

Issue 18: Unaccompanied foreign children: their right to legal representation.

Unaccompanied children are defined as 'children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.'¹ As the Committee on the Rights of the Child pointed out unaccompanied and separated children in a foreign country are particularly vulnerable.² Those children's vulnerability is exacerbated by the ambiguity of their legal status and the fact that their rights are often not clearly specified under domestic law. Under article 2(1) of the CRC, state' obligations under the CRC extend to all children within the state's territory without discrimination based on 'child's or his or her parents or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. The CRC Committee once again reaffirms the position in its General Comment stating that state parties to the CRC have an obligation to grant equal rights to all children within the boarder of the state, 'including with respect to those children who come under the state's jurisdiction while attempting to enter the country's territory.'³

It seems clear that unaccompanied children in South Africa, regardless of their nationality and legal status, have equal rights as South African children under South Africa laws. The rights of unaccompanied foreign children in South Africa include the right to legal representation in both civil and criminal matters. The right of unaccompanied foreign children to legal representation has been dealt with in two important cases.

In *Centre for Child Law and Another v Minister of Home Affairs and Others*,⁴ a group of unaccompanied foreign children were detained at Lindela Repatriation Centre with adults. The children were facing imminent and unlawful deportation to their countries of origin. Due to the urgent application by the Centre for Child Law, the High Court granted an interdict to prevent children from being deported. The Court further appointed a *curator ad litem* for the children. Following her advice, the children were moved from Lindela to Dyambo, a secure place of safety. However, despite that the High Court had ordered the children to be brought before the Krugersdorp Children's Court to consider their individual cases, it was many

¹ Committee on the Rights of the Child, General Comment no 6: Treatment of unaccompanied and separated children outside of their country of origine, CRC/GC/2005/5, para 7.

² As above, para 1.

³ As above, para 12.

⁴ *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50.

months before such children's court inquiries were carried out.

In her judgment, Justice De Vos referred to *S v Thomas*, in which the right to legal representation appointed by the State in respect of foreign citizens facing criminal charges had been confirmed. De Vos expanded this principle to civil matters. She found that under section 28(1)(h) of the South African Constitution, all children within South Africa's jurisdiction, regardless of their nationality and legal status, have the right to legal representation.⁵

*S v Thomas*⁶ concerns an Angolan citizen, who was tried in the Kempton Park district magistrates' court on a charge of attempted theft. The accused was wrongly denied legal representation based on his nationality despite his expressed wish to be represented. The accused was convicted and sentenced to 18 month-direct imprisonment. Claasen J considered section 35(3) of the South African Constitution, which provides every accused with the right to 'a legal practitioner assigned to the accused by the State, and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly'. Reading it together with section 9 of the Constitution, Justice held that 'every accused' in section 35(3) included 'foreigners accused of criminal conduct within the borders of South Africa.'⁷

From above two cases and international obligations by which South Africa is bound, it is clear that the right to legal representation in both civil and criminal matters is applicable to foreign unaccompanied children within the borders of South Africa, regardless of their nationality and legal status.

⁵ N 4 above, para 27, 28 & 29; 28(1)h of the Constitution reads as following;

(1) Every child has the right-

.....

(h) 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.'

⁶ *S v Thomas* 2001 (2) SACR 608 (W).

⁷ As above, para 5.