



## GUIDE 4

# UNACCOMPANIED AND SEPARATED FOREIGN CHILDREN

# 1 UNACCOMPANIED AND SEPARATED FOREIGN CHILDREN

## 1.1 How are foreign children in South Africa protected by the law?

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By signing the UN Convention on the Rights of the Child (CRC), the South African State committed itself to treat all children equally, irrespective of their nationality and documentation status. In relation to migrant children, the State has engaged itself to ensure that a child who seeks asylum is protected and receives humanitarian assistance. The CRC expressly states that efforts should be made to trace the family of the child. If such attempts fail, the State should ensure that the child accesses the child protection system in the host country and that he or she is afforded the same rights as children who are citizens.

South Africa is also a signatory to the African Convention on the Rights and Welfare of the Child (ACRWC). This is a treaty applicable to countries on the African continent and functions as a guideline for States on how to ensure that the child is able to realise their rights. By signing this treaty, South Africa once again committed itself to treat all children equally, irrespective of their race, ethnicity, nationality, birth or other status. The migrant child should be accorded the same protection as any other child who is permanently or temporarily deprived of their family environment. Protection refers to the provision of alternative care, including foster care or placement in an institution for children. It also refers to family tracing- and reunification.

To give effect to its international obligations, South Africa has incorporated these treaties into its national law. According to the Constitution, all children in South Africa have the right to family, or to appropriate alternative care when removed from their family environment. All children have the right to nationality, basic nutrition, shelter, basic health services and social services.

On a more practical level, it is extremely important to note that the Children's Act applies equally to all children within South Africa's borders. The Act makes no distinction between local and foreign children precisely because child protection should be approached in the same manner for all children.

## 1.2 How are the different categories of migrant children in South Africa defined?

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'Unaccompanied minor' refers to a child that has been separated from both parents and relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

'Separated minor' refers to a child that is accompanied by an adult relative other than a parent, legal guardian or customary primary care-giver.

Migrant children are often referred to as 'refugee children'. Strictly speaking, this term would refer to a child who appears to have, or who is found to have, a refugee claim. It is very important to note that not all foreign children are refugee children. Children migrate for

various reasons and grow up in different social, economic and family circumstances. Whether a child has a refugee claim will depend on the individual child's reasons for leaving their country of origin and their circumstances. If the child had left their country of origin in order to escape war, conflict or persecution, he or she may be eligible for refugee status and may qualify for protection under the Refugees Act in addition to the Children's Act. If a child has left for other reasons, for example, solely to attend school in South Africa, the child is not eligible for protection under the Refugees Act.

### 1.3 How do foreign children end up alone in South Africa?

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Various reasons and ways exist for a foreign child to find him or herself alone in South Africa. Children whose parents are deceased in the country of origin may be sent to live with family members already established in South Africa. Some children are brought, or sent to South Africa by their parents or caregiver for better education and economic opportunities. Some arrive with their parent(s), but are subsequently abandoned. Some flee war and conflict, forced recruitment as child soldiers, harmful cultural practices or natural disasters. Some children, especially from neighbouring countries, flee poverty, abusive domestic situations or are street children. Some are trafficked.

### 1.4 What to do when coming across an unaccompanied or separated foreign minor?

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Protection is the immediate priority when dealing with unaccompanied or separated minors. Every action and decision concerning the child should take into consideration the child's best interests. Once the child's safety is ensured, appropriate documentation should be secured. Documentation is necessary to identify the child and to regularize the foreign child's stay in South Africa. Parallel to ensuring protection and exploring documentation options available to the child, steps must be taken to locate the family of the child with the eye on eventual family reunification.

#### 1.4.1 Identification and intervention by a social worker

When encountering an unaccompanied or separated foreign child, he or she must be taken to the nearest police station or directly to a child-welfare office of Department of Social Development (DSD). Any person or representative of an organization may refer the child to DSD. It happens that immigration officers come across unaccompanied or separated children at the border posts. In that case, the police or immigration officer should report the case to DSD so that the child's situation is assessed by a social worker.

Children should not be detained for having breached immigration laws and as a general rule, may only be detained as a measure of last resort.

#### 1.4.2 Access to Child Protection System

Usually, unaccompanied and separated children are either found by themselves in public spaces, or they are with a person other than a parent, such as a sister, aunt, grandparent, family friend or neighbour.



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If a child is found to be in need of care and protection, the child should access the child protection system and must be brought before the Children's Court so that the court may determine the course of action that would be in the best interest of the child. The Children's Act describes various situations in which the child is deemed to be in need of care and protection. According to DSD internal guidelines, unaccompanied foreign children are assumed to be in need of care and protection.

Unaccompanied and separated children should be dealt with under Chapter 9 of the Children's Act. A Children's Court Inquiry should be opened for each case and the child must be brought before a Children's Court in the area where the child was found. Social workers and the Children's Court should deal with undocumented foreign children in the same manner as it would South African children who have been separated from their parents, have no birth certificate or ID. If it is necessary, the child should be removed temporarily to a place of safety pending a full assessment of the case. A designated social worker must compile an assessment report within 90 days following a removal of a child to temporary safe care, or opening of the inquiry. If the child is found to be in need of care and protection, the Children's Court may confirm the placement of the child in alternative care.

In the situation where the child is being cared for by an adult who is not their parent, the social worker may find that the living conditions are suitable and that the child is not in need of care and protection and as such, the intervention of the court. In this case, the social worker should conclude the assessment report and indicate reasons for this finding. The report must be reviewed by the Children's Court before the matter is finalized. In cases where the child is not found to be in need of care and protection, the social worker must still take

measures to assist the child in appropriate ways and, depending on the needs of the child, provide assistance with family reunification and rehabilitation.

In practice, social workers do not open a children's court inquiry if the child is in the care of an adult and not deemed in need of care and protection. However, the procedure which regulates children's access to the child protection system clearly requires that Children's Court Inquiries be initiated on behalf of all unaccompanied and separated foreign children.



### **1.4.3 Documentation solutions**

Once the child's protection is ensured, appropriate documentation solutions must be explored. The approach to documentation for a foreign child is different from that of a South African child.

Documentation is an integral component of child protection because life in South Africa revolves around legal documentation. In order to enter into simple transactions such as renting accommodation, buying a cell phone, opening a bank account, taking out a book from the library, seeking employment and applying for a driver's license, identification documentation is required. The type of documentation available to a child depends on his or her particular situation, and the documentation status of the care-giver is highly relevant. As soon as the foreign child attains majority without having documentation to legalize their stay in South Africa, he or she will be at risk of detention and deportation.

#### Age assessment

Foreign unaccompanied or separated children mostly arrive in South Africa without any form of documentation or identification. As part of the Children's Court Inquiry, a social worker may conduct an age assessment so as to ensure that the child is under 18 years of age and



therefore, qualifies for protection under the Children's Act. This entails a visit to a doctor where tests are done to estimate the age of the child.

The age assessment is a form of identification for the child, but it does not legalize the foreign child's stay in South Africa for immigration purposes.

#### Application for asylum

If any child appears to have a refugee claim, the Court, as part of the Children's Court enquiry, may order that the child be assisted to apply for asylum.

#### Derivative immigration status

Usually, foreign children derive the documentation status of their parent(s). If the parent holds a permit issued in terms of the Refugees Act, the child may obtain the same documentation in their capacity as a dependent of the asylum seeker or refugee. If the parent holds a temporary- or permanent residence permit, the child may obtain a relative's visa which is linked to the parent's immigration status. In order for the child to derive the immigration status of the care-giver who is not a parent, the care-relation must be formalized by a placement order issued by a Court. Adoption is another way of conferring immigration status and nationality.

### **1.4.4 Family tracing and reunification**

Concurrent to ensuring protection and exploring documentation options for the child, the designated social worker should endeavour to locate the child's family. The case should be referred to the provincial focal point of International Social Services (ISS), which is a component of DSD. The role of ISS is to initiate contact with counter-part organizations or non-governmental organizations such as the International Community of the Red Cross (ICRC) or the International Organization for Migration (IOM) in the country of origin of the child. These organizations assist to find the family and to re-establish contact between them. It is very important to note that family reunification and repatriation should not be pursued if it appears that there is a risk of abuse, or if it is otherwise not in the best interest of the child.

If family links have been successfully re-established, repatriation of the child may be arranged. Placement in a care institution in the country of origin may also be explored as an option if this is appropriate and in the child's best interest. The procedure for repatriation is not clear, nor is it indicated in law or in the DSD guidelines which party should bear the cost of repatriation. In order to repatriate a child that had been placed in alternative care through an order of court, a written authorization from the Provincial Head of DSD where the child resides must be produced upon departure.

If family tracing- and/or reunification efforts have been exhausted without yielding positive results, the South African state has the responsibility to ensure that the child remains protected. Placement in alternative care may take the form of foster care or placement in a Child and Youth Care Centre. (CYCC)

## **1.5 Can a foreign child acquire South African nationality?**

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A child born in South Africa to foreign parents does not automatically acquire South African nationality, but retains the nationality of his or her parent(s). A birth certificate is an important

record for purposes of identifying the child and allowing him or her to claim nationality, but does not automatically confer legal stay in terms of immigration law.

As a measure to protect children from statelessness, legislation was passed in 2013 which allows foreign children born in South Africa, to acquire citizenship upon attaining majority, provided that they are in possession of a birth certificate and they had resided in South Africa without interruption, for 18 years.

## 1.6 Can children claim asylum by themselves?

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An unaccompanied child who appears to qualify for refugee status should be brought before a Children's Court for an order which directs that the child be assisted to apply for asylum. This implies the intervention of a social worker and an assessment of the child's circumstances through a Children's Court Inquiry. A social worker may seek the advice of a refugee law expert in order to ascertain whether the child is eligible for refugee status. A child cannot claim asylum by themselves, without having obtained a court order and the necessary assistance.

The child who is assisted to apply for asylum should be assisted by a legal representative. Children who are not assisted may be prejudiced, since they are not able to articulate and motivate their fear. Interviews with children should be done in a child friendly manner. Officials involved with the refugee status determination process have to take into consideration their capacity to reflect on past events and abilities of expression.

## 1.7 What happens if the unaccompanied or separated foreign child attains majority?

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Once the unaccompanied or separated foreign child's protection is ensured under the Children's Act, it is extremely important that appropriate documentation options be explored. If a child attains majority without having any documentation to regularize their stay in South Africa, he or she is at risk of detention and deportation as an illegal foreigner under the Immigration Act. This is of particular concern for children who had been in South Africa for many years, who speak local languages, were educated in South Africa and who do not have any memories of or links to their country of origin.



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