

IOM Training: Department of Social Development

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Legal Framework and Standard Operating Procedures
pertaining to the treatment of Unaccompanied Foreign
Children in South Africa

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Introduction

- All children in South Africa have rights because they are children, regardless of origin and nationality
- Unaccompanied foreign children are the legal responsibility of government of South Africa
- Refugee children have special protection requirements; they have rights as children & rights as refugees
- If unaccompanied foreign children do not qualify for refugee status, government still has legal duty to protect them
- There is still uncertainty and insufficient information about legal and procedural position of refugee and unaccompanied foreign children, due to gaps in legislation and unclear procedures concerning their treatment

Key Definitions

- **Accompanied Child:** A child who is in the company of one or both parents or another family member of whom he or she is dependant.
- **Unaccompanied Child:** A child who has been separated from both parents and other relatives and is not being cared for by a guardian or other adult who, by law or custom, is responsible for the child.
- **Separated Child:** A child that is separated from both parents, or from his or her previous legal or customary primary care-giver, but not necessarily from other relatives. Such a child may be accompanied by other adult family members.

Key Definitions II

- **Refugee:** A person who flees his/her own country because of
 - (i) A well-founded fear of PERSECUTION due to Race, Religion, Nationality, Membership in a Particular Social Group or Political Opinion, **OR** (ii) CIVIL UNREST or WAR
 - A Refugee cannot return home because the persecution OR unrest continues and because State is unable or unwilling to protect him/her
 - In South Africa, a Refugee is a person who has been granted asylum by Department of Home Affairs in terms of the Refugees Act 130 of 1998
- **Asylum Seeker:** A person who has applied to be recognized as a refugee in South Africa; case pending a decision by DHA; legally permitted to stay, work and access basic services in SA until finalization of asylum application
- **Non-refoulement:** The fundamental principle that prohibits States from forcibly returning a Refugee to a country where he or she may suffer persecution, torture, or face a risk to life because of war or civil unrest.

The Legal Framework

■ Constitution of the Republic of South Africa

- Bill of Rights applies to *everyone* without discrimination; guarantees the rights of all children irrespective of their legal status and origin
- **Section 28(1)(b)**: “*every child* has the right to family care/parental care, or to appropriate alternative care when removed from family environment”
- **Section 28(1)(c)**: “*every child* has the right to basic nutrition, shelter, basic health care services and social services”
- **Section 28(1)(d)**: “*every child* has the right to be protected from maltreatment, neglect, abuse or degradation”
- **Section 28(2)**: “a child’s best interests are of paramount importance in every matter concerning the child”

The Legal Framework II

- Children's Act 38 of 2005
 - Provides protection to *all children* in South Africa, irrespective of origin, status or nationality
 - Children's court inquiry should be opened for an accompanied, separated OR unaccompanied foreign child in the same manner as for a South African child, if a social worker's assessment indicates that the child is "in need of care and protection"
 - Problem: Absence of explicit section affirming the non-discriminatory application of the provisions of the Act leaves door open for restrictive and exclusionary interpretations, particularly in relation to foreign children, whether accompanied or unaccompanied

The Legal Framework III

- Refugees Amendment Act 33 of 2008

- [Inserted section 21A into the Refugees Act 130 of 1998]

Unaccompanied Child

(1) Any unaccompanied child who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care contemplated in the Children's Act, 2005 (Act No. 38 of 2005), must—

(a) be issued with an asylum seeker permit in terms of section 22; and

(b) in the prescribed manner, be brought before the Children's Court in the district in which he or she was found, to be dealt with in terms of the Children's Act, 2005

Centre for Child Law case (2005)

- Precedent setting High Court judgment, confirming the rights of unaccompanied foreign children in SA
- The Court HELD:
 - A crisis existed in the handling of unaccompanied foreign children in RSA; such children were treated in a horrifying manner; exacerbated by an insufficiency of resources, inadequate administrative systems and procedural oversights
 - All unaccompanied foreign children found in need of care should be dealt with in accordance with the provisions of the Act; includes asylum seeker and refugee children and means that these children must be brought before a Children's Court for an inquiry

Centre for Child Law case (2005) II

- The Court HELD (continued):
 - There is an ACTIVE DUTY on government to provide unaccompanied foreign children with the rights & protection in S28 of Bill of Rights
 - South Africa has a DIRECT DUTY to meet the socio-economic needs of all children, including unaccompanied foreign children, asylum seeker and refugee children, who lacked family care
 - All unaccompanied foreign children who are in South Africa and who are undocumented must have legal representation appointed to them
 - There was a POSITIVE DUTY on government departments to jointly formulate and implement practical arrangements regarding foreign unaccompanied children

Refugee Process and Documentation

- Asylum Seeker lodges asylum application at a Department of Home Affairs' Refugee Reception Office
 - Section 22 Asylum Seeker permit
 - Right to work and study until application finalized
- Asylum Seeker gets interviewed by Refugee Status Determination Officer
 - Refugee Status is rejected OR granted
 - If granted, Section 24 Refugee Status Permit; right to apply for ID and travel document and Perm Residence after 5 years
 - If rejected, right to appeal to Refugee Appeal Board or Standing Committee for Refugee Affairs
 - Application should take 180 days to finalize but *systemic delays at DHA major obstacle*

Refugee Process for Children

- Refugee status for a child is assessed on same grounds as an adult; same refugee definition applies
- If *Accompanied* Child, asylum application is normally included in the application of the parent, relative, or legal guardian
 - In some cases, may be advisable for child to make independent application, as child's claim may have stronger merits
- If *Unaccompanied* Child, asylum application process must be child-friendly; acknowledge difficulties in determining refugee status i.e. in applying criteria of well-founded fear, as child may not be able to express his/her fear,
 - Legal representation or guardian necessary to ensure the interests of a child applicant are fully safeguarded throughout

Refugee Process for Children II

- What if an Unaccompanied Refugee Child's application for asylum is rejected?
- The best interest of an Unaccompanied Foreign Child 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

(UNHCR Guidelines on the Protection and Care of Refugee Children)

Unaccompanied Foreign Children

Main Concerns

- **Who are they and how do they end up in South Africa?**
 - Displacement due to war or civil unrest and separation from family or guardians in home country or during flight
 - Arrive on their own as asylum seekers, job seekers, AIDS orphans
 - Victims of smuggling or trafficking
 - Sent to South Africa by family who fear for well-being of child in country of origin
 - Sent to South Africa by family searching for better opportunities for their children i.e. education
 - May become abandoned, orphaned or separated from their parents or guardians while in South Africa

Unaccompanied Foreign Children

Main Concerns II

■ **Difficulty in Identification**

- For Ex, if child appears at a service provider's office unaccompanied but says it is living with a relative who may be at work OR if the relationship between the child's caregiver and child is not clear
- Thorough investigation needs to take place; DSD best suited for this and Children's Court to make final determination
- Importance of Identification: early intervention so that child is placed in safe environment; also quicker family reunification if child was forcibly separated from his family in country of origin
- Determination of whether child appears to have refugee claim is critical, in order to properly document the child and/or determine if there is even a possibility of family reunification

Unaccompanied Foreign Children

Main Concerns III

■ Tracing & Family Reunification

- Tracing is the process of searching for family members or primary legal or customary care-givers, with family reunification as the objective
- Based on principle of Family Unity (or Integrity of the Family) i.e. that all children have a right to family and that families have a right to care for their children
- Unaccompanied or Separated Children must be provided with services aimed at reuniting them with their families
- Tracing should be carried out at the earliest possible time
 - Even if reunification not possible immediately (i.e. if child is a refugee), tracing is important for restoring family links

Unaccompanied Foreign Children

Main Concerns IV

■ Tracing & Family Reunification II

- “Best interests assessment”
 - Where tracing is successful an assessment should verify that family reunification is in the best interests of the child
 - If there are serious concerns, it may be necessary to involve the appropriate local authorities, existing welfare systems, other agencies and local communities for any further action or if support is required (comprehensive approach)
- If family reunification within a reasonable period of time not possible, long-term solutions need to be found for the child in South Africa
- Return of an unaccompanied foreign child (not a refugee) to country of origin can only occur only after Children’s Court Inquiry, in which child was legally represented, which confirms that a government organ or NGO in the country of origin is willing to receive the child and provide it with the necessary support once there

Unaccompanied Foreign Children

Main Concerns V

- Long term planning in South Africa
 - Foreign children are eligible for foster care placement or institutional care in South Africa
 - *Bishogo v. Minister of Social Development (2005)*
 - For children who cannot be reunited in country of origin, important to promote community-based care that builds on local culture and provides continuity in learning, socialization & development
 - If foster-care arrangements in local community not possible, efforts should be made to keep child in touch with culture
 - Support can be provided by local refugee service providers such as the Cape Town Refugee Centre

Unaccompanied Foreign Children

Main Concerns VI

- Long-term planning in South Africa II
 - Any long-term solution must be planned to serve the child's best interests
 - Documentation by DHA (if not through the Refugee process) must be vigorously pursued - GAP exists in this regard
 - Adoption of refugee or foreign unaccompanied child only when no other solution feasible
- Other Concerns
 - Language limitations
 - Cultural barriers
 - Interpreters & Interviewers
 - Age verification
 - Possible Trauma

Standard Operating Procedures For Dealing With Unaccompanied Foreign Children (2008)

- Developed by UCT Refugee Rights Project in 2007 - 2008
- In consultation with relevant stakeholders including:
 - UNHCR, DSD, ISS, Red Cross, DHA, DoJCD and partner NGOs
 - several meetings to identify protection gaps and determine mechanisms for enhancing protection of refugee and unaccompanied foreign children
- Trained 150+ social workers from Western Cape DSD offices and service rendering partners

Standard Operating Procedures II

■ Key Principles

- Any person or entity can help identify and refer an unaccompanied foreign child to the DSD or Police
- Unaccompanied foreign children should be *assumed* to be in need of care and protection
- Legal obligation to treat all foreign children in the same manner as South African children *if they are at risk*
 - Open Children's Court Inquiry for every foreign child who appears to be in need of care and protection as contemplated in the Act
- Begin Tracing or Family Reunification endeavours as soon as possible
- Ensure legal representation for the child in the CCI and if child appears to have a refugee claim, also at DHA Refugee Process

Standard Operating Procedures

Roleplayers

■ Department of Home Affairs

- Role in identifying Unaccompanied Foreign Child at Refugee Reception Offices and Ports of Entry
- Role in documenting Unaccompanied Foreign Child if child appears to have refugee claim
- Should assist in documenting Unaccompanied Foreign Child if child not a refugee and no possible reunification for child exists i.e. where long-term planning necessary in South Africa

■ Department of Social Development

- Opening CCI for every Unaccompanied Foreign Child who appears to be in need of care and protection
- Assessing the care circumstances of separated children
- Following through with all necessary investigations i.e. family tracing and possible reunification for unaccompanied foreign child

Standard Operating Procedures

Roleplayers II

- South African Red Cross Society
 - The ICRC and national Red Cross societies have mandate to trace across international borders
- International Social Services (ISS)
 - International, non-governmental organization with a global network of social workers available to help with inter-country cooperation
- UNHCR (The UN Refugee Agency)
 - May assist in Family Reunification if unaccompanied child is “of concern” and parent(s) in a refugee camp in a third country
- IOM (International Organization for Migration)
 - May assist in Family Reunification
- UCT Refugee Rights Project
 - Can open CCI, provide court with legal opinion (if child appears to have refugee claim), represent child at DHA Refugee Process
- Cape Town Refugee Centre
 - Psycho-social and cultural needs