



UNIVERSITY OF CAPE TOWN

7 July 2011

UCT LAW CLINIC

Attention: Ms. Lindlie Kgasi, Chief Director Refugee Affairs

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In reply please quote reference

Dear Madam:

At the external stakeholders' meeting in Cape Town of 4 July 2011 to discuss the development of Refugee Regulations that will serve to operationalize the Refugees Amendment Act of 2008 and the Refugees Amendment Bill of 2010, you requested that civil society provide input into the Department of Home Affairs' (DHA) procedures for dealing with unaccompanied foreign children. More specifically you advised that DHA was seeking input as to how to define an unaccompanied foreign child, whether there are categories of unaccompanied children, and what would a proper referral system entail between DHA and the Department of Social Development (DSD) once an unaccompanied foreign child was identified.

Thank you for the opportunity provided for the UCT Refugee Rights Project to make the following submissions. Please find below our suggestions, including some critical points for consideration.

Existing Legal Framework pertaining to Unaccompanied Foreign Children

The legal framework that currently applies to unaccompanied foreign children in South Africa is found in the Constitution Act 108 of 1996, the Children's Act 38 of 2005 and Section 14 of the Refugees Amendment Act 33 of 2008, which inserted section 21A into the Refugees Act 130 of 1998 as follows: :

21 A. (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

While the Constitution sets out the guiding principles in terms of children's rights in South Africa (in particular section 28), the Children's Act provides for the specific

procedures to be followed when any child, including a foreign unaccompanied child, is in need of care and protection in the Republic. This process includes having a social worker assess the circumstances of a child who appears to be in need of care and determine the need to open a Children's Court Inquiry for the child.

It is vital for the DHA to ensure that the Refugee Regulations that will be developed clearly delineate the role of the DHA, DSD and the Children's Court, when dealing with unaccompanied foreign children in order to ensure that such children are properly dealt with and not left unattended, with lack of access to the services that they require and possibly at risk of being exploited or detained.

Defining and Identifying an Unaccompanied Foreign Child

Generally speaking, an unaccompanied child refers to a child who is separated from his or her parents or caregivers and who is often not aware of the parents' or caregivers' whereabouts. An unaccompanied *foreign* child would refer to such a child who is not native to a given country i.e. who was born outside of South Africa.

According to the UNHCR, "an unaccompanied child is a person who is under the age of eighteen years who is separated from both parents and is not being cared for by an adult who by law or custom has the responsibility to do so."¹ The UCT Refugee Rights Project recommends this as a working definition for the Refugee Regulations of an unaccompanied foreign child.

It is important for DHA to note, however, the difference between an unaccompanied foreign child and a separated child. A separated child is a child that is separated from either parents or his or her legal/customary primary caregivers, *but may be accompanied* by other adult family members.² It should also be noted that some children become separated after entry into South Africa, for example because of a breakdown of family situation, departure of caregiver etc. Lastly, children may give false information to different officials due to misunderstandings or because they feel under duress or simply because they do not know the requested information.

¹ U.N. High Commissioner for Refugees: Note on Policies and Procedures in dealing With Unaccompanied Children Seeking Asylum, Geneva, July 1996, p. 2.

² Statement of Good Practice, Revised 4th Edition, Separated Children in Europe Programme, 2009 accessed on 6 July 2011 at <http://www.unhcr.org/refworld/pdfid/415450694.pdf>, p. 2

In light of the above, it is crucial that DHA puts into place mechanisms to be able to properly identify separated children. So that where an adult accompanies a child, it will be necessary to establish the nature of the relationship between the child and the adult in order to establish whether or not the adult is in fact the child's primary caregiver. There is otherwise the risk that a trafficked child may be documented as a dependant of an asylum applicant, when in fact there is no genuine relationship between the child and the adult.

The mechanisms referred to above should entail specially trained officials at each Refugee Reception Office, who are aware of these types of issues. Such officials would play an integral role in identifying unaccompanied foreign children, as well as children who are potentially trafficked by attempting to ensure that the true nature of a relationship between a child and the principal asylum applicant is confirmed, wherever children are involved. Where necessary, the official can refer the child to DSD appropriately so that a Children's Court Inquiry can be opened.

Referral System between DHA and DSD

The Refugee Regulations should clearly set out the procedure for referring unaccompanied foreign children by the DHA to the DSD. The referral system should invariably include a mechanism for the recording by DHA of each child referred, which should include: (i) a statement confirming the circumstances under which the child was found, (ii) the name of the DSD official to whom the child was referred, and (iii) the name of the DHA official who made the referral.

The referral to the DSD must be done forthwith, without delay, and the Regulations should specifically state that a Children's Court Inquiry, as contemplated in the Children's Act, should be opened for the unaccompanied child.

The UCT Refugee Rights Project calls attention to the fact that it is the chief responsibility of the Children's Court, rather than the DSD social worker alone, to make the necessary determination of whether a child is unaccompanied and in need of care and protection. The UCT Refugee Rights Project also believes that the Court should decide, with the assistance of a legal opinion by an expert refugee lawyer, whether the child appears to have a refugee claim. If such is the case, then the

Court can or should order that the child be documented as an asylum seeker and then the envisaged status determination sub-committee duly responsible will conduct the status determination hearing.

With the above in mind, it would be advisable that DHA ensure that each Status Determination Committee have a sub-committee that has specific expertise in determining the refugee status of an unaccompanied child. A child applicant should, in any event, also have its own legal representative (as appointed by the Children's Court) who would ensure that the status determination process is child appropriate.

Suggested Regulation

The below excerpt of DHA's **DRAFT Refugees Regulations 2011** (not circulated at the 4 July 2011 meeting but obtained by UCT from a partner organization in Gauteng) outlines an initial proposed procedure by DHA for the handling of unaccompanied foreign children.

5. (1) *An official who has reason believe that any child is an unaccompanied child contemplated in section 21A(1) of the Act, must—*
 - (a) *in writing, immediately confirm the circumstances under which the child was found;*
 - (b) *request, in writing, the Department of Social Development to—*
 - (i) *investigate and provide a report within 14 days on the circumstances of the child in relation seeking asylum;*
 - (ii) *deal with child in accordance with the provisions of the Children's Act, 2005 (Act No. 38 of 2005);*
 - (c) *record the name of the official of the Department of Social Development who receives the child, in the register contemplated in subregulation (4).*
- (2) *Upon receipt of a report contemplated in sub-regulation (1)(b)(i) that confirms that the child is unaccompanied, the Status Determination Committee—*
 - (a) *must determine whether the child is an asylum seeker;*
 - (b) *must issue the child with an asylum seeker permit; and*
 - (c) *inform the Department of Social Development that the child must be brought to the nearest Refugee Reception Office on the date specified in the asylum seeker permit, in order to conduct a hearing or extend the asylum seeker permit.*

....
(4) *The Status Determination Committee must keep a register of unaccompanied children who were referred to the Department of Social Development...*

The main concerns that the UCT Refugee Rights Project has with the above draft regulation is that it does not refer to the Children's Court and erroneously places emphasis on a Social Worker's report rather than an order of the Children's Court. Furthermore, the investigations that a social worker must undertake in determining whether a child is in need of care and unaccompanied would normally take longer than 14 days. That time period, as mentioned in draft sub regulation 5(1)(b)(i) above

is too short in many cases to conduct the necessary investigations. The UCT Refugee Rights Project does commend the DHA for suggesting a mechanism to record each unaccompanied foreign child identified at its Refugee Reception Offices.

In light of the above-noted concerns, the UCT Refugee Rights Project would like to suggest that the DHA incorporate the following regulation pertaining to unaccompanied foreign children:


- X. (1) An official who has reason to believe that any child is an unaccompanied child as contemplated in Section 21A(1) of the Act must –**
- (a) in writing, immediately confirm the circumstances under which the child was found;**
 - (b) refer, in writing, the child to the Department of Social Development to open a Children's Court Inquiry for the child in terms of the provisions of the Children's Act 38 of 2005; and**
 - (c) record the name of the official of the Department of Social Development who receives the child and his or her own name in the register contemplated in sub regulation (x).**
- (2) If the Children's Court determines that the child appears to qualify for refugee status, the Court may order that the child be assisted in applying for asylum in terms of this Act.**
- (3) Upon receipt of the Children's Court order, the Status Determination Committee must**
- (a) issue the child with an asylum seeker permit; and**
 - (b) inform the Department of Social Development that the child must be brought to the nearest Refugee Reception Office on the date specified in the asylum seeker permit in order to conduct a hearing or extend the asylum seeker permit.**
- (4) If the child's asylum application is rejected, the child must forthwith be referred back to the Children's Court, who may order that the child be documented alternatively.**
- (5) The Status Determination Committee must keep a register of unaccompanied children who were referred to the Department of Social Development.**

The above recommendations will ensure that a necessary Children's Court Inquiry will be opened for **every** unaccompanied foreign child that is referred to the DSD by DHA. It will then be the Court's duty to determine, with the assistance of a specially trained lawyer, whether the child should be documented through the asylum regime or not.

We trust that the above is in order and please do not hesitate to contact the undersigned should you have any follow up queries.

Yours faithfully,

UCT LAW CLINIC

A handwritten signature in black ink, appearing to read 'Tal Schreier', written over a horizontal line.

Per: Tal Schreier

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