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Refugee Children's Project

A brief review of domestic, regional and international legislation on children's rights.

Introduction:

This document presents a brief review of domestic, regional and international legislation on children's rights. The understanding of this legal and policy framework is central for an effective advocacy work.

It is basically conceived to assist refugee and migrant children in South Africa to ease some of their challenges. The advocate should therefore be informed that the legal and policy framework outlined in this document guide children's access to their rights in the Republic of South Africa regardless of their status.

The document, however brief and limited in some aspects, it can serve as reference for an effective advocacy, lobbying and litigation endeavour.

1. Legal and policy framework:

After the fall of apartheid, South Africa signed and ratified a number of UN and regional conventions that were instrumental in keeping with human rights. Following are some of such conventions and declarations to which South Africa is signatory:

1.1. International conventions and declarations:

1.1.a. The Convention of the Rights of the Child:

This convention states that all children are given equal status regardless of their nationality. Requirements for every signatory member state include:

- Taking appropriate measures to promote the inherent right to life and ensure the child's survival and development;
- Taking appropriate measures to protect all children from any form of discrimination;
- Taking appropriate measures to protect all children from all forms of maltreatment perpetrated by parents or others responsible for their care and undertake preventive and treatment programmes in this regard;
- Taking appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee receives appropriate protection and humanitarian assistance;
- Assisting such a child to trace parents and family and, where possible, arrange family reunification;
- Providing the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason in cases where no parents or other family members cannot be found.

1.1.b. The UN Convention Relating to the Status of Refugees:

This Convention states that refugees who are minors should be protected, especially unaccompanied minors and girls with special reference to guardianship and adoption.

Article 3 of the UN Convention states that this instrument should be applied without discrimination on the basis of age. And Article 31 states that the country may not impose penalties because of illegal entry into the country nor can a refugee be expelled without appropriate process of the law.

1.1.c. International Labour Organisation Convention 182 on Child Labour:

This document recognizes the need to remove children from worst forms of child labour and provide for their rehabilitation and integration. The worst forms of child labour include forms of slavery or similar practices such as use of children in armed forces, debt bondage and compulsory labour, use of children for prostitution or the production of pornography, use of children in illicit activities and work that harm their health, safety or morals.

It calls on governments to identify where such practices exist and implement laws to address them. It also calls on them to monitor such practices and implement programmes of action to eliminate these practices as a matter of priority.

The Convention also emphasizes the importance of education in eliminating child labour and particularly for those children who are removed from such labour.

1.1.d. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children,

Supplementing the UN Convention Against Transnational Organized Crime:

The protocol calls on states to develop legislation to establish trafficking as a criminal offence and provide victims with access to the legal process and provide for their physical, psychological and social recovery. The convention also provides for their deportation which should preferably be voluntary. It also emphasizes on the need for states to develop programmes to prevent trafficking and to prevent re-victimisation of trafficking victims.

The protocol stresses that law enforcement officials in different states should cooperate to identify trafficking at the borders to determine the methods used for trafficking and ensure law enforcement officers and other relevant officials are trained to detect and prosecute traffickers.

1.1.e. The UN Declaration of Commitment on HIV/AIDS:

It calls for leadership by governments in combating HIV/AIDS through the development of national strategies and financing plans for combating HIV/AIDS. The emphasis should be on addressing the age and gender-based dimensions of the epidemic.

It encourages the development of regional and sub-regional approaches and plans to address HIV/AIDS. It also stresses on the needs of the vulnerable including the youth and the needs of orphans and vulnerable children for which national policies and strategies should be developed.

1.2. Regional legal instruments:

1.2.a. African Convention on the Rights of the Child (ACRC):

It states that every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the ACRC irrespective of the child's or his/her parents or legal guardian's race, ethnic group, sex, language, religion, political or other opinion, national or social origin, fortune, birth or other status.

The ACRC declares that all children have the right to free and compulsory primary education and calls on states to encourage secondary education. It also makes a special mention that states should promote the education of female children and allow pregnant girls to continue their studies on the basis of their individual ability.

Furthermore, it states that every child has the right to the best attainable state of health.

It also states that every child should be protected from all forms of economic exploitation and from performing any work that is hazardous or interferes with their physical, mental, spiritual, moral and social development, earn minimum wages for admission to employment, and that the hours and conditions of employment should be regulated.

The ACRC stresses that children should be protected from torture, inhuman or degrading treatment and especially physical and mental injury or abuse, neglect and maltreatment including sexual abuse.

It also states that any child separated from his/her parents is entitled to special protection and assistance.

It adds that every child should be protected from sexual exploitation and abuse including coerced sex, prostitution and involvement in pornographic activities.

Also the abduction, sale or trafficking of children should be prevented by all appropriate measures.

1.2.b. Convention on the Rights of the Child:

This convention affords a special provision to refugee children that require states to take appropriate measures to ensure that a child who is seeking refugee status regardless of whether they are accompanied by caregivers or unaccompanied, receive appropriate protection and humanitarian assistance consistent with international human rights and humanitarian instruments.

The convention encourages states to cooperate with international organizations providing family tracing and reunification services. Where no legal guardians or close relatives can be found, the child should be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason. This includes alternative foster or institutional care where they have no family environment, family tracing or reunification. However, this provision applies to internally displaced children.

1.3. Domestic legislation:

1.3.a. The South African Constitution:

In its definition of a child, the South African constitution does not make any distinction between citizens and non-citizens. It therefore states that every child has the right to:

- A name and a nationality, to 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 or degradation;
- Be protected from exploitative labour practices;
- Not be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- Not to be detained except as a measure of last resort, in which case, the child may be detained only for the shortest appropriate period of time, and has the right to be kept from detained persons over the age of 18 years and treated in a manner and conditions that take account of the child's age;
- To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;
- Not to be directly in armed conflict, and to be protected in times of armed conflict.

1.3.b. The Children's Act:

This Act aims to promote and preserve families and give effect to the constitutional rights of children.

Like the Constitution, the Act also does not make any distinction between South African children and non-South African children. This is even evident in "Getting South Africa Ready to Implement the Children's Act" speech delivered by the Minister of Social Development, Zola Skweyiye, on 27 May 2008:

"Let me remind you all that Section 1 of the Children's Act defines a child as a person under the age of 18 years. It does not add any additional requirements such as South African citizenship or that the child had to be born in South Africa. This means that foreign children are offered the same protective measures in terms of this legislation whilst they are in South Africa. Foreign children may be placed in temporary safe care and Children's Court enquiries may be opened in order to determine whether the child is in need of care and protection. If the Court finds a foreign child to be in need of care and protection, the Court will have the same options to order the future care situation of the child. This means that foreign children may be admitted to Child and Youth Care Centres or be placed in foster care in order to serve their best interests".

The Act also makes a special mention of children victims of trafficking and states that they may not be returned to their country of origin without consideration of the care arrangements in place of the child, the safety of the child and their risk of being trafficked again.

1.3.c. The Refugee Act:

It states that refugees are entitled to the same health care and basic education as nationals. Section 32 of the Act states that any child who appears to qualify for refugee status and is in circumstances suggesting he or she qualifies as a child in need of care under the Child Care Act must be brought before the Children's Court which may order them to be assisted in applying for asylum.

The South African Refugees Act recognizes the definition of the Organization of African Unity (OAU) stating that a refugee is a person who has fled their country due to "events seriously disturbing the public order". It specifies that no person can be rejected at the frontier but must be allowed to proceed to a refugee reception office.

1.3.d. The Citizenship Act:

This Act states that a person can obtain citizenship by descent, birth or naturalization. A child born in South Africa is only a citizen if born to South African parents. But it clarifies that a person born in South Africa is a South African citizen if he/she is adopted by South African citizens or has no other nationality or right to that nationality.

A person is a citizen by descent if one of their parents is South African and they register the birth of the child in terms of the Act. This also applies to an adopted child.

A child cannot be a citizen by naturalization directly but their parents can after residing legally in the country for a period of five (5) years. The child would then be awarded the same status as their parents.

1.3.e. Basic conditions of Employment Act:

It states that a child under the age of 15 may not be employed nor may anyone employ a child who is below the minimum school leaving age.

No one may employ a child in work inappropriate to their age or work that risks their education, physical and mental well-being, spiritual, moral or social development.

The Act also prohibits all forms of forced labour.

On 7 April 2008, the Johannesburg Labour Court ruled that undocumented foreign nationals have the same labour rights as South African employees.

1.3.f. South African Social Assistance Act:

It was initially conceived for South African citizens. However, in October 2006, in response to a court case brought forward by Lawyers for Human Rights in which refugees claimed the right to disability grants, the Department of Social Development filed a social assistance plan for refugees in which they committed to providing refugees access to disability grants by 2008.

The Act also specifies that refugees are entitled to care dependency grant, foster care grant, child support grant and social relief of distress.

1.3. g. South African Schools Act:

It states that a public school must admit a child without unfairly discriminating in any way and this includes learners who are unable to pay school fees.

Schools may not require any admission test or require learners to subscribe to the mission statement of the school.

National strategic plans:

- a. The HIV/AIDS and STI strategic plan:***

The key strategies for this plan include poverty reduction, empowerment, women's rights and human rights, reduction of gender-based violence, creating an enabling environment for testing, education and increasing social cohesion.

The plan mentions that refugees have higher risk due to the disruption of health care services, lack of knowledge about South African services, barriers such as language and xenophobia.

It identifies protecting and respecting children as a key principle underpinning the National Strategic Plan. It also emphasizes equality and non-discrimination against marginalized groups and specifically mentions orphans, refugees, asylum seekers and foreign migrants.