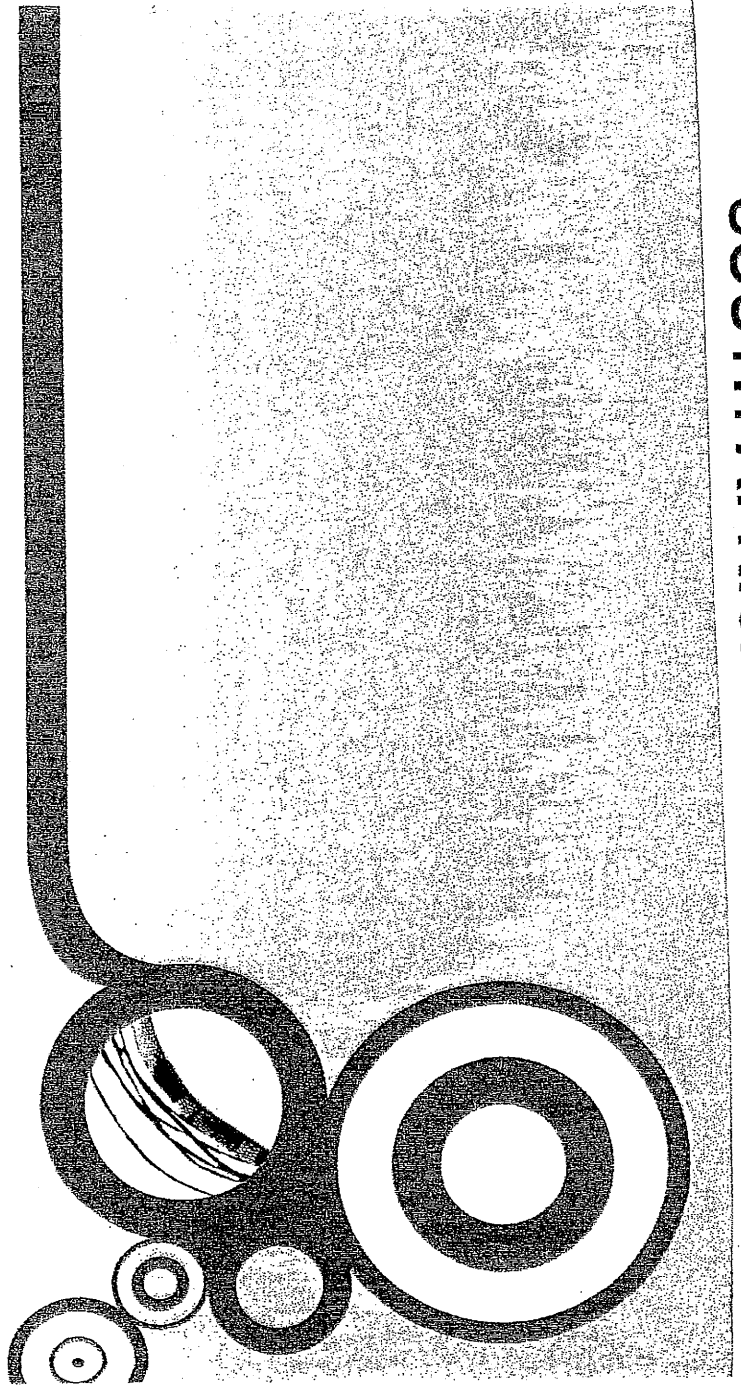
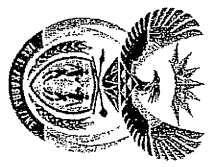


**GUIDELINES ON SEPARATED
AND UNACCOMPANIED
CHILDREN OUTSIDE THEIR
COUNTRY OF ORIGIN IN
SOUTH AFRICA**



social development



Department
Social Development
REPUBLIC OF SOUTH AFRICA

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Guidelines: Services for separated and unaccompanied children outside their country of origin in South Africa

1. Introduction

Throughout Southern Africa, thousands of children migrate through irregular channels every year. Children often leave their homes as a survival strategy after the death of a caregiver from HIV and Aids, or as a result of alarming levels of poverty, vulnerability or political instability and conflict. To seek asylum, children often migrate alone or with a caregiver in search of a better life, to find relatives, look for work and go to school.

Throughout their journey and upon arrival at their destination children are extremely vulnerable and many become subject to abuse and exploitation including exploitative forms of labour and commercial sex work. In addition, undocumented children who migrate to other countries are often simply deported and not provided with the protection, services and care to which they are entitled. There is a dire need to have guidelines for services for separated and unaccompanied children to ensure that the region's children who cross borders are able to realise their rights to food, shelter, education, health and psychosocial support, and are not exploited or abused.

2. Background

These Guidelines were developed in recognition of the increasing number and vulnerability of separated and unaccompanied foreign children in South Africa. The reasons these separated and unaccompanied children are outside of their country of origin without caregivers are diverse; they seem to be mainly fleeing persecution or conflict, are victims of trafficking, or are in search of economic opportunities or schooling. Moreover, these unaccompanied and separated children often face discrimination and difficulty in accessing basic services, and are at high risk of violence, exploitation and abuse. Presently, social welfare services are facing enormous challenges in ensuring their care and protection.

These Guidelines are to assist staff of the Department of Social Development in fulfilling their obligations with regards to separated and unaccompanied foreign children in South Africa. It is drafted with particular reference to the Convention for the Rights of the Child, the Children's Act, Act 38 of 2005 as amended and the UN guidelines for the treatment of unaccompanied and separated children outside their country of origin (General Comment No 6 of 2005).

3. Definitions

Child means a person under the age of 18 years.

Country of origin is the country of nationality of the child.

Separated children are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

Unaccompanied children (also called unaccompanied minors) are children who 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 so¹.

Principle of non-refoulement means States shall not return a child to a country where there are substantial grounds for believing that there is real risk of irreparable harm to the child.

4. International Standards

State obligations under the UN Convention on the Rights of the Child (UNCRC) apply to each child within the State's territory and to all children subject to its jurisdiction². The enjoyment of rights stipulated in the UNCRC must therefore also be available to all children – including asylum seeking refugee and migrant children – irrespective of their nationality, immigration status or Statelessness. As such, the same principles as enshrined in the UNCRC would apply to separated or unaccompanied children outside of their country of origin. These include:

- The principle of non-discrimination, which prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.
- The best interests of the child as a primary consideration in the search for short and long term solutions. A best interest determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.
- The right to life, survival and development. The obligation of the State party includes protection from violence and exploitation, which would jeopardize a child's right to life, survival and development.
- The right of the child to express his or her own views freely. In determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account.
- Respect for the principle of non-refoulement. States must fully respect non-refoulement obligations deriving from international human rights, humanitarian and

¹ *Inter-agency Guiding Principles on unaccompanied and separated children* (International Committee of the Red Cross, 2004)

² Committee on the Rights of the Child. *General Comment No. 6: Unaccompanied and Separated Children outside of their Country of Origin*. (CRC/GC/2005/6)

refugee law shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child

- Confidentiality. States parties must protect the confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child's rights, including the right to privacy.

5. Legal frameworks

The following are the legal frameworks that must be considered when assisting separated and unaccompanied children:

5.1 International Law

These guidelines endorse the ethical principles as given in:

- United Nations Convention on the Rights of the Child
- Hague Convention on The Protection of Children and Co-operation in respect of Inter-country Adoption
- African Charter on the Rights of the Child
- Hague Convention on the Civil Aspects of International Child Abduction
- United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime

5.2 National Law

- The Constitution of the Republic of South Africa Act, 1996 (Act No. 108 of 1996)
The South African Constitution offers guarantees to “all who live in it”, and Article 28 of the Bill of Rights has been explicitly interpreted by the Constitutional court to guarantee the rights of foreign children irrespective of their legal status in the country.
- Children’s Act, 2005 (Act No. 38 of 2005) and the Children’s Amendment Act, 2007
This Act provides for the protection of children and enables statutory intervention by the Children’s Court if appropriate.
Subject to assessment, separated and unaccompanied foreign children may be considered “children in need of care and protection” in terms of the Children’s Act (2005 as Amended), and the protective measures of Chapter 9 must be applied.
- Immigration Act, 2002 (Act No 13 of 2002)
This Act provides for the regulation of admission of persons to, their residence in and their departure from South Africa and for matters connected therewith.

- Refugees Act, 1998 (Act 130 of 1998)
The Refugees Act gives effect to relevant international instruments, sets principles and standards relating to refugees and provides for the reception of asylum seekers into South Africa. It regulates the applications for and recognition of refugee status, provides for the rights and obligations flowing from such status, as well as matters connected therewith.

6. Steps to follow when assisting separated and unaccompanied foreign children in South Africa

The following steps need to be followed in respect of separated and/or unaccompanied foreign children who find themselves in South Africa.

6.1. Identification

Identification of an unaccompanied or separated child can be done by anyone: The police, immigration officials, social workers, NGOs or community members. All role players potentially in contact with unaccompanied children should be briefed on the procedure to be followed.

Children who are identified as separated or unaccompanied should be referred to a social worker or police official. Unaccompanied children should be assumed to be children “in need of care and protection” and may be placed in temporary safe care. If the current care circumstances of separated children do not put them in immediate risk, separated children may be assessed by a social worker without being placed in temporary safe care. However, if the separated child appears to be a victim of an exploitative or abusive relationship, he or she should be immediately placed in temporary safe care.

Due to their particular circumstances, in some cases separated and unaccompanied children may be fearful or distrustful of authorities. This makes them extremely hard to reach by the police or social workers. Some NGOs or community based organisations have specialised in working in the milieu of street or migrant children and may have developed effective approaches to gaining their confidence. Consideration should be made to partnering with such organisations.

6.2. Assessment and documentation

The local provincial Department of Social Development will be notified of each case, at latest by the end of the next business day. The Department will in turn assign a social worker who will accompany the child through every step of the process. Each child will be assessed by a social worker within 72 hours upon receiving notification. If indeed the child is considered to be “in need of care and protection”, the social worker may complete a Form 36 (Authority for removal of child to temporary safe care) should the child require immediate emergency protection. A true copy of this authority must be given to the parent/guardian/care giver who can readily be traced within 24 hours, to the relevant clerk of the children’s court by not later than the next court day, and closest

office of the relevant provincial Department of Social Development within 24 hours. The child protection procedures provided for in the Children's Act, Act 38 of 2005 as amended and its regulations as well as the applicable forms apply when dealing with separated and unaccompanied foreign children when they are in South Africa. Section 48(2) provides that the children's court may for the purposes of the Children's Act estimate the age of a person who appears to be a child.

The child should be immediately registered and documented. This process should be conducted in an age-appropriate and gender sensitive manner, in a language the child understands, by professionally qualified persons. Assessment and documentation should include the compilation of key personal data and further information in order to meet the specific needs of the child and to make plans for his or her future. This information includes the identity and location of family members, the reasons for being separated or unaccompanied, and an assessment of particular vulnerabilities and protection needs.

6.3. Temporary safe care

The following services must be made available to the child while in temporary safe care:

- The process of family tracing and restoration of family links should be initiated without delay.
- Children should have full access to education, and be registered with appropriate school authorities and get assistance in maximizing learning opportunities.
- Children should be provided with their own personal identifying documents as soon as possible. However, the possession of identifying documents should not be a prerequisite for access to services. Children outside of their country of origin should have the same access to health care as children who are nationals.
- Many children will have suffered trauma due to separation from parents, and others will have suffered violence and abuse, will be HIV infected, or have other special needs. These children should be provided with psychosocial care and be referred to other service providers.
- If the child appears to qualify for refugee status, a social worker must assist the child in applying for asylum. However, children should not be referred into asylum procedures if their presence does not raise question of international refugee protection needs.

The length of stay in temporary safe care should not exceed 90 days.

6.4. Formal placement and options for durable solutions

Before the child is brought to the Children's Court, the designated social worker must investigate the child's situation and compile an assessment report within 90 days. The social worker must report the measures recommended in view of a formal placement or durable solution for the child (permanency plan), taking into full account the right of the child to express his or her views.

Some of the options to be considered are as follows:

6.4.1 Family reunification in country of origin.

An analysis of the possibility of family reunification is the first step in searching for a durable solution. If it is in the child's best interest to be reunified with his or her family in her country of origin and there whereabouts are known, the case should be referred to the provincial focal point for International Social Services. Family tracing and verification and reunification would then be managed through the relevant social welfare department in the country of origin, or in collaboration with existing international networks which may assist in this process, such as International Social Services, the Red Cross/Red Crescent societies, or the International Organisation for Migration.. Family reunification should not be pursued if there is a risk that the child would be subject to abuses or violations upon return. The relevant social welfare department in the country of origin is responsible to ensure follow up with the child and the family.

6.4.2 Placement into formal care in country of origin.

In the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should not take place without advance secure and concrete arrangements for care and custodial responsibilities in the country of origin. Safety, security and socio-economic conditions in the country of origin should be considered, as well as the principle of non-refoulement. The child should not be returned unless it is in his or her best interests. Article 10 of the UN Convention on the Rights of the Child guarantees a child's right, whether accompanied or unaccompanied, to apply for protection as a refugee. Article 22 of the same Convention guarantees the right of refugee children or children seeking refugee status, to special protection requiring that the state co-operate with competent organizations which provide such protection and assistance. A refugee should not be deported to a dangerous situation (one which causes a well-founded fear of persecution or one that seriously disrupts public order). Through signing or ratifying certain international agreements South Africa has undertaken to offer a safe place of protection to refugees and not to deport or send refugees back to their country of origin. Asylum seeker or refugee status of a child will therefore complicate hope of returning the child to his/her country of origin in the near future and arrangements must be made for appropriate care in South Africa.

6.4.3 Placement with family member in South Africa

If a child wishes to be placed in the care of a family member in South Africa, the local social worker must establish the validity of relationships and confirm the willingness of the child and the family member to be reunited. This may require collaboration with and between provincial departments. The local social worker is responsible to ensure regular follow up with the child and the family. In this case, a formal foster care order could be issued by the Court.

6.4.4 Alternative care. Should family reunification not be feasible, a Children's Court will make an alternative care order. The following alternative care options may be considered:

- (a) Placement with a foster family.
 - (b) Placement in community based cluster foster care.
 - (c) Supervised independent living, in the case of older children.
 - (d) Placement in a Child and Youth Care Centre, if no other option is available.
- The child's alternative care placement should ensure links are maintained with the child's community of origin. Wherever possible, the foster family should be from the same community as the child. The Children's Court order is valid for two years. The status of all children in alternative care must be monitored.

7. Service Standards

The following are the service standards that must be adhered to:

- There will be no discrimination in terms of access to social services and protective measures between a foreign and South African child.
- All unaccompanied children will have immediate access to temporary safe care facilities.
- A social worker (after having receiving the notification) will investigate the matter within 72 hours, conduct a full assessment.
- All unaccompanied children in need of care and protection will be subject to a Warrant to Remove and Place Child in Place of Safety and a Medical Report/Age Assessment.
- Family tracing procedures will begin upon intake of the child without delay.
- All children who cannot be immediately reunited with their families or communities of origin will appear before a Children's Court within 90 days of intake.
- Alternative care arrangements will promote and respect links with the child's community of origin.

8. Conclusion

Separated and unaccompanied children outside of their country of origin are very vulnerable whilst they find themselves in South Africa as a host country. They do not have the protection of their parent/s or guardian/s and therefore need urgent intervention from social workers and other stakeholders to meet their basic needs. These children should always be seen as children first and should be offered the same protection measures available to South African children.

The range and complexity of situations in which children become separated, and the diverse needs of children, however means that no single organization or government department can hope to address the situation alone. The action to assist separated and unaccompanied children that are outside their country of origin requires a long term commitment, often lasting years, by the stakeholders involved, but intervention will most certainly be required in the host country to secure the well being of this very vulnerable group of children.
