

The right to a name and nationality: The issue of undocumented migrant children

By Faith Tigere

SS v Presiding Officer, Children's Court, Krugersdorp and Others 2012 (6) SA 45 (GSJ)

'Children are the soul of our society. If we fail them, then we have failed as a society.' These are the words of Saldulker J in the case of *SS v Presiding Officer, Children's Court, Krugersdorp and Others* 2012 (6) SA 45 (GSJ). The aftermath of the 2015 xenophobic attacks is closely tied to the government initiative – Operation Fiela. The initiative, on the face of it, was aimed at cleaning up crime-ridden areas. However, the enforcement of the initiative resulted in the displacement of many undocumented foreign nationals. Affected in the process were children that accompany the undocumented parents. In most cases, these undocumented migrant children were born in the Republic and, in terms of South African law, children take the status of their parents. When they are born, they are not issued with birth certificates. Section 28(1)(a) of the Constitution states that all children have a right to a name and identity.

According to the Children's Act 38 of 2005, undocumented migrant children may be processed, but not issued with South African birth certificates. In the case of refugee undocumented children, they may be assisted with application for asylum. However, the challenge lies with undocumented migrant children whose parents are not refugees – most of them reach the age of majority without any documentation. When they attain the age of 18, they become undocumented and may be deported in their capacity as adults. The status of these undocumented immigrant children is a growing challenge.

Current position

Legislation, case law and the Constitution state that the police cannot arrest and detain children unless it is a measure of last resort, and detention for the purposes of deportation without due process would be unlawful. Therefore, children are not arrested with their parents and are in some cases left behind, often with no one to take care of them.

Regulatory framework

Relevant legislation dealing with children's rights (documented and undocumented) include the Constitution (Bill of Rights), Children's Act, Births and Deaths Registration Act 51 of 1992, South African Citizenship Act 88 of 1995 and the South African Schools Act 84 of 1996. This list is not conclusive as there are other pieces of legislation that deal with children not mentioned in this article.

Section 28(2) of the Constitution requires that a child's best interests have paramount importance in every matter concerning the child. This was enunciated in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) where the court held that the paramount principle, read with the right to family care, requires that the interests of the children who stand to be affected receive due consideration. In terms of the *African Charter on the Rights and Welfare of the Child* (www.au.int, accessed 5-10-2015) and art 9 of the *Convention on the Rights of the Child*, (www.ohchr.org, accessed 5-10-2015) South Africa is legally bound by these instruments through ratification. The four principal values of the Convention are –

- non-discrimination;
- best interests of the child standard (incorporated in the Children's Act);
- right to life;
- survival and development; and
- respect for the views of the child.

Thus the ratification of the international instrument shows South Africa's commitment to protecting and ensuring children's rights. The Convention further provides that no child shall be separated from his or her parents against his or her will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interests of the child.

The challenge of undocumented migrant children is that they have no claim to asylum as their parents had no legal status in the Republic. As such, they remain undocumented and become prone to different risks and qualify as children in need of care and protection. Chapter 9 of the Children's Act regulates the treatment of children deemed to be in need of care and protection. This need was reiterated in the case of *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T). As a result, these children must be cared for and taken to a place of safety. Section 151(1) empowers the court to remove a child that is in need of care and protection and to place that child in temporary safe care. The court will issue an order to a social worker to investigate the matter and report back to the court within 90 days.

In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the court held that the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28. Currently there are no measures in place by the government to alleviate this problem and to put these children in places of safety. It has fallen to non-governmental organisations (NGOs) to step in and rescue the children whose plight comes to their attention.

The Citizenship Act regulates the status of children born to foreign nationals. Section 2(2) of the same Act provides that any person born in the Republic and who is not a South African citizen by virtue of the provisions of subs (1) shall be a South African citizen by birth if:

‘(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and
(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act.’

The Department of Home Affairs requires foreign nationals to produce identification in a form of a passport and immigration permit to register the birth of a child. Thus undocumented foreign nationals cannot register the births of their children.

Accordingly undocumented migrant children become vulnerable and become exposed to human trafficking, child labour, neglect, exploitation and abuse without any adult supervision or parental care. Undocumented migrant children are children in need of care and protection by the state.

Available options

With regard to undocumented migrant children who do not qualify for asylum under the Refugee's Act 130 of 1998, the documentation process can be achieved through repatriation to the country of origin (highly unlikely), where they can be reunited with the family or for social welfare officials in that country to process them according to their respective laws. Repatriation in cases where parents have been deported will be challenging as this will require the assistance of family members or communication with the deported parents. Where repatriation fails, the other solution may be in the form of intervention by the South African government. The Department of Social Development will have to synchronise their efforts with the Department of Home Affairs and bridge the communication gap between them to cater for the best interests of the child – that is to legalise immigrant children. The second option will be issuing the undocumented migrant children with birth certificates under the Children's Act (s 48(2) and the Constitution (s 28(1)(a)). This can be achieved through the late

registration of births process as regulated by the Births and Deaths Registration Act.

The provisions as entrenched in the Constitution, particularly the Bill of Rights, promotes and protects the rights of all children. All children have the right to social protection. The lack of access to identification documentation infringes on that right. In my opinion, this issue needs to be addressed as the number of undocumented immigrants is not a small one and when all the undocumented migrant children grow up, they will need documentation.

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