

# UNIVERSITY OF CAPE TOWN



## UCT Law Clinic

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**8 August 2007**

Attention: Ms. Zola Vice, Committee Secretary  
Parliament of South Africa  
Box 15  
Cape Town  
8000

Dear Madam:

Re: UCT Law Clinic's Written Submission on the Children's Amendment Bill  
[B19B-2006]

Please find attached the University of Cape Town Law Clinic – Refugee Rights Project's written submissions on the Children's Amendment Bill [B19B-2006].

Thank you ahead of time for the Committee's considerations.

Yours truly,

**per: UCT LAW CLINIC**



*University of Cape Town Law Clinic, Refugee Rights Project*

## **Submission to the Portfolio Committee on Social Development**

*on the **Children's Amendment Bill [B19B-2006]***

### **About the UCT Law Clinic – Refugee Rights Project**

Since the 1970's, the University of Cape Town Law Clinic has provided free legal assistance to impoverished communities who would not otherwise have access to professional legal services. In response to the growing need of refugees and asylum seekers in South Africa, the Clinic created a Refugee Rights Project in order to offer crucial legal and advocacy services for displaced and at-risk individuals and families. The Refugee Rights Project has been funded since 1998 by the United Nations High Commissioner for Refugees (UNHCR) and is also funded by Atlantic Philanthropies, Asylum Access and the City of Cape Town. The Project is run as a legal implementing partner of the UNHCR and it assists the Western Cape's refugees and asylum seekers secure their human rights, navigate through the asylum process and find durable solutions such as voluntary repatriation, resettlement and local integration. The Project advocates at all levels of government and in the public sector for the rights of refugees. It furthermore represents refugee children before the Children's Court and is also currently leading the task team to develop Standard Operating Procedures in the Western Cape for Dealing with Unaccompanied Foreign Children.

### **Introduction**

This submission aims to focus on the protection of refugee and foreign children, who comprise a special category of vulnerable children in South Africa. South African national law and international refugee law recognizes that refugee children are differently placed and have special protection requirements from other children. Refugee children are afforded rights as children generally, and rights as refugees specifically. Foreign unaccompanied children are especially vulnerable to abuse and neglect. *All* children in South Africa have special rights by virtue of the fact that they are children and basic care and protection must be afforded to them, regardless of their origin and nationality. Unaccompanied refugee and foreign children are the legal responsibility of the government of South Africa.

Currently, there exists much uncertainty and a lack of information and training within the Department of Social Development; the Department of Home Affairs; non-governmental child protection agencies; and, even among governmental legal entities about the legal and procedural position of refugee and foreign children in South Africa. Due to gaps in legislation and unclear

legal procedures concerning the treatment of refugee and foreign children, it was anticipated that the Children's Act would become South Africa's leading piece of legislation in this regard. Sadly, despite several submissions by NGO's and child advocacy groups regarding the treatment of refugee and foreign children in the Republic, the "Children's Bill [did] little to clarify the position of these children as it makes obscure reference to only refugee and trafficked children within the Bill."<sup>1</sup> There were no sections included in the Children's Bill/Act that deal specifically with the rights of unaccompanied refugee or foreign children in South Africa. And, yet again, there is no mention in the current Amendment Bill of the special attention that must be provided to unaccompanied foreign or refugee children.

It is therefore critical for the Children's Amendment Bill [hereinafter "the Bill"] to recognize the specific needs of refugee and foreign children and expressly include provisions dealing with their care and protection. It is submitted that specific mention of refugee and foreign children needs to be included in the Bill to ensure the adequate protection of this special category of children.

This submission will highlight some of the key international and national legal obligations placed on the government of South Africa regarding foreign children and will then suggest some basic amendments to the Bill in order to give meaningful effect to same.

### **Review of International and Domestic Legal Obligations with regard to Refugee and Foreign Children in South Africa**

#### ***I. Constitution of the Republic of South Africa Act 108 of 1996***

The supreme law of South Africa protects refugee and foreign children as the Constitution's Bill of Rights provides legal protection to *everyone* in the Republic, which would include all children as well as persons who are not South African citizens. Legal protection includes the right to equal treatment, the right to life, the right to dignity, the right to freedom and security of the person.

More specifically, *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, and that a child's best interests are of paramount importance in every matter concerning the child.

*Section 9* provides *inter alia* that everyone is equal before the law and has the right to equal protection and benefit of the law and no one may be discriminated against unfairly.

*Section 10* provides that everyone has inherent dignity and the right to have their dignity respected and promoted.

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<sup>1</sup> Children's Institute *Report of Children's Bill Working Group on Foreign Children 30 November - 1 December 2004* available at <http://web.uct.ac.za/depts/ci/plr/cbill.htm>, accessed on 6 April 2006.

Furthermore, the Constitutional Court has on various occasions held firmly that one of the most important objects of the Constitution is to protect the most vulnerable groups in our country. One such vulnerable group is foreigners as was held by the Constitutional Court in *Larbi-Odam v MEC for Education 1996(12) BCLR 1612*.

## ***II. Convention on the Rights of the Child***

The obvious starting point when reviewing the rights of unaccompanied foreign children in South Africa is the Convention on the Rights of the Child<sup>2</sup>, hereinafter the "CRC", which South Africa ratified on 16 June 1995. The CRC sets the international standards for the treatment of *all* children and must therefore guide South Africa in terms of its policy and practice regarding unaccompanied foreign children within its borders. This is because the rights enshrined in the CRC are to be granted to *all* persons under the age of 18 years without discrimination of any kind.

The CRC does provide *specifically* for the special protection of some unaccompanied foreign children - those who are refugees or asylum seekers.

Article 22(1) provides that: "State parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied....receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other human rights or humanitarian instruments to which the said States are Parties."

Article 22(2) mandates that State Parties must assist such a child to trace its parents or family and where possible to arrange for reunification with the family. If this is not possible, then the child shall be "accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason." Tracing and family reunification is a crucial aspect in the international legal protection of unaccompanied foreign children. In South Africa, unfortunately, it seems that up until recently, "...the Department of Home Affairs' standard practice was to transport foreign children by train or truck and dump them without money, food or assistance at the nearest police station on the other side of the border or at the border itself."<sup>3</sup>

The *Committee on the Rights of the Child* has pointed out that foreign children are vulnerable to exploitation. They stated that the State must take positive and effective steps to protect the rights of children belonging to minorities and

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<sup>2</sup> *Convention on the Rights of the Child*, G.A. Res.44/25, 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (1989).

<sup>3</sup> A Skelton 'No Dumping: litigating for the proper treatment of unaccompanied foreign children in South Africa' A paper presented (by the Centre for Child Law, University of Pretoria) at the 4th World Congress on Family Law and Children's Rights 20-23 March 2005, Cape Town, available at <http://www.childlawsa.com>, accessed on 6 April 2006.

they found that foreign children were such a minority needing protection.<sup>4</sup> The rights of children belonging to minorities is protected under Article 30 of the CRC. They are therefore entitled to special measures of protection.

### ***III. The Refugees Act 130 of 1998***

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.

South Africa's Child Care Act No.74 of 1983 (and now the Children's Act) provide for a special Children's Court Inquiry to ensure the protection and care of children in need of care. However, nothing in these Acts explicitly states that refugee or foreign children should be included. It is because of this lacuna in the law that a number of unaccompanied refugee or foreign children easily fall between the cracks. It is only stated in the Refugees Act that the Children's Court *may* order that an unaccompanied foreign child be placed in some form of care and that such a child *must* be assisted in applying for asylum.<sup>5</sup>

The gap that exists in terms of these pieces of legislation is a combined, holistic one. The Acts are vague as they do not come together to clearly describe and put into place specific protection measures with respect to refugee and unaccompanied foreign children, before and after their detection and status determination.

### ***IV. Centre for Child Law and another v Minister of Home Affairs and 8 others 2005 (6) SA 50 (T)***

The *Centre for Child Law* case is the leading judgment on the rights of foreign children in South Africa and it is recommended that the legal principles specified in this judgment be incorporated into the Bill.

In this case, the Pretoria High Court confirmed that foreign unaccompanied children must be dealt with in terms of the Child Care Act. This includes asylum seeker and refugee children. Furthermore, the Judge states that the government of South Africa is directly responsible to provide the socio-economic and education needs of unaccompanied foreign children, refugee children and asylum seeker children. And, most importantly, "there is a legal duty on the various Government departments to together formulate a detailed policy providing for the way in which unaccompanied foreign children should be dealt with in South Africa."

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<sup>4</sup> See Concluding Observations of the Human Rights Committee, Gabon, U.N. Doc. CCPR/CO/70/GAB (2000) at paragraph 18.

<sup>5</sup> Refugees Act, Sec 32(2) and Reg 3(5).

### **Suggested changes to the Children's Amendment Bill**

In order to give effect to the aforementioned legal obligations that South Africa has vis a vis refugee and foreign children in the Republic, it is submitted that the "Strategy" sections of the Bill should include specific mention of refugee and foreign children, where appropriate, as a special category of children (similar to children with disabilities or chronic illnesses) that have distinct protection needs. Furthermore, it is submitted that that the Department of Home Affairs be included, where appropriate, in departmental strategies aimed at ensuring the effective protection of these particularly vulnerable children.

The above-recommended changes should be made in the following specific sections of the Bill: *Section 77 Strategy concerning partial care*; *Section 92 Strategy concerning early childhood development*; *Section 104 Strategy concerning child protection*; and, *Section 145 Strategy for securing prevention and early intervention*. All of these sections require the Minister to develop and implement holistic departmental strategies to deal with various aspects of children's care. In this regard, and in light of their special vulnerabilities, it is necessary that the Minister be required to give due consideration to the specific needs of refugee and foreign children, and ensure that the Department of Home Affairs is included in these strategies.

Invariably, since a Department of Home Affairs official (Refugee Affairs, Immigration Official or Border Official) may be the first point of contact with a refugee child or foreign child that is in need of care and protection, it is necessary to include these officials in the list of persons that must report a child in need of care and protection. It is therefore recommended that *Section 110(1) Reporting of child in need of care and protection* include in the list of individuals, who must report child abuse, sexual abuse or child neglect, any Department of Home Affairs official. This will support the harmonization of the Refugees Act with the within Bill, in the wake of Section 32 of the Refugees Act, which requires a Home Affairs officials to refer an unaccompanied foreign child to a Children's Court if the child appears to have a refugee claim and is found to be in need of care and protection.

*Section 184 Determination of placement of child in foster care* requires the following: (1) Before a children's court places a child in foster care by court order in terms of section 156, the court must consider a report by a designated social worker about –

- (a) the cultural, religious and linguistic background of the child; and
- (b) the availability of a suitable person with a similar background to that of the child who is willing and able to provide foster care to the child.

In order to match a foreign child with a suitable person with a similar background would require the intervention of specialist agencies, therefore, it is recommended that an additional sub-section to the above-noted Section 184 be inserted as follows:

(2) A designated social worker must, in the case of a refugee or undocumented foreign child, make inquiries with International Social Services,

or a service agency working in a relevant refugee community to identify suitable persons who are willing and able to provide foster care to the child.

Lastly, *Section 187 Reunification of child with biological parent* of the Bill should include specific reference to refugee and foreign children as family reunification for this group of children requires special procedures and the assistance of special governmental and non-governmental offices. International Social Services, a not-so-well known office within the Department of Social Development specifically deals with foreign children and may assist with their reunification. Furthermore, the United Nations High Commissioner for Refugees (UNHCR) may assist in reunifying refugee children with their families if the parent(s) or guardian(s) are in a refugee camp outside of South Africa. And lastly, the non-governmental organization Red Cross Society of South Africa has a mandate of 'restoring family links' and as such it conducts family tracing and also facilitates in certain family reunifications.

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