

**THE SCALABRINI CENTRE OF CAPE TOWN SUBMISSION
TO THE DEPARTMENT OF SOCIAL DEVELOPMENT ON
SOUTH AFRICA'S CHILD CARE AND PROTECTION POLICY (DRAFT 1)**

31 January 2018

The Scalabrini Centre of Cape Town (SCCT) is a registered not-for-profit organisation 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. In providing assistance, the SCCT advocates respect for human rights and utilises a holistic approach that considers all basic needs including advocacy, development, and welfare services. The advocacy programme functions as a walk-in paralegal office, and as such, the SCCT receives individuals who present problems around access to basic rights, including the rights of unaccompanied and separated foreign children. The SCCT also runs Lawrence House, a registered child and youth care centre based in Woodstock, which accommodates up to 25 children and youth. Lawrence House specialises in the care and protection of unaccompanied foreign minors and refugee children.

Through our daily work, the SCCT regularly provides assistance to foreign children and provides advice to their caregivers, social workers or any interested party, on the legal framework and documentation considerations. The SCCT also facilitates workshops on the rights of foreign children and provides training to the Department of Social Development (DSD) on this matter. The SCCT has undertaken and published research on the situation of foreign children in Child and Youth Care Centres (CYCC) and on foreign children in informal care arrangements.

The SCCT welcomes the opportunity to provide input to South Africa's Child and Care Protection Policy (Draft 1) (hereafter referred to as 'the Draft Policy'). Our submission is focused on the situation of unaccompanied and separated foreign children and attempts to clearly identify the challenges faced by unaccompanied and separated foreign minors; it then aims to provide recommendations that could improve the service delivery to these children, and encourage that these children are included in future child protection policies.

1. General Comments

At the outset, the SCCT wishes to acknowledge the recent positive developments undertaken by DSD and the Department of Home Affairs (DHA) on this issue. Most recently, an interdepartmental committee on Unaccompanied and Separated Foreign Minors was established, which has

commissioned research and engaged with civil society in understanding and addressing the situation of unaccompanied and separated foreign minors. In October 2017, a colloquium on unaccompanied and separated migrant children was held in Johannesburg. Government departments undertook several resolutions, including:

- Creation of interdepartmental SOPS and protocols on unaccompanied and separated minors;
- Interdepartmental committee at provincial level to find durable solutions for unaccompanied and separated minors;
- Interdepartmental committee to find recommendations in policy and law change needed;
- Focal unaccompanied and separated minors points per department;
- Improved family tracing processes;
- Best Interest Determination undertaken at provincial level for unaccompanied and separated minors cases and permanent options for documentation made possible where relevant;
- A budget for unaccompanied and separated minors per department;
- Data collection on unaccompanied and separated minors;
- Awareness campaign on unaccompanied and separated minors;
- Computer generated birth certificates for unaccompanied and separated minors born in South Africa;
- Waiver of DNA fees for unaccompanied and separated minors cases;
- Temporary document like a special dispensation for unaccompanied and separated minors cases pending durable solution; and
- A nationality and status determination committee for those unaccompanied and separated minors at risk of statelessness;

To the SCCT's knowledge, a final copy of these resolutions is not yet available; we implore DSD to ensure the final publication of these resolutions.

Secondly, the SCCT submits that unaccompanied and separated migrant children face a unique set of vulnerabilities and an immigration framework that does not consider their needs or situation. The Draft Policy as currently drafted sets out ideals in terms of service delivery to these children which do not match their situation. The SCCT believes that the Draft Policy would benefit by acknowledging the reality faced by this group of children. To demonstrate these vulnerabilities, research undertaken by the SCCT in 2015 sought to better understand the position of separated and unaccompanied children in informal care relationships in the Western Cape. The research identified 109 foreign children and revealed:

- Unaccompanied and separated children come to South Africa for several reasons with the most common reason being due to conflict in their country of origin (44%) followed by the

death of a caregiver (21%). They typically come from the Democratic Republic of Congo (DRC), Somalia, and Burundi. They migrate alone, or with an adult, and typically, they enter SA without valid documentation;

- Such children live with relatives, are placed in children's homes, or live with adult that they did not previously know;
- It is very difficult for such children to secure documentation in South Africa due to restrictive immigration law. Not all unaccompanied and separated children are refugees, so approaching the asylum system is appropriate for some of these children;
- Only 21 of the 109 children secured documentation to regularise their stay in South Africa. Therefore, 80% of these children are undocumented, meaning access to education, health care, and child protection is compromised. For example, 40% of the children interviewed were not attending school and 21% of the children were considered at risk of statelessness; and
- These children are typically not able to access the child protection system, which means the Department of Social Development is not aware of them. Indeed, 57% of the cases did not reach a social worker at all.¹

Thirdly, the SCCT considers the proper documentation of unaccompanied and separated foreign children as the key to proper protection,² and strongly urges DSD to consider the role of documentation in providing protection and stability to these children and what measures can be taken to improve their access to enabling documentation.

In these submissions, the SCCT sets out the challenges faced by unaccompanied and separated foreign minors and aims to provide recommendations that could improve the service delivery to these children in terms of child protection policies.

2. Definitions

The Draft Policy defines a 'separated migrant child' and an 'unaccompanied migrant child' (page 14).

The SCCT recommends that the wording is changed to 'separated foreign child' and 'unaccompanied foreign child' which would cover both migrant children and refugee children. The Draft Policy makes mention of asylum-seeking and refugee children (for example, section 5.9.3 principles of *non-refoulement*, page 147) – but the Draft Policy does not provide a definition of this. The SCCT recommends further that the terms 'migrant child' and 'refugee child' be included in the definition section to further clarify the Department's role in these interventions.

¹ SCCT, 'Unaccompanied and Separated Foreign Children in the Western Cape, South Africa: Exploring (the lack of) durable solutions for children in informal relations of care', September 2017, available at: <http://scalabrini.org.za/wp-content/uploads/2017/10/Unaccompanied-children-revised-5.0-Printversion-.pdf>.

² By documentation, we refer to the appropriate legal status (in terms of immigration and refugee law) held by a child. This, ideally, should be a document that establishes both the child's nationality and their right to reside in South Africa.

In our work, we consider a migrant child to be a person under the age of eighteen who has migrated with family, caregivers or alone due to non-refugee related reasons. In our experience, these children may migrate due to socio-economic reasons, better opportunities, the death of a caregiver, or to join family in South Africa. A refugee child is a person under the age of eighteen who has migrated with family, caregivers or alone due to reasons set out in Section 3 of the Refugees Act (No. 130 of 1998), which states 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, 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 a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or 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 elsewhere: or
- (c) is a dependent of a person contemplated in paragraph (a) or (b).

Referring to ‘separated/unaccompanied foreign child’ would have to occur throughout the **whole** policy. For example, in the definitions section, ‘unaccompanied and separated migrant children’ are included in those children considered to be ‘vulnerable children’ (page 14) – however, this does not include refugee children. Referring to unaccompanied and separated ‘foreign children’ would encompass both migrant and refugee children in this position.

3. International Standards (page 147)

The Draft Policy sets out international standards that apply to children as found under international law. The SCCT suggests that this section is expanded to include domestication of these international standards including:

- Section 28 of the South African Constitution guarantees the rights of all children irrespective of their nationality, origin or legal status in South Africa;
- Children’s Act (No 38 of 2005) provides protection to all children in South Africa regardless of nationality; and
- Section 32 of the Refugees Act (No 130 of 1998) provides for unaccompanied children who apply for asylum.³

³ Section 32 states:

(1) Any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983 (Act No. 74 of 1983), must forthwith be brought before the Children's Court for the district in which he or she was found.

(2) The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act.

Additionally, the SCCT submits this section would be strengthened by the inclusion of regional conventions, most notably the African Charter on the Rights and Welfare of the Child, of which South Africa is a signatory.⁴

4. Risks and Challenges (page 147)

It is agreed that unaccompanied and separated foreign children are faced with a variety of challenges; below are listed some of the more serious challenges the SCCT has encountered in recent years along with recommendations to address these issues. The challenges listed are taken from day to day client work the SCCT has undertaken attempting to assist refugees, asylum seekers and migrants in the Western Cape. These challenges are also informed by the research the SCCT has conducted on Unaccompanied and Separated Children in the Western Cape.

4.1 Challenges regarding Documentation of Foreign children

The SCCT submits that the lack of documentation for foreign children – as mentioned in the Draft Policy – is of key importance to DSD. The proper documentation of unaccompanied and separated foreign children is critical to the child accessing their basic rights including *inter alia*: their right to a name and nationality, their right to education and their right to healthcare. Aside from this, a child's lack of documentation impacts all areas of their daily life; undocumented children fail to access the public library, miss out on school trips, cannot travel or cannot access extra mural activities. The SCCT strongly recommends that DSD emphasises the importance of documentation and encourage colleagues at DHA to continue to develop durable solutions and documentation options for these children.

Documentation options available to undocumented foreign children are extremely limited in South Africa and it is clear that a holistic protection for undocumented foreign children cannot be achieved when there are no documentation options for these children. Therefore the documentation of unaccompanied and separated children should be considered as a key element of child protection processes which should run parallel with that of care and protection. Where there are documentation options available at the time DSD comes into contact with the child, these must be pursued as soon as possible.

4.1.1 Challenges with documentation under the Refugees Act

- Section 32 of the Refugees Act requires that any child who appears to have an asylum claim and is found to be in need of care and protection to be brought before the Children's Court. The social worker has to determine whether the child has asylum claim or not. The court may order that the child be assisted to apply for asylum. However, challenges arise as many social workers are not trained in Refugee law and may not understand the processes to be followed in order for child to lodge an asylum claim. It seems that the procedures are unclear tied with inconsistent application of law and regulations, leaving role players confused as to how to proceed with such cases.

⁴ African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.refworld.org/docid/3ae6b38c18.html> [accessed 30 January 2018].

- The current legal framework does not allow a child seeking asylum to apply for asylum if the child is not in possession of a Children’s Court Order. Asylum seeking children (below the age of 18) who approach the Refugee Reception Office (RRO) in order to lodge an application for asylum are often referred to DSD to obtain a children’s court order. However, when children report to DSD offices, the social workers often do not know how to assist the children. When children are not able to access the courts for the court order, the result is that the children wait until they turn eighteen years of age for them to be able to lodge asylum claims and this means that the child is not afforded protection they deserve as a child. Further, this may complicate any refugee status determination process as children fleeing persecution and conflict are in a particularly vulnerable position, and prolonged periods of uncertainty and limbo may have severe effects on a child's physical and psychological developments.
- In certain cases, the main challenge posed is that some Child Protection Agencies operate under their own internal regulations or policies. In the past, the SCCT has referred cases of foreign children to certain agencies who subsequently advise that they do not deal with cases of foreign children, or they do not assess cases of children in care of asylum seekers, or that birth registration is not part of their primary mandate. In these instances, the agency often takes the case but in practice it is not prioritised.
- The geographical location of the RROs also poses another challenge for asylum seeking children. There are currently only three RROs that accept new applications from asylum seekers in South Africa (Durban, Pretoria and Musina). This means that an unaccompanied or separated foreign child found in Cape Town who appears to have asylum claim would require a social worker assigned to his or her case to accompany the child to one of the fully functioning RROs mentioned above to lodge a fresh asylum claim. This scenario comes with financial implications for DSD. In practice, the capacity of social workers and the available resources are limited, with the result that children may end up unable to lodge their asylum claim or are delayed while certain arrangements are being made. After the initial application, an asylum seeker permit cannot be renewed at another RRO and any action on the asylum claim must be undertaken through the RRO of application. By their nature, asylum seeker permits are temporary permits valid between one month to six months and this therefore means that the child and social worker will make approximately two to four trips per year to the RRO for the renewal of the asylum seeker permit.

4.1.2 Challenges with documentation under Immigration Act

- Children who do not qualify to apply for asylum or refugee documents can only be documented through the Immigration Act (No 13 of 2002). However, immigration legislation is restrictive and envisages that all children entering South African borders are with parents or legal guardians who are able to pass on their legal status to the children. No visa category exists that actually caters to unaccompanied and separated foreign children who cannot apply for recognition as an asylum seeker or refugee – this covers children who do not qualify under the refugee definitions listed above on page 4. The practical result of this framework is that children remain undocumented in South Africa

for many years and face challenges in accessing services (education, health) and cannot plan a future. When they attain age of majority, they face the risk of detention and possible deportation.

- Some migrant children in South Africa may qualify to apply for a study visa. However, in reality, a study visa is almost impossible to obtain. The first application for a study visa must be completed in country of origin. The migrant child would then have to exit South Africa and return to their country of origin and apply for the relevant visa there. There are many reasons why this is not possible. Firstly, they risk being declared 'undesirable' upon exiting their border without a valid permit. In these cases, the child cannot re-enter for five years. In our experience, many migrant children in South Africa arrive with caregivers or parents and do not hold a passport from their country of origin. A passport is a requirement of a study visa being issued. Secondly, the application procedure for a study visa is costly and requires supporting documentation which renders the procedure impossible to those who are in low-income households or those children living in CYCCs.
- Section 31(2) (b) of the Immigration Act states that the Minister of Home Affairs may grant a foreigner rights of permanent residence when special circumstances exist. The SCCT and other organisations assisting foreign children have previously followed this route, especially for children who are faced with high risk of statelessness. This process can result in the child acquiring a durable status (permanent residence); however, it has financial implications, requires legal expertise, and is a lengthy and uncertain process, which is at the Minister's discretion.

4.2 Birth Registration in South Africa

Foreign nationals and social workers face challenges in registering the births of foreign children, especially in more complicated situations, and especially where the parents' documentation is expired or non-existent.

Children born in South Africa to foreign parents do not automatically acquire South African citizenship. A birth certificate does not provide legal status to a foreign child in South Africa. An unabridged birth certificate provides a child with proof of birth, a nationality, a name and a place of birth. A birth certificate is very important as it allows the child to claim their citizenship, thereby reducing the risk of statelessness. Unaccompanied and separated foreign children are often at high risk of statelessness.

A 2013 amendment to the Citizenship Act extends the ability of naturalization to individuals born in South Africa to parents who are not citizens or permanent residents, subject to having their birth registered and being resident in South Africa for 18 years. This means a foreign child born in South Africa will become eligible for citizenship upon turning eighteen, provided they can produce an unabridged birth certificate and have resided in South Africa for the eighteen years.⁵ At the time of

⁵ South African Citizenship Amendment Act (No. 17 of 2010), states at Section 4(3), 'A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and (b) his or her birth has been

writing, DHA has indicated that this option is only applicable to children born after January 2013. This is subject to ongoing litigation; in 2017 the Western Cape High Court ruled that, given the constitutional entitlements at stake, such as the right to dignity, the Act should be interpreted to apply retrospectively which is in line with the spirit and object of the Constitution's Bill of Rights.⁶

Section 12 of the Birth and Deaths Registrations Act read with Regulation 9 of this Act allows for the registration of birth on behalf of an abandoned or orphaned child (often referred to as 'foundling birth registration'). In cases of abandoned foreign children born in South Africa, it is very important for the social worker to immediately liaise with DHA in order to register the birth of child and have a birth certificate issued.

The Regulations to the Births and Deaths Registration Act⁷ requires that foreign parents produce a valid visa or asylum/refugee permit as a prerequisite to birth registration in South Africa. Children born to parents who do not have valid visas in South Africa then cannot be issued a birth certificate. This framework therefore inhibits the rights of a foreign child to a nationality and complicates their development. Put simply, this situation is possibly creating a sizeable population of stateless people, present in South Africa, presenting challenges to both South Africa in the near future as well as for neighbouring states.

5. Protection Measures

Section 5.9.5 of the Draft Policy outlines the procedures for dealing with unaccompanied and separated migrant children. As abovementioned, we would recommend referring to this group of children as unaccompanied and separated foreign children, thus encompassing both migrant and refugee children.

The Draft Policy is unclear on the procedures to follow. The SCCT highly recommends that the Standard Operating Procedures for dealing with Unaccompanied and Separated Foreign Children be used to guide the document.⁸

The SCCT recommends further that the Draft Policy confirm that all unaccompanied and separated foreign children are to be considered to be vulnerable, warranting a Children's Court Inquiry into each case. For example, a separated foreign child in the care of an uncle may not be in need of care and

registered in accordance with the provisions 35 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).'

⁶ Legal Resources Centre, 'Court Rules Citizenship Act Applies Retrospectively to Children Born in South Africa to Foreign Parents', 7 September 2017, available at: <http://lrc.org.za/lrcarchive/press-releases/3738-press-release-court-rules-citizen-act-applies-retrospectively-to-children-born-in-south-africa-to-foreign-parents>

⁷ Regulation 3 of the regulations to Birth and Deaths Registration Act set out which documents 'must' accompany an application to birth registration. They include a certified copy of the parent's identity documents (regulation 3(3)(e)), a certified copy of a valid passport and visa or a permit where one parent is a non-South African citizen (regulation 3(3)(g)) or a certified copy of a death certificate where one parent is deceased. Regulation 3(5) states that an application that does not meet the requirements of 3(3) 'shall not be accepted'

⁸ During July 2015 Standing Operating Procedures for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa (SOPs) were released by the Department of Social Development. It is not clear if these have been finalised or not. We annex this SOPs to this document.

protection, but a social worker should still investigate the case and make a home visit to confirm the relationship and the wellbeing of the child.

Challenges related to Foster Care

- The SCCT has found that it is often a challenge for social workers to place foreign children in the care of prospective foster parents who hold asylum seeker permits. The view is that foster care is valid for two years whereas asylum seeker permit is valid for six months or less and has to be renewed every three or six months. The courts will therefore place children with asylum seekers only in highly exceptional cases. The SCCT has encountered situations in which social workers have refused to take on cases merely for reasons that caregiver is an asylum seeker. This goes against the best interest principle when dealing with all cases involving children because, in some cases, it may be in the best interest of the child to be placed with an asylum seeker. In any case, customary duty of care or foster care does not confer any type of immigration status. The reality in South Africa is that it can take up to fifteen years or more for an asylum claim to be finalised,⁹ and the SCCT works with asylum seekers in this situation on a daily basis.

The SCCT recommends that in situations where an asylum seeker receives a final rejection on their asylum application, the matter may immediately be brought before the court for a determination on whether the child leaves the country with asylum seeker or alternative care arrangement is made.

- Besides the issue of the documentation of a potential caregiver, there is extensive list of documents or evidence required in order for a children's court enquiry to be opened. In some instances, caregivers are not able to access documents from the child's country of origin, for example, when they have no contact with family in the country of origin or when documents were lost during flight from the country of origin. When caregivers are not able to produce required documents, cases are not opened, or are not finalised.
- In some cases, enquiries are opened but matters are not finalised within a reasonable time or at all; for cases that are not concluded prior to the child attaining the age of majority, the case is closed.

6. Family Tracing and Reunification

With regards to family tracing and reunification, the SCCT submits that the Draft Policy does not consider the on-the-ground realities. The SCCT has experienced the following challenges in relation to family tracing and reunification in recent years:

⁹ See for example Carmel Rickard, 'Refugee wins asylum after 10 years in legal limbo', Mail & Guardian, 27 February 2015, available at: <https://mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo>; Thandeka Duma, 'Long delays in processing asylum claims disgraceful', Lawyers for Human Rights, March 2014, available at: <http://www.lhr.org.za/blog/2014/3/long-delays-processing-asylum-claims-disgraceful>.

- **A failure to follow-through on family tracing processes.** Often, attempts of family tracing were made by social workers and cases were referred to ISS. However, the cases ceased here as no further action was taken. It is not clear why family tracing is not pursued. In the research conducted by the SCCT, it was found that family reunification in the country of origin or alternative care in the country of origin was not pursued by social workers as a durable solution.¹⁰ Another study by the SCCT, 'Unaccompanied and Separated Foreign Children in the Care System in the Western Cape-A Socio-Legal Study'¹¹ surveyed all known cases of foreign children placed in Child and Youth Care Centres in the Western Cape – totalling 109 cases. With regards to family tracing, the study found that;

'when faced with the cross-border family tracing and reunification of foreign children to the countries of origin of children in CYCCs in the Western Cape, residential social workers generally found themselves at a loss as to how to proceed, as they had no networks or links in those countries to draw upon'.¹²

Furthermore, the study stated that:

'social workers were making real efforts to reunify foreign children with their parents who were resident in South Africa, but ... cross-border family reunification was not being pursued. This represents a major challenge to finding durable solutions for foreign children.'¹³

- **Practical challenges within ISS.** ISS not operational in a number of African countries, particularly those that are recovering from civil war and protracted conflict. For example, many of our cases are from the DRC where ISS does not have a counterpart. Whilst the Draft Policy refers to 75,000 successful ISS cases, we respectfully submit that this statistic relates to a broader, international context. In the context South Africa, family tracing very rarely occurs. When it does, it is often pursued using alternative networks, rather than through ISS, including informal community and faith-based networks and through organisations such as the ICRC and UNHCR.
- **Lack of alternative care options in country of origin.** Alternative care arrangements with family or child care agencies in the country of origin are rarely pursued. The reasons for this are unclear but may relate to difficulties in communication or a lack of resources; extensive research on alternative care in countries in Central and Southern Africa is required.

Family tracing is not only necessary for purposes of reuniting the child with his or her family. Family tracing is part of a process to understand the best interests of the child. In some cases, family may be

¹⁰ SCCT, 'Unaccompanied and Separated Foreign Children in the Western Cape, South Africa: Exploring (the lack of) durable solutions for children in informal relations of care', September 2017, available at: <http://scalabrini.org.za/wp-content/uploads/2017/10/Unaccompanied-children-revised-5.0-Printversion-.pdf>.

¹¹ Unaccompanied and Separated Foreign Children in the Care System in the Western Cape- A Socio-Legal Study Potchefstroom Electronic Law Journal (Vol 19) [2016] PER 24, accessible at <http://www.saflii.org/za/journals/PER/2016/24.html>

¹² *Ibid.* pp 15.

¹³ *Ibid.* pp 23.

traced but it would not be in the best interests of the child to return them to the family in their country of origin.

The SCCT submits that family tracing should be vigorously pursued in order for the child to maintain links with family where reunification is not possible or if it has been found that it is not in the best interest of the child to be reunited with family. In most cases the SCCT has encountered, family tracing (cross-border) was not pursued.

7. Challenges related to Guardianship / Adoption of foreign children

Adoption and guardianship are almost impossible for foreign children in South Africa to access. Legal guardianship of foreign children is not available to non-citizen caregivers and instead, such applications are treated as inter-country adoptions. The SCCT's report on unaccompanied and separated foreign minors notes:

‘Guardianship is dealt with under Section 24 of the Children’s Act where it is stated that any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child.

Section 25 goes on to treat guardianship applications by non-South African citizens as intercountry adoptions under The Hague Convention on the Civil Aspects of International Child Abduction or Hague Abduction Convention.’¹⁴

The challenges facing intercountry adoptions are numerous. The report lists two of the most prominent challenges which includes:

- The adoption of refugee children is exceptional and refugee children are generally considered not-adoptable; and
- The process for adopting a child with no documentation (especially those without birth certificates) is extremely challenging as administrative requirements for adoption cannot be met. Signatory states to The Hague Convention agree to establish a Competent Authority which functions as the service provider to children and prospective adoptive parents. Whilst South Africa is a member state to The Hague Convention, a number of African nations are not, including the DRC, Zimbabwe, and Somalia. This means there is no functioning counterpart to the South African Competent Authority in such states and these adoptions are then classified as non-convention adoptions. Non-convention adoptions are dealt with by ISS. The success of such adoptions depends on whether ISS is operational in the country of origin of the child.¹⁵

¹⁴ SCCT, ‘Unaccompanied and Separated Foreign Children in the Western Cape, South Africa: Exploring (the lack of) durable solutions for children in informal relations of care’, September 2017, available at: <http://scalabrini.org.za/wp-content/uploads/2017/10/Unaccompanied-children-revised-5.0-Printversion-.pdf>, pp. 28-29.

¹⁵ Ibid, p. 29.

In effect, these challenges make adoption and guardianship as practical options not viable. To address this, Section 24 and 25 of the Children's Act would have to be amended to allow guardianship applications by non-citizens in principle and also to grant jurisdiction to the Children's Court to deal with such applications.

8. Durable Solutions (page 148)

The Draft Policy states that:

The establishment of stable social relations and individual development opportunities is central and gives the migrant child prospects for the future under the respect of their human rights.

The future of a foreign child in South Africa is wholly dependent on their documentation. As soon as they reach majority, if they are not documented, they are at risk of detention, deportation as an illegal foreigner or finding themselves on the streets. Even development opportunities can only be achieved if the child is documented. In our experience, documentation, clear procedures, and consistent application of laws and regulations are central to realising durable solutions.

9. Recommendations

Considering the abovementioned challenges, the SCCT proposes that the Draft Policy include the following:

Accessing documentation

1. Due to the complexity of foreign minor cases, the SCCT suggests that the Draft Policy aim to employ specialised social workers or have a specialized unit within DSD to support social workers dealing with cases of foreign children. We also suggest that they make use of organizations that are mandated to work with foreign children (for example, Refugee Rights Law Clinic at the University of Cape Town can determine if a child has an asylum claim).
2. We suggest that the Draft Policy recognize the need for social worker trainings on unaccompanied and separated foreign children.
3. We recommend that the Draft Policy confirm the need to update the Standard Operating Procedures (SOPs) for dealing with unaccompanied and separated foreign children.
4. We would suggest that, when developing durable solutions, a specialized committee is created to undertake Best Interest Determination in cases of unaccompanied and separated children. This was set down by the Colloquium on UASM. A BID would determine the best interests of the child whether to remain in RSA or to return to country of origin. If it is found that it is in the best interest of the child to remain in South Africa but has no documentation options, application for permanent residence in Section 31(2)(b) should immediately be pursued.

5. With regards to refugee children, we recommend that the Draft Policy includes a proper referral mechanism between DHA and DSD that would allow the refugee reception offices to provide technical support to social workers who may require guidance in such matters.
6. Policy should clearly reference the fact that migrant children cannot easily access a relevant visa under the Immigration Act within South Africa at the present time. The SCCT strongly encourages DSD to engage with DHA to create a special avenue for migrant children in South Africa to document themselves. It is crucial that both departments work closely and effectively in matters concerning unaccompanied or separated children.

Foster care and accessing DSD

7. With regards to foster care, the SCCT recommends policy which clearly states that the best interests of the child override the documentation status of the child. In cases where a foreign child is being taken care of by a caregiver who holds an asylum seeker permit, and where a children's court inquiry finds it in the best interest of the child to be granted a foster care order, it is recommended that the status of the caregiver should not bar the Children's Court from granting this order.
8. The SCCT further recommends that DSD place emphasis on confirming that social workers cannot turn away foreign child cases due to them being foreign or undocumented. As stated above, a specialised DSD unit would assist greatly in these cases, providing support and guidance to social workers encountering complex foreign child cases.

Birth registration

9. With regards to birth registration of foreign children born in South Africa, we urge the Policy to stress that birth registration is a right of all children in South Africa, regardless of their (or their parents') legal stay in the country. We recommend that DSD continues engagement with DHA at a high level to alert them to the issues faced in registering foreign births. Furthermore, where a social worker encounters administrative difficulties (rather than legal barriers) in getting a birth certificate for a foreign child, we recommend that a specialized DSD unit support and advise them on the possible actions to take in this matter.
10. It is recommended that the relevant sub-sections of Regulations 3, 4 and 5 to the BDRA should be reviewed to ensure that every child, regardless of the legal status of their parent(s), can access nationality from birth, as well as other socio-economic rights conferred through the Constitution that require documentation. We recommend that this policy recognize the need for a closer relation between DHA and DSD so that these kinds of issues can be flagged and solutions can be found.

Family Tracing

11. It should be made clear that family tracing must be pursued as a matter of priority. In order to properly function, ISS requires more capacity and resources. More staff are needed at ISS South Africa, and counterparts are required in all African countries.

12. We recommend that the Policy acknowledge that there are alternative institutions that can undertake family tracing. For example, NGOs such as the SCCT undertake several family tracing cases, using our networks and partners in country of origin. Whilst family reunification must be undertaken by an organisation mandated to do so, much tracing work can be undertaken by other organisations.

Guardianship / Adoption

13. With regards to adoption and guardianship, it is recommended that the difficulty faced by foreign children in this regard be explicitly stated. This could be done through noting that Section 24 and 25 of the Children's Act would have to be amended to allow guardianship applications by non-citizens in principle and to grant jurisdiction to the Children's Court to deal with such applications.

Other

14. We recommend that DSD considers creating a register of all unaccompanied and separated foreign child cases reported to DSD.

Sindisiwe Moyo (Advocacy Officer, SCCT) sindi@scalabrini.org.za

Lotte Manicom (Advocacy Officer, SCCT) lotte@scalabrini.org.za

Corey Johnson (Advocacy Officer, SCCT) corey@scalabrini.org.za