateless, they will still face huge barriers to exercise their fundamental human rights such as education, health services and legal employment.”¹² To this end, the Statute of the Office of the High Commissioner for Refugees (OHCR) was adopted and assume the function of providing international protection...and of seeking permanent solutions for the problem of refugees.

It is of importance for all South African stakeholders to recognize their roles within the context of refugee-migration laws and their obligation to protect children who are at risk of statelessness¹³ This paper focus on what durable protective solutions there are in place for USMC in South Africa. It will elaborate on the impact of non-documentation for USMC and how it contributes to the

¹⁰ International Committee of the Red Cross, “Inter-agency guiding principles on unaccompanied and separated children” 2004. https://www.unicef.org/protection/IAG_UASCs.pdf (accessed 29 August 2019).

¹¹ International Committee of the Red Cross, “Inter-agency guiding principles on unaccompanied and separated children” 2004. https://www.unicef.org/protection/IAG_UASCs.pdf (accessed 29 August 2019).

¹² UNHCR Human Rights Report 2018

¹³ In April 2019, activists and civil society organisations held a stakeholder dialogue in Cape Town to discuss problems facing refugees in South Africa. The last eight years have seen the Department of Home Affairs shutting down Refugee Reception Offices (RROs) in the Western Cape, Eastern Cape, and Gauteng, leaving refugees with fewer options, and needing to travel long distances to register their refugee status. Sonke Gender Justice, “Stakeholder Dialogue: Refugee Reception Office Litigation and Advocacy Strategies”. Published 16 July 2019, Cape Town. Available online <https://genderjustice.org.za/publication/stakeholder-dialogue-refugee-reception-office-litigation-and-advocacy-strategies/> (accessed 29 August 2019).

violations of their human rights in South Africa.¹⁴ It will focus on the obligations of the state and relevant stakeholders regarding their access to all necessary services for their survival and development.¹⁵ The focus of the paper is further on USMC who are not placed in alternative care. It will not elaborate on the reasons why children migrate to South Africa or the other challenges that they experienced along the way. Rather the paper will focus on how the relevant stakeholders can ensure speedy delivery of documentation in the best interest of USMC.

1.2. PROBLEM STATEMENT

Several challenges can be identified against the background provided in the introduction. The most concerning challenge is the denial of access to basic rights, which require some form of identification and which the identified group of children require. In addition, one must not overlook other glaring challenges faced by USMC. While recognizing the rights of children generally, and the additional rights afforded to USMC, one must consider the role of stakeholders in the protection and promotion of these rights. Thus, the state departments are mandated under enabling provisions to act positively towards the realization of the rights of these children. For example, the Public-School Policy Guide stipulates that to register children at school, one must have a birth certificate, immunization card, transfer card and the latest school report card.¹⁶

¹⁴ The Refugees Amendment Act of 2015 (Act No 10 of 2015) hereafter “the Refugees Act”, was promulgated to give effect to international legal instruments, principles and standards relating to refugees. Section 32 of the Refugees Act provides for unaccompanied children in South Africa.

¹⁵ Article 6 on the United Nations Convention on the Rights of the Child (hereafter the CRC) provides for children’s rights to life. In this regard, governments should ensure that children survive and develop healthily.

¹⁶ Department of Education, Admission Policy for Ordinary Public Schools published in Government Gazette 1977 on 19 October 1998. Available online [https://www.education.gov.za/Portals/0/Admission%20Policy%20for%20ordinary%20public%20schools%20\(Notice%202432%20of%201998\).pdf?ver=2009-10-13-135307-413](https://www.education.gov.za/Portals/0/Admission%20Policy%20for%20ordinary%20public%20schools%20(Notice%202432%20of%201998).pdf?ver=2009-10-13-135307-413) (accessed on 29 August 2019). Paragraphs 14- 18 of the Admission Policy stipulates the documents needed in the case of children who are citizens of South Africa, and sections 19-21 stipulates the documents needed in the case of non-citizen children.

The policy also makes provision that, while all documentation is not available, the child can be provisionally registered. Against this backdrop, the question that begs to be asked is, to what extent has the Department of Home Affairs (DHA)¹⁷ succeeded or failed to issue the documents required by USMC for access to basic rights such as education, and which other state departments rise to or fall short of its legislated mandate to act in the best interest of the child?¹⁸ The inter-relationships between these departments will be considered in light of the topic under discussion, with due regard given to the individual roles assigned to them.

Despite its international and domestic obligations, South Africa's legislative framework collectively creates and perpetuates childhood statelessness. It appears that the concept of USMC moving across borders is not well integrated into South African policy and legislation. This research paper will therefore highlight the gaps and inconsistencies by state departments in the application of laws and policies relating to USMC. The most common gap is advocacy, particularly with the key government departments such as DHA, the Department of Social Development (DSD), and the Department of Basic Education (DBE), hence the United Nations International Children's Emergency Fund (UNICEF) partnered with South African Red Cross to support the stakeholders to better understand the situation of migrant children in South Africa¹⁹ The DHA, as the forerunner department for USMC, has the constitutional obligation to ensure the rights of all

¹⁷ The Department of Home Affairs' White Paper on International Migration (2017:27) declared 12,3 million international visitors and migrants to have entered South Africa Hereafter the DHA.

¹⁸ The best interest principle is founded on Article 3(1) of the CRC, which states, "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".

¹⁹ UNICEF (2020) *The South African Red Cross partner to assist migrant children* (confirms that "undertones of discrimination [in terms of the attitude of social workers at intake] have been noted in parts of the country).

children in South Africa to human dignity and equality; the right to a name and nationality from birth; and the right of access to basic services such as schooling/education, amongst others.

1.3. RESEARCH QUESTIONS

The main question for investigation in this research paper is:

1. What are the obligations (roles and participation responsibilities) of the relevant stakeholders in providing relevant documentation for/to USMC in South Africa?

Other relevant/related questions include:

2. What documentation do USMC in South Africa need to protect them and secure their rights and what are the requirements or steps for acquiring the relevant documentation?
3. What is the impact of the absence of documentation for USMC on their access to socio-economic rights, specifically education and social services?
4. Are the specific roles and participation duties of stakeholders in the documentation process guided by the best interest of the USMC in South Africa?

1.4. RESEARCH OBJECTIVES

The goal of this research study is to gain an understanding of the roles and participation of stakeholders in terms of documentation for USMC within South Africa. This research paper further aims to contribute towards improving USMC documentation status and finding durable child protection solutions.

To achieve this aim, the following objectives have been formulated:

1. To provide a theoretical discussion on international and national legislative frameworks, protocols and research pertaining to access to documentation and education as a socio-economic right.
2. To address the challenges that USMC experience with access to documentation for access to socio-economic rights such as education, and the negative impact on their lives when failing to acquire these.
3. To investigate the roles and participation of relevant stakeholders especially DHA as a point of departure, and the departments of education, and social services in delivering on the best interests of USMC.
4. To present conclusions regarding the importance of providing documentation to/for USMC and to make recommendations to the relevant state party stakeholders, as well as institutions who work closely with USMC in South Africa.

1.5. LITERATURE REVIEW

While South Africa has been engaged in a process of democracy, aimed at establishing a human-rights-orientated society since 1994, limited literature exists on the documentation challenges of the USMC. This subject of concern was not given priority at the time when the country itself was trying to find its feet in a new democracy. Therefore, it is imperative to relook at our laws and policies, and establish a platform for the interpretation hereof, to create an inclusive rights-based approach to the migration problem the country currently faces. Since the inception of the new democracy, South Africa has aligned itself to regional and international practices by adopting

standards of best practice in addressing the issue of refugees, migration, and the general enforcement of the rights of children, including USMC.

There are international, national, and domestic instruments that are guidelines to protect USMC. International conventions, protocols, and treaties, including the 1969 OAU²⁰ Convention Governing the Specific Treatment of Refugee Problems in Africa²¹ and the Southern African Development Community (SADAC)²² Protocol on the Facilitation of the Movement of People all give an indication of the treatment of refugees and the standard of protection they should enjoy. South Africa has ratified international treaties, including the United Nations Convention on the Rights of the Child (UNCRC), which provides for the protection of children, including vulnerable groups such as USMC. There are guidelines such as the Convention on the Right of the Child (CRC) Committee's General Comment 6 of 2005 regarding the treatment of USMC.

In 2000, South Africa ratified the African Charter on the Rights and Welfare of the Child (ACRWC)²³ which also addresses issues concerning refugee children in Africa. However, this paper will investigate whether the State is successfully implementing these guidelines.

²⁰ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45. Available at <https://www.refworld.org/docid/3ae6b36018.html> (accessed 2 September 2019).

²¹ The Convention was ratified by South Africa in December 1995.

²² Hereafter the SADC. Most SADC countries have a camp-based refugee policy, but in South Africa recognized refugees and asylum seekers have freedom of movement and are permitted to work, if their permits are in order. This blurs the distinction between labor and other categories of migrants.

²³ Hereafter the ACRWC. Article 1 (A) UNHCR A refugee is someone who has a 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 to, or owing to such fear, is unwilling to, avail himself of the protection of that country.

South Africa's relative economic and political stability makes it an important destination country for irregular migrants, including unaccompanied minors, from other, less prosperous African States. In practice, unaccompanied minors in South Africa face substantial difficulties accessing asylum procedures, healthcare, education, and accommodation, and are often precluded from guardianship or legal status.²⁴ Little is known about the reality of migration into South Africa, the situation of unaccompanied child migrants.²⁵

Save the Children, shared the challenges USMC experienced, especially with access to social services.²⁶ Evidence from a study conducted by Willie and Mfubu²⁷ suggests that this group of children is still poorly taken care of, with their rights being overlooked and often violated. It further stressed about irregular migrations,²⁸ including the 700 children that were helped by UNICEF as well the 800 children from Zimbabwe that were placed in drop-in centers.²⁹ They also shared that 1500 children have sought shelter in Johannesburg alone. There are probably hundreds or thousands in other locations across the country that we do not know about.³⁰ An article was written

²⁴ Fritsch et al 'The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: A Call for Comprehensive Legislative Action' (2010) 38 *Denver Journal of International Law and Policy* 4 623, 624, 628-629.

²⁵ Anderson K, et al Unaccompanied and unprotected: *The systemic vulnerability of unaccompanied migrant children in South Africa* in Liefaard 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).

²⁶ Save the Children (2007).

²⁷ Willie N and Mfubu P 'No Future for our Children: Challenges faced by foreign minors living in South Africa' (2016) *African Human Mobility Review* 423-442.

²⁸ IOM, 'Study on Unaccompanied Migrant Children in Mozambique, South Africa, Zambia and Zimbabwe' (2017) The International Organization for Migration defines "irregular migration" as, the "movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination". <https://www.iom.int/key-migration-terms> (accessed 25 October 2019).

²⁹ In 2009 and owing to the economic breakdown in Zimbabwe, the influx of unaccompanied children reached proportions that called for humanitarian assistance. See http://uir.unisa.ac.za/bitstream/handle/10500/24560/thesis_mathe_m.pdf?sequence=1&isAllowed=y (accessed 24 October 2019).

³⁰ Save the Children South Africa 'In Search of a Better Future: Experiences of Unaccompanied Migrant Children in Limpopo and Mpumalanga in South Africa' (2015) 6.

by Livesley on the extent of xenophobia towards refugee children.³¹ Swartz wrote on unaccompanied minor refugees and the protection of their socio-economic rights under human rights law.³²

In their study, Hashim and Thorsen gave the reader a fascinating insight into the complexities of children migration in West Africa, where the children make the decision independently, to migrate.³³ Schafer approaches the subject from a mental health perspective - the impact of stressors, further stating that in 2015 almost 60 million individuals were forcibly displaced, and USMC were exposed to violent events.³⁴ Sloth-Nielsen et al, wrote about a solution to protect these children by placing children in foster care instead of institutional care.³⁵ Assim wrote on kinship care and recommends kinship care or foster care as an alternative placement.³⁶ However, even though they are allowed to stay with an extended family member (Kinship Care), or in a foster care, the lack of identification documentation will still pose as a challenge.

To this end, this paper intends to deliberate on the findings of these authors. The study will consider the challenges faced by this group of minors. The literature will include the work of Bizimana, who has written on the right to education of child refugees,³⁷ challenges faced by unaccompanied

³¹ Livesley T. *'A survey on the extent of xenophobia towards refugee children'*. (2006). M. Diaconiology Thesis. UNISA.

³² Swartz S *'Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law'* (2009) 1 *AHRLJ* 103-128.

³³ Hashim I et al *Child Migration in Africa* 2011 p19-33.

³⁴ Schafer *'Refugees Mental Health: A public mental health challenge'* 46 (2016) *European Journal of Public Health* 3 374-375.

³⁵ Sloth-Nielsen J and Ackermann M *'Unaccompanied and Separated Foreign Children in the Care System in the Western Cape* (2016) – A Socio-Legal Study' *PER/PELJ* 21.

³⁶ Assim U *'Understanding kinship care of children in Africa'* (2015) Eleven International Publishing

³⁷ Bizimana S, *'A critical Analysis of the right of education for refugee children in Great Lakes'*: the case study of Burundi, (unpublished LLM thesis, University of Pretoria, 2007). Available at <https://repository.up.ac.za/bitstream/handle/2263/5296/bizimana.pdf?sequence=1&isAllowed=y> (accessed 2 September 2019).

minors after crossing the border into South Africa,³⁸ and will further consider recommendations by experts as to possible solutions to protect these children. In 2014, a thesis on the realization of the socio-economic rights of refugees under international human rights law was written using South Africa as a case study.³⁹ What most authors stress, is the importance of international and national law, and the obligation of the state and stakeholders in terms of documentation and education. If there are obligations, then the question is, why is these guidelines not working and why stakeholders cannot implement these guidelines successfully. This paper will establish how certain stakeholders, especially DHA can make their transition less challenging for USMC.

1.6. SIGNIFICANCE OF THE STUDY

The study is significant because although there are international laws and policies to protect USMC, there is not enough emphasis on the obligation of stakeholders to enforce the socio-economic rights of all USMC. The paper will be significant to USMC, to the DSD, DHA, the Department of Justice and Constitutional Development (DOJ and CD) and other relevant stakeholders. Though many people have done studies on unaccompanied children, there are still limited publications that have been done focusing on this specific topic/aspect.

The study will identify gaps, provide a platform for knowledge sharing and will benefit the academic community on a bigger scale, to challenge the state departments involved herein to take a proactive approach to the issue at hand. It will also benefit the policy makers by informing them

³⁸ Chiguvare B, 'Children Crossing Borders-: An evaluation of state response to migrant Unaccompanied Minors at Musina' - Beit Bridge border post of South Africa (unpublished Master of Arts Thesis, University of Johannesburg 2011). Available at <http://ujdigispace.uj.ac.za/bitstream/handle/10210/8278/Chiguvare.pdf?sequence=1> (accessed 30 August 2019)

³⁹ Alexie TK, 'Realising the socio-economic rights of refugees under International human rights law': A case study of South Africa (unpublished LLM Thesis, University of the Western Cape, 2014). Available at <http://etd.uwc.ac.za/xmlui/handle/11394/3853> (accessed 31 August 2019).

about these challenges and encourage an improvement in the implementation of existing policies and legislation, and subsequently create advocacy therefrom.

1.7. LIMITATIONS OF THE STUDY

The foregoing emphasizes the lack of current, reliable data as a limitation to this study. It is therefore important to also acknowledge that the paper provided, might not express the exact views of the entire USMC population, nor may it convey a complete oversight of USMC. The study is limited to the experiences of USMC whose plight has been highlighted through documented process issues within the relevant state departments.

Another limitation of the study lies in the fact that, because of the status of USMC, many cases go unreported for lack of documentation and thus a true reflection of the USMC is not determined by this study.

1.8. RESEARCH METHODOLOGY

This paper will be predominantly a theoretical, qualitative desktop study. The primary source of data will be from legislation, including international and national law addressing USMC issues in South Africa. The paper utilized a descriptive and analytical review at applicable legal instruments as well as case law. The secondary data will include books, articles, media reports and electronic materials from the internet. Several different agencies or institutions will also serve as important sources of knowledge, good practices, innovations, and lessons learned regarding USMC.

1.9. CHAPTER OVERVIEW

The study comprises of 4 chapters, chapter one introduces the reader to the subject matter of the paper, including the background to the study, formulation of the research problem, research questions, the literature review and outline of the chapters.

Chapter two captures legislations embedded in international and national law. It will define legislative frameworks in terms of access to socioeconomic rights and the documentation required to access those rights, including education and health.

Chapter three focus on the challenges due to lack of documentation, case studies and the requirements to receive documentation to access education and health departments. It will discuss process of documentation, nationality, age assessment, care, and reunification. It will also consider how the lack of relevant documentation can create major socio-economic right challenges resulting in statelessness. It will identify the obligation of the relevant state departments and participation of key stakeholders such as the DHA, the DSD, the DOJ and (CD), and DoE in the documentation process.

Chapter four presents a summary of the research paper, including an overall presentation of findings. It will also include recommendations on how stakeholders in South Africa can improve and implement systems, to ensure the safeguarding of the rights of USMC, in the provision of necessary documentation to prevent statelessness and other human right violations.

CHAPTER 2

LEGISLATIVE FRAMEWORK GOVERNING THE RIGHTS OF USMC

2. INTRODUCTION

The rights of children are defined in international human rights treaties, such as the CRC, regional human rights treaties, the ACRWC, the South African Constitution and policies. For this chapter, the applicable international framework will be deliberated upon. Separated children are children, as defined in Article 1 of the CRC,⁴⁰ who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.⁴¹ Unaccompanied children are those children who are separated from their families and are totally alone, in that they have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.⁴² For the purpose of this study, the above groups of children are collectively referred to as USMC, and refers specifically to USMC who move within or outside the borders of their countries of origin. This chapter intends to consider the legislative provisions within the framework of USMC. A theoretical discussion on the legislative framework pertaining to documentation of USMC in South Africa will be provided. It will provide an overall description of the rights of USMC, the risks they face under that status and the corresponding legislative responsibilities of State Parties in the fulfillment of the rights of USMC. This chapter will ultimately consider arguments by different scholars on the legislative

⁴⁰ Article 1 provides that "...a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

⁴¹ Committee on the Rights of the Child, General Comment No.6 (2005), 8. Available at <https://www.refworld.org/docid/42dd174b4.html> (accessed 17 September 2019). [Hereafter General Comment 6].

⁴² General Comment 6 para 7.

framework for USMC and the gaps needed to be addressed to fully appreciate the intention of the drafters of enabling provisions.

2.1. UNDERSTANDING INTERNATIONAL LEGISLATION

2.2. THE UN CONVENTION ON THE RIGHTS OF THE CHILD (1989) (UNCRC)

The role of the UNCRC is a human rights treaty that sets out the civil, political, economic, social, health and cultural rights of children and it is regarded as part and parcel of international human rights law.⁴³ The CRC specifically places an obligation on State Parties to respect and ensure the rights of children, without discrimination of any kind.⁴⁴ In addition, State Parties are required to take appropriate measures to ensure that a child who was seeking refugee status receives appropriate protection and assistance in the enjoyment of applicable rights.⁴⁵ In their need for protection and justice, children have a place on the international legal platform to grow and develop.

2.2.2. UN CONVENTION RELATING STATUS OF REFUGEES (1951) (UNHCR)

The United Nations Convention on the Rights of the Child (commonly abbreviated as the CRC or UNCRC) is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. The UN Convention is another important guiding international treaty that sets out the rights of persons applying for refugee status and the responsibilities of

⁴³ *UN Convention on the Right of the Child (CRC)*

⁴⁴ *Article 2 of the CRC.*

⁴⁵ *Article 22 of the CRC.*

signatory countries that grants asylum. The convention recognizes the family as the natural and fundamental group unit of society and emphasize the essential rights of a refugee to a family.⁴⁶

2.2.3. GENERAL COMMENT 6 (GC)

General comments often seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions. The UNCRC Committee issued General Comment 6 of 2005 following the identification of several protection gaps in the treatment of such children. In the GC reports that USMC, are often discriminated against and denied access to food, shelter, housing, health services and education. With especially girls being at risk of gender-based violence, including domestic violence. In some situations, USMC have no access to proper and appropriate identification, thereby making registration, age assessment and the procurement of documentation extremely difficult.⁴⁷

2.3. REGIONAL LEGISLATION AND POLICIES: SOUTH AFRICA

South Africa has signed and ratified many UN Conventions that create the domestic framework for legislation and policy in keeping with human rights. While some are specific to children, others are specific to migrants. There are also reports and policies that offer protection to migrant children.⁴⁸

2.3.1. THE ACRWC

⁴⁶ UNHCR 1951 Convention relating to the status of refugees.

⁴⁷ General Comment 6, para3.

⁴⁸ 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.

Article 23 of the ACRWC is regarded by scholars as being superior in the scope of its protection to migrant children.⁴⁹ It recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child. In this paper Article 6 of the ACRWC focus on name and nationality of the African child. That every child shall have the right from his birth, must be registered immediately after birth and has the right to acquire a nationality.⁵⁰ This is because of their heightened vulnerability, which ultimately requires a raised level of protection. This further requires additional assistance in the search for solutions to this problem. Fundamental interventions are required to ensure that the provision of protection to USMC provided for in the ACRWC, meets fulfilment at national level, given that the ACRWC goes further than the CRC by extending its protection to internally displaced children.⁵¹

2.3.2. SOUTH AFRICAN CONSTITUTION

In section 28 (2) of the Constitution entrenches the best interest of the child in the Bill of Rights as being of paramount importance in all matters concerning a child. It is an obligation on State Parties to respect and ensure the rights of children, without discrimination of any kind.⁵² State Parties are required to take appropriate measures to ensure that a child who was seeking refugee status receives appropriate protection and assistance in the enjoyment of applicable rights.⁵³ In their need for protection and justice, children have a place on the international legal platform to grow and develop. Section 28(3) of the Constitution gives protection to children's rights while the

⁴⁹ Kaime T 'The Protection of Refugee Children under the African Human Rights System: Finding Durable Solutions in International Law' in Sloth-Nielsen J Children's Rights in Africa: A Legal Perspective (2008) 183.

⁵⁰ Article 6 of the ACRWC

⁵¹ Kaime (2008) 184.

⁵² Fambasayi & Koraan 'Intermediaries and the International Obligation to Protect Child Witnesses in South Africa' (2018) 21 *PELJ* 412. Available at <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a2971> (accessed 17 September 2019).

⁵³ Article 2 and 22 of the CRC.

Children's Act⁵⁴ gives effect to these rights.⁵⁵ The Constitution also guarantees a child's right to basic nutrition, health care services and social services.⁵⁶ Section 28(1) (d) provides for the protection of children from exploitation.⁵⁷ This is in accordance with the CRC and most of the relevant international frameworks. Children are also protected from doing work that is inappropriate for their wellbeing or development.⁵⁸

2.3.3. The Refugee Act 130 of 1998

The Refugees Act states that refugees are entitled to the same health care and basic education as nationals. Most important is section 32 which states that any child who appears to qualify for refugee status and is in circumstances suggesting he or she qualifies as a child in need of care under the Children's Act must be brought before the Children's Court who may order them to be assisted in applying for asylum. Section 33 provides that a person who qualifies for asylum under the Refugees Act must assist any dependents to apply or apply on their behalf.

⁵⁴ The Children's Act 38 of 2005.

⁵⁵ Chames C et al (2016).

⁵⁶ Section 28(1) (c) of the Constitution of South Africa.

⁵⁷ Section 28(1) (e) of the Constitution states that children are to be protected from exploitative labour practices.

⁵⁸ 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.

According to Anderson,⁵⁹ data suggests that it is rare for a child migrant to enter South Africa for a single reason and indicates that it is often a complexity of factors that steer USMC to South Africa. These factors often include abuse and neglect.⁶⁰ Although section 32 of the Act does not specifically mention unaccompanied children in its text, it is particularly important because it draws attention to the care aspect of children seeking asylum.⁶¹ It does, however, provide that a child qualifies for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that they are a child in need of care, must forthwith be brought before the Children's Court with the necessary jurisdiction.⁶²

Willie and Mfubu indicates that the Act refers to children who are refugees or who may qualify for refugee status.⁶³ They propose that to avoid unlawful detentions and arrests in the absence of the required documentation, a child should be placed in temporary care until a Children's Court declares that the child is indeed in need of care and protection.⁶⁴ The argument forwarded is that such children can be documented under section 31(2) (b) of the Immigration Act. This section provides that the Minister may, at his discretion, grant a foreigner the status of permanent residence for a specified or unspecified period.⁶⁵ To this end, children who are not properly documented are also granted access to the care and protection system, and it further provides them with access to rights as enjoyed by South African children.

⁵⁹ Anderson K (2016) 362-363.

⁶⁰ Anderson K (2016) 364-366

⁶¹ The heading of Section 32 refers to the unaccompanied child.

⁶³ Willie N & Mfubu P (2016) 433

⁶⁴ Willie N & Mfubu P (2016) 434.

⁶⁵ Section 31(2) (b) of the Immigration Act.

2.3.4 The Immigration Act 13 of 2002 This Act provides for entry into and exit out of the Republic, provided that entry and departure are done at a port of entry.⁶⁶ 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.⁶⁷ The Immigration Regulations state that unaccompanied minors shall not be detained,⁶⁸ but is otherwise silent on what should happen to undocumented and separated children. In 2017, Lawyers for Human Rights brought an application to the Constitutional Court to confirm the High Court order of constitutional invalidity of certain provisions of section 34.⁶⁹ The court first had to determine whether foreigners enjoyed the protection and rights of section 12 and section 34.⁷⁰ It was found that the two sections encompassed foreigners within the Republic of South Africa. The second finding by the court was related to whether the limitation was justified under section 36.⁷¹ The court ruled that the reasons forwarded by the State fell short of justifying the limitation.⁷² 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.⁷³

⁶⁶ Section 9(1) of the Immigration Act.

⁶⁷ Section 34 of the Immigration Act.

⁶⁸ Regulation 33(5) (d) of the Immigration Regulations.

⁶⁹ *Lawyers for Human Rights v Minister of Home Affairs and Others (2017) ZACC 22* para 30. In its attack the applicant singled out section 34(1) (b) and (d). It contended that, by omitting to provide for automatic judicial oversight before the expiry of 30 calendar days, section 34(1) (b) and (d) was inconsistent with sections 12(1), 35(1) (d) and 35(2)(d) of the Constitution. The challenge against section 34(1) (d) was based on the contention that it did not permit a detainee to appear in person before a court and impugn the lawfulness of his or her detention.

⁷⁰ Section 12 and 34 of the Immigration Act made provision for diplomatic permits and the deportation and detention of illegal foreigners, respectively.

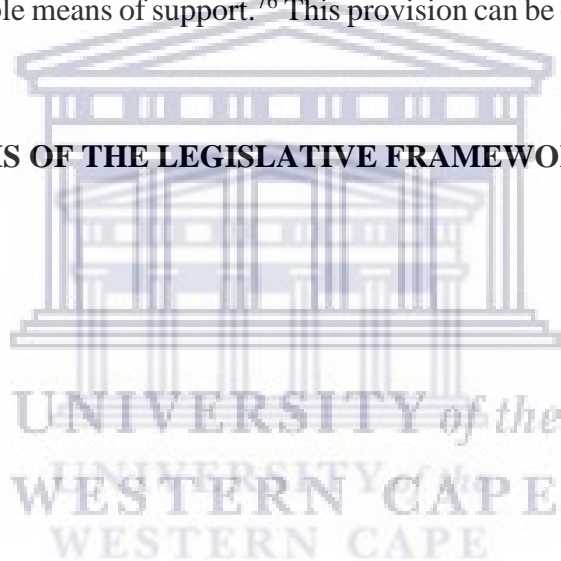
⁷¹ Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account 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

2.3.5 The Children's Act 38 of 2005

The point of departure in understanding the Children's Act would be section 9, which provides that in all matters concerning a child, the best interests of the child are of paramount importance.⁷⁴ Section 7 provides a list of factors to consider in the determination of the child's best interest. When determining the placement of an unaccompanied child, these factors may then be used to determine what would be suitable for the child.⁷⁵ Section 150 makes provision for children in need of care and protection. It points out that a child needs protection if he or she has been abandoned or orphaned and has no visible means of support.⁷⁶ This provision can be extended to USMC within the borders of the Republic.

2.4 CRITICAL ANALYSIS OF THE LEGISLATIVE FRAMEWORK

2.4.1 The UNCRC



in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

⁷² *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 62.

⁷³ *Lawyers for Human Rights v Minister of Home Affairs and Others* (2017) ZACC 22 para 69. Section 12 of the Immigration Act has since been repealed.

⁷⁴ Section 9 of the Children's Act.

⁷⁵ Section 7(1) (a) of the Children's Act.

⁷⁶ Section 150 (1) (a) of the Children's Act. See also section 150(1)(a) of the Children's Amendment Act 17 of 2016 (published in GG no 40564 of 19 January 2017), where an amendment was affected to include instances where the child does not have the ability to support himself or herself and such inability is readily apparent.

It is important to note that the CRC is considered a critical milestone in the legal protection of refugee and asylum-seeking children,⁷⁷ in that it is holistic with regards to the rights of children.⁷⁸ One shortcoming can be found in the fact that the CRC does not make any reference to unaccompanied children who cross borders for socio-economic reasons,⁷⁹ and thus falls short of the definition of a refugee. One possible reason for this could be that the drafters did not foresee the possibility of children leaving their family voluntarily for reasons such as seeking basic healthcare or social services. Magaya indicated that international law fails to strike a balance between child protection and child autonomy.⁸⁰ Fritsch explains that unaccompanied children migrate as a result of starvation and poverty, amongst other reasons, particularly those who cross the border from Zimbabwe.⁸¹ Van der Burg demonstrates that State Parties struggle with the proper implementation of the rights of the CRC, and that General Comment 6 served as a standard for State Parties to ensure that unaccompanied minors are handled in an appropriate manner.⁸² Paragraph 39 specifically touches on the placement aspect by emphasizing that USMC are children who are temporarily or permanently deprived of their family environment and, as such, are the beneficiaries of State Parties obligations under Article 20 of the CRC.⁸³ They are therefore also entitled to special protection and assistance provided by the relevant State.⁸⁴ State Parties are therefore tasked with establishing mechanisms under national laws to ensure the care of USMC.⁸⁵ In South Africa, the DSD is responsible for providing measures regarding the placement of unaccompanied children. Ultimately, the aim of addressing the fate of USMC is to identify a long-lasting solution that addresses all their needs, including considering the view of the child concerned.

⁷⁷ 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) *International Journal on Children's rights* 52 at 55.

⁷⁸ Anderson K (2016) 18.

2.4.2 The ACRWC

The ACRWC includes a non-discrimination clause and states that every child shall be entitled to the enjoyment of the rights and freedoms recognize and guaranteed in the ACRWC. These rights are extended to children regardless of the child's or his or her parents' or legal guardians' race, ethnic group, color, sex, language, religion, political or other opinion, national and social origin, fortune, birth, or other status.⁸⁶ This suggests that there should be no distinction between USMC within the borders of South Africa, and South African children.



⁷⁹ 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.

⁸⁰ Magaya I (2015) 27.

⁸¹ Fritsch (2010) 634.

⁸² Van der Burg A 'An examination of the extent to which South Africa is meeting its legal obligations about the protection of undocumented foreign migrant children' (unpublished LLM thesis, University of the Western Cape, 2005) 27.

⁸³ Article 20 of the CRC says that children and young people have the right to special protection and help if they can't live with their family.

⁸⁴ General Comment 6, para 39.

⁸⁵ Paragraph 39 General Comment 6.

⁸⁶ Article 3 of the ACRWC.

Kaime insists that State Parties are under an obligation to ensure that children who are deprived of a family environment, are provided with alternative care in the prescribed forms.⁸⁷ Chirwa's approach is from an African perspective, and states that children are considered to lack the capacity to make decisions and should therefore be afforded protection.⁸⁸ If the child is separated from his or her family, alternative care should be provided by the state. Under the ACRWC, State Parties 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.⁸⁹ In addition to the ACRWC, the General Comment No 2 of the African Committee of Experts on the Rights and Welfare of the Child elaborating on Article 6 of the ACRWC (Name and Nationality) provides for state obligations about the implementation of this right, also applicable to USMC. 'The purpose of [the] General Comment is to give the meaning and scope of these rights and explain the corresponding obligations of the States parties to the Charter for their implementation.'⁹⁰

These possible solutions in protecting and assisting USMC require the availability of relevant documentation, which may be hard to come by, given that USMC often are not in possession of any legal documentation when they migrate.

⁸⁷ Kaime T (2004) 342.

⁸⁸ Chirwa D 'The merits and demerits of the African Charter on the rights and welfare of the Child' (2002) 10 The International Journal of Children's Rights 157-177.

⁸⁹ Article 25(2) (a) of the ACRWC.

⁹⁰ See <https://www.acerwc.africa/general-comments/> (accessed 20 October 2020).

2.4.3 The Refugees Act

Among refugee children, unaccompanied and separated children require attention among other vulnerable children because of their need. The Act provides limited guidance on the specific procedures involved and what the responsibilities of all the role players are in assisting unaccompanied foreign children.⁹¹ Shreier focused on the key challenges that the Refugee Rights Unit (at the University of Cape Town) has experienced in its case work relating to the protection of unaccompanied foreign children in the Western Cape. Their working paper alludes to a wide gap between available policy and legal frameworks and their implementation, with reference to cases brought to the attention of the Unit. It further cites cases that bring to the fore one of the key areas of concern, which is that unaccompanied foreign children are not readily able to access the child protection system in the first place, due to a lack of role clarification between social workers and the DHA.

The working paper confirms the central problem of lack of documentation. This is particularly acute for children who do not have a claim to refugee status, which needs to be grounded in a well-founded fear of persecution in the country of origin by reasons of race, tribe, religion, nationality, political opinion or membership of a particular social group.⁹²

⁹¹ Khan F and Shreier T, *Refugee Law in South Africa* (2014) 150. Available online <http://www.probono.org.za/wp-content/uploads/2017/06/Refugee-Law-practical-guide.pdf> (accessed 31 October 2019).

⁹² Working Paper, no 4 on Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the UCT Refugee Rights Unit".

In addition, the process of bringing a child before the Children’s Court, for the child to become documented is riddled with problems, with the biggest problem being the time that it takes for the Court to finalize each child’s matter. This matter was discussed in the *Mubake* case.⁹³ The Applicants argued that the first step to be taken prior in the investigation should be to document the child and issue the child with a permit to legalize his or her stay in the country. The Respondents were of the view that the Children’s Court processes should take place prior to the issue of such permit. The Court held that the risk of not documenting a child is greater than the risks associated with documenting separated children as ‘dependents’ without any investigation. The Court further held that granting a child a temporary permit has the advantage of legalizing and regulating their stay in the country.⁹⁴

2.4.4 The Immigration Act

The absence of any specific provision in this Act referring matters to the Children’s Court for processing under the Children’s Act, leaves a gap for an interpretation that USMC can be deported without there being a Children’s Court process. Nevertheless, the DHA Passport Control Instruction 1 of 2004⁹⁵ states that USMC must be reported to a social worker for arrangements to be made for the children to be placed in appropriate place of care or place of safety.⁹⁶ This change in legislation ultimately requires specific documentation for children who are not in position to furnish same to the state departments who have been mandated to process, assist, and protect them.

⁹³ *Mubake and Others v Minister of Home Affairs and Others (72342/2012) (2015) ZAGPPHC 1037;2016 (2) SA 220 (GP) (9 July 2015)*

⁹⁴ *Mubake* para 23-25.

⁹⁵ Available at https://www.gov.za/sites/default/files/gcis_document/201409/26126gen352a.pdf (accessed 19 September 2019).

⁹⁶ Skelton A et al ‘*In Search of a better Future: Experiences of Unaccompanied Migrant Children in Limpopo and Mpumalanga*’ (2016) Save the children <https://www.savethechildren.org.za/sites/savethechildren.org.za/files/field/file/Case%20Studies.pdf> (Accessed 18 September 2019) 15.

2.4.5 The Children's Act

In line with the best interest principle and the provision against non-discrimination, the Children's Act does not distinguish between 'citizens' and 'non-citizens' Supplementing the Children's Act, the DSD Guidelines of 2009⁹⁷ provide some guidance to social workers as to their approach to foreign children and specifically stipulate that unaccompanied foreign children should be assumed to be children "in need of care and protection."⁹⁸ The evidence suggests, however, that the unaccompanied and separated child's documentation status has an impact on his or her ability to access the child protection system as well as access to basic socio-economic rights.

The Children's Act is silent on USMC, but the wide interpretation of 'unaccompanied children' includes USMC. It must be noted, however, that authors argue that it is problematic that no mention is made of unaccompanied children in the Children's Act. In their submissions for an amendment to the Children's Act, the University of Cape Town's Refugees Rights Units argued that it is crucial for the development of USMC to be recognized as children in need of care and protection in terms of the criteria established in section 150.⁹⁹ The Refugees Rights Unit proposed that to ensure that this always happens, that an amendment should be made in section 150 (j) to provide that an unaccompanied child is a child in need of protection and care. This submission was not taken into consideration.¹⁰⁰

⁹⁷ Department of Social Development (DSD). 2009. *Guidelines on separated and unaccompanied children outside their country of origin in South Africa*.

⁹⁸ Section 150(1) of the Children's Act.

⁹⁹ 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&i.e., =UTF-8> (accessed 18 September 2019).

¹⁰⁰ UCT Refugee Law Clinic 'Submission on the Children's Bill.

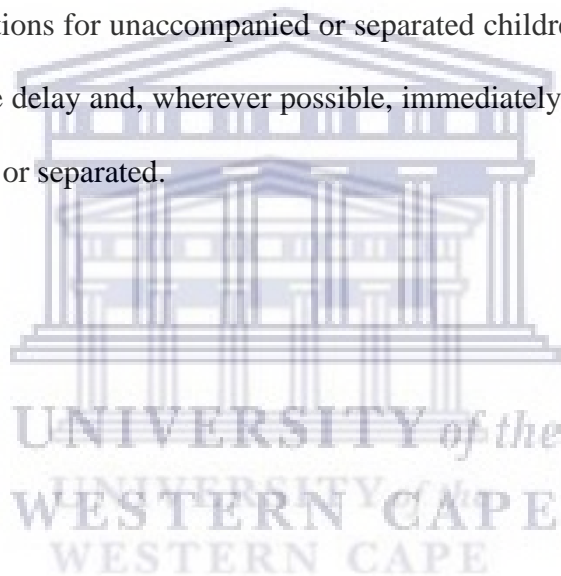
2.5. CONCLUSION

The successful application of international and national legal protection mechanisms is essential to the well-being of USMC. While international legal instruments provide an important legal framework for child protection, understanding national law and custom as it relates to USMC is also essential to establishing appropriate care and protection. While international and domestic structures surrounding the issue indicate that such children are entitled to the same level of protection as any other child deprived of his or her family environment, the reality is different. Despite judicial pronouncement on the vulnerability of USMC, there has been no provision of legal status or a consequent pathway to naturalization for unaccompanied foreign minors.

The Immigration Act makes provision for a host of temporary and permanent residence permits for businesses, spouses and family members but makes no mention of this arguably far more vulnerable group. The Children's Act is also lacking and could benefit from unequivocally delineating the various role-players in relation to unaccompanied foreign minors - as well as their duties - to avoid any confusion. It is argued that Section 32 falls short of providing adequate protection to unaccompanied refugee children for three main reasons. One of the reasons are that the Refugees Act presumes that the unaccompanied refugee child is, in need of care and protection, as understood in the context of the Children's Act, and it does not envisage assisted asylum claims by separated children who are adequately cared for by relatives. The other reason is, that it presumes that there is a designated office, or person, tasked with identifying the unaccompanied refugee child and ensuring that he or she is brought before the Children's Court. Lastly, only three Refugee Reception Offices (RROs) across South Africa are receiving new asylum applications. These are in Durban, Musina and Pretoria. Practically, the capacity and resources required to achieve this are simply not in place.

Without serious governmental initiative and law reform there is only one avenue available to children falling into this group – a ministerial exemption in terms of the Immigration Act. This is a totally discretionary application for permanent residence which the Minister of Home Affairs can grant if “special circumstances exist”. It is available to individuals as well as to groups. Being discretionary, there are no regulations guiding the exercise of this power and there is no definition as to what would constitute “special circumstances.”

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.



CHAPTER 3

A SYNOPSIS OF THE CHALLENGES AT STATE DEPARTMENTS AND OTHER STAKEHOLDER LEVELS AND THE EFFECT ON THE SOCIO-ECONOMIC RIGHTS OF USMC

3. 1. INTRODUCTION

One of the most challenging aspects in the protection of USMC in South Africa is the issue of legal documentation. The most significant challenge about legal documentation relates specifically to those USMC who do not appear to have a refugee claim.

According to the UNHCR Guidelines on the Protection and Care of Refugee Children, the best interest of an USMC who has been denied refugee status, requires that the child not be returned to his or her country of origin, unless, prior to the return: a parent has been located in the country of origin who can take care of the child and the parent is informed of all the details of the return, or, a relative, or other adult care-giver, government agency or child-care agency has agreed and is able to provide immediate protection and care for the child upon arrival.

USMC often have trouble in obtaining the necessary legal documentation to access services.¹⁰¹ Some of the difficulties which USMC experience in South Africa include the unavailability of proper documentation such as identity documents to ensure access to socio-economic services in South Africa.¹⁰²

¹⁰¹ Magqibelo L (2016) “Challenges faced by minor-refugees in South Africa” 52 Social Work (Stellenbosch Online) 73-89. Available at <http://dx.doi.org/10.15270/52-1-480> (accessed 1 October 2019).

¹⁰² Minutes of Home Affairs Portfolio Committee meeting to establish a refugee relief fund in South Africa. Available at [15http://www.pmg.org.za/viewminute.php?id=6200](http://www.pmg.org.za/viewminute.php?id=6200) p2 (accessed 28 September 2019).

This chapter will highlight the challenges that USMC experience in terms of documentation, birth registration, age estimation and statelessness. It will also look at the challenges faced within relevant government departments in this regard.

3. 1.1. BIRTH REGISTRATION AND NATIONALITY

3.1.2. Importance of nationality and identity

It is a child's right to have a name, a nationality and immediate birth registration.¹⁰³ Birth in South Africa does not automatically confer South African nationality.¹⁰⁴ A child's nationality is determined in South Africa by the Citizenship Act which was amended in 2010.¹⁰⁵ Every child must be registered immediately after birth and the registration must be universal, free and accessible.¹⁰⁶ Where no legal guardians or close relatives can be found, the child should be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.¹⁰⁷

The DSD Guidelines state that when any unaccompanied or separated migrant child is identified, "the child should be immediately registered and documented".¹⁰⁸ This process should be conducted in an age-appropriate and gender sensitive manner, in a language the child understands, by

¹⁰³ This right to be registered can be confirmed in the 1989 UNCRC, Article 7, Universal Declaration of Human Rights in article 6, Article 24 in International Covenant on Civil and Political rights as well as Article 24 of the Human Rights Committee.

¹⁰⁴ Scalabrini report 2019.

¹⁰⁵ *The South African Citizenship Act of 1995* was amended by the South African citizenship Amendment Act, 2010. (Act No 17 of 2010)

¹⁰⁶ *ACRWC article 6*

¹⁰⁷ Note on Refugee Children. Available at <https://www.unhcr.org/excom/scip/3ae68ccc18/note-refugee-children.html> (accessed 1 October 2019).

¹⁰⁸ Guidelines on Separated and Unaccompanied Children outside their country of Origin in South Africa. Available at (accessed on 1 October 2019).

professionally qualified persons.¹⁰⁹ State Parties are required to recognize the principles according to which the child should acquire nationality if he or she is not granted nationality by the laws of any other state.¹¹⁰ This is also provided in General Comment 2 of the ACERWC on ‘Name and Nationality’ on Article 6 of the ACRWC: it recognizes the three interlinked rights: name, birth registration, and nationality.¹¹¹

Those without birth certificates are not entered national population registers. This also means that the child without a birth certificate is more likely to remain undetected in terms of care and protection services. This leads to a range of complex issues around being an undocumented child.

3.1.3. Age Assessment

Where the child is undocumented, the Children’s Act stipulates that the Children’s Court can estimate the age of the child, aided by the written motivation of a designated social worker, an investigation into the circumstances of the child, including any abuse, neglect or exploitation must be conducted and recorded and the findings together with a recommendation presented to the Court.¹¹² In order to establish age to register the birth of any child in South Africa that are in need of care and protection, a social worker must bring the matter to the Children’s Court.

An assessment and investigation must be done, accompanied with an advertisement placed in search of the parents, and form 7 must be completed by a medical practitioner. This information

¹⁰⁹ Vermeulen G, Desmet E (2017) ‘Essential Texts on European and International Asylum and Migration Law and Policy’ 1 90.

¹¹⁰ See Articles 7 & 6 of the CRC and ACRWC respectively.

¹¹¹ ACERWC, ‘General Comment On Article 6 of The African Charter On The Rights and Welfare of The Child: "Right to Birth Registration, Name And Nationality"’ Available at https://www.acerwc.africa/wp-content/uploads/2018/04/General-Comment_Art6_ACRWC_English.pdf (accessed 20 October 2020).

¹¹² Section 48(2) of The Children’s Act.

includes the identity and location of family members, the reasons for being separated or unaccompanied, and an assessment of vulnerabilities and protection needs.¹¹³ With a report all this must be presented before court upon which the court will issue a form 8 which is an order instructing DHA to issue a birth certificate for the child.

However, even when the DHA is furnished with the documents, they may still refuse to register the birth of the child.

3.1.4. In the absence of birth registration and age assessment

Where the DHA fails to issue the relevant legal documentation to either register the birth of a child, or to assess the age of the child, a DSD official will be left with no other option but to place the child in alternative care, where the child will be able to access socio-economic facilities such as health care and education.

However, consequently, once the child turns 18 and reaches the age of majority, this child may not be able to register for final senior examination without proper identification and may also not be able to secure employment as a result.

¹¹³ Vermeulen G, Desmet E (2017) 91.

3.2. CHALLENGES THAT NON-GOVERNMENTAL ORGANISATIONS (NGO) EXPERIENCE

3.2.1 REFUGEE RIGHTS UNIT (RRU)

The RRU¹¹⁴ elaborate on the challenges that they experienced with stakeholders in terms of the protection of USMC. They experienced difficulties with suitable entry into South Africa's childcare and protection services., including the DHA's inability to access legal documentation for the children. Further challenges are the poor level of knowledge of the legal protection framework by some government departments staff and frontline service providers.¹¹⁵ The closure of several Refugee Reception Offices (RROs) since 2010 is also a major challenge for migrants in South Africa.

3.2.2. SCALABRINI

Scalabrini Centre of Cape Town is a NGO that foster the cultural, social, and economic integration of migrants, refugees, and South Africans into local society. Scalabrini released a report in July 2019 highlighting the challenges of USMC in three provinces. It covered that in Child and Youth Care Centre's (CYCC) in Gauteng, Limpopo, and the Western Cape, 34% of children hold no documentation. In Limpopo 82 per cent were undocumented; this is due to South Africa having no system to record their entry. ¹¹⁶ The report of Scalabrini, reiterates the same documentation challenges with DHA that other stakeholders in South Africa experienced.

¹¹⁴ As part of its direct legal services activities, the RRU represents several unaccompanied and separated foreign children in the Department of Home Affairs (DHA) asylum application process and within Children's Court Inquiries (CCIs), with the paramount principles of non-refoulement and the best interests of the child guiding each of its activities.

¹¹⁵ Shreier T 'Critical Challenges to Protecting unaccompanied separated foreign children in the Western Cape. (2011)

¹¹⁶ Foreign children in Care: South Africa a Comparative report of foreign children placed in child and youth care centers in Gauteng, Limpopo, and Western Cape Provinces of South Africa –July 2019

3.2.3. LAWYERS FOR HUMAN RIGHTS (LHR)

The Centre for the Child Law and Lawyers for Human Rights, two non-governmental organizations, were appointed to provide legal representation to 2 Rwandan female teenagers that were raped, exploited, and placed in prison.¹¹⁷ Various attempts were made by the teenagers to obtain assistance from local authorities including the police, a magistrate's court, and the Department of Home Affairs. (DHA). However, shortly after the appointment of the attorneys, the teenagers disappeared and were never found. The attorneys from the Centre for Child Law and Lawyers for Human Rights indicated that, had the girls been found, they would have ensured that the State considered the girls' application for asylum. The attorneys advised that the teenagers should immediately have been identified as children in need of care and legal representation should have been made available to them. However, none of the government departments identified the teenagers accordingly, nor was legal representation afforded to them. The imprisonment of the teenagers was in direct contravention of the provisions of the South African Constitution.

In *Centre for Child Law v Minister of Home Affairs* the rights of unaccompanied and separated migrant children, found themselves detained in South Africa. The court ordered that all unaccompanied children found in need of care should be dealt with in accordance with the provisions of the Children's Act. This includes asylum seeker and refugee children and means that these children must be brought before a Children's Court for an inquiry into their circumstances to be conducted when they are found in need of care. Unaccompanied migrant children may no longer be detained at the Lindela Repatriation Centre. The way in which the matters was dealt at the Lindela Centre was unlawful.¹¹⁸

¹¹⁷ Van Der Burg *A Legal protection of undocumented foreign migrant children in South Africa: Reality or myth?* (2016)

¹¹⁸ *Centre for Child Law and others v Minister of Home Affairs and others* 2005 (6) SA50(T)

3.3. CHALLENGES FACED AT DEPARMENTS LEVELS

3.3.1 Challenges within DHA

The DHA usually encounters children at the initial undocumented stage. The Immigration Act was legislated following the tabling of the White Paper on International Migration¹¹⁹ and the Immigration Bill in 2001. An appropriate resolution to control the legal status of foreign children in long term care is required.¹²⁰ Since data does not provide evidence of an influx of foreign children requiring their status to be regularized.¹²¹ Where a child appears to have a refugee claim, it is easily understood that the child should be documented as an asylum seeker at the RRO as stipulated in chapter two. The following case study will demonstrate the challenges that USMC face in the acquisition of documentation.

3.3.2. DHA Case Study

In an article in the Daily Maverick, it was reported that DHA was to open an office in Maitland but DHA cancelled the plans. However, Scalabrini and Lawyers for Human Rights and other NGOs took them to court and the court ruled that DHA must continue with the opening of the RRO in Cape Town.¹²²

The DHA Refugee Reception Office, refused to document an unaccompanied foreign Somali child¹²³ as an asylum seeker in the absence of a parent or a guardian or Children's Court order. This resulted in the conflict between the child protection regime, whereby DHA refuses to assist

¹¹⁹ The South African policy on International Migration is set out in the White Paper on International Migration. Available at <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf> (accessed 1 October 2019).

¹²⁰ Sloth-Nielsen et al, "Foreign children in care in the Western Cape Province" Scalabrini Centre of South Africa (2015), 27-28.

¹²¹ Sloth-Nielsen, Ackermann (2015) 30-31.

¹²² Daily Meverick 2019, *Home Affairs to open Refugee Office in Maitland*. Date 24 January 2019, by Tairo Washinyira.

¹²³ *Abdulaahi and Others v The Director General of Home Affairs and Others 7705/2013*

the unaccompanied child without a Children's Court order, and the social worker refuses to open up a Child Court Inquiry (CCI) as he or she does not feel that the child in question is in need of care and protection.¹²⁴ In light of this dead end, the matter was brought before the court and on 24 May 2011, the court ordered that the child be recognized by the DHA RRO with a Section 22 Asylum Seeker permit,¹²⁵ pending the finalization of the matter.

In South Africa most of the USMC are placed in CYCC instead within a family environment such as foster care or kinship care¹²⁶. This seemed to be due to the challenges that foster parents will encounter to secure birth certificates from DHA. Kinship care as an option seems to be not be available to USMC in South Africa. This could be due to them being without any next of kin in a strange country or if they have a next of kin, the kin might not have legal documentation to assist with kinship care. Nonetheless, kinship care or foster care seemed to be a more durable solution in terms of family care rather than placement in CYCCs as a first option.¹²⁷

3.3.3. Challenges within DSD

3.3.4. DSD Case Study

In the case of *The Aids Law Project v Minister of Social Development, and others*,¹²⁸ it successfully brought an application to have curator ad litem appointed in respect of 56

¹²⁴ Schreier Tal (2011)

¹²⁵ A section 22 permit is valid for six months and makes it legal to stay in South Africa while waiting for the DHA to decide whether it will grant refugee status or not. The permit can be extended every four to six months pending a final decision, and permit holders can move around freely, study and work. The DHA is supposed to decide within six months, but because of lack of resources and corruption, it can take five years or more.

¹²⁶ Assim U (2011) The care of children who have become deprived of parental care by other relatives/family members or family friends is generally described as kinship care.

¹²⁷ Assim U (2015) addressed Kinship Care of Children in Africa in three forms: as (an existing) 'family environment'; as a form of 'supplementary care' (to existing parental care); and as a form of 'alternative care' (in the same manner as foster care and other alternative care options in the care continuum.

¹²⁸ *Aids Law Project v Minister of Social Development* :52895/09 (SGJ)

unaccompanied children who were living at the Central Methodist Church in Johannesburg, to investigate the circumstances, obtain the views of all the parties, including the children, and make recommendations regarding the care arrangements for the children.

The Court held that the respondents' behavior constituted a serious infringement of the children's fundamental rights and that the government's failure to act in the best interests of the children was shameful. This case is demonstrative of the fact that the DSD did nothing to facilitate the children being brought before the court or investigations into the children's circumstances. Research studies suggested that social work services to unaccompanied refugee minors by government social workers were minimal.¹²⁹

3.4. Challenges with Department of Basic Education

In terms of Section 29 (1) of the Bill of Rights, everyone has the right to a basic education, including adult basic education. USMC or any child citizen or non-citizen in South Africa are legally entitled to an education however, many do not gain access to state schools.

In terms of access to education, reports indicate that these children have been denied access to schools or threatened with legal action if they are not able to provide the documentation.¹³⁰

According to Hlatshwayo (2014), migrant children are often turned away from school because they do not have birth certificates and other forms of documentation.¹³¹

¹²⁹ Save the Children UK, 2007

¹³⁰ Sandisiwe Shoba "Topic No papers, no rights: The plight of undocumented foreign children in SA Daily Maverick" 7 August 2019.

¹³¹ Hlatshwayo M 'Violence, resilience and Solidarity: The Right to Education for child migrants in South Africa (2014) Vol 35 (3): 266-279

3.4.1. Education case study

An incident occurred in 2017 at Eastleigh primary School where letters to parent were sent to the parents that their children would be reported to the police if they fail to update their documentation process¹³².

“In 2018 at Phakamisa High school 37 children were excluded due to lack of necessary documentation. The South African Human Rights Commission (SAHRC) intervened as a second amicus to make a submission on the interpretation of the Immigration Act which would allow the right to basic education for undocumented learners. Advocate Ferreira contested the circular 1 of 2019 which gave undocumented learners conditional acceptance to schools within 12-month period to file their documentation, otherwise they will be removed from the school. It seems that there is little cooperation between the DBE and DHA.”¹³³

3.5. Challenges within DOJCD

Oftentimes, Magistrates are not experienced as to the legal and procedural frameworks regarding USMC in South Africa. Furthermore, there may be some bias on the part of the Magistrate. Social workers are tasked to work together with these officials and are equipped to inform Magistrates of the legal entitlements of the child, and make recommendations, particularly to argue strongly for the care and protection of a child.

¹³² Thobekile Zhou “South Africa to kick out undocumented foreign learners” News 24 24 Feb 2017

¹³³ *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2019) (2019) ZAECGHC 126; (2020) 1 ALL SA 711 (EGG); 2020 (3) SA 141 (EGG).

3.5.1. DOJCD Case Study

In the 2004 Khosa case, the Constitutional Court decided that a group of permanent residents are a vulnerable group and that excluding them from social security was not consistent with section 27 (right of access to social assistance)¹³⁴. The Magistrate at the Children's Court¹³⁵ in Mosselbay refused to recognize the rights of an abandoned foreign infant. In this instance, a foreign mother gave birth to a child in a local public hospital and abandoned the child, stating that she was going to go back to Mozambique with her older son. A Children's Court Inquiry (CCI) was opened on the social worker's conclusion that the abandoned child needed care and protection. The court instructed the social worker to track down the South African father. In the absence of confirmatory evidence, the Magistrate failed to acknowledge that the infant was South African. Notwithstanding the advice from the social worker that the mother wanted nothing to do with the child and would abandon the child, the Magistrate refused to find the child in need of care or protection. The infant was handed to the mother and she returned to Mozambique, after which the social worker learned that the mother in fact abandoned the infant shortly after re-entering her country of origin.¹³⁶ In this regard, the Magistrate clearly decided incorrectly that the USMC, abandoned in South Africa, was not entitled to care and protection in South Africa, contrary to the Constitution in section 28, and the recommendation of the social worker assigned to this case.

3.6. Challenges with health care services

¹³⁴ Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) BCLR 569 (CC).

¹³⁵ Working Paper: 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 p23 (accessed on 1 October 2019).

¹³⁶ Working Paper p 24.

South Africa and other states struggle to meet its key health targets which includes UNAIDS targets and the Sustainable Development Goals (SDG).¹³⁷ A study in 2017 on migrants right to health care found that undocumented persons were given access to emergency health services but outside the context of emergency care, hospital administrators routinely required valid documentation for care to be administrated.¹³⁸

3.6.1. Case study on health care

It has been reported that a Somalia refugee gave birth at the reception of one of the big hospitals as the husband was unable to pay for admission fee for the maternity ward. According to Kaajal Ramjathan of Lawyers for Human Rights: “though South Africa has free emergency medical services, but the hospital departments do not regard pregnancy as an emergency case except where there are complications”¹³⁹ Further inequalities pertaining to health care towards refugee children are demonstrated in Durban. It has been reported that care workers were not satisfied with health care services delivery due to the long waiting periods, the negative attitude, and discriminatory behaviors in the public health care facilities.¹⁴⁰ Access to health services is indispensable to the survival of unaccompanied and separated migrant children in South Africa.

¹³⁷ Vearey J et al *Towards a Migration-aware Health System in South Africa: A Strategic opportunity to address health enquiries*

¹³⁸ Alfaro-Velcamp T “Don’t send your sick here to be treated, our own people need it more”: Immigrants’ access to healthcare in South Africa” (2017)

¹³⁹ Ramjathan K *Lawyers for Human Rights in a talk with Refugee Community held in the Constitution Hill Female Prisons* (2005).

¹⁴⁰ Meyer-Weitz A et al *Healthcare service delivery to refugee children from the Democratic Republic of Congo living in Durban, South African: A Care Giver’s Perspective*. Available online at <https://doi.org/10.1186/s12916-018-1153-0> (accessed 3 December 2020).

3.7. Conclusion

A lack of documentation, and thus the inability to access essential services, renders local integration by USMC effectively impossible. Despite the challenges to obtaining documentation, cross-border family reunification is not systematically pursued as a durable solution in such cases. The concerning and very real result are that USMC remain mostly undetected in South Africa, and at high risk of abuse, neglect, and statelessness. This situation is clearly not conducive to economic growth in South Africa and the broader region. Considering these realities, USMC are basically faced with the choice of either leading a life outside the realms of formal societal structures, or eventual return to their country of origin.



CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4. 1. INTRODUCTION

Documentation is essential and forms a significant part of the protection of USMC. This paper has highlighted the documentation process and the obligation of stakeholders in dealing with USMC, as well as the legal challenges that the unaccompanied and separated children face in the South Africa. Based on the case studies the authorities whom the children approached lacked the knowledge and implementation mechanisms.

A consistent theme in this paper has been the lack of enough legal paths and stakeholder's participation for the documentation of USMC. The paper touched on birth registration, age estimation, education, health, and statelessness pertaining to unaccompanied and separated migrant children. True child protection can only be achieved by considering the best interests of the child, regardless of status, thereby giving effect to the "best interest" principle in section 28(2) of the Constitution, as well as in the CRC and the ACRWC.

4.2. SUMMARY OF FINDINGS

The introductory chapter attempted to inform the reader of the plight of USMC and the background of USMC in South Africa. The paper intentionally did not focus too much on the history of migration and the reasons for migration because issues of migration is very broad. Subsequently, it also did not focus on other challenges such as child trafficking, child headed households, sexual abuse, and exploitation and other forms of abuse towards USMC in South Africa. However, this

paper focused on the challenges to access relevant documentation at DHA, to prevent the above-mentioned forms of abuse, including the prevention of childhood statelessness.

Chapter one also covered the literature review that identified numerous authors that wrote on the various challenge that USMC experience in South Africa. For instance, Bhabha touched on international, national, and domestic law and how it is applicable to child migration. Further discussions in the paper covers USMC placed in alternative care because they did not have relevant documentation. This is also largely due to the role that social services played, in that 700 children from Zimbabwe were placed in drop-off center's owing to lack of relevant documentation. NGOs involvement such as Scalabrini are more explicit on the challenges in terms of relevant documentation for USMC in South Africa. All these focus on the legal rights, the challenges, and the socio- economic rights of the USMC. It stresses on the history and the reasons why the children migrate on their own.

Chapter two focused on the definition of the USMC as well as the international and regional treaties. It includes the legislative frameworks in terms of access to socio-economic rights and the documentation required to access those rights, including education. Chapter two also looked at the South African laws applicable to USMC, highlighting challenges with the system.

Chapter three focused on the issues of nationality, birth registration, age assessment and how it ties into the role and participation of each stakeholder in South Africa. The challenges that USMC experienced with stakeholders are unpacked and deliberated upon. The chapter uses case studies to reiterate the documentation challenges facing USMC in vis-a-vis relevant stakeholders. The chapter also deliberated on the role and obligations of the state parties in South Africa.

4.3. RECOMMENDATIONS

Overall, the child protection services need to be strengthened. It is important to have a collaborative approach with communities and families to address root causes of unsafe and irregular migration. The principle of the CRC in terms of child participation is crucial to hear the voice of the child. There should be more research on undocumented and separated migrant children and to document them to prevent child abuse, child trafficking, exploitation and children engaging in harmful work. In addition, more effective protection programs need to be implemented at schools and other spaces, including government institutions and by NGOs; and should be propagated via the media.

The Justice system must build-up capacity in South Africa to make the care and protection system work effectively to care for the children who would be truly in danger if returned to their home countries. In terms of the jurisprudence, countries must harmonize their laws relating to children by starting a comprehensive and consultative review of existing legislation. This process should be open, inclusive, and participatory. Capacity building is needed for all role players and stakeholders, government, parliamentarians, police, and judiciary officials. Cases and issues should be interpreted in the light of provisions of the CRC and The African Children's Charter. There should be an institutionalized monitoring mechanism established by law to ensure implementation.

This would require that Refugee Status Determination Officers be adequately trained in determining the refugee status of unaccompanied children. The Refugees Act and its Regulations

should clearly set out the procedure for referring unaccompanied or separated migrant children to the DHA or DSD. The referral system should invariably include a mechanism that promotes synergy between section 32(2) of the Refugees Act and the chapter 9 of the Children's Act. Section 32 of the Refugee's Act provides for the referral of unaccompanied refugee children to the Children's Court through the Children's Act. The Children's Act needs to reflect this provision by empowering the magistrate with the powers to make such an order.

It is paramount to provide information to the officials at the border posts about the services, and to establish a procedure for identifying USMC at the border and ensure that they are systematically referred to the nearest DSD office. Specialized trainings for legal representatives, guardians, interpreters, and others dealing with USMC are also recommended.

The Minister and the MEC for Social Development should ensure the provision of adequate funding to establish enough numbers of child and youth care centers in South Africa. Training for social workers on the documentation options available to USMC, particularly those who risk becoming stateless should be prioritized. In addition, it is recommended that priority be given in budget allocations to the realization of the socio-economic rights of refugee children, particularly USMC. Also, only children who may have asylum claims should be documented as asylum seekers.

On education, stakeholders need to engage more actively in addressing the concern of when USMC are not allowed to enroll in schools. Also, provide informal schooling and vocational training at

the shelters to ensure that the educational and therapeutic needs of minors are being met when formal schooling is either not appropriate or not available.

The DHA must stop the practice of denying entry to asylum seekers at the border, which forces them to cross the border informally and increases the likelihood of abuse. It is also recommended that DHA provide a clear directive on the application of Section 2 (2) and Section 4 (3) of the Citizenship Act as amended, to enable access to citizenship to reduce statelessness. Make sure that all staff at the refugee reception office are aware of their obligation to contact DSD if a USMC approaches the office. Develop mechanisms to document USMC who do not qualify for asylum. DHA must provide a special permit under Section 31 (2) (b) of the Immigration Act especially to those with whom family tracing avenues have been exhausted.

In conclusion, addressing the concerns of USMC, especially with regards to their access to socio-economic rights, it is important for all stakeholders involved with USMC to work together in a coordinated manner, and with the best interest of the child as the guiding principle.

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