



**SUBMISSIONS ON THE NEEDS OF CHILDREN IN THE DEPARTMENT OF HOME AFFAIRS' GREEN
PAPER ON INTERNATIONAL MIGRATION**

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Submitted by:

The Centre for Child Law

Lawyers for Human Rights

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List of endorsing organisations:

Save the Children International, East & Southern Africa Regional office

Lawrence House Child and Youth Care Centre

Legal Resources Centre

The Johannesburg Child Advocacy Forum

Sophiatown Community Psychological Services

Refugee Social Services

Kids Haven

Jo'burg Child Welfare

Three2Six Refugee Children's Education Project

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1. Introduction

The Green Paper on International Migration ('the Green Paper') addresses the policy in terms of which all immigration matters will be regulated. However, the Green Paper is silent on the needs of children. The purpose of these submissions are to bring to the attention of the Department of Home Affairs the fact that children have specific needs which are not covered by the Green Paper and to request that the Department include our recommendations on the Green Paper.

These submissions are made by the Centre for Child Law¹, Lawyers for Human Rights² and the Scalabrini Centre of Cape Town³. All three organisations have significant experience in dealing with children who migrate and with children who live in South Africa who are affected by immigration and the policies covered by the Green Paper.

Children are among the most vulnerable in our society and are at risk of further marginalisation and violations of their human rights if not effectively planned for in policies such as the Green Paper.

¹ The CCL is a human rights organisation that protects and promotes children's constitutional rights through strategic public interest litigation and advocacy. The CCL brought the first case, *Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T)*, that established that unaccompanied migrant children should not be deported without a Children's Court process as they should be considered children in need of care and protection in accordance with international treaties and standards. The CCL has continued to litigate and research in the area of unaccompanied migrant children with the aim of ensuring that these children are not detained for lack of an immigration status and that they are afforded the protection stipulate in the Constitution, Children's Act 38 of 2005 and other relevant legislation.

² LHR is a South African human rights organisation committed to social justice activism and strategic public interest litigation. In 2011, LHR launched the Statelessness Project as part of the Refugee and Migrant Rights Programme. LHR provides direct legal services to stateless persons; engages government on the need for legal reform to prevent and reduce statelessness; raises awareness the rights of stateless people; and advocates for accession to the 1954 and 1961 UN statelessness conventions. LHR has reached more than 3,000 persons from over 28 countries of origin. LHR has identified numerous categories of stateless persons in the Republic, both migrants and those born in South Africa. For more details of LHR's statelessness project, see: <http://www.lhr.org.za/programme/rmrp-statelessness-project-accessing-citizenship-and-nationality>.

³ The Scalabrini Centre of Cape Town (SCCT) is a registered NPO that perceives migration as an opportunity and is committed to alleviating poverty and promoting development in the Western Cape while fostering integration between migrants, refugees, and South Africans. The Scalabrini Centre Advocacy Programme offers legal advice and practical assistance to foreign individuals with regards to documentation and services. In addition to assisting individuals, the programme also conducts 'higher level' advocacy to improve implementation of existing laws and procedures and change legislation and policies where necessary.

2. Definitions

Considering the fact that some children migrate by themselves or eventually live in South Africa unaccompanied by parents or relatives, or live with adults who have no legal duty to take care of the child, The green Paper should ideally make provision for the documentation of those children who are not migrating to south Africa or living in south Africa with their parents or legal guardians. At the moment the Green Paper does not deal with such children or assumes that children's status will be dealt with as an extension of their parents' status which is not ideal. There is a need to deal with children in the Green Paper as a separate group who need specific policy considerations, particularly when they are not connected to (or adversely affected by) an adult who they are considered a dependent of. Such children are particularly at risk of becoming undocumented or stateless, especially children who are unaccompanied and separated. Unaccompanied children have specific needs which are not currently recognised by the Green Paper. In light of this we suggest that the following two definitions be included in the section on definitions:

Child: A child means a person under the age of 18 years⁴.

Unaccompanied and separated migrant child: A child under the age of 18 years who is not in the care of a biological parent or adult who has legal duty to care for the child.

Stateless person: A stateless person is a person who is not recognised as a national by any state under the operation of its laws,⁵ including a person who cannot establish a nationality.

Dependent: A child who, in relation to an asylum seeker, migrant or refugee, accompanies their parent or caregiver into South Africa, or who migrates to join this parent or caregiver at a later date.

Regarding the existing definitions we would like to suggest the following:

⁴ Section 28(3) of the South African Constitution.

⁵ The definition of statelessness in the 1954 Convention on the Status of Stateless Persons, which is considered international customary law according to the International Law Commission. See the conclusions in Articles on Diplomatic Protection with commentaries, 2006, which states that the Article 1 definition can "no doubt be considered as having acquired a customary nature". The Commentary is accessible at http://untreaty.un.org/ilc/guide/9_8.htm.

Illegal migrant: We suggest the addition of the phrase: “... not including children.”⁶

3. Rationale of the Green Paper

The Department of Home Affairs (DHA), within its constitutional obligation to determine and secure the identity of all South African citizens and to ensure effective international migration, also has the constitutional obligation to ensure the right of all children in South Africa to human dignity, equality, the right to a name and nationality from birth and the right to basic services and schooling amongst others. These rights are often affected by their status or lack thereof and should be addressed in the Paper.

The current rationale of the Paper leans towards the development of the economy which fails to recognise the needs of children who are not able generally to contribute to the economy. When it comes to children a human- and child rights approach is most suitable and should take precedence over economic development. This should be clear from the policy.

The paper identifies certain constitutional principles on page 16 of the Paper. What is missing from the list is the right of every child in terms of section 28 of the Constitution to:

- A name and a nationality from birth; (section 28)
- Family care or parental care, or to appropriate alternative care when removed from the family environment;
- Basic nutrition, shelter, basic health care services and social services;
- Be protected from maltreatment, neglect, abuse and degradation;
- Be protected from exploitative labour practices;
- Not be required or permitted to perform work or services that
 - o Are inappropriate for a person of that child’s age; or
 - o Place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development

⁶ As it has been established that established that unaccompanied migrant children should not be deported without a Children’s Court process and should be considered children in need of care and protection in accordance with international treaties and standards. (, *Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T)*).

- Not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - o Kept separately from detained persons over the age of 18 years; and
 - o Treated in a manner, and kept in conditions, take account of the child’s age;
- Have a legal practitioner assigned to the child by the state, and at the state’s expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- Not to be used directly in armed conflict, and to be protected in times of armed conflict;
- The principle that the child’s best interest are of paramount importance in every matter concerning the child.

The Green Paper will ultimately affect children and the above principles are of paramount importance when considering such policy. It is in this context that our submissions are made and concerns are raised.

The Paper purports to address the gaps in legislation, however, it fails to recognise and address the current gaps which affect children which will be discussed below.

Chapter 3 addresses trends and statistics of migration, but fails to indicate what portion of those migrants are children whether children where accounted for at all. We suggest that numbers of migrant children be reflected, particularly unaccompanied and separated children, and if no such data is available the policy should express the state’s commitment to obtaining and maintaining reliable statistics on migrant children. These statistics should include, inter alia, data on the amount of children in the care system and those in detention.

This chapter notes that 24% of visa applications were family related (relatives visas) and that 18% of permanent residence permit applications were made by dependents (under the age of 18 years). There is regrettably no information on the amount of children’s asylum applications made and approved or rejected.

4. Chapter 4: Policy and Strategic Options

DHA identifies certain areas which require policy and strategic interventions. We suggest that an area which needs to be added to the current list is the management of all aspects of immigration related to children, especially unaccompanied and separated children.

The Green Paper notes an increase in children who are migrating and notes that children fall into a vulnerable group who are negatively impacted by an overloaded asylum system. Yet, children are not included in thematic debate nor does it provide policies that respond to these points. We are concerned about how some of Green Paper's proposals would affect child migrants' access to documentation broadly and how migrant children should be protected from statelessness. We are particularly alarmed about the potential detention of children at the proposed processing centres.

The issues faced by migrant children are layered, complex and often depend on the individual's circumstances. The present legal- and policy framework contains a number of gaps with regard to foreign children (migrant children as well as those born to migrant parents in South Africa) which are not addressed by the Green Paper. This will be expanded on below.

4.1 Management of admissions and departures

Registration and identification of unaccompanied and separated migrant children

We appreciate the intention of the Green Paper to address inadequate data capturing on the larger scale and in this context we wish to draw the attention to the fact that presently no system exists to record the entries (or departures) of undocumented, unaccompanied or separated minors from the Republic. This is a highly vulnerable population group that, by virtue of being children, acquires certain rights under the Constitution and Children's Act. We believe that it is necessary for such children to be identified and documented, and promptly referred to appropriate service providers where their best interests may systematically be determined. At present, no information is available on the number or profiles of children who migrate to South Africa by themselves and therefore it is not possible for the Government to analyse the

trends which would inform the need for protection services, or the establishment of bi-lateral arrangements to ensure the eventual safe return and care of migrant children.

It is necessary to note that the presence of undocumented, unaccompanied or separated migrant children impacts on the policies and service provision of the Departments of Social Development and Education. To access such services, children often required identification documentation, which is currently not provided by DHA. Often, undocumented children are not able to access social services, child protection agencies, the courts, or alternative care, without identification documentation or proof of legal stay. They are caught in a cycle which exposes them to suffering, exploitation and abuse. This situation also perpetuates poverty, street life and increases the possibility of such children resorting to crime to survive.

At present, attempts at cross-border family tracing are being made on an ad hoc basis by individuals or benevolent organisations. There is little information available on the functionality of cross-border initiatives to ensure that children who intend to migrate for socio-economic reasons are cared for in their countries of origin. This results in many such children remaining undocumented, in the informal care of citizens, migrant communities, or in alternative care for long periods of time. It is our opinion that the GP should acknowledge this issue and mention at least that working relations between DHA and DSD should be established and strengthened to ensure that children's best interest be protected as a priority. Recent surveys of Child- and Youth Care Centres across the Western Cape⁷, Limpopo and Gauteng⁸ found that the number of foreign children placed in institutional care is not overwhelming but rather proportional to the percentage of migrants estimated to be present in the country (between 3 – 4%) which means that addressing the issue through making available appropriate resources, does not have to be especially resource intensive for the State. In fact, if there is an appointed desk to efficiently assess queries from DSD or child protection agencies, this problem could be contained, measured and managed. We urge the Department of Home

⁷ Sloth-Nielsen, J., & Ackermann, M. (2016). Unaccompanied and Separated Foreign Children in the Care System in the Western Cape—A Socio-Legal Study. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 19, 1-27.

⁸ Unpublished as of yet.

Affairs to embrace this window of migration policy-making to ensure that the protection needs of these various categories of migrant children are addressed.

Proposal:

- We propose the Green Paper identify unaccompanied and separated migrant children in the care system to be regularised through a special dispensation. These children have been placed in care by a court order after family reunification has failed and the Children's Court has determined that they should remain in South Africa. However, there is no immigration status available to children like these. This exposes children to the risk of becoming stateless as they have lost links to their country of origin and this separation is deepened by their prolonged stay in South Africa, because of the impossibility if return to their countries of origin.
- There is an acute need to develop a strategy around the regularisation of such children as they will grow up to be (or are already) stateless. Once they become adults they will be classified as illegal immigrants who are impossible to deport which will contribute to the amount of people unaccounted for in the country. These children also face barriers to schooling and health care services because of the lack of documentation and immigration status contrary to their constitutional rights. This recommendation ties in with the policy option of regularisation programmes on page 78 of the Green Paper.

The challenge of mass illegal migration

In this section the Green Paper addresses the enforcement of the Immigration Act and identifies several strategic interventions which are under way. One of these is the promotion of the development of reliable population registers in SADC. In order to ensure that all children are accounted for the policy should identify universal birth registration as a strategy to accomplish this intervention. In order for children born in South Africa to migrants to access

birth certificates in their countries of nationality and to avoid statelessness, their births must first be registered by DHA in South Africa. Currently the Births and Deaths Registration Act precludes children of undocumented parents or parents with expired permits from having their births registered. This means that those children will be undocumented and face severe risk of statelessness. The Immigration Act also does not allow parents to leave South Africa with their children if they do not have birth certificates. The cumulative effect of these provisions is that children (and their parents) are forced to remain in South Africa without any way of accessing nationality in their countries of nationality and thereby become stateless.

Proposal:

- In order to prevent this situation birth registration should be made available to all children regardless of their parents' status. The Green Paper should identify universal birth registration as a strategy to prevent statelessness in South Africa.⁹
- At present, legislation governing birth registration does not allow for the registration of birth of a child born to an undocumented mother. Whilst this is meant as a punitive measure or deterrent for the parent, the consequences become the direct burden of the child who is effectively rendered unidentified, illegal, at risk of statelessness, unable to exercise any basic rights or access public services.
- We would like to add that this form of institutional discrimination fuels xenophobic sentiment amongst citizens, who sees the child as an alien and non-compliant being who presents only administrative problems. Access to birth registration as a form of identification and a preventive measure of statelessness is an important area of action for the State and should form part of any future policy.

⁹For more on barriers to birth registration in South Africa see LHR's publication on childhood statelessness here: http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf.

4.2 Management of residency and naturalisation

This section addresses the factors to be taken into account with regards to naturalisation. We propose that the stability and family unity of children be identified as an important factor in considering the naturalisation of children in order to comply with the constitutional values discussed above.

The period of stay in South Africa of children significantly decreases their likelihood to retain citizenship in their parents' country of origin. The DHA should be cognisant of the fact that many SADC countries (and other countries) automatically deprive persons of nationality at age 21 when they are perceived to have the nationality of another country because of factors such as birth on the territory. If those children are not allowed to naturalise based on their long term residence in the country they face the risk of becoming stateless in South Africa. Statelessness is contrary to the objectives of the Green Paper. Long term residence in South Africa may also significantly decrease children's ability to establish a link to their parents' country of origin leaving them dependent on South African pathways to nationality through naturalisation.

Children of refugees are also at significant risk of statelessness if they are not afforded the opportunity to naturalise based on long stay, particularly when their parents pass away or abandon them when leaving South Africa. The UN Convention on the Status of Refugees requires South Africa to facilitate the naturalisation of refugees. Any contrary policy would violate South Africa's international obligations under this Convention.

The section goes on to state that naturalisation should be given strategically. These strategies should include a strategy to ensure that children are naturalised when necessary to ensure their right to a nationality (to prevent statelessness) and their right to family unity and stability. The applications of children for naturalisation should also be fast tracked and should not only be connected to certain visas as they have the right to family unity regardless of their parents' visa type or level of critical skills.

We are particularly concerned about the exclusion of unaccompanied and separated migrant children from any documentation/visa regime. Aside from the study visa, visa options for children are dependent on family relations. Unaccompanied and separated children often

enter the Republic without any form of identification which automatically excludes the child from regulation of stay and compliance to the legal framework. This concern extends to children born to an undocumented, foreign mother in South Africa.

Furthermore, the SADC visas do not make mention of family members joining the suggested permit options. This will have the effect of excluding unaccompanied and separated children coming into the country to join their family members from being able to regularise their stay in the country through joining the permit that these family members have been granted.

Proposal:

- Children should also be able to naturalise independent of their parents to cater for children who are unaccompanied in South Africa.
- In this regard the naturalisation of children should not be delinked from residency. The granting of naturalisation of children should be considered as automatically exceptional in order to ensure their rights in terms of the Constitution.
- We would urge DHA to consider including some reference to the inclusion of families, especially children, in the permits of their family members when they join them in the country at a later stage.
- In addition to the above, we urge DHA to consider a provision for all visa application fees for children to be waived, particularly when children are unaccompanied.

4.3 Management of international migrants with critical skills and capital

This section of the Green Paper seeks to formalise a system that attracts and retains skilled migrants. We welcome the proposition of the family-based visa as it recognises the need to document a family unit rather than just an adult skilled migrant. We would recommend that the provision of a family-based visa be replicated in other sections of the White Paper.

Namely, the White Paper should specify how dependents of those applying to SADC-based

visas could join the applicants. We would recommend a family-based SADC visa, mirroring the family-based visa proposed at section 4.3 of the Green Paper. The granting of family-based visas to holders of business and critical skills visas to exclusion of other visa holders will necessarily violate the right to family unity of children of other visa holders.

4.4 Management of ties with South African expatriates

This section identifies the need to maintain links with the South African diaspora abroad. In this regard it is important to ensure that expatriates do not automatically lose citizenship of South Africa by obtaining the nationality of another country. Particularly of concern is the automatic loss of the citizenship of children when their parents lose citizenship based on the (often incorrect) assumption that they will obtain the citizenship of their parents.

Proposal:

- The Green Paper should include plans to ensure that expatriates retain their South African nationality, particularly where it will lead to statelessness.
- The policy should plan to allow the children of parents who lose their citizenship to retain their South African citizenship, particularly where they would become stateless.

4.5 Management of international migration in the African Context

The African Union has emphasized the need to ensure the right of all children to a name and nationality from birth. The African Committee on the Rights and Welfare of the Child (ACRWC) has made the following recommendations in its General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child¹⁰. States parties should inter alia:

- a. establish legal frameworks in accordance with, or align them to, this General Comment in all of the respects outlined above;

¹⁰ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, 16 April 2014, ACERWC/GC/02 (2014), available at: <http://www.refworld.org/docid/54db21734.html> [accessed 27 September 2016].

- b. establish a functioning, well managed, resourced, integrated, universal, free and accessible birth registration system;
- c. Respect the principle of international law that statelessness shall be avoided; and in particular that, as required by Article 6(4), a child who, at the time of birth, is not granted nationality by any other State in accordance with its laws acquires the nationality of the State in the territory of which he or she has been born.
- d. Provide that children found abandoned in the territory of a State Party (foundlings) acquire the nationality of that State.
- e. Facilitate the acquisition of nationality by children adopted by a national of that State.
- f. Provide protections against statelessness for children where the status of one or both parents changes through divorce, marriage, loss, deprivation or renunciation of nationality.

Proposal:

The Green Paper should include the recommendations of the African Charter on the Rights and Welfare of the child in order to protect children's nationality and prevent statelessness.

Refugee children

The present legal framework does not allow for an unaccompanied child to submit an application for asylum without an order from the Children's Court and the assistance of a social worker.¹¹ The result is that the asylum system in its present form is not accessible to many children who may have a genuine need of protection. The Green Paper does not address this aspect.

Another practicality that is overseen is the possibility that unaccompanied and separated refugee children may end up in the informal care of relatives, benevolent persons (including

¹¹ Section 32 of the Refugees Act requires that the child is referred to the Children's Court where an order is made that the child be assisted in applying for asylum. This order is made in terms of Section 46(h)(viii) of the Children's Act.

citizens), and foster care or in institutional care in different places across the country. The Green Paper does not mention how the asylum system should be made accessible to service providers such as child care facilities, or individuals who do not live in proximity to the proposed processing centres.

Proposal:

- Provision should be made for unaccompanied asylum seeking children to access temporary asylum permits pending the referral to the Children’s Court and the final determination of the children’s status. This approach will ensure that children are captured in the DHA system, that they are protected from potential deportation and can access services.
- We would like to urge the DHA to consider retaining an urban asylum processing policy where residents of South Africa may easily access Refugee Registration Offices and the services of DHA.

Detention of unaccompanied migrant children

We are particularly concerned about how asylum-seeking children would be dealt with by the South African state in light of the policy proposal for “asylum seeker processing centres” and “administrative detention centres.” We wish to point out that it is an entrenched rule of International Law that the detention of children should be used as a last resort and if so, for the shortest possible period of time.¹² National case law sets down that unaccompanied asylum-seeking children cannot be detained in Lindela Repatriation Centre and must be dealt with in terms of the Child Care Act and be placed in a place of safety.¹³ As children are considered a “vulnerable group,” and do not receive specific mention elsewhere in this discussion, we are concerned that proposed policy direction is contemplating the detention of children, despite research showing that the mental health impacts of detention on children,

¹² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, Article 37(b).

¹³ *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T).

particularly on the mental health of children, can be particularly deleterious.¹⁴ The Committee on the Convention on the Rights of the Child states that unaccompanied and separated children are particularly vulnerable groups of children (including the children of migrant families, those who lack parental care, and those placed in institutions) and implores State Parties to ensure that state obligations are met in terms of providing access to appropriate and effective services such as health, care and education.¹⁵ It is unclear what the Green Paper proposes as a policy approach for dealing with the issue on the detention of minors and how minimum standards of detention will be ensured, including the duty to ensure that detention should be for the shortest period of time.¹⁶

In *Dawood v Department of Home Affairs* the Constitutional Court confirmed that the right to family unity is borne out of the right to dignity and is therefore constitutionally protected.¹⁷ The detention proposal in the Green Paper is unclear as to what provisions would be made to maintain family unity¹⁸ for families in regards to the detention proposal and how the specific protections and rights of children would be met in this context. Accordingly, any proposal must consider the impact on family unity and in particular the impact on children.

The Green Paper indicates an unwillingness to link family applications of those dependents arriving in South Africa after the refugee application is made. We urge the WP to take into consideration the fact that families fleeing conflict are at risk of becoming separated and losing contact.

Proposal:

- We urge the DHA to, in accordance with its current legislation, not detain unaccompanied and separated migrant children solely on account of their migration status and that such

¹⁴ Farmer, A. (2013). The impact of immigration detention on children. *Forced Migration Review*, (44), p.15; Silove, D., Austin, P., & Steel, Z. (2007). No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia. *Transcultural psychiatry*, 44(3), 359-393.

¹⁵ Committee on the Convention on the Rights of the Child. (2005). General Comment 7: Implementing Child Rights in Early Childhood, Para 24.

¹⁶ Committee on the Rights of the Child (2005). General Comment 6: Treatment of unaccompanied and separated children outside their country of origin, para 63.

¹⁷ (2000) CCT 35/99.

¹⁸ The right to family unity is protected under Article 23 of the International Covenant on Civil and Political Rights.

children should be referred to the Department of Social Development for a process that will ensure the protection of their rights.

- Unaccompanied and separated migrant children can be placed in Child and Youth Care Centres, as is currently the case, which already fulfil minimum standards for child care and protection.
- Provision should be made for dependents joining asylum applications at a later date. We further recommend that the reality of such migration be recognised in terms of adults taking care of non-biological children.

5. Chapter 5: Capacity for managing international migration

We appreciate the fact that there is a need for a “whole government and society” approach for the management of international migration; that there is a need for inter-sectoral governance approach and that there is a need to capacitate DHA as the lead organisation for the management of international migration.

Proposal:

- In this regard we want to urge the DHA to consider the role of the Department of Social Development, the Department of Health, the Department of Education, community based organisations and the domestic and international Non-Governmental Organisations in the protection of unaccompanied and separated migrant children.
- The needs of unaccompanied and separated migrant children require a concerted effort which can be comprised by an approach that is solely migration focused. In as much as South Africa is a sovereign state, we are parties to international and regional treaties that place specific obligations on us in so far as the treatment of unaccompanied and separated migrant children concerned.

6. Conclusion

The DHA commits itself to paying due attention to creating legislation that will enable coordination across society and that protects human rights, including the right to safety and security of all those who live in SA. We commend this undertaking and urge the DHA to remain true to this when drafting the policy, particularly in so far as unaccompanied and separated migrant children are concerned. Unaccompanied and separated migrant children, whether asylum seeking or not, deserve protection that accords with the international, regional and domestic laws. Moreover, they must be treated in a humane manner recognising that no child would voluntarily leave a conducive environment and venture to the unknowns of a foreign country.