



Unaccompanied Foreign Migrant Children in South Africa

Policy Brief¹

Introduction

South Africa has ratified international treaties and has domestic law that provides for the protection of all children in its territory, including unaccompanied foreign migrant childrenⁱ despite panoply of legal provisions, unaccompanied foreign migrant children continue to face challenges in accessing basic rights in South Africa.ⁱⁱ The key policy gaps lie in the area of access to the care and protection system; denial of education due to lack of documentation; arrest and detention on account of immigration status and the inaccessibility of documents that can legalise the unaccompanied foreign migrant children's stay in South Africa.ⁱⁱⁱ Unaccompanied foreign migrant children must be treated as children in need of care and protection and be afforded the benefits that come with that status.^{iv} Education is a fundamental right that unlocks the potential to a better life and the continued denial of access to education to unaccompanied foreign migrant is not beneficial to the children or to the broader society.^v Lack of proper guidelines and standard operating procedures continue to contribute to the arrest, detention and deportation of unaccompanied foreign migrant children on account of their lack of documentation.^{vi} This practice must cease as no child should be repatriated to their country of origin without a process that provides the necessary safeguards. It is essential that these issues be addressed as a matter of urgency for systemic transformation that will enable South Africa to better manage the continued influx^{vii} of unaccompanied foreign migrant children.

¹ This policy brief was prepared for PAN: Children by Prof. Ann Skelton and Karabo Ngidi from the Centre for Child Law.

Care and protection system

The care and protection system under the provisions of the Children's Act 38 of 2005 is considered the appropriate mechanism to receive unaccompanied foreign migrant children.^{viii} However, research shows that the system is inaccessible to many unaccompanied foreign migrant children.^{ix} As a mechanism to ensure that the concerned children are placed in temporary safe care while durable solutions are explored, it is true that making the child care and protection system through the Children's Court more accessible to unaccompanied foreign migrant child will ameliorate some of the vulnerabilities to which that these children are susceptible. Lack of understanding and empathy towards the plight of unaccompanied foreign migrant children results in them being marginalised and excluded from a system that is in most cases their only hope to access basic human rights.^x It is therefore imperative that the National Department of Social Development continue to make it unequivocally clear that discrimination by those who are tasked to assist unaccompanied foreign migrant children through the Children's Court process will not be tolerated. Where an unaccompanied migrant child is a victim of trafficking, the Children's Act and the Prevention and Combating of Trafficking in Persons Act provide for protective mechanisms, which include a process through the Children's Court that will provide for the child's protection.

Education

The right to education has been described as both a human right in itself and an indispensable means of realizing other human rights.^{xi} As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.^{xii} Research over a number of years shows that one of the main reasons unaccompanied foreign migrant children travel to South Africa is to seek education opportunities.^{xiii} The Admission Policy to Ordinary Public Schools creates a barrier to accessing education in that it requires foreigners to produce evidence that they have applied to the Department of Home Affairs to legalise their stay in the country.^{xiv} However, this is difficult to do because of the lack of clarity by the Department of Home Affairs on how to process claims and results in a struggle to access the system. These provisions have resulted in schools excluding learners on account of lack of status documentation.^{xv} International law demands that unaccompanied foreign

migrant children have access to education in their country of destination, albeit temporarily while the process of tracing and reunifying them with family is underway.^{xvi} Current reports^{xvii} on the situation of unaccompanied foreign migrant children in South Africa show that these children end up being in the county for long periods for varied reasons and it is therefore important to ensure that they access education in order to enable them to be able to contribute to society either in their country of origin upon return or in their country of destination.

Status documents

Access to status documents for unaccompanied foreign migrant children remains elusive. Asylum seeking children are denied asylum permits on arrival and are required to undergo a Children's Court process before they are issued any documentation.^{xviii} This makes the children vulnerable to arrest and detention on account of their lack of documentation.^{xix} The Refugee Amendment Act inserts section 21A in to the Refugee Act which provides for a process that would allow for asylum seeking unaccompanied foreign migrant children to be issued with asylum permits upon arrival into the country and then be referred to the Department of Social Development for a Children's Court process.^{xx} Unfortunately, this amendment is yet to be put in operation.

Unaccompanied foreign migrant children who do not have an asylum claim face a seemingly insurmountable battle in so far as access to status documents is concerned. Currently, there is no provision for a document that legalises their stay in South Africa even in cases where such children have been formally placed in the care and protection system.^{xxi} This is an untenable situation that results in the children ageing out of the care and protection system without any status documents and the possibility of deportation upon becoming adults.^{xxii} It is imperative that where unaccompanied foreign migrant children are placed in the care and protection system, provision is made for them to obtain status documents. A possible document that can be provided for these children is a permit under section 32(1)(b) of the Immigration Act which empowers the Minister of Home Affairs to grant permanent residence permits to a group of persons.^{xxiii} Unaccompanied foreign migrant children should be assisted to access status documents in order to minimise the risk of unlawful deportations as well as the possibility of becoming stateless.

Arrest, detention and deportation

A recent court case^{xxiv} in which two Zimbabwean boys were detained in police cells for 8 days and were on the verge of being deported shows that despite existing case law that set a precedent in relation to the unlawfulness of arrest, detention and deportation of unaccompanied foreign minors, some children are still at risk of being deported without a Children's Court process. One of the challenges in relation to this aspect is the lack of guidelines that clearly set out the procedure that members of the South African Police Services must follow when they encounter unaccompanied foreign migrant children.^{xxv} Furthermore, as in the recent case mentioned above, some of the officials of the Department of Home Affairs seem to be under the misapprehension that unaccompanied foreign migrant children can be deported as "special deportations" without a Children's Court process. A notable gap that may be contributing to this state of affairs is the absence of a provision in the Immigration Act 13 of 2002 that sets out the fact that unaccompanied foreign migrant children must, despite the absence of travel documents, be handed over to the Department of Social Development and not be summarily deported.^{xxvi} It is therefore crucial that the South African Police Services adopt a standard operating procedure that will ensure that unaccompanied foreign migrant children are not subject to unlawful arrest; detention and deportation solely on account of their status.

Concluding remarks

Uninformed and uncoordinated policies are contributing to unsuitable responses to the challenges that come with the influx of unaccompanied foreign migrant children into South Africa. It is therefore necessary that the policy shifts proposed here be considered as they reflect, to a large extent, a position informed by the reality lived and experienced by the unaccompanied foreign migrant children and those who come to their aid. The continued denial of rights and marginalisation of unaccompanied foreign children does not serve the interests of the children or that of the country.

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