

RIGHTS & REALITIES OF FORCIBLY DISPLACED CHILDREN & YOUTH IN SOUTH AFRICA

A Handbook by Lawyers for Human Rights
with support from terre des hommes Germany

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HUMAN RIGHTS

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Help for Children in Need



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FOREWARD

“A child's best interests are of paramount importance in every matter concerning the child.”

- ART.28(2) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

The purpose of this handbook is to provide a detailed guide to the law relating to Forcibly Displaced Children and Youth (FDCY), their rights, and their access to public services, and their lived realities.

The handbook is meant to be a living document. It is intended to map out application of these laws and policies to demonstrate how laws and policies are impacting the lives of FDCY. It should be seen as a source of information that aims to point out the failings of our system regarding the protection of FDCY and the unlawfulness of some aspects of their lived experiences.

This handbook is but one contribution towards strengthening the capacity of those with a material say in the lives of South Africa's refugees, asylum seekers and migrants: the legal fraternity, in its roles as adjudicators and advocates, Parliament, in executing its oversight role, and civil society, in its admirable efforts to ensure accountability.¹

¹ Lawyers for Human Rights, A practitioner's Guide to Immigration Detention in South Africa, at p.11.



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ACRONYMS & LEGISLATION SHORTHANDS

ACRWC	African Charter on the Rights and Welfare of the Child
BIC	Best Interests of the Child
BDRA	Births and Deaths Registration Act
CRC	UN Convention on the Rights of the Child
CYCC	Child and Youth Care Centre
DOE	Department of Education
DSD	Department of Social Development
DOH	Department of Health
DHA	Department of Home Affairs
FDCY	Forcibly Displaced Children and Youth
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LHR	Lawyers for Human Rights
RRO	Refugee Reception Offices
RSDO	Refugee Status Determination Officer
SASSA	South African Social Security Agency
UNHCR	United Nations High Commissioner for Human Rights
USMC	Unaccompanied and Separated Migrant Children



KEY TERMS & CONCEPTS

ASYLUM SEEKER

Section 3 of the *Refugees Act* defines an asylum seeker as a person who seeks recognition as a refugee in the Republic and is still in the process of having their refugee status determined.

CHILD

According to section 28 of the *Constitution*, a child is any person under the age of 18.

DEPENDENT CHILD

Any unmarried minor dependent child, whether born prior to or after the application for asylum, and who is included by the asylum seeker in the application for asylum.²

DETENTION

Detention generally refers to the deprivation of liberty of any person. A 'deprivation of liberty' is defined in the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

In the context of immigration, detention is imposed because of irregular entry and/or stay in the country. Immigration detention is characterised by its administrative (as opposed to criminal) nature.

FORCIBLY DISPLACED CHILDREN & YOUTH

Children and/or youth who are forced to move, within or across borders, due to armed conflict, persecution, terrorism, human rights violations and abuses, violence, the adverse effects of climate change, natural disasters, development projects or a combination of these factors.

MIGRANT

The International Organisation for Migration defines a migrant as any person who is moving or has moved across an international

² "Refugees Amendment Act 11 of 2017," § 1, <https://www.gov.za/documents/refugees-amendment-act-11-2017-english-afrikaans-18-dec-2017-0000>.



border or within a State away from their habitual place of residence.³

FOREIGN CHILD

A foreign national in South Africa is someone who is not a citizen of the Republic of South Africa and includes stateless children (i.e., a foreign child).

REFUGEE

A refugee is a person who is granted asylum as a result of establishing their refugee claim under section 3 of the *Refugees Act*.

STATELESS CHILD

The *United Nations Convention Relating to the Status of Stateless Persons* defines a stateless person (including children) as a person who is not considered a national (citizen) by any State under the operation of its laws.

SEPARATED CHILD

Article 1 of the *United Nations Convention on the Rights of the Child* defines a separated child as a child who has been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. A separated child may, therefore, include a child accompanied by other adult family members.

UNACCOMPANIED CHILD

Article 1 of the *United Nations Convention on the Rights of the Child* defines an unaccompanied child as a child who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so.

YOUTH

For the purposes of this handbook, youth is an individual from age 18 to 24.

³ “About Migration,” International Organization for Migration, <https://www.iom.int/about-migration>.



INTRODUCTION

In 2019, more than 642,000 migrant children were estimated to be living in South Africa, making it the country with the largest child migrant population on the continent.⁴

Forcibly Displaced Children and Youth (“FDCY”) residing in South Africa come from a wide range of countries and for a variety of reasons. Although the challenges confronting each country are different, their conflicts have been driven in large part by similar causes: the divisive legacies of colonialism, contested identity loyalties between ethnicity and nationality, state weakness to exert central power and functions throughout the territory, prevalence of patrimonial policies, ethnic tensions, pervasiveness of militia groups, poverty, and vulnerability.

These challenges are often urgent threats to many of the residents’ lives and in addition to direct violence, it often leads to a lack of the basic necessities for life and development.⁵ For these reasons, many children flee their countries of origin together with their families, with adult family members, or being separated from their families, orphaned, or left unaccompanied to seek shelter in South Africa.⁶

South Africa’s Legal Obligations towards FDCY

All people on the move have human rights, which should be respected, protected, and fulfilled. FDCY are entitled to certain protections because of their specific vulnerabilities and needs, and status as minors and young persons. The proper realization of FDCY’s rights as contained in international and domestic law is imperative for their protection.

South Africa has a domestic legal and policy framework with respect to forced migration and children. This framework constitutes an undertaking to FDCY entering South Africa that they will be recognized, their rights will be respected and protected, and that their best interests are of paramount importance in every situation pertaining to them. The *Children’s Act* and *Constitution* each guarantee that all children must be provided with specific provisions.

Further, as a signatory to international instruments such as the *CRC*, the *ICCPR*, and the *ICESCR*, South Africa has a duty to promote children’s rights and afford them protection and care.

⁴ “UNICEF and The South African Red Cross Partner to Assist Migrant Children,” UNICEF, January 8, 2020, <https://www.unicef.org/southafrica/press-releases/unicef-and-south-african-red-cross-partner-assist-migrant-children>.

⁵ Lawyers for Human Rights, “Baseline Assessment on the state of Forcibly Displaced Children and Youth and their access to protection services in inner-city Johannesburg, South Africa,” 2020.

⁶ Department of Social Development, “Guidelines on Separated and Unaccompanied Children Outside Their Country of Origin in South Africa,” n.d., http://www.refugeerights.uct.ac.za/usr/refugee/Information_Sources/Guidelines_on_separated_&_unaccompanied_minors.pdf.



Lived Experiences of FDCY in South Africa

In reality, South Africa's often falls short regarding its responsibilities towards FDCY. The lived experiences of FDCY demonstrate that they face several challenges in accessing the rights and protections to which they are entitled. They frequently encounter difficulties in accessing documentation, and basic services such as healthcare and education. They also face discrimination based on their nationality and legal status or lack thereof, and face xenophobia.

Furthermore, the lack of reliable, disaggregated, and timely data available on the number of FDCY residing in South Africa causes a limited understanding of the situation of children on the move in South Africa. This prevents national and provincial authorities from fully planning and implementing appropriate care and protection.⁷

Themes of the Handbook

This handbook highlights the concerning disparity between the aims of the legal framework for forced migration in South Africa and children, and the lived realities of FDCY, under the following seven (7) key themes:

1) ACCESS TO BIRTH REGISTRATION AND STATELESSNESS

Although birth registration is a fundamental right in both domestic and international law, many FDCY and their families face challenges in registering their births, a process which is governed by the *Births and Deaths Registration Act* ("BDRA") and its accompanying regulations.

FDCY families often experience financial and logistical difficulties in obtaining a notice of birth, which is a crucial initial step in the process of birth registration. Such documentation is also not accessible for FDCY born outside of South Africa. Even where they are born within South Africa, the thirty-day registration deadline hinders effective birth registration. Where FDCY's parents are undocumented or unmarried, they face additional obstacles and are often required to undergo DNA testing or face delays at the Department of Home Affairs.

Where their right to birth registration is compromised, FDCY are vulnerable to statelessness. UNHCR estimates that there are over 10,000 people who are stateless in South Africa.⁸ Although South Africa is not party to the two major international conventions on statelessness, provisions of the Citizenship Act and Immigration Act aim to provide access to a South African nationality for persons who would otherwise be stateless. Despite court orders to promulgate regulations on these provisions, however, the DHA is yet to materialize these pathways to citizenship.

⁷ "UNICEF and The South African Red Cross Partner to Assist Migrant Children," note 4.

⁸ Lawyers for Human Rights, "Briefing by Lawyers for Human Rights on Statelessness in South Africa, Re-Opening of Refugee Reception Offices and Processing of Documentation for Refugees and Asylum-Seekers, and Trends on Arrests and Detention of Migrants," 13 September 2022, ¶ 4, <https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2022/09/LHR-submission-to-the-PC-Home-Affairs-on-statelessness-2022-09.pdf>.



2) ACCESS TO DOCUMENTATION

There are approximately 15 million undocumented people in South Africa, of which over 3 million are children.⁹ Most FDCY or their family members come to South Africa to seek asylum and apply for refugee status. Despite a comprehensive legal framework under the Refugees Act to facilitate access to asylum and refugee documentation for forcibly displaced persons, FDCY face a number of challenges in acquiring valid documents.

Children accompanied by their parents are barred from claiming asylum on their own right. If they are undeclared at the time that their parent applies for asylum, they risk being completely excluded from access to asylum documentation. Separated children carry the burden of proving their dependence on the adult they arrived with in order to be included in an application for asylum.

For unaccompanied children, there is no automatic asylum seeker visa. Even where they are in the care of the state, many social workers do not understand the asylum process and FDCY's lived experiences and hence do not facilitate assistance in asylum applications for unaccompanied youth.

3) ACCESS TO HEALTHCARE

FDCY, especially those over the age of seven, struggle to access healthcare despite it being a fundamental right recognised in international law as well as the Constitution. Medical xenophobia, arbitrary and unconstitutional subordinate rules, high admissions fees, and lack of documentation prevents FDCY from accessing even primary and emergency health services.

4) ACCESS TO EDUCATION

Like any other group of children, FDCY have the right to education. This right is protected by international, regional, and domestic law. However, children uprooted from their homes often find themselves at the risk of never re-joining school or completing their studies. Even where there is access, FDCY find themselves marginalised within schools, experience overcrowdedness, and under resourced facilities. In addition to this, they also must overcome or navigate an unfamiliar curriculum and, in some cases, an unfamiliar language of instruction. Fees and documentation requirements create extra hurdles for FDCY seeking to access education.

5) DETENTION MONITORING

South African immigration laws and regulations, the *Refugees Act*, and the *Children's Act* together provide protections for FDCY relating to detention. These laws give legislative meaning to the constitutional guarantee that children may not be detained except as a measure of last resort and provide guidance for law enforcement and detention authorities.

Notwithstanding these strong legal protections, NGOs have reported for more than two decades on the unlawful detention and deportation of FDCY in South Africa. When FDCY are kept in detention, their other basic human rights are also infringed upon, and they are often kept in the same cells as adults in

⁹ Soyiso Maliti, "Fifteen Million without Legal Docs in SA, Parly Hears," IOL, November 21, 2022, <https://www.iol.co.za/capeargus/news/fifteen-million-without-legal-docs-in-sa-parly-hears-0d5801c3-c2b1-4b39-95ec-81aa8a0dea49>.



direct contravention to the South African Constitution. Unfortunately, they largely also do not have access to legal representation to help ameliorate the situation.

6) ACCESS TO SOCIAL ASSISTANCE

Although international and constitutional obligations require South Africa to recognise FDCY's right to social assistance, domestic legal provisions leave gaping holes in social protection for migrants. Only refugees and permanent residents are covered by the Social Assistance Act and eligible for grants, despite the fact that asylum-seekers who recently arrived in South Africa are often the most economically vulnerable.

FDCY are kept in a limbo state of vulnerability due to the elongated period of time they are classified as asylum seekers, without an automatic right to work. This vulnerability was especially acute during the COVID-19 lockdown when FDCY families could not access social grants or unemployment insurance.

The lack of formal state initiatives to recognize FDCY's right to social assistance is in violation of international human rights obligations and places the burden to realise that right onto charitable organisations.

7) ACCESS TO JUSTICE

All forcibly displaced persons are at a disadvantage when they are forced to navigate the legal system of a foreign country. FDCY are especially disadvantaged in this situation, and therefore their right to legal assistance is comprehensively codified in domestic and international law.

However, the lack of capacity of knowledgeable practitioners, the complexity of the justice system, the physical distance to courts, and lack of free services for civil matters all hinder the realisation of the right to unfettered access to justice for FDCY. Due to their position and intersecting vulnerabilities, FDCY's representatives need to consider their specific needs.



FDCY: ACCOMPANIED, SEPARATED, & UNACCOMPANIED

“Each day, children and families facing the ravages of violence, poverty or climate change make the painful decision to leave their homes in search of safety and a more hopeful future.”¹⁰

- UNICEF EXECUTIVE DIRECTOR HENRIETTA FORE

“Violence, war, poverty and effects of climate change are among the main reasons that millions of children lose their homes around the world every year. In South Africa alone, there are currently more 600,000 migrant or displaced children. Many of them are subjected to abuse, exploitation and violence during their journeys from their home countries to an assumed safer place. The most vulnerable among these children are those unaccompanied or separated from their families. We must leave no stone unturned for these children to have access to rights.”¹¹

- UNICEF SA CHILD PROTECTION SPECIALIST HELEN NYANGOYA

As of 2019, nearly one in four forcibly displaced persons in Africa was a child or youth, double the global average.¹² The number of displaced children and youth continues to rise, with the United Nations (“UN”) reporting a record global number in 2022 due to “cascading crises.”¹³ According to the Department of Social Development in South Africa, more than 600,000 FDCY currently reside within the country.¹⁴ These children come from multiple regions in Africa for reasons such as violence, war, poverty, climate change, and persecution.

The term FDCY covers a wide range of children and youth arriving in South Africa. Some children arrive with their legal parents or guardians, while others may be separated from their caregivers and come with a different group of adults. Still others may arrive completely on their own as unaccompanied

¹⁰ “13.5 Million Children Now Uprooted in Africa - Including Those Displaced by Conflict, Poverty and Climate Change,” UNICEF, <https://www.unicef.org/press-releases/135-million-children-now-uprooted-africa-including-those-displaced-conflict-poverty>.

¹¹ Kevin Brandt, “UNICEF: More than 600,000 Migrant, Displaced Children Live in SA,” Eyewitness News, October 18, 2021, <https://ewn.co.za/2021/10/18/unicef-more-than-600-000-migrant-displaced-children-live-in-sa>.

¹² “13.5 Million Children Now Uprooted in Africa,” note 10.

¹³ “A Record 37 Million Children Displaced Worldwide: UNICEF,” UN News, June 17, 2022, <https://news.un.org/en/story/2022/06/1120642>.

¹⁴ Brandt, “UNICEF: More than 600,000 Migrant, Displaced Children Live in SA,” note 11.



youth. Although these categories of children have different needs and vulnerabilities, this handbook covers the similarities in their experiences in South Africa: both the rights that they have under domestic and international law, as well as their lived experiences.

Children Accompanied by Parent(s)

The majority of FDCY in South Africa arrive with their parent or join their parent in South Africa. Many of these children leave their country of origin when they are very young and have few memories of life outside of South Africa, although they are labelled as foreign nationals along with their parents. Often these children are the first to get accustomed to life in South Africa and guide their parents and community members through legal and social processes in the country.

Many FDCY have siblings who are born in South Africa but are treated both legally and socially in the same way as FDCY. Children born to displaced parents in South Africa do not have access to South Africa citizenship until they reach the age of majority and navigate many of the same uncertainties as asylum-seekers and refugees. For this reason, this handbook includes children born to displaced parents in South Africa as part of the FDCY category.

Separated Children

Children who arrive separately from their parents may come in the care of different relative or with a separate group of adults altogether. Sometimes these children are joining parents who separated from them, or are leaving family members behind. Although these children come with caregivers, the lack of legal ties with the adults they arrive with often causes a host of legal issues in accessing their rights.

Unaccompanied Children

Unaccompanied children are perhaps the most vulnerable group of FDCY as they have little experience or knowledge navigating the legal and social structures in South Africa and have nobody to assist them. Unaccompanied children are to be placed in the care of the State; however, lack of coordination, capacity, and knowledge by relevant stakeholders means that unaccompanied children often fall through the cracks and do not receive the protection that they are entitled to.



LEGAL OBLIGATIONS

Forcibly displaced children and youth have a host of legal protections under both domestic and international law. This handbook looks to both bodies of law as well as court judgments, circulars, policies, and guidelines to illustrate what South Africa's obligations are in protecting the rights of FDCY. In order to understand these obligations, it is first necessary to note the guiding principle in child rights: "best interests of the child." This section then briefly summarizes the main legal instruments that relate to FDCY on three different realms: domestic, regional, and international.

Best Interests of the Child

In both international law and South African law, all decisions taken involving children must be guided by the best interests of the child. The best interest of the child principle is key to understanding and advocating for FDCY; where their realities do not match up with their best interests, there is a legal obligation to remedy the gap.

CONVENTION ON THE RIGHTS OF THE CHILD

The best interests of the child principle ("BIC") is most famously codified in the United Nations Convention on the Rights of the Child ("CRC"). Article 3 of the CRC states that *"in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

The best interests of the child principle relates not only to decisions taken about children; it emphasizes the requirement that children have a say in what their own best interests are. Article 12(1) of the CRC states that:

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

The BIC principle guides all interpretation of child rights both globally and domestically within South Africa, and is especially important for vulnerable groups of children such as FDCY.

SOUTH AFRICAN CONSTITUTION & CHILDREN'S ACT 38 OF 2005

The Constitution of South Africa entrenches the paramountcy of the best interests of the child in Section 28(2). Under the Constitution, BIC can be considered as both a principle and a self-standing right. "[T]he 'best-interests' or 'paramountcy' principle creates a right that is independent and extends beyond the recognition of other children's rights in the Constitution."¹⁵ Paramountcy requires that

¹⁵ J v NDPP 2014 (2) SACR 1 (CC) ¶ 35; Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC), ¶ 17.



children's interests are to be afforded the "*highest value*," meaning that their interests are "*more important than anything else*."¹⁶

The Constitution's BIC principle is enacted into law through the Children's Act 38 of 2005. This law applies to non-national children including FDCY and underlines the standards and guidelines for determining a child's best interests. This legal framework is used for BIC determinations, especially around issues of child protection. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies – the South African government must take the action that is in the best interests of the child; that is non-discriminatory; that ensures the survival, protection and care of the child; and that sustains participation of the child in all matters concerning the child.

CASE LAW

South Africa's Supreme Court of Appeal in the case of *Centre for Child Law v The Governing Body of Hoerskool Fochville* confirmed that the best interests of the child principle as enshrined in section 28(2) of the *Constitution* "*incorporates a procedural component, affording a right to be heard where the interests of children are at stake*."¹⁷ The Court held that a truly child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. "*To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned*."¹⁸ It was further held that "[t]his "overarching principle" has been codified in the provisions of the *Children's Act*. Section 10 of the *Children's Act* confers a specific right on children to participate in all decisions affecting them, taking into account their age, maturity and development."¹⁹

Domestic Laws

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

South Africa is a constitutional democracy. In terms of the Constitution of South Africa, any law or conduct that is inconsistent with the Constitution is invalid. Section 9 of the Constitution prohibits discrimination on various grounds including race, colour, ethnicity and social origin. The Preamble to the Constitution states that South Africa "belongs to all who live in it" making no distinction between citizens and non-nationals nor between children and adults. The South African Bill of Rights contained in Chapter 2 of the Constitution assures that everyone within the territory of South Africa is entitled to equal treatment, human dignity, and freedom and security of the person. In this way, the Constitution is a key instrument in realizing the rights of FDCY residing in South Africa. All of the themes discussed in this handbook are codified as rights within the Constitution.

The Constitution of South Africa says that international law is also law in South Africa to the extent of its consistency with the Constitution.²⁰ The Constitution further states that when interpreting

¹⁶ S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC), ¶ 42.

¹⁷ Centre for Child Law v The Governing Body of Hoerskool Fochville 2016 (2) SA 121 (SCA) ¶ 19, where the Supreme Court of Appeal held that children have a right to be heard in matters affecting their interests, either directly or through their representatives.

¹⁸ S v M, ¶ 24, note 16.

¹⁹ AB and Another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC) ¶ 143.

²⁰ S.A. Const. § 232.



legislation, an approach that is consistent with international law should be adopted over any alternative interpretation inconsistent with international law.²¹ Section 39 of the Constitution also says that when interpreting the Bill of Rights, a court or tribunal must international law and obligations under the various international treaties.

REFUGEES ACT 130 OF 1998, AS AMENDED

The Refugees Act applies to forced migrants and regulates the asylum seeker process and provides for the rights and obligations of refugees and asylum seekers. Although initially enacted in 1998 as a progressive piece of legislation meant to guarantee the rights of asylum seekers, the 2020 amendments and accompanying regulations were enacted bringing about a number of regressive changes to the Refugees Act, curtailing a number of rights previously afforded to refugees and asylum seekers, including children. Significantly, the amendments remove asylum seekers' automatic right to work and study, presume the abandonment of a refugee claim should an asylum seeker fail to renew their visa (previously known as a "permit") within 30 days of its expiry, and includes strict requirements for lodging an application for asylum. Contrary to jurisprudence, the amendments also introduce a narrower definition of who is a dependent, hindering the rights of unaccompanied and separated children and youth.

IMMIGRATION ACT 13 OF 2002

The Immigration Act regulates voluntary migration and also the status of displaced persons found to be indefinite refugees, thereby qualifying them for permanent residence in South Africa. In most cases, it takes FDCY 10-15 years before they can be documented under the Immigration Act. FDCY who are born in South Africa may apply for citizenship by naturalisation under the Immigration Act once they turn eighteen.

CHILDREN'S ACT 38 OF 2005

Section 28 of the Constitution is enacted into law through the Children's Act 38 of 2005. The law applies equally to all children regardless of documentation status and defines a child as a person under the age of 18 years. There has been significant case law that outlines and expands on the rights enshrined within the Children's Act and the full force with which they apply to FDCY.

Regional Obligations

AFRICAN UNION

African Charter on Human and Peoples' Rights ("ACHPR")²²

The ACHPR is a regional treaty that promotes equal and fair treatment of all humans in the African region, regardless of nationality. The ACHPR contains an equality clause, which states that all peoples shall be equal and enjoy the same respect and rights. Article 18 further places an obligation on States to ensure the protection of the rights of children.

²¹ Ibid, § 233.

²² "African Charter on Human and Peoples' Rights" (1981), <https://au.int/en/treaties/african-charter-human-and-peoples-rights>.



*African Charter on the Rights and Welfare of the Child (“ACRWC”)*²³

The African Charter on the Rights and Welfare of the Child specifically protects the rights of FDCY and was ratified by South Africa in 2000. Under Article 23(1), States are obligated to “*extend appropriate protection and assistance to refugee children or children who are seeking refuge irrespective of whether or not they are accompanied.*”

*Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Refugee Convention”)*²⁴

The OAU Refugee Convention enshrines international obligations to refugees under the UN Convention within the specific African context and emphasizes that refugees should be treated without discrimination. The OAU Convention is in response to the individual and collective character of the refugee crisis in Africa. The OAU Convention does not specifically mention children, although like the UN Convention, it applies to all individuals regardless of age.

International Obligations

INTERNATIONAL TREATIES

*United Nations Convention on the Rights of the Child (“CRC”)*²⁵

The CRC is the foremost international legal instrument on child rights and protection. Although the CRC does not specifically refer to the rights of migrant children, it is applicable to all children in the territory of any state, regardless of their nationality and immigration status. All of the rights contained in the CRC must be interpreted in a manner that conforms to the principles of non-discrimination, best interests of the child, the right to life, and the right of the child to express his or her views. South Africa ratified the CRC in June 1995.

*International Covenant on Civil and Political Rights (“ICCPR”)*²⁶

The ICCPR is part of the international bill of rights and seeks to protect basic human rights relating to the civil and political realms, such as the right to life and human dignity, equality before the law, freedom of speech, assembly and association, religious freedom and privacy, freedom from torture, ill-treatment, and arbitrary detention, right to family life and family unity, and minority rights. Under Article 24 of the ICCPR, children enjoy the right “*to such measures of protection as are required by [their] status*” as minors. The ICCPR also contains general provisions from which children are entitled to benefit as well as certain specific provisions on safeguards for children in the administration of justice and as members of a family unit. South Africa ratified the ICCPR in December 1998.

²³ “African Charter on the Rights and Welfare of the Child” (1990), <https://au.int/en/treaties/african-charter-rights-and-welfare-child>.

²⁴ “OAU Convention Governing the Specific Aspects of Refugee Problems in Africa” (1969), <https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>.

²⁵ “Convention on the Rights of the Child,” General Assembly resolution 44/25 (1989), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

²⁶ “International Covenant on Civil and Political Rights,” General Assembly resolution 2200A (XXI) (1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.



*International Covenant on Economic, Social and Cultural Rights (“ICESCR”)*²⁷

The ICESCR is another part of the international bill of rights and focuses on access to social services, health, education, and welfare, among others. Similar to the ICCPR, the ICESCR contains general provisions that children benefit from as well as a specific provision in Article 10(3) which states that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.” South Africa ratified the ICESCR in 2015.

*United Nations Convention and Protocol Relating to the Status of Refugees (“UN Refugee Convention”)*²⁸

This 1951 UN treaty was the first to codify obligations of States towards those fleeing persecution and violence in other states, or “refugees.” Although the definition of refugee contained in Article 1(A)2 of the UN Convention applies to all individuals regardless of their age, it has traditionally been interpreted considering events experienced by adults. However, later guidelines and compacts have built upon the foundation of refugee protections built in the UN Refugee Convention.

²⁷ “International Covenant on Economic, Social and Cultural Rights,” General Assembly resolution 2200A (XXI) (1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

²⁸ “Protocol Relating to the Status of Refugees,” General Assembly Resolution 2198 (XXI) (1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-relating-status-refugees>.



BIRTH REGISTRATION & STATELESSNESS

“Every child has the right to a name and a nationality from birth.”

- SECTION 28(1) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

“[w]here a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity”.

– ART.8 CONVENTION ON THE RIGHTS OF THE CHILD

Birth Registration

Birth registration is a key civil status event which enables multiple other civil, socio-economic, and political rights. These include but are not limited to the right to vote, access to social welfare, access to education, and access to health.²⁹ In South Africa, birth registration is a fundamental right recognized in both domestic and international law. The Department of Home Affairs (“DHA”) is tasked with processing birth registrations and issuing birth certificates. Without effective birth registration, FDCY risk being rendered stateless and facing a host of issues throughout their lives.

Despite birth registration being recognised as a fundamental right, many FDCY and their families face challenges in registering their birth. Statistics show that South Africa’s birth registration rate has remained the same for nearly a decade, leaving thousands of children unregistered.³⁰ Save the Children reported that many children start to experience difficulties in accessing documentation in South Africa at the birth registration phase.³¹ Such difficulties include delays or obstacles in receiving a notice of birth, discrimination by DHA officials, requirements around DNA testing, and parents’ lack of documentation. A baseline assessment by LHR in 2022 found that 71% of interviewed FDCY in Johannesburg were unable to register their birth and did not possess a birth certificate. Importantly, FDCY born outside of South Africa do not have a way to register their birth within the country.

²⁹ “Birth Registration in South Africa,” Scalabrini Centre of Cape Town, September 26, 2019, <https://www.scalabrini.org.za/birth-registration/>.

³⁰ Statistics South Africa, Statistical release P0305, Recorded Live Births (2018 report): 2007 – 2011 = 89,2%; 2011 – 2016 = 88,6%, and 2017 – 2018 = 89,2%.

³¹ LHR interview with Save the Children on 30 November 2020.



SOUTH AFRICA'S LEGAL OBLIGATIONS

The primary legal basis for FDYC's right to birth registration is the Constitution. There are also various laws that provide for and protect the right to birth registration for children. Case law has also been used to develop the law and provide guidance in terms of how these laws should be interpreted.

South Africa's Constitution

Section 28 of the Constitution of South Africa provides for the right to a name and nationality for every child. The term “every child” has been interpreted to include children who are non-nationals or children born to non-nationals.³² The Constitution's best interests principle³³ also underlies the right of all children to have their births registered.

Legislation

DHA has the exclusive responsibility to process birth registrations as well as to issue birth certificates. The registration of a child's birth in South Africa is governed by the *Births and Deaths Registration Act* (“BDRA”)³⁴ and its accompanying regulations.³⁵ Regulations 7 and 8 outline the notice of birth that is issued to commence the process of birth registration for children of non-South Africans.³⁶ The notice of birth including particulars of the medical practitioner who attended to the birth.³⁷ Parents or guardians are then required to register this notice of birth with the DHA, who are in turn obliged to issue a birth certificate which reflects the child's legal name, date of birth, and place of birth. If a child has been abandoned, a social worker may register the birth within 60 days of receiving a court order from the Children's Court.³⁸

A notice of birth must be registered with the DHA within 30 days of the child's birth. Section 9 of the BDRA states that:

“in the case of any child born alive, the birth must be registered within 30 days. Either of the biological parents can register the birth, or, if neither of the parents are able to do so, a person caring for the child or a person assigned by the parents can register the birth. If birth registration happens after 30 days but before 1 year, the informant has to provide reasons for late registration.”³⁹

Should the child be registered after one year, the requirements for late registration apply. According to the Act, “where the notice of a birth is given more than one year from the date of birth (Republic of

³² This interpretation is on the backdrop of the definition of the term “everyone” as contained in section 27 which was interpreted to include non-nationals by our courts in the case of Minister of Home Affairs and others v Watchenuka. Minister of Home Affairs and Others v Watchenuka and Another, (010/2003) [2003] ZASCA 142 (28 November 2003), South Africa: Supreme Court of Appeal, 28 November 2003.

³³ See *infra* section “Best Interests of the Child,” p. 14.

³⁴ “Births and Deaths Registration Act 51 of 1992,” <https://www.gov.za/documents/births-and-deaths-registration-act>; “Births and Deaths Registration Amendment Act 18 of 2010,” <https://www.gov.za/documents/births-and-deaths-registration-amendment-act-3>.

³⁵ “The Births and Death Registration Act 51 of 1992: Regulations on the Registration of Births and Deaths,” https://www.gov.za/sites/default/files/gcis_document/201409/37373rg10135gon128.pdf.

³⁶ *Ibid*, § 7-8.

³⁷ “Births and Deaths Registration Act 51 of 1992,” § 9-10, note 3434.

³⁸ “Regulations on the Registration of Births and Deaths,” § 9, note 3535.

³⁹ “Births and Deaths Registration Act 51 of 1992,” § 9, <https://www.gov.za/documents/births-and-deaths-registration-act>.



South Africa 1992), the birth will not be registered unless the parents comply with the prescribed requirements for a late registration of birth.” The Act requires an affidavit stating reasons for late registration, and other proof that the child belongs to the parents seeking to register the child.

Timely birth registration is also required by Section 21(b)(2) of the Refugees Amendment Act, which states that a child of an asylum seeker or refugee born in South Africa must register their birth within 30 days and submit the birth certificate to the relevant RRO in order to be included as a dependant of their parent.

DHA has specifically stated that FDCY whose parents are undocumented may be issued a birth certificate free of charge upon registration.⁴⁰ However, although children of South African citizens are issued a birth certificate with an ID number, children of other migrant categories are issued an unabridged birth certificate which does not include an ID number.⁴¹ In addition, FDCY are not included in the National Population Register unless their parents are refugees or permanent residents.

Case law

South African courts have emphasized that it is in the best interests of the child to have a birth certificate and access to a nationality.⁴² The case of *Centre for Child Law v Director-General: Department of Home Affairs and Others* reiterated that children’s “*lack of recognition in the civil birth registration system exposes them to the risk of being excluded from the education system and from accessing social assistance and healthcare. They are effectively denied support and assistance considered necessary for their positive growth and development.*”⁴³ In this way, the Court has recognised that the right to birth registration is a foundational right that gives access to other civil, socio-economic, and political rights.

Previously, the BDRA required that both parents show valid documentation to register the birth of the child. In the 2018 court case *Menzile Naki and another v Director General: Department of Home Affairs and Another*, the High court found this requirement to be unconstitutional and instead ordered that the BDRA Regulations be read to mean that parents must show valid documentation “*where possible.*”⁴⁴ The court confirmed that that a child’s right to birth registration should not be dependent on the documents that their parents do or do not have. When this same case was considered by the Constitutional Court in *Centre for Child Law v Minister of Home Affairs*, the Court further ruled that mothers and fathers, regardless of marital status, should now have an equal right to register the births of their children in order to prevent a situation of statelessness.⁴⁵

⁴⁰ “Birth Certificates,” Department of Home Affairs, <http://www.dha.gov.za/index.php/civic-services/birth-certificates>.

⁴¹ Lawyers for Human Rights and UNHCR, “Birth Registration in South Africa: Know Your Rights,” December 2020, <https://www.lhr.org.za/wp-content/uploads/2020/12/KYR-Birth-Registration-SA-Digital-Brochure-014.pdf>.

⁴² *Centre for Child Law v Director-General: Department of Home Affairs and Others* 2020 (6) SA 199 (ECG)

⁴³ *Centre for Child Law v Director-General: Department of Home Affairs and Others* (CA 319/2018) [2020] ZAECHGHC 43; 2020 (8) BCLR 1015 (ECG); [2020] 4 All SA 76 (ECG); 2020 (6) SA 199 (ECG) (19 May 2020), ¶ 4.

⁴⁴ *Menzile Naki and another v Director General: Department of Home Affairs and Another* (4996/2016) [2018] ZAECHGHC 90, fn. 6-8.

⁴⁵ *Centre for Child Law v Minister of Home Affairs* CCT 101/20 [2021] ZACC 31.



International instruments

Article 6 of the UDHR states that every person has a right to recognition as a person before the law. The ICCPR obliges States to register every child immediately after birth without discrimination.⁴⁶ The Human Rights Committee, a treaty body tasked with interpretation and monitoring implementation of the ICCPR, reiterated that this should be interpreted in such a manner that affords “*special measures to protect children... intended primarily to ensure that children fully enjoy the other [social, economic, and cultural] rights enunciated in the Covenant.*”⁴⁷ The Committee further stated that the rationale behind registration of children after birth is to reduce the danger of abduction, sale, or trafficking of children as well as other forms of ill-treatment.⁴⁸

The CRC similarly provides for the right to birth registration and places a duty on states to ensure implementation of this right through their domestic laws.⁴⁹ The CRC’s key principles of non-discrimination, best interests of the child, right to life, and right of the child to express his or her views also makes it mandatory for every child’s birth to be registered. The right to a name and nationality is also protected under the 1999 African Charter on the Rights and Welfare of the Child.

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Despite the strong domestic and international obligations to facilitate birth registration for all children, FDCY in South Africa face many challenges in obtaining a birth certificate. These difficulties, in turn, make it difficult for FDCY to access school and healthcare, as well as other documentation.

Difficulty Obtaining Notice of Birth

Filling out a notice of birth is a necessary step to register birth. Although the government has made these easily accessible and easy to complete, people living in rural areas still face challenges where they have to travel long distances to access hospitals or clinics.⁵⁰ The cost of transport is also unreasonably high in rural areas. Studies have shown that in some cases authorities do not accept a faxed or emailed document as they require the original document⁵¹. This is seen as an impediment and has resulted in many people failing to complete notices of birth. Some people in rural areas still give birth in their homes and it makes it difficult for them to complete the notice of birth.

In Gauteng province, several human rights organisations have recently noted that hospitals are denying issuing notice of birth documents for children born to undocumented mothers or mothers who have not paid the full fees for their obstetric or pre and post-natal treatments. LHR has, on several occasions, had to intervene on behalf of migrant mothers who did not receive the notice of birth, despite the legal obligation of hospitals to issue the notice before the mother and child leave the hospital.

⁴⁶ ICCPR, art. 24.

⁴⁷ UN Human Rights Committee, “CCPR General Comment No. 17: Article 24 (Rights of the Child),” 7 April 1989, ¶¶ 1,3, <https://www.refworld.org/pdfid/45139b464.pdf>.

⁴⁸ Ibid, ¶ 7.

⁴⁹ “Convention on the Rights of the Child,” art. 7, note 25.

⁵⁰ “What Are the Barriers to Registering Births of Non-National Children in South Africa?,” Sonke Gender Justice, <https://genderjustice.org.za/card/birth-registration-of-non-national-children-in-south-africa-explained/what-are-the-barriers-to-registering-births-of-non-national-children-in-south-africa/>.

⁵¹ https://etd.uwc.ac.za/bitstream/handle/11394/8749/beko_m_ems_2021.pdf?sequence=1&isAllowed=y, page 31



Thirty Days Requirement

The 30 days requirement was passed by the Department of Home Affairs in 2010 with the aim of reducing late birth registrations. The Department is cognizant of the fact that late registration of birth can be detrimental to children. However, the reality is that it is not always easy to comply with this requirement especially for children who are born to refugees or asylum seekers while in transit. In addition, those who stay in rural areas usually fail to access the offices or hospitals to register births, as a result, they miss the 30 days requirement and end up requiring more documentation to do late registration.

Where FDCY have parents who are asylum seekers or refugees, the thirty-day requirement in the Refugees Amendment Act complicates their ability to be joined as a dependent on their parent's asylum or refugee file. For many children, this is the only way to access documentation and a valid ID number. However, if an asylum seeker or refugee child's birth is not registered within thirty days, they risk exclusion from this type of documentation.

FDCY Born Outside of South Africa

Currently, the BDRA Regulations do not allow for registration of births outside of South Africa. This leaves many FDCY without access to birth registration as they were born in their country or origin where they were not registered, or they were born while in their parents were in transit. Several human rights organisations have challenged this gap in protection, but FDCY born outside South Africa remain excluded from the right to register their birth.⁵² This is a major obstacle for FDCY in realising their right to birth registration, and has been highlighted by the UN Committee on the Rights of the Child, the African committee of experts on the right of the child, and the UN Human Rights Council as a failure by South Africa in implementing its international human rights obligations.⁵³

Parents need Valid Documentation

Even after the historic 2018 judgment in *Naki and Others v Home Affairs and Another*,⁵⁴ undocumented parents remain unable to register their children's birth. Many parents of FDCY are unaware that documentation is not required and therefore avoid approaching authorities altogether. In addition to that, undocumented migrants also fear having their immigration status reported to the authorities if they reveal their status to register their child's birth.

DHA Delays

LHR has recorded "inordinate delays and backlogs" in birth registration at the DHA.⁵⁵ This places a burden on FDCY families as they remain in a limbo state and are often prevented from accessing healthcare and education for their children. Scalibrini Centre of Cape Town has noted that schools have become increasingly strict about not enrolling students who cannot provide documentation. Children over the age of seven also face difficulties accessing healthcare if they do not have a birth certificate.⁵⁶

⁵² Ernest Mabuza, "Foreign-Born Children Should Not Be Deprived of Birth Certificates," TimesLIVE, accessed December 4, 2022, <https://www.timeslive.co.za/news/south-africa/2018-11-15-foreign-born-children-should-not-be-deprived-of-birth-certificates/>.

⁵³ "What Are the Barriers to Registering Births of Non-National Children in South Africa?," note 50.

⁵⁴ *Naki v Director General*, note 44.

⁵⁵ Lawyers for Human Rights, "Briefing by Lawyers for Human Rights on Statelessness in South Africa," ¶ 5.4, note 855.

⁵⁶ "Birth Registration in South Africa," note 29.



The temporary closure of the Cape Town Refugees Reception Office made it difficult for refugees and asylum seekers in that city to obtain relevant documents and as such many births have gone unregistered.⁵⁷ The extension of permits and other documents has been riddled by exigencies like long queues at relevant offices, long distances to relevant offices to renew or apply for documents and corruption at various government offices. Since the re-opening of Refugee Reception Offices after the COVID-19 lockdown, the new online process has also caused delays in renewal of documentation and new applications for asylum.⁵⁸

DNA Testing

In 2015, DHA issued a circular stating that if one parent of a child applying for birth registration is a non-South African citizen, DHA officials may require a DNA test upon “reasonable suspicion” regarding the paternity of the child.⁵⁹ Although this is contrary to the BDRA and other legal provisions, it has affected the ability of FDCY and their families to register their birth and be issued a birth certificate. The circular does not guide DHA officials as to what constitutes “reasonable suspicion,” allowing for arbitrary and discriminatory practices. Furthermore, the DNA testing requires payment, which places a burden on poor or indigent families of FDCY.

Unmarried fathers

Prior to the decision in *Centre for Child Law v Minister of Home Affairs*, it was not possible for unmarried fathers to register the birth of their child in the absence of the mother. However, even since the judgment, many unmarried fathers face issues with birth registration due to lack of knowledge or refusal by DHA officials. In some cases, DHA officials state that the fathers must prove paternity through DNA results but do not issue DNA referral letters. In other cases, officials require the presence of the mother even if the father states that the mother is deceased or missing. LHR has reported at least 30 of these incidents to the DHA since the 2018 judgment.⁶⁰

Statelessness

Statelessness is directly linked to the exercise of the right to birth registration and the right to a nationality for all children. The international definition of a stateless person is “*a person who is not considered as a national by any State under the operation of its law.*”⁶¹ This means that the person does not belong to any nationality. FDCY are vulnerable to statelessness, especially when their right to birth registration is compromised.

⁵⁷ Ibid.

⁵⁸ Lawyers for Human Rights, “Briefing by Lawyers for Human Rights on Statelessness in South Africa,” § B, note 855.

⁵⁹ Department of Home Affairs, “Departmental Circular Number 5 of 2014: Requirements Relating to Paternity Tests in Respect of Registration of Births and Referral to National Health Laboratory Services,” <http://citizenshipprightsafrica.org/wp-content/uploads/2020/04/SADepthHomeAffairs-DNA-Circular-5-2014.pdf>.

⁶⁰ Lawyers for Human Rights, “Briefing by Lawyers for Human Rights on Statelessness in South Africa,” ¶ 5.2, note 855.

⁶¹ “Convention Relating to the Status of Stateless Persons,” Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954 art. 1, (1954), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-stateless-persons>.



There are approximately 15 million undocumented people in South Africa, of which over 3 million are children.⁶² Although there is no clear mechanism to identify the number of stateless persons, UNHCR estimates that over 10,000 people are stateless in South Africa.⁶³ Not all children without birth registrations are stateless; however, those born to migrant, refugee or asylum-seeking parents may find themselves in a much more precarious position to suffer statelessness. It should be reiterated that birth registration does not in itself confer citizenship on a child, however, it is the first step to the acquisition of nationality. Birth registration is the first link between an individual and the State after birth.

SOUTH AFRICA'S LEGAL OBLIGATIONS

The United Nations Convention on the Reduction of Stateless of 1961 aims to prevent statelessness and reduce it over time. It establishes an international framework to ensure the right of every person to a nationality. It requires that states establish safeguards in their domestic laws to prevent statelessness at birth and later in life. Perhaps the most important provision of the convention establishes that children are to acquire the nationality of the country in which they are born if they do not acquire any other nationality.

The United Nations has also adopted the Convention on the Status of Stateless People of 1954. This Convention attempts to resolve the legal void in which the stateless person often exists, by identifying the problem of statelessness, promoting the acquisition of a legal identity, and providing for a legal status which will serve as a basis for access to basic social and economic rights. It should be noted that South Africa has not ratified these instruments, however, the government has previously made commitments to ratify them.⁶⁴

South Africa has ratified a range of international and regional legal instruments which provide a strong legal basis to address childhood statelessness. These include the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Article 7 of the CRC states that among other things every child shall have a right to a nationality. Article 6 of the ACRWC also guarantees the right to a nationality for every child.

In addition, the Constitution protects the right of every child to a name and nationality at birth.⁶⁵ Section 2(2) The South African Citizenship Act states that all children born in South Africa who would otherwise be stateless should be considered South African citizens by birth. This position has been confirmed by the Supreme Court of Appeal in the case of *Minister of Home Affairs v DGLR and Another*.⁶⁶

⁶² Soyiso Maliti, "Fifteen Million without Legal Docs in SA, Parly Hears," IOL, November 21, 2022, <https://www.iol.co.za/capeargus/news/fifteen-million-without-legal-docs-in-sa-parly-hears-0d5801c3-c2b1-4b39-95ec-81aa8a0dea49>.

⁶³ Lawyers for Human Rights, "Briefing by Lawyers for Human Rights on Statelessness in South Africa," ¶ 4, note 855.

⁶⁴ "Department of Home Affairs - Minister Malusi Gigaba to Attend a Special Treaty Event on the Status of Stateless Persons in Geneva, Switzerland," Department of Home Affairs, June 30, 2014, <http://www.dha.gov.za/index.php/statements-speeches/479-minister-malusi-gigaba-to-attend-a-special-treaty-event-on-the-status-of-stateless-persons-in-geneva-switzerland>.

⁶⁵ S.A. Const. § 28(1)(a).

⁶⁶ *Minister of Home Affairs v DGLR and Another* CCT115/21 [2021] ZACC 50.



Section 4(3) of the Citizenship Act also allows for citizenship by naturalisation for children who are born in South Africa to parents who are not South African citizens nor permanent residents, and who have lived in South Africa from birth to the age of 18 years old.

For foreign-born children or separated or unaccompanied children, Section 31(2)(b) of the Immigration Act outlines an exemption process by which those without access to any other nationality may apply for South African citizenship. This requires “special circumstances” as well as an application fee of R1 550. The granting of citizenship under this provision is also under the discretion of the Minister of Home Affairs.

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Procedural obstacles

The main challenge faced by children and youths who are stateless is the burden of proving nationality. The law requires one to show some form of proof with a particular country in order to claim nationality of that country. In South Africa, the pathway to acquisition of South African nationality starts with the notice of birth and acquisition of a birth certificate. The obstacles related to acquisition of birth certificates for children born of undocumented foreign nationals has led to an endless cycle of statelessness for children. Children born of refugees and asylum seekers who are not registered in their home countries and being unregistered in South Africa puts them at risk of being stateless

Lack of Clear Pathways to Citizenship

The DHA should prescribe an administrative process or Statelessness Determination Mechanism to identify persons who are at risk of being stateless in order to determine if they are eligible for citizenship under Section 2(2) of the Citizenship Act. However, these regulations have not been promulgated, making it “practically impossible” to access citizenship through this provision.⁶⁷

Citizenship through naturalisation is technically a remedy for FDCY born in South Africa not to be rendered stateless. However, again the DHA has not outlined regulations for this process despite the High Court and Supreme Court of Appeal ordering the DHA to do so by 30 November 2019.⁶⁸ Applications made by affidavit in the meantime have had a minimal response rate.⁶⁹

⁶⁷ Lawyers for Human Rights, “Briefing by Lawyers for Human Rights on Statelessness in South Africa,” ¶ 7, note 855.

⁶⁸ Minister of Home Affairs v Miriam Ali (2018) ZASCA 169 SCA.

⁶⁹ Lawyers for Human Rights, “Briefing by Lawyers for Human Rights on Statelessness in South Africa,” ¶ 8, note 855.



ACCESS TO DOCUMENTATION

Most FDCY or their families come to South Africa as asylum-seekers in the hopes of applying for refugee status. Without documentation confirming this status, FDCY can be barred from accessing education, health care and various social services. Just like birth registration, the documentation for asylum seekers and refugees provides them with access to enjoyment of other rights. Upon application for asylum at a Refugee Reception Office, FDCY are to be issued a temporary Section 22 asylum seeker visa. If they are found to be a refugee under Section 3 of the Refugees Act, they are then issued a Section 24 refugee certificate. Once they have had refugee status for 10 years, refugees can apply for certification in which they ask that they be found to be a refugee indefinitely so that they may apply for permanent resident status in South Africa.

There are several impediments to obtaining the required asylum seeker or refugee documents. In South Africa, delays in processing time for these documents have been recorded across the country leaving applicants vulnerable to the legal and social ills associated with lack of documentation.

Asylum-Seeking Process

Section 3 of the *Refugees Act* states that a person qualifies for refugee status if that person –

“(a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having any nationality and being outside the country of his or her for my habitual residence is unable or, owing to such fear, and willing to return to it; or

(b) owing to external aggression, occupation, foreign domination or other events seriously disrupting order in either part of the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or

(c) is a spouse or dependent of a person contemplated in paragraph (a) or (b).”

Upon arrival, a person seeking asylum must declare their intention to apply for asylum at a border post where their biometrics and details of their dependents, either in South Africa or their country of origin, will be captured by an immigration officer.⁷⁰ They will thereafter be issued with an asylum transit visa, which is valid for a period of five days, allowing them to travel to, and submit their application for asylum, at a Refugee Reception Office.⁷¹ Following the submission of an application for asylum, an

⁷⁰ “Refugees Act: Regulations” (2019), § 7, <https://www.gov.za/documents/refugees-act-regulations-27-dec-2019-0000>.

⁷¹ Ibid; “Immigration Act 13 of 2002,” § 23, <https://www.gov.za/documents/immigration-act>.



applicant will undergo a refugee status determination interview with a Refugee Status Determination Officer (“RSDO”) who is tasked with adjudicating their claim.⁷²

Applicants are thereafter either recognised as refugees or considered asylum seekers (presumptive refugees) pending the further adjudication of their claims. Refugees are issued with a section 24 refugee certificate, valid for four years at a time.⁷³ Asylum seekers are issued with a temporary section 22 asylum seeker visa, which is valid for three to six months at a time and must be renewed repeatedly until a decision is reached regarding their application for asylum.⁷⁴

In terms of 21(2) of the Refugees Act, the RRO is obliged to accept an application for asylum and, if required, RRO staff must assist an applicant to complete the necessary application forms. Further, the RRO:

“must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.”⁷⁵

The asylum-seeking process is meant to be for a short duration, and the RROs are expected to make speedy determinations on claims for refugee status. With respect to delays in the processing of documentation, the court in *Kiliko v Minister of Home Affairs* remarked that:

“[a]vailability of adequate facilities to receive, expeditiously consider and issue asylum-seeker permits would not only be consistent with the State’s obligations in terms of the international instruments to which it has become a party and the legislation enacted by it in order to give effect thereto, but would also comply with the obligation under s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights”⁷⁶

Documentation for Children Accompanied by Parent(s)

SOUTH AFRICA’S LEGAL OBLIGATIONS

Domestic laws

Children are not specifically mentioned in the Section 3(a) of the *Refugees Act*. As a result of this omission, children who accompany their parents are not seen to have a claim for asylum in their own right and are automatically considered to be part of a family unit and a dependent of their parent(s). This means that most FDCY are attached to their parents’ asylum file and are issued their visa under Section 3(c) of the Refugees Act.

⁷² “Refugees Act: Regulations” (2019), § 8, note 70.

⁷³ Ibid, § 17.

⁷⁴ Ibid, § 12.

⁷⁵ “Refugees Act 130 of 1998,” § 21(1), <https://www.gov.za/documents/refugees-act>.

⁷⁶ *Kiliko and Others v Minister of Home Affairs* 2006 (4) SA 114 (C).



Asylum seekers have to declare all dependents who are to be included in an application for asylum at a port of entry when obtaining an asylum transit visa.⁷⁷ Dependent children not declared at a port of entry will be excluded from an application for asylum, unless an applicant is able provide proof of relationship in the form of a DNA test at their own cost, failing which, such child shall be dealt with as an unaccompanied child in terms of Section 21(a) of the Act.⁷⁸

Case law

South Africa's Supreme Court of Appeal in the case of *Centre for Child Law v The Governing Body of Hoerskool Fochville* confirmed that the best interests of the child principle as enshrined in section 28(2) of the *Constitution* and “incorporates a procedural component, affording a right to be heard where the interests of children are at stake.”⁷⁹ The Court held that a truly child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. “To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”⁸⁰ It was further held that “[t]his “overarching principle” has been codified in the provisions of the *Children's Act*. Section 10 of the *Children's Act* confers a specific right on children to participate in all decisions affecting them, taking into account their age, maturity and development.”⁸¹

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Accompanied children have no claim on their own right

The main challenge with the asylum system in South Africa is that accompanied children have no claim on their own right. This means that if the parent's application fails, the child's application automatically fails. The system does not consider the fact that factors that lead to displacement of people do not affect adults only but children also. It is possible for a child to be affected by persecution, war, terror on their own right and should have their own individual merits considered.

Undeclared dependent children are excluded of the application for asylum

Seemingly the law does not consider the fact that other people may have dependents (especially children out of wedlock) that they may not be aware of at the time of application. This means that these children are not declared at the time of entry and therefore excluded from family joining. This has left many families separated simply because the child's name was not declared.

Documentation for Children born in South Africa

Children of non-South Africans born in South Africa do not automatically qualify for South African citizenship. Instead, they must wait until they turn 18 to apply. In the meantime, these children are left without documentation beyond their unabridged birth certificates, making it difficult for them to access education and health care as they are not issued an ID number.

⁷⁷ “Refugees Act: Regulations” (2019), § 7, note 70.

⁷⁸ See section below on Unaccompanied Children, *infra* p. 3332.

⁷⁹ *Centre for Child Law v The Governing Body of Hoerskool Fochville*, ¶ 19, note 17, where the Supreme Court of Appeal held that children have a right to be heard in matters affecting their interests, either directly or through their representatives.

⁸⁰ *S v M*, ¶ 24, note 16.

⁸¹ *AB v Pridwin Preparatory School*, ¶ 143, note 19.



SOUTH AFRICA'S LEGAL OBLIGATIONS

Where these children are born to asylum-seekers and refugees, they may apply for the same Section 22 or Section 24 visas as their parents, even though they themselves never fled their country of origin. This process, known as “family joinder,” is proscribed under the Refugees Amendment Act and its importance has been recognised by case law.

Domestic laws

Although the Refugees Act requires that all dependents be declared while an adult makes an application for asylum, the Refugees Amendment Act allows for additional dependents born in South Africa to be declared while the applicant holds a Section 22 or Section 24 visa. Section 17 of the Refugees Amendment Act states that “[a]ny child of an asylum seeker born in the Republic and any person included as a dependant of an asylum seeker in the application for asylum has the same status as accorded to such asylum seeker.”

Case Law

Despite the legislative provisions allowing for family joinder, prior to 2019 many families faced issues obtaining visas for their dependents. For FDCY children, this meant that they faced an increased risk of arrest and many administrative barriers in enrolling for school.⁸² This was brought to the Court’s attention by Scalabrini Centre of Cape Town and the Refugee Rights Unit at the University of Cape Town, and in 2019 the Western Cape High Court recognised the right of asylum-seekers and refugees to join their families to their asylum or refugee files.⁸³

After the Court order, the Department of Home Affairs also codified this right in its Standard Operating Procedure: Refugee Family Unification, which provides that an alleged dependent of a recognized refugee who applies for refugee status is entitled to be issued with a visa under section 24 of the Act irrespective of whether the recognised refugee declared the existence of such dependent when making an application for refugee status, when such dependent applied for refugee status or where such dependent was married, or born, to a recognised refugee. The same applies for alleged dependents of asylum-seekers who hold a section 22 visa.⁸⁴

Documentation for Separated Children

SOUTH AFRICA'S LEGAL OBLIGATIONS

Separated children in migration situation face a number of legal challenges. The best interests principle requires that children who arrive in a country are to be afforded adequate protection in that country. Although South Africa’s legislative framework seems to exclude separated children from legal protection under the asylum system, the Constitutional Court has held that separated children have

⁸² Tariro Washinyira, “Shoddy Treatment by Home Affairs Wrecks Families,” GroundUp News, March 27, 2018, <https://www.groundup.org.za/article/refugees-denied-constitutional-rights-home-affairs/>.

⁸³ Tariro Washinyira, “Court Ruling Will Legalise Dependents of Asylum Seekers,” GroundUp News, June 20, 2019, <https://www.groundup.org.za/article/court-rules-dependents-can-join-asylum-seekers/>.

⁸⁴ Standing Committee for Refugee Affairs, “Department of Home Affairs Standard Operating Procedure: Refugee Family Reunification” (2019), https://scalabrini.org.za/wp-content/uploads/2019/06/Draft-Order_Scalabrini-Centre-v-Minister-of-Home-Affairs-5242-2016_19-June-2019.pdf.



the same right to benefit as a dependant with the adult that they arrive with as biological children of asylum-seekers.

Domestic laws

South Africa's legislative framework offers protection to FDCY by providing for refugee status to those who are included in their parent or guardian's refugee or asylum seeker applications. Any FDCY included as a dependent of an asylum seeker or refugee in the application for asylum qualifies for asylum in terms of Section 3(c) of the *Refugees Act 130 of 1998* and is accorded the same status as such asylum seeker or refugee.

However, the Refugees Act limits the definition of "dependent" to unmarried minor biological children who are younger than 18 years, as well as children legally adopted in the asylum seeker/refugee's country of origin. This effectively deprives separated children who arrive with adults who are not their legal parents or guardians of legal protection under the asylum system, as they are typically barred from applying on their own (or are too young to be able to do so) and previously could not be joined with the adults who accompanied them.

Case law

This gap was addressed in *Mubake v Minister of Home Affairs*, where the Court held that the definition of a family member in the *Children's Act* is not restricted to the nuclear family, but also includes "*any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship*".⁸⁵ The Court further held that a narrow interpretation of a dependent child is "*inimical to the interests of the children...[and] leaves them in a state of uncertainty pending the determination by the Children's Court of the suitability of their relatives to care for them.*"⁸⁶

As a result, the Court held that "*separated children should be documented as they enter the country, accompanied by their adult care-givers*" and that the definition of dependent should be interpreted so as to include in "*the category of persons who are dependents of the adult asylum seekers, separated children.*"⁸⁷

International Directives

The UNHCR handbook on *RSD Procedural Standards in Processing Claims based on the Right to Family Unity*⁸⁸ states that the term "dependency" does not only relate to financial or economical dependency but also relates to emotional and social dependency. It holds that a flexible approach to dependency must be adopted "*when applying criteria for granting derivative refugee status and should take into account social and cultural norms or other specific circumstances.*"⁸⁹ Given the disruptive and traumatic

⁸⁵ "Children's Act 38 of 2005," § 1(d), <https://www.gov.za/documents/childrens-act>.

⁸⁶ *Mubake and Others v Minister of Home Affairs and Others* 2016 (2) SA 220 (GP) at ¶ 23.

⁸⁷ *Ibid*, ¶ 26.

⁸⁸ UN High Commissioner for Refugees (UNHCR), UNHCR RSD Procedural Standards Unit 5: Processing Claims Based on the Right to Family Unity, 26 August 2020, available at: <https://www.refworld.org/docid/5e87075e2.html> [accessed 5 November 2022].

⁸⁹ UN High Commissioner for Refugees (UNHCR), UNHCR RSD Procedural Standards Unit 5: Processing Claims Based on the Right to Family Unity, 26 August 2020, available at: <https://www.refworld.org/docid/5e87075e2.html> [accessed 5 November 2022].



factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival.

Unaccompanied Children

SOUTH AFRICA'S LEGAL OBLIGATIONS

South Africa has an obligation in terms of both domestic and international law to protect the rights of unaccompanied children. When unaccompanied children arrive on South African territory, their safety becomes the responsibility of the government.

Domestic laws

The *Refugees Amendment Act* briefly sets out the procedure relating to unaccompanied children. Section 21(a) states that 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* must be both issued with an asylum seeker visa and brought before the Children's Court.⁹⁰

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

No automatic asylum seeker visa

There is no provision that allows for automatic asylum seeker visa for unaccompanied children. These children often get absorbed by the social services and care organizations. Where such children have no other document proving their nationality, they often find themselves either document less or stateless. This is one of the main challenges faced by children who arrive in South Africa to seek asylum but are unable to meet the stringent requirements in the asylum system.

Lack of understanding of FDCY lived experiences by social workers

FDCY normally find themselves in the care of social workers and other social service practitioners. This is because of their minority and also due to the ills that they encounter while in transit or when they have arrived in South Africa. They are often exposed to abuse and various forms of sexual violence, resulting in severe trauma. According to scholars, the challenges faced by these children are then worsened by lack of specialised social workers and training. It has also been highlighted that the care workers who assist these children simply use “common knowledge” and nothing is tailor made to meet the needs of FDCY. According to researchers “[t]his lack of the required skills and competencies aggravated the dire circumstances of the unaccompanied refugee children.”⁹¹

⁹⁰ Section 21A of the Refugees Amendment Act.

⁹¹ Magqibelo, L., Londt, M., September, S. and Roman, N., 2016. Challenges faced by unaccompanied minor-refugees in South Africa. *Social Work*, 52(1), pp.73-89.



Children that reach the age of the majority

SOUTH AFRICA'S LEGAL OBLIGATIONS

Domestic laws

According to the *Refugees Amendment Act*, once a child of an asylum seeker or recognised refugee attains the age of majority, they are no longer considered to be a dependent.⁹² However, under Section 33 of the Refugees Act, dependants of refugees or asylum-seekers may remain in the country despite the cessation of their dependency on the main applicant. This reflects the right to family life and family unity, as espoused in international refugee law and the South African Constitution.

International Laws

Protection of the family as the natural and fundamental group unit of society is confirmed articles 17 and 23 the *ICCPR*. Article 10 of the *ICESCR* further confirms that states have an obligation to ensure the “widest possible protection and assistance” to families. Protection and assistance has been interpreted to mean an obligation that goes further than “refrain from interference.”⁹³

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Because FDCY who apply for asylum and refugee documentation in South Africa must do so as a dependant of an adult, their status becomes complicated when they reach the age of majority. Unfortunately, this is often when FDCY need their identity documents the most, as many are in the process of writing their matric exams or applying for university.

De-Linking

Since 2018, RROs have been “de-linking” dependants from the main applicant’s file when they reach majority and requiring them to undergo an asylum interview again, even if they previously held refugee status. This is often complicated by the fact that these dependants were extremely young when they left their country of origin and often do not know why they left. LHR recorded that many of these applicants were rejected by the Standing Committee of Refugee Affairs as “manifestly unfounded:” “[p]ractically, upon turning 18 a dependent loses their previous documentation status without due process, and their claim is rejected, leaving them without a substantive claim for refugee status.”⁹⁴

Unaccompanied FDCY Rendered Stateless

A research report by the African Centre for Migration & Society also found that South African governmental departments lack durable solutions to allow unaccompanied FDCY to receive an asylum or refugee status and continue that status once they turn eighteen.⁹⁵ Even where children are assisting by the DSD, social workers are unsure of how to create an “exit plan” or guide unaccompanied youth

⁹² The definition of “dependent” as contained in the Refugees Amendment Act specifically refers to a minor child.

⁹³ Fatima Khan, “Family Reunification within the Refugee Context: Is South Africa Meeting Its International, Regional, Constitutional and Legal Obligations towards Refugees?,” University of Cape Town Refugee Rights Unit, Working Paper Series, 2011, p. 9, http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_1_of_2011.pdf.

⁹⁴ Lawyers for Human Rights, “Briefing by Lawyers for Human Rights on Statelessness in South Africa,” ¶ 35, note 855.

⁹⁵ Rosalind Elphick and Roni Amit, “Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and GenderBased Violence in Musina” (African Centre for Migration & Society, 2012), p. 10, <http://www.migration.org.za/wp-content/uploads/2017/08/Border-Justice-Migration-Access-to-Justice-and-the-Experiences-of-Unaccompanied-Minors-and-Survivors-of-Sexual-and-Gender-Based-Violence-in-Musina.pdf>.



to apply for asylum when they reach majority. This often results stateless youth who do not have access to the nationality of their country of origin, nor have they applied to seek protection in South Africa.



ACCESS TO HEALTHCARE

“Everyone has the right to have access to health care services, including reproductive health care”

– SECTION 27 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

“Every child has the right c. to basic nutrition, shelter, basic health care services and social services.”

- SECTION 28(1)c) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Forcibly displaced children and youth often face barriers in access to health and other socio-economic rights, despite their acute vulnerability that requires access to these services. FDCY typically live in densely populated areas that lack hygiene services such as clean water and safe ablution facilities. Migrant children are generally at a higher of communicable diseases, parasitic infections, chronic illnesses and inadequate nutrition. Many also face both mental and physical health complications from their journey into South Africa, including sexual violence. Where there are health services such as clinics in these areas, they are usually ill-equipped or costly for FDCY and their families to access. The impact of this is much higher on undocumented children and youth.

In addition, FDCY face discrimination and negative attitudes from both host communities and service providers. Migrant or displaced children are often seen as straining resources and opportunities for locals. This is particularly the case in communities where the resources are already scarce for locals.

SOUTH AFRICA’S LEGAL OBLIGATIONS

The South African Constitution entitles everyone access to basic health care service and emergency health treatment. Essentially, this entails that FDCY may not be denied access to emergency health services owing to lack of documentation. In addition to this, the domestic laws provide for compulsory free health care services for children under the age of six and pregnant or lactating women regardless of their documentation status or nationality.

South Africa’s Constitution

Section 27 of the *Constitution* guarantees everyone the right to have access to healthcare services in South Africa, and that no one may be refused emergency treatment.⁹⁶ This right applies to everyone

⁹⁶ S.A. Const. § 27(3).



including FDCY. The term “[e]veryone” as contained in section 27 of the *Constitution* has been explicitly interpreted by courts to include non-nationals.⁹⁷ Section 28(1)(c) of the *Constitution* provides that every child has the right to basic healthcare services.

Domestic laws

The *National Health Act*,⁹⁸ enacted to give effect to the State’s constitutional duties regarding the provision of healthcare services, recognises that everyone has the right to access healthcare, specifically recognising children under the age of 6 and pregnant and lactating women’s rights to free healthcare.

The *Refugees Amendment Act* states that a refugee is entitled to full legal protection, which includes the rights set out in the *Bill of Rights* including the right to access to health except those rights that only apply to citizens.⁹⁹ Asylum seekers are also entitled to the rights contained in the *Bill of Rights* “*in so far as those rights apply to an asylum seeker.*”¹⁰⁰

In 2007, the Department of Health released a circular confirming that refugees and asylum seekers, with or without permits, can access the same basic healthcare services as South African citizens.¹⁰¹ Basically, everyone regardless of their documentation status is entitled to free primary healthcare, maternal health care as well as HIV and TB treatment.

Mental Health

The National Department of Health has agreed that mental health includes “*the successful performance of mental function, resulting in productive activities, fulfilling relationships with other people, and the ability to adapt to change and to cope with adversity; from early childhood until later life, mental health is the springboard of thinking and communication skills, learning, emotional growth, resilience, and self-esteem.*”¹⁰² According to the *Mental Health Care Act*, mental health services should be provided as part of primary, secondary and tertiary health services.¹⁰³ This means that everyone, including FDCY, should have access to mental health services as part of primary health care.

The cost of healthcare services

Primary healthcare services are provided free of charge, but higher levels of care are subject to a fee. Healthcare fees are regulated by the *Uniform Patient Fee Schedule*, amended annually and approved by the Minister of Health. The UPFS was developed to regulate a fee structure for public healthcare facilities. It provides for three groups of patients, namely full-paying, subsidised, and free users. Under the category of subsidised patients, refugees, asylum seekers and persons from SADC states who enter

⁹⁷ Minister of Home Affairs v Watchenuka, note 32.

⁹⁸ Preamble to the National Health Act 61 of 2003.

⁹⁹ Section 27(b) of the Refugees Amendment Act.

¹⁰⁰ Section 27A(d) of the Refugees Amendment Act.

¹⁰¹ National Department of Health Revenue Directive: Refugees/Asylum Seekers with or without a permit (September 2007).

¹⁰² The National Department of Health’s National Mental Health Policy Framework and Strategic Plan 2013-2020 p 9. See also United States Department of Health and Human Services “Mental health: a report of the surgeon general” (2000).

¹⁰³ The Mental Health Care Act no 17 of 2002 provides a legal framework for mental health in South Africa and for the admission and discharge of mental health patients in mental health institutions with an emphasis on human rights for mentally ill patients.



South Africa illegally are subject to a means-test which calculates the fee payable depending on the patient's income.¹⁰⁴

Section 4(3)(b) of the *National Health Act* further states that, subject to any condition prescribed by the Minister, the State, clinics and community health centres funded by the State must provide all persons with free primary health care services.¹⁰⁵ In addition, all children under the age of six (6) are entitled to free health care services at any level. Provincial governments can regulate healthcare tariffs for admission and fees paid to hospitals.

Duty to report illegal foreigners

The *Immigration Act* states that staff at clinics and hospitals must find out the legal status of patients before providing care (except in an emergency). Hospitals and clinics are required to "report to the Director-General [of Home Affairs] any illegal foreigner" or anyone whose status is not clear.¹⁰⁶

International Instruments

Article 12 of the International Covenant on Economic Social and Cultural Rights¹⁰⁷ states that everyone has the right to "the enjoyment of the highest attainable standard of physical and mental health." Article 12 further places an obligation on State Parties to achieve the full realisation of this right. The World Health Organisation has defined "health" as "a state of complete physical, mental and social well-being".¹⁰⁸

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Xenophobia

There is medical xenophobia in South Africa-this has been reflected in the derogatory manner in which foreigners are treated in South Africa's healthcare facilities. There is an underlying belief among citizens and government that non-nationals are depleting the country's medical resources. Extensive medical procedures like dialysis and fibroids treatment are often reserved for only citizens.

According to the Mail and Guardian, Operation Dudula, a prominent anti-foreigners group "*targeted the sick and vulnerable outside Kalafong Hospital in Tshwane where they profiled patients, allegedly by skin colour and language, turning away anyone who failed to pass muster. The protesters also targeted Hillbrow Community Health Centre where they intimidated migrants accessing care.*"¹⁰⁹ The MEC for Health for Limpopo province recently came under fire for berating a foreign woman who was seeking medical attention at a Limpopo medical facility. The MEC was recorded on video saying foreigners are "*killing my health system.*" Another politician, Gayton Mackenzie publicly announced that he would

¹⁰⁴ The Gauteng Patient Classification Policy Manual further provides that undocumented citizens of a SADC state and asylum seekers are entitled to be means tested and receive the same health benefits as South African citizens, at a level of subsidization in line with the means test results.

¹⁰⁵ Except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases

¹⁰⁶ "Immigration Act 13 of 2002," § 44, note 71.

¹⁰⁷ "International Covenant on Economic, Social and Cultural Rights," art. 12, note 27.

¹⁰⁸ WHO "World Health Report 2001, Mental Health: new understanding, new hope" (2001).

¹⁰⁹ Tasanya Chinsamy and Claire Waterhouse, "Vulnerable Migrants Denied Maternal and Child Healthcare Services at Gauteng Hospitals," The Mail & Guardian, September 7, 2022, <https://mg.co.za/opinion/2022-09-07-vulnerable-migrants-denied-maternal-and-child-healthcare-services-at-gauteng-hospitals/>.



switch off a foreigner's oxygen to save a South African. The Mail and Guardian also reports that in Gauteng, some hospitals have a deliberate policy that aims to discriminate against foreign nationals. These policies are patently contrary to the national health and the constitution.

Maternity services

It has been reported that at some hospitals in Tshwane, foreign pregnant and lactating women face challenges in accessing maternal health care especially if they lack appropriate documentation and are unable to pay the required fees. The hospitals have used the Department of Health Circular 20 of 2020 to exempt South Africa citizens and documented refugees only from paying fees. Undocumented persons' ability to pay is not evaluated. According to the Mail and Guardian, *"some senior hospital managers view this circular as an instruction from the department of health to deny means testing and free (or lower-fee) services to pregnant and lactating women and children if they are asylum seekers, undocumented or people affected by statelessness – unless they need emergency services."*

Unconstitutional regulations on admission fees

The issue of admission fees is a pertinent one. Even though there are various guidelines for hospitals regarding fee structure, the reality on the ground is that these are not always implemented correctly. There are instances in which patients are incorrectly categorized in terms of the Uniform Patient Fee Schedule. This has resulted in them being billed exorbitant fees which they cannot afford. In 2019, the Gauteng health department passed instructions to its hospitals and clinics for foreign nationals to pay their admission fees in full including for emergency and basic health.¹¹⁰

Reluctance to seek medical assistance in the absence of valid documentation

It has been observed that most newcomers without any form of documentation are usually reluctant to seek medical assistance for fear of reprisals. In some cases they fear that their immigration status would be reported to the authorities. It has also been observed that they often assume and perhaps learn from their neighbours that it is impossible to access healthcare services without a letter from a lawyer or a permit.

¹¹⁰ S Stevenson "Are foreigners really entitled to free healthcare in South Africa?" Bhekisisa Centre for Health Journalism (2019), <https://bhekisisa.org/opinion/2019-03-06-can-foreigners-get-medical-aid-free-healthcare-in-south-africa/>.



ACCESS TO EDUCATION

“Basic education is an important socio-economic right directed, amongst other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.”¹¹¹

– EASTERN CAPE HIGH COURT IN 2019 CASE *CENTRE FOR CHILD LAW AND OTHERS V MINISTER OF BASIC EDUCATION AND OTHERS*

“Women, men, boys and girls of all ages and backgrounds- whether migrants, refugees, asylum-seekers, stateless persons, returnees or internally displaced persons have the right to education.”¹¹²

– FORMER UN SPECIAL RAPPORTEUR ON THE RIGHT TO EDUCATION

“[Education] offers a form of physical protection in a safe learning space away from the dangers of war and persecution, it also provides psychosocial protection in the form of interaction with other classmates and teachers with opportunities to be creative and exchange concerns and ideas.”¹¹³

– SABELO KENNETH MWENI, RESEARCHER ON REFUGEE AND ASYLUM ISSUES

FDCY often experience challenges accessing education. Access to education is essential because it can empower FDCY to acquire new skills to improve their future life opportunities. The United Nations High Commissioner for Refugees has outlined that education is a basic human right which everyone

¹¹¹ Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG) ¶ 3.

¹¹² A/HRC/14/25 United Nations Human Rights Council Fourteenth session, The right to education of migrants, refugees and asylum- seekers

¹¹³ Sabelo Kenneth Mweni, “The Right to Education of Asylum Seeker and Refugee Children” (Master Thesis, University of Cape Town, 2018), <https://open.uct.ac.za/handle/11427/27907>.



including refugees is entitled to. Schools provide children with safe spaces for development and growth and are also less vulnerable to social ills like violence, abuse and sexual exploitation.

Like any other group of children, FDCY have the right to education. However, studies have shown that there is a huge gap between forcibly displaced children and youths and non-forcibly displaced in terms of access to education¹¹⁴. It is common knowledge that displacements upset virtually all facets of one's life, including education. Children uprooted from their homes often find themselves at the risk of never re-joining school or completing their studies. Even where there is access, FDCY find themselves marginalised within schools, experience overcrowdedness, and under resourced facilities. In addition to this, they also must overcome or navigate an unfamiliar curriculum and, in some cases, an unfamiliar language of instruction.

SOUTH AFRICA'S LEGAL OBLIGATIONS

As a member of the international community, South Africa has both legal and moral obligations to ensure unfettered access to education for FDCY. South Africa is a signatory of the Convention on the Rights of the Child, and under this Convention, all state parties undertake to guarantee the right to education for all children. This right has been codified in South Africa's domestic law.

International Law

The right to education is guaranteed in terms of international law. The CRC provides for the right to education for all children. This includes children who are forcibly displaced. In addition, the 1951 Convention Relating to the Status of Refugees provides specifically for the right to education for all refugees including children. The right to basic education is stated at Article 22 of the Refugee Convention and provides that:

1. The contracting states shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The contracting states shall accord to refugees' treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

In addition, the UDHR provides that “everyone has the right to education... and education shall be free, at least in the elementary and fundamental stages.”¹¹⁵ The ICESCR also provides for the right to education for all:

“The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental

¹¹⁴ https://www.unhcr.org/people-forced-to-flee-book/wp-content/uploads/sites/137/2021/10/Dina-Abu-Ghaida-and-Karishma-Silva_Educating-the-Forcibly-Displaced-Key-Challenges-and-Opportunities-1.pdf

¹¹⁵ UN General Assembly, “Universal Declaration of Human Rights,” 10 December 1948, 217 A (III), <https://www.refworld.org/docid/3ae6b3712c.html>.



*freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*¹¹⁶

Constitution

The right to education is enshrined in section 29 of the *Constitution*, which holds that “[e]veryone has the right...[t]o a basic education, including adult basic education.”¹¹⁷ This means that the government of South Africa has a constitutional duty to make education available and accessible to everyone.

Legislation

The *Refugees Amendment Act* also refers to asylum seekers and refugees’ rights as contained in the *Bill of Rights* and in so far as they apply to refugees and asylum seekers, including basic education. South Africa’s education system is further regulated by the *South African Schools Act*¹¹⁸ and the regulations thereto.¹¹⁹

Section 5(1) of the *Schools Act*, which regulates admission to public schools, is aligned with the Constitution and holds that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. Section 3(1) of the *Schools Act* further makes it compulsory for every child to attend school from the age of seven (7) until the learner reaches age 15, or the 9th Grade, whichever occurs first. Section 5(2) the *Schools Act* states that the governing body may not administer any test related to the admission of a learner to a public school. Section 5(3)(a) of the *South African Schools Act* of 1996 states that “no learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body.” The *South African Schools Act* requires students to be admitted to public schools without any form of discrimination. This section goes on to say that the governing body of a public school determines its admission policy subject to the Schools Act, the Constitution, and applicable provincial law.

Section 9 of the *Admission Policy for Ordinary Schools* states that an admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission. Section 19 of the *Admissions Policy* states that this policy should apply equally to learners who are not citizens of the Republic of South Africa and whose parents are in possession of a permit for temporary permanent residence issued by the Department of Home Affairs. This would include asylum-seeker and refugee children. Section 21 states that when persons classified as illegal aliens apply for admission for their children or for themselves, they must show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the relevant legislation (Immigration Act or Refugees Act, as applicable).

¹¹⁶ “International Covenant on Economic, Social and Cultural Rights,” art. 13, note 27.

¹¹⁷ S.A. Const. § 29(1).

¹¹⁸ “South African Schools Act 84 of 1996,” <https://www.gov.za/documents/south-african-schools-act>.

¹¹⁹ The South African Schools Act 84 of 1996: Regulations Pertaining To The Conduct, Administration And Management Of The National Senior Certificate Examination, 2008, Regulations pertaining to the conduct, administration and management of the National Senior Certificate examination, published as Government Regulation Notice No. R872 in Government Regulation Gazette No. 31337.



Case law

In the case of *Section 27 and others v Minister of Basic Education*, the court pronounced that the right to education is a right that frees and unlocks the potential of each and every member of society.¹²⁰ In 2019, the Eastern Cape High Court confirmed that undocumented children cannot be excluded from accessing education.¹²¹ Department of Basic Education issued a circular advising that public schools must act in accordance with the judgment.¹²² The circular states that:

“[c]hildren not in possession of an official birth certificate must be admitted to public schools; and where an official birth certificate cannot be provided, the school must accept alternative proof of identity, such as an affidavit or sworn statement of a learner’s parent, caregiver or guardian that fully identifies the learner.”

It further states that children cannot be removed or excluded from school on the sole basis that they have no identity document number, permit or passport, or have not produced identity documents.

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Broken education system

The legacy of apartheid is still visible in South Africa’s education system. Inasmuch as the government and legislature have passed legal instruments and policies to improve the situation in the current democratic dispensation, the education system is still lagging behind. The education system in South Africa is still riddled by gross inequalities which have since been exacerbated by the recent COVID-19 related regulations. The public schooling system which caters for most vulnerable groups include FDCYs is characterized by overcrowding, poor infrastructure, poorly qualified teachers, and shortage of textbooks. The stark reality of the socio-economic situation in the country is reflected in the education system thereby creating and endless cycle of poverty and vulnerability.

Language barrier and bridging education projects

In South Africa each school has a degree of leeway in adopting its own language policy but are predominantly restricted to the 11 official languages which refugee and migrant children largely do not speak. Most schools use English and or Afrikaans as medium for instruction. It has been observed that children from Francophone countries often struggle to adapt as they adjust from French medium to English medium. This language barrier makes it difficult for these children to integrate well into the schooling system. It has been observed that learners who struggle to adapt often find themselves staying in school longer than required or are likely to quit before they complete.

Limited access to technology and learning resources

The everchanging world requires many facets our lives to change with it, including education. The recent past has seen drastic technological advances and integration of technology in to teaching and learning. These changes have brought with them accessibility challenges. Children enrolled in predominantly rural or remote schools are unable to access the new technology due to lack of access

¹²⁰ *Section 27 and others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012).

¹²¹ *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG).

¹²² Minister of Basic Education, “Admission of Learners to Public Schools Circular No. 1 of 2020,” <http://section27.org.za/wp-content/uploads/2020/02/Circular-1-of-2020-Undocumented-Learners.pdf>.



to internet and relevant devices. The shortage of essential facilities and physical infrastructure stagnates the realisation of quality education.

This gap was especially acute during the COVID-19 lockdown when schools moved online. Three2Six, an organisation working on the right to education for refugee children, noted that most refugee families only had one smartphone per household, if any. Additionally, FDCY were unable to access their textbooks and online assessments during the lockdown.¹²³

Financial Pressures on refugee or asylum-seeker parents

Most forcibly displaced children and youths come from low-income households. Their parents or guardians often struggle to make ends meet and rely on odd jobs to sustain their physical needs. These includes car guarding, hairdressing, and domestic work. Those who are unable to pay fees often approach NGOs to assist them negotiate payment plans for their school children. A 22-year-old who was forcibly displaced as a child related to LHR in its baseline assessment,

“I successfully completed my first year, coming top of my class, unfortunately I was unable to register for the second year due to lack of finance. Applying for a bursary has also been an issue as majority of them are only applicable to citizens.”

Documentation requirements

Children or parents who cannot identify themselves by means of a passport, birth certificate, visa, permit or other documents cannot be denied basic education on that basis alone. However, undocumented children are often denied from enrolling in school without some of identification. For other undocumented children, it is much harder to enrol in secondary school as they are often required to produce study permits or asylum or refugee documentation. Additionally, lack of documentation prevents them from accessing applications for fee exemptions, receiving their matric results, or applying for university.

¹²³ LHR Interview with Three2Six on 01 December 2020.



DETENTION MONITORING

"[I]n line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them. The Constitution demands that our criminal justice system should be child-sensitive."¹²⁴

- SOUTH AFRICAN CONSTITUTIONAL COURT

"It is a known fact that our detention centres, be it police holding cells or correctional centres, are not ideal places. They are not homes. They are bereft of most facilities which one requires for raising children. It is worse for children. The atmosphere is not conducive to their normal growth, healthy psycho-emotional development and nurturing as children."¹²⁵

- SOUTH AFRICAN CONSTITUTIONAL COURT

SOUTH AFRICA'S LEGAL OBLIGATIONS

Constitution

The provisions relating to children's rights in the Constitution do not differentiate between citizen and non-citizen children; therefore, South African constitutional guarantees apply to FDCY. The Constitution states that a child's best interests are of paramount importance in every matter concerning a child. Specific to detention, the Constitution states in Section 28(1)(g) that: every child has the right not to be detained except as a measure of last resort. If a child must be detained, the child may be detained only for the shortest appropriate period. The child has the right to be kept separately from detained persons over the age of 18 years and treated in a manner and kept in conditions that consider the child's age.

These are in addition to the general protections in sections 12 and 35 of the Constitution relating to rights of arrested, detained, and accused persons which apply with equal force to children. Section 12 protects from arbitrary detention, detention without trial, all forms of violence, torture, and cruel, inhuman, or degrading treatment. Section 35 outlines, among others, the right against self-

¹²⁴ Raduvha v Minister of Safety and Security and Another (CCT151/15) [2016] ZACC 24, ¶ 59.

¹²⁵ Ibid, ¶ 68.

incrimination, the right to information regarding arrest and detention, the right to legal assistance, and fair trial guarantees.

Domestic Laws

South African immigration laws and regulations, the *Refugees Act*, and the *Children's Act* together provide protections for FDCY relating to detention. These laws give legislative meaning to the constitutional guarantees outlined above and provide guidance for law enforcement and detention authorities.

Non-nationals in the Republic are required to obtain documentation that authorises their stay in South Africa, such as asylum seeker visas, refugee status permits or refugee identification documents, or a valid visa in terms of the *Immigration Act*.¹²⁶ Any person seeking asylum with a valid visa or application cannot be detained simply because they have not yet obtained refugee or permanent resident status.¹²⁷

In addition to these protections, the *Refugees Act* and *Immigration Regulations* outline specific guidelines for detention of migrant children. If FDCY are detained, it must be as a last resort measure and “for the shortest appropriate period of time” under Section 29(2) of the *Refugees Act*. Under *Art. 1(d) of Annexure B to Immigration Regulations 28(5)*, detained children and youth must be held separately from adults, and unaccompanied minors may not be detained.

The *Children's Act 38 of 2005* reflects provisions of the Convention on the Rights of the Child as they relate to detention of children, whether they are citizens or non-citizens. Section 9 of the *Children's Act* provides that “in all matters concerning the care, protection and well-being of a child the standard that the child’s best interest is of paramount importance, must be applied.” This applies to law enforcement officials who come into contact with children.¹²⁸

Section 14 of the *Children's Act*, which deals with access to courts, read with section 15, provides that “every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.” Section 15 emulates the provisions of section 38 of the Constitution by empowering a person, in addition to or apart from the affected children, to bring a matter before courts for redress in the public interest.

The *Children's Act* also specifically deals with FDCY in Section 139, wherein it states that no unaccompanied minor child can be removed from South Africa without the consent of the children’s court.¹²⁹

Case law

In the context of arrest and detention, the Constitutional Court has stated that the best interests principle requires the criminal justice system to be “child-sensitive.”¹³⁰ Highlighting children’s “inherent vulnerability,” the Court in *Raduvha v Minister of Safety and Security and Another* held that arrest and

¹²⁶ “Immigration Act 13 of 2002,” note 71.

¹²⁷ “Refugees Act 130 of 1998,” § 21(4), note 75.

¹²⁸ *Raduvha v Minister of Safety and Security*, ¶ 58, note 124.

¹²⁹ “Children’s Act 38 of 2005,” § 139 (b)(iii), note 85.

¹³⁰ *Raduvha v Minister of Safety and Security*, ¶ 59, note 124.



detention should only be resorted to when there are “no other less invasive way[s].”¹³¹ This is due to the serious psychological harm that detention can inflict on a child.¹³²

Specific to FDCY, the court in *Centre for Child Law v Minister of Home Affairs* said that the detention of children for immigration reasons was unlawful. The court said that as a vulnerable group, children are entitled to protection under the Children’s Act, regardless of whether they are documented or undocumented. This includes access to places of safety.¹³³

Regional Instruments

The African Charter on the Rights and Welfare of the Child specifically protects the rights of FDCY and underscores the best interests principle. Related to detention, Article 17(2)(b) requires separate accommodation for children in detention facilities.

International Instruments

The United Nations Convention on the Rights of the Child provides widespread protections for children facing detention.¹³⁴ These rights apply to FDCY in South Africa, as article 2 prohibits any discrimination against children irrespective of, amongst others, their parents or guardian’s nationality, birth or other status.

Specific to detention, article 37 of the CRC requires that a State Party to the Convention, must ensure that no child is: 1) subjected to torture or other cruel, inhuman or degrading treatment or punishment; 2) deprived of his or her liberty unlawfully or arbitrarily; 3) treated with inhumanely or without respect for the inherent dignity of the human person; 4) denied prompt access to legal and other appropriate assistance if detained; and 5) denied the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority.

The CRC also declares that a child’s arrest, detention or imprisonment should be used only as a measure of last resort and for the shortest appropriate period of time.¹³⁵ Any deprivation of liberty must be done in a manner that takes into account the needs of the age of the child. Children should be detained separately from adults unless it is considered in the child’s best interest not to do so. The CRC also clearly states the right of a detained child to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.¹³⁶

Rather than being detained, FDCY who fall under the definition of a refugee should be given “*protection and humanitarian assistance*” regardless of whether they are accompanied by adults or not.¹³⁷ Article 22(1) specifies that such children must be able to enjoy all of the rights within the UNCRC.

The Committee on the Rights of the Child has commented on the inappropriateness of detention of all children in other publications that expand on the meaning and interpretation of the UNCRC. For

¹³¹ Ibid, ¶¶ 57-58.

¹³² Ibid, ¶ 68.

¹³³ *Centre for Child Law v Minister of Home Affairs and Others* 2005 6 SA 50 (T).

¹³⁴ “Convention on the Rights of the Child,” note 25.

¹³⁵ Ibid, art. 37(2).

¹³⁶ Ibid, art. 37(3).

¹³⁷ Ibid, art. 22(1).

example, detention of children was found to be a “*deprivation of childhood*” and “*difficult to reconcile with the guiding principles of the Convention on the Rights of the Child.*”¹³⁸ The Committee has commented on how States must use non-custodial solutions if deprivation of liberty is required, as detention affects a child’s physical and mental health as well as their development.¹³⁹ If children are detained, it must be in a manner consistent with their humanity and with respect for their dignity. They must also be provided with “prompt legal and other assistance” to challenge their detention.¹⁴⁰

In General comment No. 35 on Article 9, Liberty and security of person, the UN Human Rights Council emphasised that children should not be deprived of liberty unless as a last resort measure and for the shortest period of time possible. The UNHRC specifically places a positive obligation on States to take into account the best interests of migrant children in detention, their “extreme vulnerability” and the “need for care of unaccompanied minors:”

*“Where possible [unaccompanied or separated children] should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision”*¹⁴¹

The recent Global Compact for Safe, Orderly and Regular Migration also emphasizes that all detention related to migration should be used only as a measure of last resort.¹⁴²

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA¹⁴³

Around the world, approximately 330,000 children are detained for migration-related purposes per year.¹⁴⁴ Among detained children, migrant and FDCY are overrepresented.¹⁴⁵ Despite having laws that protect the rights of migrants, especially children, from detention, South Africa’s security-based approach to irregular migrants has resulted in FDCY being arrested and detained simply for their migration status or their family’s migration status.

In South Africa, it is clear that there are FDCY being arrested and detained for their immigration status; however, there is insufficient data on how many children are in detention centres.¹⁴⁶ This is contrary to the country’s self-reporting to the UN Global Study on Children Deprived of Liberty in 2019 that it

¹³⁸ “United Nations Global Study on Children Deprived of Liberty” (Committee on the Rights of the Child, July 11, 2019), ¶ 2, <https://www.ohchr.org/en/treaty-bodies/crc/united-nations-global-study-children-deprived-liberty>.

¹³⁹ Ibid, ¶ 20.

¹⁴⁰ Ibid, ¶ 21.

¹⁴¹ UNHRC General Comment No. 35, fn. 179, citing UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention (2012), ¶ 54.

¹⁴² The Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195), objective 13.

¹⁴³ Centre for Child Law and Others v Minister of Basic Education and Others (2840/2017) [2019] ZACGHC 126; [2020] 1 All SA 711 (ECG)

¹⁴⁴ “United Nations Global Study on Children Deprived of Liberty,” ¶ 57, note 138.

¹⁴⁵ Ibid, ¶ 45.

¹⁴⁶ In March 2021, the UN Committee on the Rights of the Child requested that South Africa provide disaggregated data on the number of Asylum-seeking, refugee and migrant children who are in detention and the measures taken since 2016 to “expeditiously and completely cease the detention of children in irregular migration situations.” Committee on the Rights of the Child, List of issues prior to submission of the combined 3rd to 6th periodic reports of South Africa, CRC/C/ZAF/QPR/3-6 (2010), ¶ 26, 42.



does not detain children for migration-related reasons.¹⁴⁷ These unlawful detentions are due to the fact that South African police lack training and sensitization on the rights of FDCY, leading to arbitrary arrests and unlawful detention.¹⁴⁸

FDCY in detention centres are especially vulnerable as the centres have inadequate monitoring and oversight or complaint mechanisms through which such unlawful detentions of children can be identified and corrected.¹⁴⁹

Unlawful detention and deportation

In 2016, the UN Committee on the Rights of the Child expressed concerns over practices of arresting and detaining migrant, asylum-seeking and refugee children due to their documentation status in South Africa.¹⁵⁰ Many civil society organisations have similarly reported on detention of migrant children and unlawful detention conditions, both related to and separate from their documentation status.

It is clear that in South Africa, FDCY often come into contact with the police either personally or through their family members. The African Centre for Migration & Society found that “*children living at the border and on the streets undergo a cycle of arrest and release.*”¹⁵¹

There have been reports of migrant children detained at SMG, a military base near Musina, and the Lindela repatriation centre.¹⁵² Before being detained in these centres, children are kept in police stations. LHR reported on the presence of child detainees in SMG in 2008, some as young as twelve years old.¹⁵³

In 2017, the South African Human Rights Commission reported that unaccompanied minor migrants had been arrested and detained both at police stations and at Lindela.¹⁵⁴ Médecins Sans Frontières similarly reported that unaccompanied minors were being illegally detained at Lindela, and at times the centre staff themselves did not know that they were minors because of lack of screening and age-determination practices.

These practices of detention are unlawful as most relate only to FDCY’s lack of documentation. This practice runs contrary to the basic protections from detention outlined in South African domestic law and the country’s international obligations. The recent rise in xenophobia and discrimination has led to increased practices of “*arbitrary and abusive detention of migrants*” in recent years.¹⁵⁵ In 2015, LHR

¹⁴⁷ “United Nations Global Study on Children Deprived of Liberty,” note 138.

¹⁴⁸ Carolyne Rono et al., “Migration Related Detention of Children in Southern Africa: Developments in Angola, Malawi and South Africa,” 2020, p. 417, <http://doi.org/20.500.11825/2038>.

¹⁴⁹ Ibid.

¹⁵⁰ UN Committee on the Rights of the Child (CRC), Concluding observations on the second periodic report of South Africa, 27 October 2016, CRC/C/ZAF/CO/2, ¶ 61.

¹⁵¹ Elphick and Amit, “Border Justice,” p. 50, note 95151.

¹⁵² Carolyne Rono et al., “Migration Related Detention of Children in Southern Africa,” p. 416, note 148148.

¹⁵³ Lawyers for Human Rights, “Monitoring Immigration Detention in South Africa,” December 2008, p. 10, <https://cmr.jur.ru.nl/cmr/docs/South%20Africa.pdf>.

¹⁵⁴ South African Human Rights Commission, “Annual Report,” 2017, pp. 29-33, <https://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202017%20HR.PDF>.

¹⁵⁵ “Human Rights Watch Submission to the Africa Regional Review on Implementation of the Global Compact for Safe, Orderly and Regular Migration,” Human Rights Watch, July 6, 2021, <https://www.hrw.org/news/2021/07/06/human-rights-watch-submission-africa-regional-review-implementation-global-compact>.



noticed and reported a practice of arresting officers listing FDCY as adults intentionally in order to detain them.¹⁵⁶

Denial of Other Basic Human Rights

Detention of children inevitably leads to violations of their other basic human rights, through harmful detention conditions and practices. In the United Nations Global Study on Children Deprived of Liberty, the Committee on the Rights of the Child examined the impact of immigration detention on FDCY:

“Regardless of the conditions of detention, the available evidence shows that immigration detention is harmful to a child’s physical and mental health and exposes the child to the risk of sexual abuse and exploitation. Reports have found that it both aggravates existing health conditions and causes new ones to arise, including anxiety, depression, suicidal ideation and post-traumatic stress disorder.”¹⁵⁷

Unsanitary conditions, overcrowding, and abuse by officials violate a child’s right to health.¹⁵⁸ In 2008, LHR interviewed a fourteen-year-old boy who had malaria but was kept at SMG without any medical care.¹⁵⁹ Reports have also shown that detention cells designed to hold twelve people held up to 40-70 people without sufficient food, water, and hygiene in South Africa.¹⁶⁰

FDCY are also abused in detention. Some of the children in SMG reported that officers threatened to hit them with a switch as a method of controlling them.¹⁶¹ As of 2017, Lindela did not have any complaint mechanisms for child detainees to express their concerns. This runs directly contrary to one of the four guiding principles of the UNCRC: taking into account the views of the child.¹⁶²

No separate accommodation

In the 2005 case *Centre for Child Law v Minister of Home Affairs & Others*, the court found it unlawful that migrant children at Lindela were detained together with adults for long periods while awaiting deportation.

Despite this, practices of joint detention continue, further exposing FDCY to risks of abuse. LHR reported that the child detainees they visited at SMG in 2008 were kept together with adults.¹⁶³ In 2014, LHR discovered a child held in the same cell as adults in Benoni Police Station and then transferred to Lindela without a final determination on his age.¹⁶⁴ A more recent 2020 report also

¹⁵⁶ Lawyers for Human Rights, “Briefing by Lawyers for Human Rights on Statelessness in South Africa,” ¶ 61, note 855.

¹⁵⁷ “United Nations Global Study on Children Deprived of Liberty,” ¶ 60, note 138.

¹⁵⁸ *Ibid*, § IV.

¹⁵⁹ Lawyers for Human Rights, “Monitoring immigration detention in South Africa,” p. 10, note 153153.

¹⁶⁰ Elphick and Amit, “Border Justice,” p. 50, note 95151.

¹⁶¹ Lawyers for Human Rights, “Monitoring immigration detention in South Africa,” p. 10, note 153153153.

¹⁶² Alexandra Hiropoulos, “Migration and Detention in South Africa: A Review of the Applicability and Impact of the Legislative Framework on Foreign Nationals,” APCOF Policy Paper, 18 (November 2017), p. 12, <https://apcof.org/wp-content/uploads/018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf>.

¹⁶³ Lawyers for Human Rights, “Monitoring immigration detention in South Africa,” p. 10, note 153153153.

¹⁶⁴ Lawyers for Human Rights, “Briefing by Lawyers for Human Rights on Statelessness in South Africa,” ¶ 60, note 855.



outlines how migrant children “continue to be detained together with adults for lengthy periods of time and in deplorable conditions.”¹⁶⁵

Inaccessibility of legal representation

Despite the fact that the Legal Aid Board is tasked with “*providing children with the specialised legal assistance unaccompanied minors require,*” FDCY face many obstacles in accessing legal representation.¹⁶⁶

LHR reported that child detainees at SMG in 2008 did not have access to any social workers or other personnel qualified to consult with them.¹⁶⁷ Children are often unaware of their right to legal assistance, and even where it is offered it is typically limited in amount and duration.¹⁶⁸

¹⁶⁵ Carolyne Rono et al., “Migration Related Detention of Children in Southern Africa,” p. 419, note 148148.

¹⁶⁶ Anisa Mahmoudi and Tshegofatso Tracy Mothapo, “Reception of Children on the Move in South Africa” (Kids Empowerment, November 2018), <https://bettercarenetwork.org/sites/default/files/KE-Country-Report-South-Africa.pdf>.

¹⁶⁷ Lawyers for Human Rights, “Monitoring immigration detention in South Africa,” p. 10, note 153153153.

¹⁶⁸ Thomas F. Geraghty and Diane Geraghty, “Child-Friendly Legal Aid in Africa,” UNDP-UNICEF Practitioners’ Meeting on Legal Aid Programming in Africa (UNICEF West and Central Africa Regional Office and UNDP Regional Centre, Dakar, 2010), p. 10, https://www.unodc.org/pdf/criminal_justice/Child-Friendly_Legal_Aid_in_Africa.pdf.



ACCESS TO SOCIAL ASSISTANCE

“Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

– ART.27(1)c) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

SOUTH AFRICA’S LEGAL OBLIGATIONS

Although international and constitutional obligations require South Africa to recognise FDCY’s right to social assistance, domestic legal provisions leave gaping holes in social protection for migrants. Only refugees and permanent residents are covered by the Social Assistance Act and eligible for grants, despite the fact that asylum-seekers who recently arrived in South Africa are often the most economically vulnerable.

Constitution

The right to access social assistance is embedded in the South African Constitution. According to Section 27 of the *Constitution*, “[e]veryone has the right to have access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance.” The term “[e]veryone” as contained in section 27 of the *Constitution* has been explicitly interpreted by our courts to include non-nationals.¹⁶⁹

Domestic Laws

The *Social Assistance Act*,¹⁷⁰ enacted to give effect to Section 27 of the Constitution, sets out when and how people can qualify for government assistance. Under the Act, only South African citizens or a member of a group or category of persons prescribed by the Minister of Social Development is eligible for social assistance.¹⁷¹

According to the 2012 Amendments to the *Social Assistance Act*, qualifying refugees with a valid refugee permit can access social grants. Children must also have a birth certificate.¹⁷² Refugees can apply at the nearest South African Social Security Agency (“SASSA”) and have to undergo a means test

¹⁶⁹ Minister of Home Affairs v Watchenuka, note 32.

¹⁷⁰ “Social Assistance Act 13 of 2004,” <https://www.gov.za/documents/social-assistance-act>.

¹⁷¹ Ibid, § 5.

¹⁷² “SASSA Grants,” Scalabrini Centre of Cape Town, <https://www.scalabrini.org.za/childrens-services/sassa-grants/>.



to determine whether they are eligible for the grant. There is no application fee for this determination.¹⁷³

The grants available for refugee children are the Foster Child Grant, Child Support Grant, and Care Dependency Grant.¹⁷⁴

- The Child Support grant is given to the primary care-giver of a child under 18 years of age who fulfills the conditions and “takes primary responsibility for the daily care needs of the child.” Each primary caregiver is limited to receiving grants for six children.¹⁷⁵ The children must be enrolled in school and the caregiver must present a school attendance certificate.¹⁷⁶
- The Foster Child Grant is limited to where the foster parent has received a court-ordered status, and the child is in their care.¹⁷⁷
- Care Dependency Grants are for parents or caregivers of a child who needs “permanent care due to his or her severe mental or physical disability.” The child may not be in a State institution such as a special needs school.¹⁷⁸

Where FDCY are unaccompanied, they are eligible for the same care and protection by the Department of Social Development as South African children. The *Children’s Act* outlines that if the child is in need of care and protection because they are without “*visible means of support*,” a social worker must “*take measures to assist the child*.”¹⁷⁹

Case law

South African courts have recognised that refugees and their dependent children are eligible for state funded social assistance for as long as they retain that status.¹⁸⁰ However, asylum seekers are often in possession of temporary visas for several years before they receive a final decision on their application for asylum. As a result, many FDCY do not qualify for social assistance in terms of the Act.

In *Centre for Child Law v Minister of Home Affairs and Others*, the Court held that the state had a “*direct duty*” to ensure the basic socio-economic provisions for unaccompanied minor foreign children.¹⁸¹

¹⁷³ Consortium for Refugees and Migrants in South Africa, “A Guide to Accessing Social Grants for Refugees,” 2018, p. 1, <http://www.cormsa.org.za/wp-content/uploads/2018/08/A-guide-to-accessing-social-grants-for-refugees.pdf>.

¹⁷⁴ Ibid, p. 2.

¹⁷⁵ Western Cape Local Government, “A Useful Guide for Refugees, Migrants & Asylum Seekers,” 2015, pp. 14-15, <https://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/local-governmentnet-useful-guide-for-refugees-15-march-2013.pdf>.

¹⁷⁶ Ibid, p. 17.

¹⁷⁷ Ibid, p. 14.

¹⁷⁸ Ibid, pp. 13-14.

¹⁷⁹ “Children’s Act 38 of 2005,” § 150, note 85.

¹⁸⁰ This was following the matters of *Scalabrini Centre of Cape Town and Five Others v The Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another*, Case No. 32054/ 2005 and *Bishogo, C. and Others v Minister of Social Development and Others*, Case No. 9841/05, High Court of South Africa, Transvaal Provincial Division, Consent Order, September 2005, which confirmed refugees’ eligibility for foster-care grants and disability grants, respectively.

¹⁸¹ *Centre for Child Law v Minister of Home Affairs and Others* 2005 6 SA 50 (T), ¶ 17.



However, this was interpreted generally to mean access to education and documentation, rather than access to social assistance. One commentator writes:

“Although the court in the Centre for Child Law case stated that the state has an “active duty” to provide for unaccompanied minor children, it is still not clear, if and to what extent refugee children under parental care can claim socio-economic rights from the state.”¹⁸²

International Guidelines

As an integral part of the right to social security, the right to access social assistance is stated in article 9 of the United Nations International Covenant on Economic, Social and Cultural Rights. The CESCR Committee has also stated in one of its general comments that state parties have an obligation under the treaty to provide social protection to disadvantaged and marginalised groups.¹⁸³ Where states have social security schemes in place relating to family support, access should be non-discriminatory and include asylum-seekers.¹⁸⁴

The UNHCR Reception Standards for Asylum-Seekers in the European Union of 2000 comments that asylum seekers’ legal status allows them to have access to primary goods that will ensure *“the minimum threshold of an adequate standard of living.”*¹⁸⁵ Additionally, it states that *“needy”* asylum seekers should be given *“all necessary support covering the basic necessities of life, including food, clothing and basic accommodation, throughout the asylum procedure until a final decision is taken on their application.”*¹⁸⁶

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Even where FDCY and their families are clearly in need of social assistance, they face legal or practical barriers in accessing such assistance. Migrants are often stuck in asylum status for years on end, thereby excluding them from SASSA grants. Their economic situation is further exacerbated by the fact that they do not have an automatic right to work. This leaves FDCY dependent on NGO and other welfare organisations for social assistance. This vulnerability was particularly acute during the COVID-19 pandemic.

Temporary classification of asylum seekers

Children who arrive unaccompanied are often caught between the asylum system and the children’s court system, with neither giving them adequate social assistance. In *Shaafi Daahir Abdulahi*, a 17-year old minor was found not to be in need of care and protection by a social worker, but the Refugee

¹⁸² Christine van Baalen, “The Rights of Refugee Children in South Africa” (North-West University, 2012), https://dspace.nwu.ac.za/bitstream/handle/10394/8223/vanBaalen_CH.pdf?sequence=2&isAllowed=y.

¹⁸³ UN Committee on Economic and Social and Cultural Rights (39th sess : 2007 : Geneva), “General Comment No. 19, The Right to Social Security (Art. 9)” (UN, February 4, 2008), ¶ 28, <https://digitallibrary.un.org/record/618890>.

¹⁸⁴ *Ibid.*, ¶ 38.

¹⁸⁵ United Nations High Commissioner for Refugees, “Reception Standards for Asylum Seekers in the European Union,” July 2000, ¶ 13, <https://www.unhcr.org/4aa763899.pdf>.

¹⁸⁶ “In light of this, an asylum-seeker [in South Africa] can access the minimum threshold of public benefits.” C. Kavuro, “Refugee Rights in South Africa: Addressing Social Injustices in Government Financial Assistance Schemes,” *Journal of Sustainable Development Law and Policy* (The) 5, no. 1 (September 18, 2015): 176–97, 190, <https://doi.org/10.4314/jsdplp.v5i1>.



Reception Office refused to allow him to apply for asylum on his own.¹⁸⁷ This meant that he could not receive refugee status, which would allow him to apply for social assistance.

A research report by the African Centre for Migration & Society also found that South African governmental departments lack durable solutions to allow FDCY to receive an asylum or refugee status and continue that status once they turn eighteen.¹⁸⁸ FDCY who come with family are often given asylum under Section 3(c) of the *Refugees Act 130 of 1998* and are required to keep renewing their temporary status every few months. If their families are not given a decision on their asylum application by the time they turn eighteen, they are sometimes requested to then apply for asylum independently, even if they were so young when they fled their country of origin that they do not know the reasons why they were forced to flee.

The supposed temporary nature of asylum applications are stretched across years before a decision is made on their refugee status. Only after that decision is made may FDCY and their families apply for social assistance. Thereby, the asylum system in itself “prevents access to essential services.”¹⁸⁹

No automatic right to work

Under the Refugees Amendment Act, asylum seekers do not have an automatic right to work. Instead, they must be “endorsed” after an assessment to determine if the applicant can support themselves.¹⁹⁰ If the assessment finds that the asylum seeker is receiving assistance from a charitable organisation or can sustain themselves without work, they are not granted the right to work.¹⁹¹

Oftentimes, FDCY and their families who have just arrived in South Africa and have not yet been assessed for the right to work are most in need of social assistance. During the time when they are undocumented and/or waiting for endorsement of right to work, they struggle to secure formal employment and are forced to take on informal positions “*where they are more vulnerable to exploitation and underpay.*”¹⁹² Coupled with the fact that they are ineligible for social assistance under the Social Assistance Act, this leaves FDCY extremely vulnerable. A recent study of migrant women in South Africa notes that rather than getting assistance from the state, “[m]igrant caregivers are often dependent on their social networks and connections within South Africa to assist them with supporting their children.”¹⁹³

LHR’s baseline assessment of FDCY in Johannesburg found that almost half of FDCY’s caregivers were unemployed. Approximately 16% were formally employed, and the rest were either self-employed or engaged in informal work. Even where they are granted a right to work, language barriers, xenophobic

¹⁸⁷ Shaafi Daahir Abdhulahi and others v Minister of Home Affairs and others [2000] ZACC 8.

¹⁸⁸ Elphick and Amit, “Border Justice,” p. 10, note 15195151.

¹⁸⁹ Ademola Oluborode Jegede, Puleng Letuka, and Tivoneleni Edmund Lubisi, “International Human Rights Law and the Access of Children of Asylum Seekers to Social Assistance in South Africa,” *Comparative and International Law Journal of Southern Africa* 53, no. 3 (2020): 3, <https://doi.org/10.25159/2522-3062/8060>.

¹⁹⁰ “Refugees Amendment Act 11 of 2017,” § 18.

¹⁹¹ *Ibid.*

¹⁹² Tanusha Raniga and Zimi Fitshane, “Economic Experience of Migrant Women Residing in Gauteng, South Africa: A Sustainable Livelihood Perspective,” *Social Work* 58, no. 3 (2022): 239–71, 264, <https://doi.org/10.15270/58-3-1056>.

¹⁹³ *Ibid.*, pp. 262-263.

attitudes, and misinformation about certain types of documentation among employers create hurdles in access to work.

Impact of COVID-19

Although the South African government introduced new types of social assistance during the COVID-19 pandemic to protect those who were unemployed or otherwise vulnerable, asylum seekers and certain categories of migrants were not included in these plans. FDCY who were undocumented or had asylum status were continued to be excluded from RSD grants or distributions of food parcels, which required that recipients furnish a South African ID booklet.

Additionally, during the COVID-19 lockdown, Refugee Reception Offices were closed and FDCY arriving in South Africa were unable to apply for asylum. This left them completely undocumented and ineligible for any type of social assistance. Even those asylum seekers who were engaged in formal employment were unable to access payments from the unemployment insurance fund. LHR noted that certain Department of Labour branches refused to process UIF requests because migrants did not possess a South African ID. Taken altogether, these barriers further deteriorated *“the socio-economic situation of refugees, asylum seekers, and special-permit holders.”*¹⁹⁴

Dependent on NGO Welfare Organisations

Without assistance from the state or opportunities for formal jobs, FDCY and migrant families are dependent on charities and NGO welfare organisations for social assistance.

UNHCR provides social assistance through local partners in each province. This assistance is however not rights-based and instead depends on availability of funds.¹⁹⁵ In KZN province, Refugee Social Services provides emergency social assistance to *“new arrivals and those who find themselves in difficulty,”* including food, accommodation, and medical care. In Gauteng, Future Families assists documented asylum seekers and refugees with social assistance, including children. The availability of these funds is, however, based on international funding and has recently been reduced due to the ongoing war between Russia and Ukraine.

Even where individuals qualify for SASSA, they are often unable to navigate the process without assistance from a refugee organisation. Within the Department of Social Development in Musina, social workers reportedly lack language skills and there are no interventions for street children.¹⁹⁶ Even where children are assisted, they are subject to *“lengthy and often improper placement procedures...that limit their access to needed services.”*¹⁹⁷

The lack of formal state initiatives to recognize FDCY’s right to social assistance is in violation of international human rights obligations and places the burden to realise that right onto charitable organisations.

¹⁹⁴ Ferdinand C. Mukumbang, Anthony N. Ambe, and Babatope O. Adebisi, “Unspoken Inequality: How COVID-19 Has Exacerbated Existing Vulnerabilities of Asylum-Seekers, Refugees, and Undocumented Migrants in South Africa,” *International Journal for Equity in Health* 19, no. 1 (August 20, 2020): 141, <https://doi.org/10.1186/s12939-020-01259-4>.

¹⁹⁵ “Social Services, Peacebuilding & Sports,” UNHCR South Africa, <https://help.unhcr.org/southafrica/get-help/social/>.

¹⁹⁶ Elphick and Amit, “Border Justice,” p. 9, note 15195151.

¹⁹⁷ *Ibid*, p. 10.



ACCESS TO JUSTICE

“Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.”

– ART.28(1)(H) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

“As children are usually at a disadvantage in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.”

REPORT OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS ON ACCESS TO JUSTICE FOR CHILDREN, (A/HRC/25/35), 16 DECEMBER 2013,

SOUTH AFRICA’S LEGAL OBLIGATIONS

Constitution

Under Art.28(1)h of the Constitution, every child has the right to have a legal practitioner assigned to him by the state and at the state expense, in civil proceedings affecting him. This provision does not differentiate between citizen children and non-citizens, and therefore covers FCDY.

Domestic Laws

The key domestic legislation covering access to justice for children is the *Children’s Act 38 of 2005* which is meant to “give effect to certain rights of children as contained in the Constitution.”¹⁹⁸ The *Children’s Act* applies to FCDY and makes no distinction between the rights of citizen children and non-citizen children.

Within the *Children’s Act*, article 9, 10, and 14 relate directly to access to justice for children. Art.9 of the *Children’s Act* states that in all matters concerning the care, protection and well-being of a child, the standard that the child’s best interest is of paramount importance must be applied. The best

¹⁹⁸ <https://www.gov.za/documents/childrens-act>

interests principle applies to all decisions about FDCY and requires the Court to balance several factors before making a determination.

Art.10 of the *Children's Act* states that Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

Art. 14 of the *Children's Act* states that every child has the right to bring and be assisted in bringing a matter to a court. As most FDCY do not have the financial resources to pay for their own legal assistance, provisions of the Legal Aid Act are extremely relevant in determining the extent to which a migrant child has access to justice.

The *Legal Aid South Africa Act No. 39 of 2014* requires the state to provide free legal advice and representation through Legal Aid South Africa to qualifying individuals. This is not limited to citizens and includes asylum-seekers and refugees. This was confirmed in *S v Thomas*.¹⁹⁹ Where FDCY are unaccompanied, they qualify for legal aid to “protect the best interests” and “if substantial injustice would otherwise result.”²⁰⁰ The Court held in *Centre for Child Law v Minister of Home Affairs* that “all unaccompanied foreign children who found themselves in South Africa illegally had to have legal representation appointed to them by the State.”²⁰¹

Children automatically qualify for legal aid regardless of means in a criminal case where a child is charged.²⁰² Children in civil cases may also be given legal aid if they are respondents. Even as applicants, children can qualify for legal aid if they “may suffer substantial injustice” depending on their financial situation, the complexity of the case, the chance of success, and the severity of constitutional and personal rights of the child at risk.²⁰³

In cases related to the *Children's Act*, children or their caretakers may be given legal aid relating to their guardianship, adoption, abduction, paternity, or parental responsibilities. Such persons need not be citizens if they have “an interest in the care, well-being and development of a child.”²⁰⁴

International instruments

There are a wide range of international standards relating to access to justice for children. While all the fair trial guarantees provided in the *ICCPR* are equally applicable to children, the *CRC* additionally provides a list of fundamental safeguards to ensure fair treatment of children, including the rights to information,²⁰⁵ expeditious decisions,²⁰⁶ prompt access to legal assistance and to prompt decisions by the court²⁰⁷

¹⁹⁹ *S v Thomas* 2001 (2) SACR 608 (W).

²⁰⁰ “Legal Aid South Africa Act 39 of 2014: Regulations,” § 23(1)(b)(6), https://pmg.org.za/files/170504Legal_Aid_Act.docx.

²⁰¹ *Centre for Child Law v Minister of Home Affairs and Others* (2005) (6) SA 50 (T)

²⁰² “Legal Aid South Africa Act 39 of 2014: Regulations,” § 14, note 200.

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²⁰⁴ “Legal Aid South Africa Act 39 of 2014: Regulations,” § 24, note 200.

²⁰⁵ “Convention on the Rights of the Child,” art. 17, note 25.

²⁰⁶ *Ibid*, art. 10.

²⁰⁷ *Ibid*, art. 37(d).



Article 3 provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 9 requires that children shall not be separated from their parents against their will, except when competent authorities, subject to judicial review, determine, in accordance with applicable law and procedures, that the separation is necessary for the best interests of the child. Article 12 provides that in any judicial and administrative proceedings affecting them, children shall be afforded the opportunity to be heard, either directly or indirectly through a representative or appropriate body. Article 19, which deals with abuse and neglect, specifically mentions procedures for reporting, referral to investigation, and – where appropriate – judicial involvement. There is also reference to law, procedures and competent authorities in relation to care and protection, adoption, refugee children, sexual abuse and sale or trafficking. Article 37 focuses on freedom from cruel, inhuman, or degrading treatment, and article 40, on the administration of juvenile justice. These articles include strong and detailed provisions on issues of justice for children

While it is not explicitly mentioned in the CRC, the Committee on the Rights of the Child held that the right to an effective remedy is an implicit requirement of the Convention. The Committee affirmed that:

*“States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-sensitive information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance.”*²⁰⁸

The CRC Committee has also emphasised that children’s communications with their legal representatives should be strictly confidential.²⁰⁹ States must “ensure” that privacy and confidentiality of children in judicial proceedings is always safeguarded in order to avoid re-victimization.²¹⁰

Specific to FDCY, migrant children must be “*notified of the existence of a proceeding and of the decision adopted in the context of the immigration and asylum proceedings, its implications and possibilities for appeal*” and “*be fully informed throughout the entire procedure, together with their guardian and legal adviser, including information on their rights and all relevant information that could affect them.*”²¹¹

The Special Rapporteur on the independence of judges and lawyer has advocated for a definition of legal aid that is as broad as possible in the context of children and children’s rights, including:

“not only the right to free legal assistance in criminal proceedings, as defined in article 14 (3) (d) of the International Covenant on Civil and Political Rights, but also the provision of effective

²⁰⁸ UN Committee on the Rights of the Child, General Comment No. 5 on General measures of implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/527, November 2003, section 5.

²⁰⁹ UN Committee on the Rights of the Child, General Comment No. 24 on children’s rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019, ¶ 53.

²¹⁰ Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013, ¶ 59.

²¹¹ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, ¶ 17



legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations.”²¹²

The CRC Committee has also commented on the state obligation to create an environment that allows a child to be effectively heard. The Committee calls on states to make proceedings accessible and child-appropriate, with particular attention to *“the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.”²¹³*

THE LIVED REALITIES OF FDCY IN SOUTH AFRICA

Complexity of the justice system

FDCY and their caregivers are often unaware of their legal options as there are intersection laws and policies in place that govern their rights. In addition, the South African Police Services often over-enforce the Immigration Act and arrest migrant children instead of referring them to the Department of Social Development for assistance.²¹⁴

FDCY are often illiterate in English and migrants in general have little knowledge of the rights regime in the country.²¹⁵ Formal institutions such as the police or immigration departments which may facilitate access to justice are often feared. The Constitutional Court has noted that non-citizens generally do not succeed in challenging a violation of their rights due to a lack of *“resources, knowledge, power or will to institute appropriate proceedings.”²¹⁶* The complexity and jargon of the justice system therefore acts as a barrier for FDCY access to justice.

Physical distance to courts

FDCY and their families also struggle with physical access, as courts may be in completely different areas from where they live. Asylum proceedings typically must take place in the office of first application, which means that FDCY must invest much of their financial resources into simply attending proceedings. In Musina, the African Centre for Migration & Society noted that children’s court proceedings were conducted without the presence of the child, which violates the Children’s Act.²¹⁷

No consideration of the special needs of FDCY

All attorneys are required to provide free legal assistance through the Law Society. However, it is unlikely that they *“have the specialised knowledge relating to child trafficking and migrant children.”²¹⁸* This increases the burden on legal organisations that specialise in this area such as the Legal Resources Centre and the Centre for Child Law to provide legal assistance for the hundreds of thousands of FDCY living in South Africa.

²¹² HRC, Report of the Special Rapporteur on the independence of judges and lawyers – Protecting children’s rights in the justice system, A/HRC/29/26 (and corrigendum A/ HRC/29/26/Corr.1), 1 April 2015, ¶ 35.

²¹³ Committee on the Rights of the Child, General Comment No. 12: The right of the child to be heard, UN Doc. CRC/C/GC/12, 20 July 2009, ¶ 34.

²¹⁴ Elphick and Amit, “Border Justice,” p. 10, note 15195151.

²¹⁵ Lawyers for Human Rights v the Minister for Home Affairs ¶ 21.

²¹⁶ Ibid.

²¹⁷ Elphick and Amit, “Border Justice,” p. 10, note 15195151.

²¹⁸ Mahmoudi and Mothapo, “Reception of Children on the Move in South Africa,” p. 24, note 166166.



Although an organisation called Childline runs a free telephone helpline, the assistance is only available in English. FDCY are unlikely to have the contacts in South Africa to translate the information for them into a more accessible language. In fact, despite the rights that children have to representation under the Children's Act, there is no domestic legislation on providing free interpreters to minor children.²¹⁹ This contradicts the Constitutional right to use one's own language.²²⁰

Lack of free services for civil matters

Although children are allowed to receive free legal aid for civil matters as stated prior, it is discretionary and often leads to a lack of services. This is particularly problematic as FDCY and their families are often in dire financial circumstances and do not qualify for social assistance until they are recognized as refugees.

²¹⁹ Ibid, pp. 26-7.

²²⁰ S.A. Const. § 30.

