

**SUBMISSION FOR INCLUSION IN THE DRAFT CHILDREN'S BILL  
PREPARED BY LAWYERS FOR HUMAN RIGHTS**

**July 2004**

## **1. Introduction**

This submission aims to highlight the current draft Children's Bill's shortcomings in providing protection and care to foreign children in South Africa. It is important to recognise that migrant children are vulnerable, both as children and as migrants. It is LHR's submission that the Bill fails to recognise specific vulnerabilities of certain categories of foreign children in need of care and assistance, such as unaccompanied foreign minors and refugee children.

Currently foreign children are given limited protection in a variety of forms and are often vulnerable to abuse and neglect. There exists a lot of uncertainty within the governmental and non-governmental child protection agencies about the legal and procedural position of foreign children. Although the Immigration Act, 13 of 2002 ("the Immigration Act") and Refugees Act, 130 of 1998 ("the Refugees Act") outline the rights and duties of foreigners in South Africa, it is inadequate on the treatment and protection of foreign children. It is therefore important for the Children's Bill, which will become the country's principal child care legislation when enacted, to expressly include foreign children in its scope.

The current draft of the Children's Bill deals with refugees and undocumented migrants in only two areas: foster care placements and trafficked children. In both cases the protection being suggested is haphazard and does not take into account the huge procedural gaps that challenge true access to protection for these children.

## **2. Definitions**

The Bill defines a child as "a child under the age of 18 years". In order to ensure certainty that the Bill indeed includes foreign children in its scope LHR recommends that the definition be changed in the following way:

*"Child means **any** child under the age of 18 years, regardless of nationality".*

This is important as, in our experience, governmental institutions often restrict access to services to only South African citizens and permanent residents despite the constitutional- and other courts having clearly expressed that foreigners have the same fundamental rights as citizens unless the constitution itself provides otherwise.

One practical example was when Lawyers for Human Rights had to approach the Pretoria High Court to order the Commissioner of Child Welfare to open inquiries for unaccompanied foreign children in terms of

Section 13 of the Child Care Act. The Commissioner refused to open the inquiries in part because the children were foreigners. His refusal was despite the Child Care Act's definition of a child being neutral towards nationality and residence status, similar to the current draft's definition.

See the following important Constitutional Court judgments:

- 1.1 Lawyers for Human Rights and Another v Minister of Home Affairs and Another
- 1.2 Khosa and Another v Minister of Social Development and Others
- 1.3 Larbo-Odam v MEC for Education: North West Province
- 1.4 Watchenuka and Others v Minister of Home Affairs and Others

### **3. Rights of Foreign Children**

#### **3.1. Introduction**

In South Africa, the Constitution provides for a number of rights to which any child, irrespective of their resident status in South Africa, are entitled.

- Section 28 of the Constitution *inter alia* states that every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment. Further every child's best interests are of paramount importance in every matter concerning that child.
- Section 9 thereof provides, *inter alia*, that everyone is equal before the law and has the right to equal protection and benefit of the law and that no one may be discriminated against unfairly.
- Section 10 thereof provides that everyone has inherent dignity and the right to have their dignity respected and protected.

In addition to the Constitution, there are at least three statutes that impact on the rights of foreign children in South Africa. These are the Refugees Act 130 of 1998, Immigration Act 13 of 2000 and the Child Care Act 74 of 1983.

- Section 32 of the Refugees Act states that any unaccompanied child who appears to qualify for refugee status and who is found under circumstances which clearly indicate that he or she is a child in need of care, as contemplated by the Child Care Act, must be brought before the Children's Court.
- Section 34 (b) of the Immigration Act gives any illegal foreigner who are being detained pending his or her deportation the right to confirm the detention by a warrant the court;
- Section 8 of the Immigration Act provides for any person who is affected by a deportation order to appeal such order firstly to the Director General of Home Affairs and thereafter the Minister of Home Affairs.

- Section 1 of the Child Care Act defines a child as *any* person under the age of 18 years;
- Section 13 of the Child Care Act, amongst others, provides that any child who appears to have no parent or guardian or if the child has a parent or guardian who cannot be traced or has been abandoned or is without visible means of support or lives in circumstances likely to cause or conduce to his/or seduction, abduction or sexual exploitation or who lives in or is exposed to circumstances which may seriously harm the physical, mental or social well being of the child must be brought before a Children’s Court for an inquiry to determine whether the child is a child in need of care and that should be removed to a place of safety.

### **3.2. Children’s Bill: General rights clause**

Domestic and international law recognise that refugee children are differently placed and have different requirements from other children. Refugee children obtain rights accorded to children generally, and as refugees specifically. Similarly, foreign children who are not eligible for refugee status also have needs specific to their circumstances, particularly in the context of the possible removal from the Republic. Unaccompanied refugee and foreign children are the legal responsibility of the government.

It is imperative that the Children’s Bill recognises the specific needs of refugee and other foreign children.

Section 21 of the first draft of the Children’s Bill contained certain rights relevant to refugee and foreign children. It is unfortunate that this section was omitted in the latest draft.

Therefore, LHR recommends that a section dealing with the specific rights of unaccompanied refugee and foreign children be added to the Bill. It could read as follows:

*" Refugee and unaccompanied minors*

1. *Every child who is a refugee or asylum seeker in terms of the Refugees Act and every unaccompanied foreign child, have –*
  - (a) *the rights set out in this Chapter,*
  - (b) *the right to be re-united with his or her parents or family if the child was separated from his or her parents or family.*
2. *No child may in any way whatsoever be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such a refusal, expulsion, extradition, return or other measure, such child is compelled to return to or remain in a country where –*
  - a. *He or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or*
  - b. *His or life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, other events seriously disturbing or disrupting public order in*

*either part of the whole of that country.”*

#### **4. Chapter 5 Children’s Courts**

##### **4.1. Section 45(1): Matters Children’s Courts may adjudicate**

LHR submits that the Children’s Courts are best placed to serve as an initial point of entry into the protection framework for foreign children.

This becomes particularly necessary in respect of issues relating to the determination of the resident status of the children and thereafter the departure and removal of children, declared as illegal foreigners in terms of the Immigration Act, from the Republic.

The Children’s Court *must* play a crucial role in ensuring access to justice for foreign children. This is important for a number of reasons.

- 4.1.1. Firstly, there is a need to determine the resident status of the foreign child in South Africa. As an example, the Court by inquiring into the reasons for the child presence in South Africa is in the position to determine whether the child has a refugee claim and if he/she should be assisted in making the application. If no inquiry is held, he or she is at risk of arbitrarily being deported to a country where his or her life and or freedom may be in danger.
- 4.1.2. Secondly, should it be found that the child is indeed an illegal foreigner; the children’s court inquiry is necessary to establish whether or not the child is unaccompanied and if not, where he family members in South Africa are.
- 4.1.3. Similarly, should the child be found without family members in South Africa, the children’s court inquiry could serve an invaluable role in determining whether or not the child has family members or parents in his country of origin into whose care he should be returned.
- 4.1.4. Fourthly, should the child have no family members in South Africa or in his country of origin, the children’s court inquiry can establish whether there is an appropriate child care or other facility in the child’s country of origin to where he or she should be returned to. It should thus oversee the deportation process to ensure that it is sensitive towards the rights and needs of the deportee child.
- 4.1.5. Fifthly, the children’s court, through its inquiry, should prima facie establish whether or not the child may has an appeal in terms of the section 8 of the Immigration Act against a deportation order, and if so, should assist the child in terms of section 28 (1)(h) of the Constitution to have a legal representative assigned for purpose of assisting with such an appeal.

Accordingly, LHR recommends the High Court should not have exclusive jurisdiction on matters relating to the departure and removal of a child from Republic, as presently provided for by section 45(3)(d) of the Bill.

Furthermore, LHR recommends that the Children's Court's authority to adjudicate matters, provided for in section 45(1) of the Bill be expressly extended to include

*"any matter which relates to the manner in which children, who had been declared to be illegal foreigners in terms of the Immigration Act, are detained and removed from South Africa".*

#### **4.2. Section 46: Orders which Children's Courts may make**

It appears from numerous reports, including the SAHRC, LHR, Human Rights Watch and others, that foreign children are regularly detained pending their removal in contravention of Section 28 the Constitution and that the provisions of the Child Care Act providing for the protection of children in need of care are totally ignored when such children are foreigners.

In a recent high court application, LHR and the Centre for Child Law, had to approach the court to intervene in preventing the authorities from:

- Detaining unaccompanied foreign children inappropriately;
- Deporting children in an unsuitable manner, including dumping unaccompanied children at border posts without making the necessary arrangements with the relevant authorities in the country of origin to ensure the reception and reintegration of the children.

LHR, therefore, recommends that the following subsection be included as an additional order which the Children's Court may make:

*"An order instructing the circumstances when and the manner in which children, who had been declared to be illegal foreigners in terms of the Immigration Act, are detained and removed from the Republic."*

### **5. Chapter 10: Child in need of care and protection**

#### **5.1. Section 150**

A child is unaccompanied if no person can be found who by law or custom has primary responsibility for that child.

As mentioned in paragraph 4.1 hereinbefore it is absolutely crucial that unaccompanied refugee and foreign children be recognised as children in need of care and protection, who are entitled to be dealt with in terms of Children's Court proceedings.

To ensure that this happens at all relevant times, LHR recommends that the following subsection be added to section 150 of the Bill, which is the section that defines who are children in need of care and protection.

*"(j) is an unaccompanied foreign child"*

