

April 2020

The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: A Call for Comprehensive Legislative Action

Cerise Fritsch

Elissa Johnson

Aurelija Juska

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Cerise Fritsch, et al., The Plight of Zimbabwean Unaccompanied Refugee Minors in South Africa: A Call for Comprehensive Legislative Action, 38 Denv. J. Int'l L. & Pol'y 623 (2010).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

**THE PLIGHT OF ZIMBABWEAN
UNACCOMPANIED REFUGEE MINORS IN SOUTH AFRICA:
A CALL FOR COMPREHENSIVE LEGISLATIVE ACTION**

CERISE FRITSCH, ELISSA JOHNSON, AND AURELIJA JUSKA *

Since the economic and social breakdown in Zimbabwe, hundreds of thousands of people have fled the country for South Africa, including thousands of unaccompanied refugee minors. An unaccompanied refugee minor, or a “URM,” is a person under the age of eighteen who has either crossed the border alone or with another child, or who has found himself or herself living in a foreign country without an adult caregiver. Zimbabwean URMs come to South Africa in search of education, shelter, or jobs to support family back in Zimbabwe. Unaccompanied refugee minors who travel to South Africa face a myriad of challenges, including physical safety, life without a parent or guardian, legal and social discrimination, and a constant struggle to find food, shelter, education, health care, and employment. Although these children have rights under international and domestic law, political and other factors combined have denied children the protection and support to which they are legally entitled.

While South Africa has been somewhat responsive to the needs of Zimbabwean adults, it has largely ignored those of unaccompanied refugee minors. This paper shifts that focus and argues that South Africa must immediately turn its attention to the plight of the thousands of unaccompanied minors who have entered the country from Zimbabwe. Specifically, it advocates for the adoption and implementation of comprehensive and carefully tailored legislation to protect unaccompanied minors who enter the country primarily for economic and educational reasons. Enactment and enforcement of such laws would respond to the immediate crisis of Zimbabwean URMs, while providing a sustainable approach for dealing with similar refugee populations in the future.

INTRODUCTION

Moses Re Muleya,** a fourteen-year-old Zimbabwean boy, lives in an overcrowded shelter in the South African border town of Musina. His father died approximately one year ago, a victim of political violence; his mother suffers from HIV. Given Zimbabwe’s crippled economy, Moses’ mother encouraged him to

* Cerise Fritsch graduated from Loyola University Chicago School of Law in May 2010 with a dual degree in law and social work. Elissa Johnson is expected to graduate from Loyola University Chicago School of Law in February 2010 with a dual degree in law and social work. Aurelija Juska graduated from Loyola University Chicago School of Law in May 2010.

** Due to his age and legal status in South Africa, Moses’ name has been changed to protect his identity.

travel to South Africa to earn money to help support her and his four younger brothers. In December 2008, he and a friend boarded a train and made the 538-mile journey to the border. Since arriving, he has been forced to beg and run errands to survive. He has been unable to enroll in school, find steady work, or travel safely to Zimbabwe to visit his family, nor has he had access to a social worker to help him with these problems, something to which he is theoretically entitled to under South African law.

Unfortunately, Moses' experience is not unique. In recent years, thousands of children have traveled alone from Zimbabwe to South Africa to seek a better life for themselves and their families. Currently, almost the entire unaccompanied refugee minor ("URM") population in South Africa is Zimbabwean, with approximately 1,500 URMs living in the Musina area alone.¹ Most children came with a sibling or a friend, but about 25% traveled alone.² The majority are between the ages of twelve and eighteen, with the largest percentage between the ages of fifteen and seventeen.³ Approximately 70% of the children are boys.⁴ It is likely that there are a greater number of girls, but the girls tend to work as domestic laborers or sex workers and thus remain unseen.⁵ Some of the girls are young mothers, coming with children of their own.⁶

Unaccompanied refugee minors who travel to South Africa face a myriad of challenges, including physical safety, life without a parent or guardian, legal and social discrimination, and a constant struggle to find food, shelter, education, health care, and employment.⁷ Although these children have rights under international and domestic law, political and other factors deny children like Moses the protection and support to which they are legally entitled. Some suggest that South Africa has been reluctant to move aggressively towards protecting Zimbabwean refugees because to do so might threaten the country's self-assumed

1. Interview with Bruno Geddo, United Nations High Commissioner for Refugees, in Musina, S. Afr. (Feb. 25, 2009). Non-governmental organizations have difficulty assessing the actual number of URMs living in South Africa and Musina, in particular, because URMs tend to be "invisible," by virtue of their means of entry into the country and their attempts to evade the authorities. Girls are particularly invisible since many of them take on domestic or sex labor. No shelters in the Musina-area provide services to girls, and few girls were present at the Showgrounds.

2. *Id.*

3. *Id.*; Interview with Vera Chrobok, UNICEF, in Musina, S. Afr. (Feb. 25, 2009).

4. Interview with Shyamol Choudhury, Emergency Response Worker, Save the Children UK, in Musina, S. Afr. (Feb. 25, 2009).

5. Chrobok, *supra* note 3.

6. Choudhury, *supra* note 4.

7. An unaccompanied refugee minor ("URM") is a person under the age of eighteen who has either crossed the border alone or with another child, or who has found himself or herself living in a foreign country without an adult caregiver. Trafficked children are not synonymous with URMs, but rather are a subset of URMs. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, SAVE THE CHILDREN UK, 2007, at 8. Throughout this paper, minors from Zimbabwe who have come to South Africa will be referred to as URMs although, as discussed later, these minors arguably may not qualify as refugees under international and South African law and may be more appropriately classified as migrants.

role as international mediator in the Zimbabwean conflict.⁸ Others explain that the South African government is concerned that increased efforts to recognize and assist Zimbabwean refugees would strain the country's already overburdened infrastructure, encourage even more migration to South Africa, and exacerbate internal tensions around the refugee situation.⁹

To the extent that South Africa has responded to the refugee crisis, its focus has been on the needs of Zimbabwean adults.¹⁰ This article shifts that focus and argues that South Africa must immediately turn its attention to the plight of the thousands of unaccompanied minors who have entered the country from Zimbabwe. Specifically, it advocates for the adoption and implementation of comprehensive and carefully tailored legislation to protect unaccompanied minors who enter the country primarily for economic and educational reasons. Enactment and enforcement of such laws would respond to the immediate crisis of Zimbabwean unaccompanied minors while providing a sustainable approach for dealing with similar refugee populations in the future.

Part I of this article provides background information on the circumstances that have led to the mass migration of unaccompanied minors from Zimbabwe. Part II examines the life of URMs in South Africa, including barriers and challenges that prevent them from taking advantage of their rights. Part III discusses the numerous international and African treaties that apply to URMs. Part IV focuses on South African domestic law and how it has been interpreted to apply to political rather than economic refugees. Lastly, Part V offers recommendations for addressing the plight of Zimbabwean URMs, including proposed legislation and additional humanitarian aid.

I. PUSH AND PULL FACTORS: WHY DO ZIMBABWEAN URMs COME TO SOUTH AFRICA?

In 1980, when Zimbabwe gained independence from Great Britain, the Zimbabwe African National Unity Party ("ZANU-PF") came into power, led by former political prisoner Robert Mugabe.¹¹ Mugabe was the Prime Minister until 1987, when he became President after merging the two offices.¹² Despite being a one-party state, Zimbabwe prospered, benefiting from its long legacy of public education and commercial farming. In the 1990s, Zimbabwe had the highest literacy rate in Africa.¹³

8. FORCED MIGRATION STUDIES PROGRAMME, RESPONDING TO ZIMBABWEAN MIGRATION IN SOUTH AFRICA—EVALUATING OPTIONS (2007), available at <http://migration.org.za/wp-content/uploads/2008/03/zimresponses07-11-27.pdf>.

9. *Id.*

10. Interview with Motlalepule Nathane, Social Work Doctoral Candidate, University of Witwatersrand, School of Human and Community Development: Social Work, in Johannesburg (March 4, 2009).

11. OneWorld.net, <http://uk.oneworld.net/guides/zimbabwe/development>.

12. *Id.*

13. *Id.*; *Schools Close as Hordes of Teachers Resign*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (Oct. 8, 2007), <http://www.irinnews.org/Report.aspx?ReportId=74698>.

In 2000, the Mugabe-led government embarked on a controversial land reform policy which redistributed over 4,000 white-owned commercial farms to non-land owners.¹⁴ The land redistribution program led to a collapse of the fertilizer industry, disruptions in transportation and irrigation systems and a massive decline in foreign currency, all of which contributed to the current economic crisis.¹⁵ The Zimbabwean economy has contracted by 35% since 2005, while unemployment has soared past 80%.¹⁶ Annual inflation rates of 1,700%¹⁷ and a serious food shortage make simple household items, such as milk and bread, too expensive for many families to afford.¹⁸

Zimbabwe's previously vaunted school system has essentially collapsed. Teacher salaries have fallen to Z\$5 million, the equivalent of ten American dollars per month.¹⁹ These meager salaries have not kept up with inflation, causing many teachers to seek employment in neighboring countries.²⁰ By the beginning of 2007, over 15,200 teachers had migrated to countries such as South Africa, Botswana, Namibia, and Swaziland.²¹ Efforts to replace them with untrained recruits have failed.²² The combined lack of resources, competent teachers, and students has resulted in the closing of virtually all public schools.²³ Because they are unable to receive a proper education in Zimbabwe, many children travel to South Africa for better opportunities. They believe that the school system is the "best thing" about South Africa, and they want to benefit from it.²⁴

Zimbabwe also lacks the resources to provide its citizens with basic sanitation and health care. There is a severe lack of clean water for drinking, bathing, ablution, and food preparation.²⁵ Many people are forced to relieve themselves outdoors, rather than using the toilets in their homes, thereby contaminating the existing water supply and leading to serious diarrhea and cholera outbreaks in large portions of the country.²⁶ Like much of Southern Africa, Zimbabwe is also afflicted with an HIV and AIDS pandemic. In the country of 13.1 million,

14. *Small Scale Farmers Seen as Backbone of Food Security*, U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (May 15, 2008), <http://www.irinnews.org/Report.aspx?ReportId=78222>.

15. *Id.*

16. OneWorld.net, *supra* note 11; *It Is a Sorry Sight for Zimbabwe but We Pray That Freedom Will Come*, ONEWORLD.NET (March 27, 2007), <http://us.oneworld.net/node/147051>.

17. OneWorld.net, *supra* note 11.

18. *Id.*

19. *Schools Close as Hordes of Teachers Resign*, *supra* note 13.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 18.

25. OneWorld.net, *supra* note 11.

26. *Illness Rises as Desperate Residents Seek Safe Water in Bulawayo, Zimbabwe*, UNICEF (Nov. 14, 2007), http://www.unicef.org/infobycountry/zimbabwe_41788.html?q=printme.

approximately 2 million people or 15.6% of the population has HIV or AIDS.²⁷ While the AIDS population has decreased since 2001,²⁸ the vastly underfunded government cannot provide those who still struggle with the disease with the antiretroviral drugs necessary to keep them healthy.²⁹ Thus, the average life expectancy in Zimbabwe has dropped below forty years old.³⁰

The land redistribution program marked a change in the reasons that Zimbabweans travel to South Africa. Previously, they came to visit family, vacation, and shop and most returned to Zimbabwe voluntarily.³¹ Only a small fraction crossed the border without official documentation.³² Unlike today, many Zimbabweans felt that their country was safer and a better place to raise a family.³³ However, since 2000, the majority of Zimbabweans, including unaccompanied minors, come to South Africa for reasons tied to the economy. Many URMs, like Moses, come in search of work in order to earn money to send home to their families.³⁴ Some have lost parents or other caregivers to political violence, starvation, AIDS, or abandonment.³⁵ Without someone to provide for them in the chaotic environment of Zimbabwe, they migrate to South Africa where they may have family and friends to support them³⁶ or where they imagine they will have a “better life.”³⁷ While some children want to stay in South Africa, many others want to travel legally and safely to and from Zimbabwe.³⁸

II. LIFE IN SOUTH AFRICA FOR ZIMBABWEAN URMS

Many URMs have lofty expectations of South Africa, but they face many hardships both crossing the border and surviving in South Africa. The journey across the Zimbabwe-South Africa border is dangerous for any person, but it is especially dangerous for URMs. Some children migrate to South Africa by train or minibus, but the vast majority of URMs walk at least a portion of their journey.³⁹ While the risk of wild animals and exposure to the elements is undoubtedly a concern, the greater danger is the risk of exploitation.⁴⁰ To make themselves less

27. *Id.*

28. In 2001, 26.1% of the country had AIDS. The decrease in the AIDS population has been attributed to both mortality and increased public health education. *Id.*

29. *Id.*

30. *Id.*

31. David A. McDonald, et al., *Guess Who's Coming to Dinner: Migration from Lesotho, Mozambique and Zimbabwe to South Africa*, 34 INT'L MIGRATION REV. 813, 822 (2000).

32. *Id.* at 824-25.

33. *Id.* at 826.

34. Chrobok, *supra* note 3.

35. Interview with Temdai Simom, Resident, Concerned Zimbabwe Campbell Shelter, in Musina, S. Afr. (Feb. 25, 2009).

36. Choudhury, *supra* note 4.

37. Interview with Forster Kwangwori, Pastor, Concerned Zimbabwe Citizens Campbell Shelter, in Musina, S. Afr. (Feb. 25, 2009).

38. Interview with Duncan Breen, Advocacy Officer, Consortium for Refugees and Migrants in South Africa, in Johannesburg (CoRMSA), S. Afr. (March 6, 2009).

39. Kwangwori, *supra* note 37.

40. Chrobok, *supra* note 3.

visible to the authorities, many URMs use irregular channels of border crossing,⁴¹ which makes them more vulnerable to physical or sexual violence, theft, and muggings. *Gumagumas* (“scavengers”) often wait in the bushes for unsuspecting travelers.⁴² The *gumagumas* will take money in return for guiding URMs across the border, but then often steal larger sums of money and assault the children.⁴³ On the South African side of the border, “border jumper” gangs may attack the children and steal whatever cash or valuables they have left.⁴⁴ In an attempt to avoid the *gumagumas*, some children must trade money or sex to *malaishas* (“human smugglers” or “truck drivers”) to assist in their passage into South Africa.⁴⁵ Approximately 10% of URMs paid off border guards or police to gain entry into the country.⁴⁶ Overall, approximately 40% of children gave some form of payment to enter South Africa and over one third of URMs experienced some sort of violence on their way to South Africa.⁴⁷ The girls are especially vulnerable to sexual exploitation, whereas the boys are at risk for physical brutality.⁴⁸ Because the children are undocumented, they rarely report these occurrences to the authorities for fear of deportation.⁴⁹

Migrants most often enter from Zimbabwe at Beitbridge, Maroyi, and Dite, small border towns near Musina, South Africa.⁵⁰ Musina also borders Botswana and Mozambique.⁵¹ Because of its location, it has a history of being a city of migrant workers.⁵² The recent instability in Zimbabwe, however, has led to a dramatic increase in Zimbabwean migrants, overburdening the municipality’s resources.

Once they reach South Africa, URMs encounter a serious shortage of humanitarian services, employment, and educational opportunity. The South African government is largely unable and unwilling to provide services for URMs, and the few locally run shelters lack the capacity to handle the volume of children

41. *Migrants’ Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, International Organization for Migration, Nov.- Dec. 2008, at 3.

42. *Id.* at 19-20; *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 1, at 15; Kwangwori, *supra* note 37.

43. *Migrants’ Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, *supra* note 41, at 19; *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 15.

44. *Id.*

45. *Id.* at 20.

46. *Id.*

47. *Id.* at 19-20.

48. Kwangwori, *supra* note 37.

49. *Migrants’ Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, *supra* note 41, at 20.

50. Kwangwori, *supra* note 37. Musina is a city of 40,000, located about 17 kilometers from the Zimbabwe-South Africa border. Zosa De Sas Kropiwnicki, Child Protection Research and Policy Advisor, Save the Children UK South Africa Programme, World Congress on Sexual Exploitation (Nov. 25-28, 2008).

51. Zosa De Sas Kropiwnicki, *supra* note 50.

52. *Id.*

who need their services.⁵³ Moreover, the URM face hostility not only from the South African authorities but also from South African citizens.⁵⁴

One of the constant worries for URM and other refugees is the risk of deportation. Even though deportation of unaccompanied minors is illegal under South African law,⁵⁵ overburdened government agencies see no alternative but to send children back to their native country. In practice, the experience of detention is most acutely felt by migrants between thirteen and eighteen years old.⁵⁶ Some children are arrested when they cross the border or are trying to reach Musina.⁵⁷ The majority, however, are arrested and deported after authorities stop them on the street and ask for documentation, which they cannot produce.⁵⁸

Lindela, near Johannesburg, and Soutpansberg Military Grounds (“SMG”), near Musina, are the two most prominent deportation centers in South Africa.⁵⁹ The conditions at these facilities are substandard, with insufficient toilets and sleeping quarters to meet the needs of detainees.⁶⁰ Contrary to South African law, children are held with adults, further increasing their vulnerability to being harmed.⁶¹ Despite the time and resources spent on the deportation of minors, the process is counterproductive; once the children are dropped on the Zimbabwe side of the border they simply reenter South Africa.⁶²

Although many URM come to South Africa in the hope of finding work, the reality is that employment opportunities for minors are very limited because South African law makes it illegal to employ undocumented workers and/or workers under the age of eighteen.⁶³ Additionally, South Africa has a 40% unemployment rate, resulting in fierce competition for the jobs the URM are seeking. While some businesses are willing to take the risk of employing URM, many are not.⁶⁴ Because the children who obtain a job do so in contravention of South African law, employers exploit minors by paying them less than market wages.⁶⁵ A significant number of URM take seasonal employment on farms.⁶⁶ Many of the girls take on domestic labor, where they are at additional risk for exploitation and sexual

53. Kwangwori, *supra* note 37; Interview with Georgina Matsaung, Church Mother, Uniting Reformed Church, in Musina, S. Afr. (Feb. 25, 2009).

54. Kwangwori, *supra* note 37.

55. See *infra* note 99.

56. *Migrants' Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, *supra* note 41, at 19.

57. Chrobok, *supra* note 3.

58. *Id.*

59. *Id.*

60. Breen, *supra* note 38.

61. *Id.*

62. Chrobok, *supra* note 3.

63. Breen, *supra* note 38.

64. *Id.*

65. Matsaung, *supra* note 53.

66. Chrobok, *supra* note 3.

abuse.⁶⁷ Because farm and domestic labor are largely out of the public eye, it is impossible to determine exactly how many URMs are employed in these jobs.⁶⁸ Some children earn subsistence money through informal means: selling fruits and vegetables, washing cars, running errands, doing housework, and engaging in the sex trade.⁶⁹ These types of jobs not only compromise children's rights, but expose them to sexually transmitted diseases, including HIV/AIDS.⁷⁰ While most children want to save money in order to provide for family back home, the majority are unable to do so because they are barely surviving on their wages.⁷¹

For many of the children who enter South Africa through Musina, it is not their intended final destination. The majority hope to make their way to Johannesburg to find work, but the cost and logistics of travel make that difficult.⁷² The United Nations High Commissioner for Refugees ("UNHCR") does make an effort to help URMs contact family members in other parts of South Africa and provides transportation in an attempt to re-connect families.⁷³ Nevertheless, UNHCR cannot provide this service to all URMs who need it.

Although URMs list education as the main reason they come to South Africa, many are disappointed when they arrive.⁷⁴ Despite a constitutional mandate to provide education to all children residing in South Africa,⁷⁵ school administrators often impose superficial roadblocks to providing education to Zimbabwean children. Some principals, for example, require official documentation to enroll in school—papers which the children do not possess.⁷⁶ Others turn away children because they cannot afford school fees or uniforms.⁷⁷ Additionally, South African schools are already overcrowded, especially in the border areas surrounding Musina, and therefore are not accepting additional students.⁷⁸ Although some international organizations, such as the United Nations Children's Fund ("UNICEF"), are planning to erect temporary schools and bringing in additional teachers, it is a time-consuming and costly enterprise that leaves children without access to education in the interim.⁷⁹ The lucky students who are able to complete

67. *Id.*

68. Kwangwori, *supra* note 37.

69. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 15-16.

70. *Id.* at 15.

71. *Id.* at 16. Only ~50% of URMs who can find work earn R1,000 (approximately \$100) per month; the majority live off of less than R500 per month. *Migrants' Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa*, *supra* note 41, at 19; *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 13.

72. Nathane, *supra* note 10.

73. Geddo, *supra* note 1.

74. *Id.*

75. S. Afr. Const. Ch. 2, § 29.

76. Matsaung, *supra* note 53.

77. *Id.* *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra*, note 7, at 18.

78. Matsaung, *supra* note 53.

79. *Id.*; Geddo, *supra*, note 1.

secondary school are often unable to continue to the university level because one must be a South African citizen to be eligible for higher education student loans.⁸⁰ Moreover, many URMs are afraid to enroll in school for fear of making themselves more visible and thus more vulnerable to deportation.⁸¹

In 2008, South Africa was hit by a wave of xenophobic attacks against Zimbabwean refugees, particularly in Johannesburg and Tschwane.⁸² These were largely targeted at adults and are believed to have been caused by tensions over competition for jobs and scarce government aid resources.⁸³ Some children have also experienced xenophobic attacks, especially in the form of arbitrary arrest and beatings by police officers.⁸⁴ Zimbabwean URMs additionally confront xenophobia in the school setting, where they are made to feel different and unwanted due to language differences and their inability to afford school uniforms.⁸⁵ Fortunately, this type of national prejudice has declined as South Africans grow accustomed to the increased number of Zimbabwean refugees,⁸⁶ and as schools have begun to implement a curriculum on tolerance.⁸⁷ Additionally, Zimbabweans' ability to speak English and Zulu has made them less conspicuous than other refugee populations and better suited to assimilate into South African culture.⁸⁸

The plight of children entering South Africa from Zimbabwe has recently become even more dire. From July 2008 to April 2009, the Musina Showgrounds served as an informal refugee settlement or camp where Zimbabwean refugees congregated to sleep, receive minimal services, apply for asylum, and meet others in a similar position.⁸⁹ The South African government did not sanction the use of the Showgrounds for this purpose and prohibited the construction of "permanent structures" such as tents or portable toilets.⁹⁰ The government resisted creating a formal refugee camp because it believed such a facility would attract additional Zimbabweans to the country.⁹¹ As a result, refugees staying at the Showgrounds slept under the open sky or in makeshift tents created from plastic bags and barbed

80. Nathane, *supra* note 10.

81. *Children on the Move: Protecting Unaccompanied Migrant Children in South Africa and the Region*, *supra* note 7, at 18.

82. *UNICEF Responds to Emergency Needs of Children and Women Affected by Xenophobic Violence in South Africa*, UNICEF (May 27, 2008), http://www.unicef.org/inforbycountrymedia_44181.html.

83. Many Zimbabweans come with technical and language skills to qualify for coveted positions. Additionally, because they are in South Africa illegally, they are willing to work for lower wages than South African workers. Nathane, *supra* note 10.

84. Chrobok, *supra* note 3.

85. *Id.*

86. Matsaung, *supra* note 53.

87. Breen, *supra* note 38.

88. Interview with Dr. Zosa De Sas Kropiwnicki, Child Protection Research and Policy Advisor, Save the Children UK, in Cape Town, S. Afr. (March 3, 2009).

89. Chrobok, *supra* note 3; Choudhury, *supra* note 4.

90. Choudhury, *supra* note 4.

91. Breen, *supra* note 38.

wire fences and relieved themselves in the bushes. Because there was no formal policing of the Showgrounds, women and children were especially vulnerable to sexual violence.⁹² The situation became so serious that in November 2008, Save the Children-United Kingdom (“SCUK”) declared Musina an emergency zone.⁹³

Although the government did not provide any humanitarian services to the Showgrounds, international organizations provided minimal assistance. For example, Doctors Without Borders provided medical treatment and SCUK distributed food.⁹⁴ In response to the dangers of the Showgrounds, SCUK created “child-friendly spaces” to help serve the needs of mothers and young children.⁹⁵ These “child-friendly spaces” provided protection from adult males, food, informal education (with an emphasis on health and life skills), recreational activities, and assistance in filing asylum papers for the mothers.⁹⁶ Unfortunately, the spaces were only open for limited hours from 8 a.m. to 4 p.m. and thus did not protect women and children during the night, when they were most vulnerable.⁹⁷ Moreover, the Showgrounds were relatively unclean and exposed to the elements.

On March 2, 2009, the South African Department of Home Affairs (“DHA”) ordered the Showgrounds closed and disassembled all semi-permanent structures without a realistic alternative plan for the refugees.⁹⁸ The government declared that those people already in possession of documents would have fourteen days to travel to the Refugee Reception Office (“RRO”) in Johannesburg to renew their temporary asylum permit or they would face deportation.⁹⁹ The government required those without asylum documents, including all URMs, to return to Zimbabwe to apply for asylum.¹⁰⁰ Even those with documentation lacked the resources to make the 520-kilometer trek from Musina to Johannesburg, and if they do make it, it may take several days to reach the front of the queue at the Johannesburg RRO.¹⁰¹ Additionally, one cannot apply for asylum from one’s home country, thus asking the refugees to return to Zimbabwe is futile.¹⁰² Therefore, this plan effectively prevents any lawful means of seeking asylum.¹⁰³ Without the minimal amount of protection from the Showgrounds, local resources and shelters are even more strained than previously.

There are currently only two functioning shelters in the Musina area that provide services to unaccompanied minors, the Uniting Reform Church Shelter¹⁰⁴

92. Chrobok, *supra* note 3.

93. *Id.*

94. Choudhury, *supra* note 4; Chrobok, *supra* note 3.

95. Choudhury, *supra* note 4.

96. *Id.*

97. Chrobok, *supra* note 3.

98. Breen, *supra* note 38.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Matsaung, *supra* note 53.

and the Concerned Zimbabwe Citizens Campbell Shelter.¹⁰⁵ While providing ad hoc support, they are insufficient to provide for all those in need of their services; the shelters only accept boys and have a limited capacity.¹⁰⁶ Both shelters were formed by local churches and are funded almost entirely by donations from congregants.¹⁰⁷ They do not receive government money, and international organizations only sporadically supply them with items such as blankets and hygiene products.¹⁰⁸ The accommodations are sparse: children sleep on dirt floors and in tents and converted garages. However, this is more protection than they would be receiving otherwise, and they are also provided food, clothing, and informal education. Moreover, the shelters are in a double-bind with the government: they cannot be licensed (and therefore cannot receive money) because they are substandard, but they cannot receive funds to meet regulations until they are licensed.¹⁰⁹ Despite their best efforts, those who run the shelters are consistently on the brink of collapse due to insufficient funding.

The problems minors face is further exacerbated by the fact that the provincial and municipal governments, the organizations bearing the brunt of the financial burden of attending to the refugees, are severely overextended and underfunded. Musina, the city most severely impacted by the influx of Zimbabwean refugees, only has five social workers to help provide services and documentation for the refugees and adult-asylum seekers.¹¹⁰ Any attempt to provide food or shelter is taken on by international relief organizations or local privately-run shelters. These services are irregular and do not provide for all of those in need nor a sustainable solution to the problem.

III. THE INTERNATIONAL AND AFRICAN LEGAL FRAMEWORK FOR URM'S

South Africa has signed numerous international treaties pertaining to the rights of URM's. The current situation of URM's living in South Africa, however, demonstrates that these laws are not being enforced in a way that affords children the broad spectrum of rights to which they are entitled.

South Africa is a signatory to four key international and continental treaties that affect URM's: the United Nations Convention Relating to the Status of Refugees ("UN Refugee Convention"), the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention on Refugees"), the United Nations Convention on the Rights of the Child ("UNCRC"), and the African Charter on the Rights and Welfare of the Child

105. Kwangwori, *supra* note 37.

106. The Uniting Reform Church Shelter has a maximum capacity of 150. Matsaung, *supra* note 53. The Concerned Zimbabwe Citizens Campbell Shelter has a capacity of 20. Kwangwori, *supra* note 37.

107. Matsaung, *supra* note 53; Kwangwori, *supra* note 37.

108. Matsaung, *supra* note 53.

109. Geddo, *supra* note 1. In order to be licensed, shelters must demonstrate adequate measures of safety and inhabitability. Once the government licenses a shelter, the government provides funding to the shelter, to be used for food, bedding, hygiene, and other necessary services.

110. *Id.*

("ACRWC").

The traditional definition of "refugee" under international law is contained in the UN Refugee Convention. According to that instrument, a person must meet four criteria to be considered a refugee: the person (1) must be outside his or her country of origin, (2) must have a well-founded fear of persecution, (3) based on either race, religion, nationality, membership or a particular social group or political opinion, and (4) must be unwilling or unable to avail himself or herself to the protection of the country of origin for fear of persecution.¹¹¹ An additional provision is that one would lose his or her refugee status upon return to the country of origin.¹¹²

A critique of the UN Refugee Convention is that its narrow definition of refugee does not capture the situation faced by many African refugees, whose circumstances are a product of ethnic or tribal conflicts, socioeconomic breakdown, and natural disasters such as famine.¹¹³ For that reason, the drafters of the 1969 OAU Convention on Refugees chose to define refugee in broader terms and gave African refugees greater rights than those provided by the UN Refugee Convention.¹¹⁴ The OAU Convention on Refugees defines a refugee as any person compelled to leave his or her country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either a part or the whole of his country of origin or nationality."¹¹⁵ The OAU Convention on Refugees also provides a general right to asylum,¹¹⁶ a right to be housed in a refugee settlement,¹¹⁷ and a right to mandatory issuance of travel documents.¹¹⁸ Additionally, it states that refugees will not lose their refugee or asylum status by merely returning to their country of origin.¹¹⁹

Although the OAU Convention on Refugees provides a broader definition to account for the African context, it lacks some of the important provisions contained in the UN Convention on Refugees. For example, the OAU Convention on Refugees does not provide a right to education, housing, and health care.¹²⁰ The drafters of the OAU Convention on Refugees recognized that many African countries lack the resources to even provide their own citizens with such services let alone refugees from other countries.¹²¹

111. Emmanuel Opoku, *Refugee Movements in Africa and the OAU Convention on Refugees*, 39 J. OF AFR. L. 79, 80 (1995). South Africa acceded to the OAU Convention in 1994. *Id.*

112. *Id.* at 82.

113. *Id.*, at 79.

114. *Id.* at 80.

115. Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa art. I(2), Sept. 6-10, 1969 (emphasis added).

116. *Id.* at art. II.

117. *Id.*

118. *Id.* at art. VI.

119. *Id.* at art. V(4).

120. Opoku, *supra* note 111, at 84.

121. *Id.*

The UNCRC also contains general and specific provisions that are relevant to the situation of URM in South Africa.¹²² First, the UNCRC's provisions apply to all children, not just children who are citizens of the country where they are physically located.¹²³ The UNCRC provides that the best interests of the child must be the primary consideration "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."¹²⁴ Other provisions guarantee a child's right of identity and documentation¹²⁵ and a right to "special protections and assistance by the state for any child temporarily or permanently deprived of his or her family environment."¹²⁶

Article 22 of the UNCRC applies specifically to refugee children, including unaccompanied minors.¹²⁷ It states that unaccompanied minors shall "receive appropriate protection and humanitarian assistance,"¹²⁸ and that unaccompanied refugee children "shall be accorded the same protections as any other child temporarily or permanently deprived of his or her family."¹²⁹ Those rights include the right to an adequate standard of living,¹³⁰ the right to a free, compulsory primary education,¹³¹ the right to be protected from economic exploitation and child labor,¹³² the right to protection against sexual exploitation,¹³³ and the freedom from arbitrary arrest and detention.¹³⁴

Much like the UNCRC, the ACRWC enumerates a broad spectrum of rights to which unaccompanied children are entitled without regard to citizenship,¹³⁵ and mandates that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."¹³⁶ The ACRWC entitles children to virtually the same rights as the UNCRC, namely the right to an identity,¹³⁷ the right to free, compulsory education,¹³⁸ the right to health services,¹³⁹ the right to protection against economic exploitation,¹⁴⁰ and the right to

122. The UNCRC was adopted in 1989 and put into force in 1990. South Africa acceded to the CRC in 1996. Julia Sloth-Nielsen, *Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child*, 10 INT'L J. CHILD. RTS. 137 (2002).

123. U.N. Convention on the Rights of the Child art. II, Nov. 20, 1989.

124. *Id.* at art. III.

125. *Id.* at art. VIII(1).

126. *Id.* at art. XX(1).

127. *Id.* at art. XXII(1).

128. *Id.*

129. *Id.* at art. XXII(2).

130. *Id.* at art. XXVII.

131. *Id.* at art. XXVIII.

132. *Id.* at art. XXXII.

133. *Id.* at art. XXXIV.

134. *Id.* at art. XXXVII.

135. African Charter on the Rights and Welfare of the Child art. III, 1990.

136. *Id.* at art. IV.

137. *Id.* at art. VI.

138. *Id.* at art. XI.

139. *Id.* at art. XIV.

protection against physical and sexual abuse or exploitation.¹⁴¹ Article 23 of ACRWC specifically addresses the rights of refugee children, including unaccompanied minors, and uses the same phraseology as the UNCRC; refugee children shall “receive appropriate protection and humanitarian assistance,”¹⁴² and an unaccompanied refugee minor “shall be accorded the same protections as any other child permanently or temporarily deprived of his family environment for any reason.”¹⁴³ The ACRWC goes further than the UNCRC, however, by specifying that children may be considered refugees if they are displaced “through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.”¹⁴⁴ Due to the current chaos in Zimbabwe, the “breakdown of economic and social order” provision includes the Zimbabwean URM within ACRWC’s definition of refugees entitled to specific rights.¹⁴⁵

IV. DOMESTIC LEGAL FRAMEWORK FOR URMS IN SOUTH AFRICA

South Africa’s domestic legal framework provides various avenues by which Zimbabwean unaccompanied minors can achieve legal status, be protected from abuse and exploitation, and receive humanitarian assistance and services. Specifically, the South African Constitution, Immigration Act, 13 of 2002 (as amended by Act 19 of 2004), the Refugees Act, 130 of 1998 (as amended by Act 33 of 2008), and the Children’s Act, 38 of 2005 (as amended by Act 41 of 2007) all contain provisions that would allow for the protection of Zimbabwean URMs within South Africa.¹⁴⁶

A. South African Constitution

After the end of apartheid in South Africa, the drafters of South Africa’s new Constitution deliberately provided for a broad range of human and civil rights. The Preamble of the South African Constitution states, “We, the people of South Africa . . . believe that South Africa belongs to all who live in it, united in our diversity.”¹⁴⁷ Moreover, Article 9 of the Constitution states, “Everyone is equal before the law and has the right to equal protection and benefit of the law.”¹⁴⁸ The word “citizen” is notably absent, thereby providing a strong argument that non-citizens, including URMs, are entitled to the protections and rights provided in the Constitution. These rights include the right to adequate housing,¹⁴⁹ the right to

140. *Id.* at art. XV.

141. *Id.* at art. XVI.

142. *Id.* at art. XXVIII(1).

143. *Id.* at art. XXVIII(2).

144. African Charter on the Rights and Welfare of the Child art. XXVIII(4).

145. *Id.*

146. Immigration Act 13 of 2002; Immigration Amendment Act 19 of 2004; Refugees Act 130 of 1998; Refugees Amendment Act 33 of 2008; Children’s Act 38 of 2005; Children’s Amendment Act 41 of 2007.

147. S. AFR. CONST. 1996, Preamble.

148. *Id.* at ch. 2, art. IX, § 1.

149. S. AFR. CONST. ch. 2, art. XXVI, § 1.

health services and social assistance,¹⁵⁰ the right to education,¹⁵¹ and the freedom from arbitrary arrest and detention.¹⁵² These provisions imply that the South African government will provide humanitarian services for those in need.¹⁵³

Drafters of South Africa's Constitution took the provisions of the UNCRC into special account, including many of the same rights set out in international law. Section 28 constitutionalized nine of the UNCRC's most important provisions, including the mandate that the child's best interests be of primary importance in every matter concerning the child.¹⁵⁴ Moreover, Sections 39(1) and 39(2) require that South African courts and legal forums to consider international law, including treaties, when interpreting the Bill of Rights.¹⁵⁵

*B. Other Domestic Laws Impacting URM*s

In addition to the South African Constitution, the Immigration Act, Refugees Act, and Children's Act provide provisions for the protection of URM. On first review, the Immigration Act takes a restrictive approach to addressing the issue of foreigners within the borders of South Africa by laying out its purpose of securing the country's borders. In contrast, the Refugees Act, on its face, should guarantee URM full legal protection under South African law, including adequate housing, education, access to health care, public relief, and assistance. The Refugees Act references the Children's Act, which provides the procedures by which URM can recognize the full realization of these rights. However, in practice, the Immigration Act (not the Refugees and Children's Act) potentially provides the greatest amount of protection and relief for Zimbabwean URM in South Africa under a provision allowing for the grant of permanent residency rights. The efficacy of this provision to alleviate the current situation in South Africa necessarily depends on the government's full implementation of it.

1. Immigration Act

The post-apartheid government of South Africa replaced the Aliens Control Act of 1991 with the Immigration Act of 2002 in order to align the country's immigration policies and practices with the government's objectives of tolerance.¹⁵⁶ The Act became effective in 2003 and was subsequently amended in

150. *Id.* at ch. 2, art. XXVII, § 1.

151. *Id.* at ch. 2, art. XXIX, § 1.

152. *Id.* at ch. 2, art. XXV. In *Lawyers for Human Rights v. Minister of Home Affairs*, the Constitutional Court held that when the South African Constitution limits rights to only citizens, it clearly expresses that limitation. Therefore, because the Constitution did not specifically reserve the aforementioned rights for citizens, all those living within South African borders are entitled to them. *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (CC) at 13-14 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2004/12.html>.

153. Breen, *supra* note 38.

154. S. AFR. CONST. ch. 2, art. XXVIII; Julia Sloth-Nielsen, *supra* note 122 at 139.

155. S. AFR. CONST. ch. 2, art. XXXIX; Sloth-Nielsen, *supra*, note 122. All of the aforementioned provisions of the South African Constitution are part of the South African Bill of Rights.

156. Aliens Control Act 96 of 1991; Immigration Act 13 of 2002.

2004.¹⁵⁷ Unlike the Aliens Control Act, the intended purpose of the Immigration Act of 2002 was to facilitate and encourage temporary skilled labor migration.¹⁵⁸ The Immigration Amendment Act of 2004 included the promising goals of preventing and countering xenophobia, promoting a “human rights based culture of enforcement,” complying with international obligations, and educating civil society “on the rights of foreigners and refugees.”¹⁵⁹ Nevertheless, the post-apartheid government maintains a restrictionist and anti-immigration approach to foreigners due to “the imperatives of nation-building, job protection for South Africans and rampant intolerance of outsiders, bordering on xenophobia.”¹⁶⁰ Although the Immigration Amendment Act focuses on controlling and securing South Africa’s borders and providing for the strict regulation of the admission to, residence in, and departure of foreign persons, the Act does provide protective provisions, which can be applied to the situation of Zimbabwean URMs.¹⁶¹

The Immigration Amendment Act of 2004 defines a “foreigner” as an individual who is not a citizen, and an “illegal foreigner” as an individual who is in South Africa in contravention of the Act, or in other words, without a legal permit.¹⁶² The applicable regulation for asylum seekers is Section 23, which provides for an asylum transit permit.¹⁶³ This section, in theory, provides protection for up to fourteen days for those who enter the country and qualify for refugee status, but do not yet have legal documentation in South Africa.¹⁶⁴ Section 23 does not require, but rather allows the Director-General of the DHA to issue an asylum permit to a person who “at a port of entry claims to be an asylum seeker.”¹⁶⁵ If the individual does not report to one of the five RROs to apply for asylum under Section 21 of the Refugees Act by the expiration of the fourteen day asylum transit permit, then the individual is automatically classified as an “illegal

157. Due to the 2002 Act being largely inconsistent with stated government goals and policies, President Thabo Mbeki directed the Ministry of Home Affairs to amend the Act to make it easier for skilled migrants to enter the country. The Immigration Amendment Act No. 19 of 2004 became effective on July 1, 2005 with the publication of the new Immigration Regulations. See Jonathan Crush & Vincent Williams, “International Migration and Development: Dynamics and Challenges in South and Southern Africa,” United Nations Expert Group Meeting on International Migration and Development, Population Division, Department of Economic and Social Affairs, United Nations Secretariat, New York, July 6-8, 2005, 24; HUMAN RIGHTS WATCH, KEEP YOUR HEAD DOWN: UNPROTECTED MIGRANTS IN SOUTH AFRICA (2007).

158. Crush & Williams, *supra* note 157. The purpose of the Aliens Control Act No. 95 of 1991 was “to provide for the control of the admission of persons to, their residence in, and their departure from, the Republic; and for matters connected therewith.” Aliens Control Act 95 of 1991.

159. Immigration Amendment Act 19 of 2004 Preamble.

160. Crush & Williams, *supra* note 157.

161. Immigration Amendment Act 19 of 2004.

162. *Id.* at s. 1.

163. *Id.* at s. 23.

164. *Id.* at s. 23(1).

165. *Id.* The Act in relevant part states that “The Director-General *may* issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only.” *Id.* (emphasis added).

foreigner” under the Immigration Act.¹⁶⁶

In order to more efficiently address the number of Zimbabwean nationals entering South Africa, the Consortium for Refugees and Migrants in South Africa (“CORMSA”) along with numerous other non-governmental and humanitarian organizations, including Human Rights Watch, have called for the implementation of Section 31(2)(b) of the Immigration Act.¹⁶⁷ Section 31(2)(b) allows for a ministerial exemption from the standard permit requirements under the Immigration Act.¹⁶⁸ The exemption applies to specific groups of foreigners as designated by the Minister of Home Affairs and would provide the necessary legal basis to respond to the situation of URMs and Zimbabwean nationals in South Africa.¹⁶⁹ If “special circumstances” exist, then the Minister of Home Affairs may “grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period” of time.¹⁷⁰ Advocates argue that the unique situation and push factors for Zimbabwean unaccompanied minors should qualify as a “special circumstance.”¹⁷¹ If granted permanent resident status, Zimbabwean unaccompanied minors would possess “all the rights, privileges, duties and obligations of a citizen” except for those which the Constitution or other law “explicitly ascribes to citizenship.”¹⁷²

The Minister is given substantial discretion under the Act to implement this provision under his or her own “terms and conditions.”¹⁷³ Specifically, the Minister can:

- (i) Exclude one or more identified foreigners from such categories; and
- (ii) For good cause, withdraw such rights from a foreigner or a category of foreigners¹⁷⁴

Additionally, the Minister has the power to “waive any prescribed requirement or form” and to “withdraw an exemption granted by him or her” under

166. *Id.* at s. 23. The five RROs are located in Pretoria, Durban, Cape Town, Port Elizabeth, and Crown Mines. The government opened up an additional RRO on July 12, 2008 in Musina to handle the large influx of Zimbabweans entering the country, but recently in March 2009 announced the closure of this office. Breen, *supra* note 38.

167. Immigration Amendment Act 19 of 2004 s. 31(2)(b); CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA [hereinafter “CORMSA”], REPORT TO THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA ON THE HUMANITARIAN CRISIS IN MUSINA, SOUTH AFRICA 12 (2009); Breen, *supra* note 38.

168. Immigration Amendment Act 19 of 2004 s. 31(2)(b).

169. *Id.*

170. *Id.*

171. Breen, *supra* note 38.

172. Immigration Amendment Act 19 of 2004 s. 25(1). In *Lawyers for Human Rights & Another v. Minister of Home Affairs & Another*, the court stressed that illegal foreigners at the port of entry are entitled to the protections of the Constitution stating “when the Constitution intends to confine rights to citizens it says so.” *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, *supra* note 152.

173. Immigration Amendment Act 19 of 2004 s. 31(2).

174. *Id.* at s. 31(2)(b)(i)-(ii).

Section 31 provided that he or she can demonstrate good cause.¹⁷⁵

Recognizing the potential for this Section to apply to the current situation of Zimbabweans in South Africa, DHA has indicated that once it receives funding from the Treasury it will begin issuing Section 31(2)(b) permits.¹⁷⁶ The permits will provide legal status for a temporary interim during the humanitarian crisis in Zimbabwe and will grant similar rights as a Section 22 asylum seeker permit, including the right to work and study and the right to access health care.¹⁷⁷ The permits, however, will not provide Zimbabweans the right to housing or the right to access social grants.¹⁷⁸ Furthermore, the government will allow the permit to serve as a travel document for migration between South Africa and Zimbabwe.¹⁷⁹ All Zimbabwean nationals who plan on remaining in South Africa for longer than one month may apply for the permit, but URMs have yet to be granted the right to apply on their own without the appointment of a guardian.¹⁸⁰

Advantages and Drawbacks: Implications of the Immigration Act

Despite advocates' support for the implementation of Section 31(2)(b), the application of the Immigration Amendment Act may have unintended ramifications. As the purpose of the Immigration Act is to control and secure the South African borders, numerous provisions serve to restrict the rights of persons without legal documentation in South Africa. First, the Act allows for the automatic deportation of all persons who an Immigration Officer has reasonable suspicion to believe to be an illegal foreigner.¹⁸¹ This appears to conflict with the Immigration Regulations of June 2005 which provide that unaccompanied minors are not subject to detention and make it illegal to deport such minors without regard to the procedural processes under the Children's Act of 2007.¹⁸²

The Immigration Amendment Act forbids the employment and education of persons classified as "illegal foreigners," effectively eliminating the pull factors for

175. *Id.* at s. 31(2)(c)-(d).

176. Breen, *supra* note 38.

177. CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA [hereinafter "CORMSA"], SECTION 31(2)(B) PERMITS FOR ZIMBABWEAN NATIONALS IN SOUTH AFRICA 1 (2009). The Minister has yet to decide whether to issue the permits for 6 or 12 months from the date of issue. In either instance, the Minister has the power to extend the length of validity and announce its expiry once he has determined that the situation in Zimbabwe is sufficiently stable for Zimbabweans to return. Although providing temporary legal status, the permits will not constitute amnesty. *Id.* at 1-3.

178. *Id.*

179. *Id.*

180. *Id.*

181. Immigration Amendment Act 19 of 2004 s. 34. Lawyers for Human Rights challenged the constitutionality of parts of Section 34 in the Pretoria High Court and sought confirmation in the Constitutional Court of the High Court's order with respect to those provisions that the High Court ruled to be unconstitutional. The Constitutional Court established the reasonable suspicion standard. *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, *supra* note 152, at 19; HUMAN RIGHTS WATCH, *supra* note 157.

182. Children's Amendment Act 41 of 2007; JULIA WILLAND, IMMIGRATION LAWS SOUTH AFRICA 10 (Ritztrade 2005).

Zimbabwean unaccompanied minors.¹⁸³ Moreover, the Act forbids employers to hire illegal foreigners,¹⁸⁴ making it an offense, punishable by a fine or imprisonment.¹⁸⁵ The Act also prohibits learning institutions from “knowingly” teaching “illegal foreigners.”¹⁸⁶ It is a crime to aid and abet “illegal foreigners,” although South Africans and NGOs can provide humanitarian assistance to undocumented persons.¹⁸⁷ Lastly, the Act encourages the harassment of suspected persons in the country without legal documentation because it permits police and immigration officers to request a form of identification on demand and requires individuals to produce documentation demonstrating they are legally permitted in the country.¹⁸⁸

Although the Minister can issue asylum transit permits under Section 23 of the Act, this section is essentially inapplicable to unaccompanied minors as it requires children to have a legal guardian.¹⁸⁹ Additionally, (as discussed above in Part II) many unaccompanied minors cross and re-cross the South Africa-Zimbabwe border, and Musina security officials frequently illegally detain and deport the children.¹⁹⁰ Under the Immigration Amendment Act, the children should therefore be classified as “prohibited persons,” disqualifying them from obtaining a visa or a temporary or permanent residence permit or entering the country in the future.¹⁹¹ The Act also grants broad power to the Director-General of the DHA to declare a group of persons “undesirable.”¹⁹² Classification as “undesirable persons,” which includes “anyone who is or is likely to become a public charge,” also prohibits the group of persons from obtaining a visa or a temporary or permanent residence permit or entering the country.¹⁹³

Despite these restrictive provisions, South African courts have interpreted the Act in positive light, favoring foreigners. In *Lawyers for Human Rights v. Minister of Home Affairs*, the Court dealt with the issue of the detainment and deportation of persons classified as “illegal foreigners” and their procedural rights under the Constitution.¹⁹⁴ The Court acknowledged that “the very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.”¹⁹⁵ Moreover, the Court recognized that these persons who are not

183. Immigration Amendment Act 19 of 2004.

184. *Id.* at s. 38(1); HUMAN RIGHTS WATCH, *supra* note 157.

185. Immigration Act 13 of 2002 s. 49; Immigration Amendment Act 19 of 2004 s. 45; HUMAN RIGHTS WATCH, *supra* note 157.

186. Immigration Amendment Act 19 of 2004 s. 39.

187. *Id.* at s. 42.

188. *Id.* at s. 41.

189. *Id.* at s. 23.

190. Breen, *supra* note 38.

191. Immigration Amendment Act 19 of 2004 s. 29.

192. *Id.* at s. 30.

193. *Id.*

194. *Lawyers for Human Rights v Minister of Home Affairs*, *supra* note 157.

195. *Id.* at 13-14.

entitled to a “large variety of residence permits” under the Immigration Act are vulnerable and poor without support systems, family, friends or acquaintances in South Africa, and they also may have limited knowledge of the South African legal system, laws, policies, and values.¹⁹⁶

Despite these potential unintended ramifications, the government and Minister of Home Affairs has recently taken positive steps by stating their intent to implement Section 31(2)(b). Nonetheless, the government has not yet expressed its intent to allow URMs to apply for these permits without a guardian, which substantially limits the utility of the Act and their ability to apply and have access to the full realization of their rights under South African law.

2. Refugees Act

The Refugees Act, as amended in 2008, seeks to protect children and adults who have been compelled to leave their countries of origin as a result of a well-founded fear of persecution, violence, or conflict.¹⁹⁷ The stated purpose of the Act is:

To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate application for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.¹⁹⁸

Contrary to the aims of the Immigration Act, the Refugees Act prohibits persons to be refused entry into South Africa, expelled, extradited or returned to another country if that individual falls into one of two categories.¹⁹⁹ While many contend that the Refugees Act is not applicable to unaccompanied minors from Zimbabwe due to their unique reasons for entering South Africa, arguably, under Section 2 of the Refugees Act, South Africa should be prohibited from refusing entry, expelling, extraditing, or returning these minors to their country of origin.²⁰⁰

196. *Id.* at 14.

197. In reviewing the applicable provisions of the Refugees Amendment Act, it is necessary to have an understanding of the similarities and differences between a refugee, asylum seeker, and migrant. Traditionally, the international community has recognized a refugee as a “person facing political persecution or discrimination on social, racial, religious, and political grounds from his or her own government.” Siobhan Ciara Neveling, *Implementing the Immigration Act: A Cause of or Hindrance to Xenophobia in South Africa* (June 2005) (unpublished M.A. in Politics dissertation, University of Johannesburg) (on file with author). An asylum seeker on the other hand is a refugee whose asylum claim has not yet been examined to determine whether his or her fear of persecution is genuine. *Id.* at 17. Lastly, migrants are persons that move across borders, in and out of a country mainly for work, and most do not want permanent residency in South Africa. *Id.* at 18.

198. Refugees Amendment Act 33 of 2008.

199. *Id.*

200. Interview with Ingrid Palmary, Coordinator & Senior Researcher, Forced Migration Studies

The applicable provision states that an individual cannot be returned to his or her country of origin if it would result in “his or her life, physical safety or freedom [to] be threatened on account of . . . other events *seriously disturbing public order* in a part or the whole of that country.”²⁰¹ Therefore, Zimbabwean unaccompanied minors qualify for refugee status because “owing to . . . other events *seriously disturbing public order* in either a part or the whole” of Zimbabwe has “compelled [the minors] to leave [their] place of habitual residence in order to seek refuge in” South Africa.²⁰² However, should a URM choose to return to Zimbabwe, his or her qualification for refugee status ceases.²⁰³

Similar to Section 31(2)(b) of the Immigration Act, the Refugees Act grants the Minister to enact additional regulations “relating to a large scale influx of asylum seekers into South Africa.”²⁰⁴ Therefore, the Minister has the power to create additional regulations that would more adequately protect the rights of Zimbabwean URM.

The Refugees Act outlines general procedures in which asylum seekers can obtain refugee status and allows for a separate process by which URM can seek asylum in South Africa. The general procedures require an application for asylum to be made in person at a Refugee Reception Office.²⁰⁵ Upon application, a Refugee Reception Officer will conduct an interview of the applicant, and then the applicant will be issued with an asylum seeker’s permit under Section 22 of the Act, allowing them to reside in South Africa temporarily.²⁰⁶ The role of the Refugee Reception Officer is to inspect the forms and assist in accurately filling them out.²⁰⁷ The application will then be referred to a Refugee Reception Determination Officer who will hold a hearing and make a ruling on the application.²⁰⁸ Under Section 22 of the Refugees Act, the Refugee Reception Determination Officer must issue a temporary permit to all asylum seekers allowing them to remain in the country legally while the decision of their Section 21 refugee application is pending.²⁰⁹ The Act does not enumerate a specified time period for which the temporary permit is valid; however, it was the practice of the DHA to issue the permits for 6 months.²¹⁰ Depending on the amount of time before a decision is made on their application, the Act requires the permit to be extended “from time to time.”²¹¹

Programme, University of Witwatersrand, in Pretoria, South Africa (Mar. 4, 2009).

201. Refugees Amendment Act 33 of 2008 s. 2(b) (emphasis added).

202. *Id.* at s. 3(b).

203. *Id.* at s. 5.

204. *Id.* at s. 38.

205. *Id.* at s. 21.

206. *Id.* at s. 21-22.

207. *Id.* at s. 21.

208. *Id.*

209. *Id.* at s. 15.

210. Palmary, *supra* note 200.

211. Refugees Amendment Act 33 of 2008 s. 22(a)(3). In effect, applicants can remain in South Africa until the Refugee Service Determination Officer has reached a decision in the case. *Id.*

a. URM Rights under the Refugees Act

Under the Refugees Act, URMs are guaranteed the full legal protections including those under Chapter 2 of the Constitution: adequate housing, education, access to health care, public relief, and assistance.²¹² Furthermore, they are granted identity documents, the right to employment and education, the right to remain in the country pending finalization of their refugee application, the right to have asylum applications adjudicated in a manner that is lawful, reasonable and procedurally fair, which includes the right to appeal a negative decision on an asylum claim, and the right to freedom of movement and against unlawful arrest or detention.²¹³ Specifically with respect to children, detention should be used as a last resort for the shortest possible period of time taking into consideration family unity and the best interests of the child.²¹⁴ Furthermore, when detained, conditions must be consistent with human dignity, and URMs should be granted legal representation in refugee proceedings.²¹⁵ The Refugees Amendment Act restricts the rights granted to an unaccompanied minor under the Refugees Act. The Act limits the protections guaranteed under the Constitution to those rights not exclusively granted to citizens and further eliminated the provision that entitled refugees to “the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.”²¹⁶ As previously stated, however, these rights are still guaranteed under the South African Bill of Rights.²¹⁷

b. Reference to the Children's Act

In regards to unaccompanied minors, the Refugees Amendment Act of 2008 requires the government to issue a Section 22 asylum permit to an unaccompanied child “who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care as contemplated in the Children's Act.”²¹⁸ Furthermore, this child must be brought before the Children's Court and dealt with under the provisions of the Children's Act.

Under the Refugees Amendment Act, unaccompanied minors should be granted the same legal mechanisms of protection as national children of South Africa. In 2005, the Pretoria High Court affirmed the application of the Constitution and Child Act of 1983 to unaccompanied minors.²¹⁹ The case of *Centre for Child Law and Another v. Minister of Home Affairs and Others* 2005

212. S. AFR. CONST. 1996.

213. Child Rights Information Network, *A Legal Analysis of South Africa's Implementation of the UN Convention on the Rights of the Child* (CRIN, Working Paper, 2008), available at <http://www.crin.org/resources/infoDetail.asp?ID=15447>.

214. *Id.*

215. *Id.*

216. Refugees Act 130 of 1998 s. 27(g); Refugees Amendment Act 33 of 2008 s. 21-22.

217. S. AFR. CONST. 1996.

218. *Id.* at s. 21(A).

219. *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 (6) SA 50 (T) (S. Afr.), available at http://www.childlawsa.com/case_04.html.

(6) SA 50 (T)²²⁰ further “entrenched the principle that government departments” cannot “without due process detain and deport unaccompanied foreign children from South Africa.”²²¹ Judge Annemarie de Vos also noted that the “lofty ideals” of South Africa’s Constitution become “hypocritical nonsense” if the government fails to make them a reality.²²² Although advocates view the importance of this case as “remov[ing] any doubt that may have existed about the fact that unaccompanied foreign children should be dealt with under the provisions of the Child Care Act,” the High Court of Pretoria only has jurisdiction over all matters within its geographical area, the Transvaal Provincial Division, and the case was decided based on the old Child Act of 1983.²²³ Nonetheless, the High Court’s ruling served to reaffirm what the Refugees Amendment Act already requires in the case of unaccompanied minors.²²⁴

Thus, if an unaccompanied minor is found in need of care, then, similar to a South African child, the minor “must be placed in a place of safety, his or her personal circumstances investigated by a social worker and a Children’s Court inquiry opened, conducted and finalized” in accordance with the Children’s Act.²²⁵

Chapter 9 of the Children’s Act gives the procedures and safeguards required in dealing with a child in need of care and protection.²²⁶ The Act outlines several circumstances in which a child may be found to be in need of care. With respect to URMs, they may qualify under a number of circumstances including: being abandoned or orphaned without visible means of support; living or working on the streets; being exploited or living in circumstances that expose them to exploitation; or living in or being exposed to circumstances that may harm their physical, mental, or social well-being.²²⁷

If the child is suspected to be in need of care, a social worker will be appointed to the child and the case will be referred to the Children’s Court for a determination of whether the child meets the requirements of Section 150(1).²²⁸ In the interim before the court holds a hearing and makes a ruling, the court may order that the child:

- (i) remain in temporary safe care at the place where the child is kept; (ii) be transferred to another place in temporary safe care; (iii) remain with

220. *Id.*

221. Lawyers for Human Rights, *Deportation of Foreign Unaccompanied Children from South Africa*, <http://www.lhr.org.za/case/deportation-foreign-unaccompanied-children-south-africa>.

222. *Id.*

223. *Id.*

224. The judge also found that the government has a duty to work with one another in order to enact and implement “practical arrangements for unaccompanied foreign minors in South Africa.” *Id.*

225. *Id.*

226. Children’s Act 38 of 2005.

227. *Id.* at s. 105(1).

228. Under Section 155, prior to the child being brought before the Children’s Court a social worker must investigate the case and within 90 days complete a report stating whether the child is in need of care. *Id.* at s. 155.

the person under whose control the child is; (iv) be put under the control of a family member or other relative of the child; or (v) be placed in temporary safe care.²²⁹

If the Court determines that the child is in need of care, then the court can place the child in foster care, temporary safe care pending adoption, shared care, or a youth care centre.²³⁰

Under the amended provisions of the Children's Act, alternative care is defined as a placement in foster care, child and youth care centre, or drop-in centre.²³¹ Children are prohibited from leaving their placement without permission and are prohibited from leaving the country.²³² This causes conflicts with the goals of Zimbabwean URMs because of their frequent migration back to Zimbabwe to visit family or bring money home (as previously discussed in Part II).

c. Advantages and Disadvantages: Implications of the Refugees Act

Despite the legal framework for providing a process by which Zimbabwean unaccompanied minors can obtain legal status within South Africa, the implementation of the Refugees Act has had numerous shortcomings which have left the children unprotected and vulnerable. Unaccompanied minors face numerous barriers to obtaining asylum including: being prevented from lodging claims, failing to have their claims fairly adjudicated, failing to have their rights respected, and continually facing arbitrary arrest, detention, and unlawful deportation.

The initial hurdle in obtaining asylum involves the lack of knowledge of South African laws and policies. Unaccompanied minors are not adequately informed of the laws and do not understand the possible ramifications of obtaining asylum, non-governmental and humanitarian organizations interpret the laws inconsistently, and the government has implemented the laws in a piecemeal and inadequate fashion.²³³ In addition, under the very narrow interpretation of the Refugees Act (initially taken by the DHA and government), only a limited proportion of the children who have experienced individual political persecution were seen to qualify for asylum.²³⁴ Considering the majority of the children from Zimbabwe come for economic reasons and educational endeavors, their

229. *Id.* at 155(6)(i)-(v).

230. *Id.* at s. 156(1)(e).

231. Children's Amendment Act 41 of 2007 ch. 11.

232. *Id.*

233. Breen, *supra* note 38.

234. The Refugee Directorate stated that "The influx [in asylum seekers] observed throughout 2006 suggested that a massive population of people seeking asylum might increase in years to come although the majority are economic migrants as most of their claims are not aligned with the basic principles for asylum." THE FORCED MIGRATION STUDIES PROGRAMME [hereinafter "FMSP"], BARRIERS TO ASYLUM: THE MARABASTAD REFUGEE RECEPTION OFFICE 17 (Darshan Vigneswaran ed., 2008).

applications would be immediately denied.

However, as a result of the number of Zimbabwean unaccompanied minors in the border town of Musina and pressure from NGOs, the government did temporarily allow these minors to apply for refugee status.²³⁵ With the help of UNICEF and UNHCR, Zimbabwean minors were allowed to apply for asylum at the Showgrounds in Musina. This raised confidentiality and privacy concerns given the location and the number of asylum seekers seen each day.²³⁶

When applying for asylum, unaccompanied minors face the additional barrier of needing a legally appointed guardian. Although the DHA required the children to have a guardian, they failed to recognize the Department of Social Development (“DSD”) social workers as such, in contravention of the Children’s Act.²³⁷ This resulted in unaccompanied minors “effectively being denied access to asylum and documentation.”²³⁸ In Musina, however, SCUK had stepped in to act as the guardian for these children, and the government seemed to be accepting this procedure despite any legal provision allowing a government agency to act as the guardian.²³⁹ This has further implications as to whether SCUK would then be legally responsible for providing for the care and protection of the child throughout the process as well as after the child has gained refugee status.²⁴⁰

Additionally, asylum seekers lack access to the RROs, delaying the process of initiating their claims. In a 2008 study conducted by the Forced Migration Studies Programme, researchers found the procedural issues at RROs and a lack of communication between applicants and the DHA were the key barriers for asylum seekers in obtaining refugee status.²⁴¹ Although all persons have the right to apply for asylum and have their application fairly considered under the Refugees Act, gaining physical access to RROs remains an impediment in the process.²⁴² There are groups of 5,000 per day at the RRO in Pretoria, which can only handle about 350 applications a day.²⁴³ On average, a person would need to return to the Pretoria RRO three times, waiting approximately twenty-two days, in order to enter the actual office, and by this time their asylum seeker transit permit would have expired.²⁴⁴ Once an individual gains access to an RRO, they face an indeterminate amount of time before their application will be reviewed and a decision issued.²⁴⁵ Therefore, even if the minors coming from Zimbabwe are

235. Chrobok, *supra* note 3; Geddo, *supra* note 1.

236. SCUK, UNICEF, & INT’L RESCUE COMMITTEE, CHILD PROTECTION RAPID ASSESSMENT MUSINA MUNICIPALITY LIMPOPO PROVINCE, SOUTH AFRICA (2008).

237. *Id.*

238. *Id.*

239. Choudhury, *supra* note 4.

240. Geddo, *supra* note 1.

241. FMSP, *supra* note 234, at 2.

242. Palmary, *supra* note 200.

243. SCUK, UNICEF, & INT’L RESCUE COMMITTEE, *supra* note 236.

244. FMSP, *supra* note 234, at 9.

245. Of the 44,000 applications filed in November 2007 only 1,000 were granted and 9,000 were rejected, resulting in 34,000 applications still pending. FORCED MIGRATION STUDIES PROGRAMME,

aware they can apply for refugee status and arrive at an RRO with a guardian, they are unlikely to actually obtain legal documentation.

If an unaccompanied minor files a refugee claim and obtains a temporary permit under Section 22 of the Refugees Act, the permit is only valid for six months.²⁴⁶ Therefore, the child would be required to return to an RRO after five months with the same legal guardian who accompanied them in the initial application in order to renew the temporary permit. However, this entire process could be circumvented if the government implemented the procedures under the Children's Act, necessitating that a Section 22 permit automatically be issued and the case be referred to the Children's Court.

There is also a question as to whether refugee status would in fact improve the situation of Zimbabwean unaccompanied minors in South Africa. While the minors would be granted legal status, eliminating any "fear of deportation and allow[ing] them to settle and move freely within the country," and facilitate their access to services, the Refugees Act disallows the minors to return to Zimbabwe, which many of them desire to do.²⁴⁷ Additionally, service providers and the DSD are already underfunded and short-staffed; therefore, the minors' rights and services may never be realized.²⁴⁸ Technically, under the South African Constitution, these children should have access to health care and education, however, as discussed above this is not happening. With the government's changing policies, the recent closure of the Showgrounds and the continual deportations, any previous effort to document the URMs has become futile and a waste of resources.

V. RECOMMENDATIONS FOR SUSTAINABLE SOLUTIONS

Based on the dire situation facing Zimbabwean URMs in South Africa, it is imperative for there to be action at the systemic and grassroots level. First, the South African government needs to address the shortfalls of the legislation meant to protect and provide for URMs. Secondly, there should be collaboration between the government, schools, and NGOs to provide increased humanitarian aid. Specifically, more services are needed to ensure that URMs have adequate shelter and their right to education is realized.

A. Legislative Solutions: Adapting Existing Legislation

RESPONDING TO ZIMBABWEAN MIGRATION IN SOUTH AFRICA—EVALUATING OPTIONS, *supra* note 8. The most recent report from CORMSA indicates that over 200,000 Zimbabweans have received Section 22 Asylum permits and subsequently over 90% of their applications for asylum have been denied. CORMSA, *supra* note 167.

246. The Act does not enumerate a specified time period for which the temporary permit is valid; however, it was the practice of DHA to issue the permits for six month periods. The FMSP study found that at the RRO in Pretoria it was the practice to issue the permits for only two and a half month periods which adds to the already timely, costly, and burdensome process for the government and applicants. FMSP, *supra* note 234, at 15.

247. SCUUK, UNICEF, & INT'L RESCUE COMMITTEE, *supra* note 236.

248. *Id.*

There is no doubt that the South African government worked hard to amend its laws to reflect the new leadership and ideology after apartheid ended, but the present interpretation and implementation of the laws reveals how the government fell short of its goal when dealing with refugees.²⁴⁹ When assessing the situation of Zimbabwean URMs, the government must balance the needs of South African citizens with those of Zimbabweans.²⁵⁰ South Africa's hesitation to act is clearly evidenced by the fact that they have yet to formally recognize Zimbabwe as a refugee-producing country.²⁵¹ There is a need for legislative reform to put structural measures in place to afford Zimbabwean URMs legal status and adequate protection.

It is critical that the existing laws are interpreted broadly to include protections and allowances for Zimbabweans, especially URMs. If South Africa recognized Zimbabwe as a refugee-producing country, it would be forced to provide extensive humanitarian aid and extend legal status to the thousands of Zimbabweans in South Africa.²⁵²

1. Immigration Act: Reaching its Full Potential

Problem: *The government's narrow interpretation of the Immigration Act prevents Zimbabwean URMs from taking advantage of its protections intended for economic migration.*

Presently, the Immigration Act fails to meet the needs of Zimbabwean URMs because the South African government has narrowly interpreted the law and has failed to tailor its implementation to the unique situation of URMs.²⁵³ Section 31(2)(b) gives the Minister of Home Affairs the authority to grant a category of foreigners status as a permanent resident.²⁵⁴ However, the Minister has yet to grant Zimbabwean URMs permanent residency.

In April 2009, the DHA relied on Section 31(2)(b) of the Immigration Act to allow all documented Zimbabwean nationals to apply for a six or twelve month temporary residence permit that would allow them to live, work, and attend school legally in South Africa.²⁵⁵ However, to date, the DHA has not issued these visas.²⁵⁶ Although there was an announced moratorium on the deportation of documented Zimbabweans that accompanied the announcement on temporary permits, there are

249. Tara Polzer, *South African Government and Civil Society Responses to Zimbabwean Migration*, 22 Southern African Migration Project Policy Brief (2008), available at <http://www.queen.su.se/samp/sampresources/samppublications/policybriefs/brief22.pdf>.

250. FORCED MIGRATION STUDIES PROGRAMME, *supra* note 227, at 19.

251. Palmary, *supra* note 200.

252. *Id.*

253. Palmary, *supra* note 200.

254. Immigration Act 31(2)(b)

255. Delia Robertson, *South Africa Adopts New Visa Policy for Zimbabweans*, Voice of America, 2009, available at <http://www.voanews.com/english/2009-04-03-voa22.cfm>

256. CORMSA, *supra* note 167 at 1.

reports that the police continue to deport Zimbabweans.²⁵⁷ To further complicate matters, the DHA failed to clarify whether these temporary permits would be available to URM's.²⁵⁸

Solution: *The Minister of Home Affairs must implement Section 31(2)(b) of the Immigration Act and grant Zimbabwean URM's status as permanent residents.*

In order for this modified invocation of Section 31(2)(b) of the Immigration Act to effectuate a sustainable solution for URM's, they must be eligible to take advantage of these temporary permits.²⁵⁹ As it stands, the temporary permits are for *documented* Zimbabweans, and many URM's do not possess the requisite records to qualify.²⁶⁰ Because of the high risk of deportation, URM's often avoid government officials or lie to NGO personnel about their age in an effort to apply for asylum as an adult,²⁶¹ making it difficult to provide services and humanitarian aid.²⁶² If URM's were eligible to apply for a temporary residence visa, they would no longer have to fear deportation and would be able to benefit from the protections and rights offered by legal status in South Africa. If the government does not allow URM's to apply for permits under Section 31(2)(b), their only recourse is under the Refugees Act, which, as discussed below, presents its own set of challenges.²⁶³

2. Refugees Act: Suggestions to Help URM's Seek Asylum

Problem: *The Refugee Act's requirement of a guardian presents two challenges to URM's: 1) the Act does not explicitly state who can serve as a guardian and 2) the lengthy application process makes it difficult for a URM to maintain contact with a guardian.*

Under Section 2 of the Refugees Act, URM's are entitled to asylum protection, and in some cases children have been granted Section 22 permits, allowing them to stay in South Africa temporarily.²⁶⁴ As presently interpreted and applied, the Refugees Act does not adequately protect the majority of URM's seeking asylum.²⁶⁵ The Refugees Act requires a guardian to apply for asylum on the URM's behalf.²⁶⁶ In theory, the requirement of a guardian would seek to ensure that an adult helps to protect the best interests of the URM. However, in reality, the present system creates formidable obstacles for URM's who are trying to seek asylum. The DHA has been unclear and inconsistent on the question of who

257. Human Rights Watch, *South Africa Stop Deporting Zimbabweans* available at <http://www.hrw.org/en/news/2009/04/30/south-africa-stop-deporting-zimbabweans>

258. CORMSA, *supra* note 167, at 1.

259. Robertson, *supra* note 255.

260. *Id.*

261. *Id.*

262. Chrobok, *supra* note 3.

263. Geddo, *supra* note 1.

264. Refugees Amendment Act 33 of 2008 s. 5.

265. Geddo, *supra* note 1.

266. *Id.*

qualifies to serve as a URM's guardian.²⁶⁷

Presently, the DHA refuses to allow the five DSD social workers to serve as guardians, even though, under South African law, these individuals are charged with the safe placement and care of any child who is deemed a "child in need of care."²⁶⁸ All URMs meet the definition of a "child in need of care," and despite the DSD's limited resources, a URM's social worker has more consistent contact with him or her and can assist a URM throughout the lengthy asylum application process.²⁶⁹

To date, however, South African law does not generally recognize NGO representatives as guardians.²⁷⁰ In limited cases, the DHA has permitted SCUUK to serve as a guardian and present their asylum papers to DHA.²⁷¹ Generally, it will take weeks or months for a child to be appointed a guardian by the court in order to be able to move forward with the asylum application process.²⁷² To address this issue, the court should allow NGOs such as SCUUK and UNHCR to bring groups of children before the court to appoint guardianship.²⁷³

Secondly, even when the court does appoint a guardian, the law requires the same guardian to appear with the URM at every stage of the asylum process, which typically takes over a year.²⁷⁴ Because of their vulnerability to arrest and deportation, URMs move frequently and can easily lose contact with their appointed guardian. Therefore, it is imperative that the DHA find a way to streamline the application process to ensure that URMs are not waiting in asylum limbo for months at a time.

Solution: *In order to remove the barriers associated with the requirement of a guardian, the DHA must 1) clarify or eliminate the guardian requirement and 2) create a special body to review URM asylum applications to ensure a speedy process.*

First, the DHA must explicitly state who can serve as a URM's guardian. An ideal choice would be the DSD social workers because of their ongoing contact with the URMs. However, considering that there are only five social workers in the Limpopo region, the DHA needs to recognize other adults who can act in URMs' best interests. NGOs are the obvious alternative to serve as guardians for the purpose of asylum applications. The DHA should accept the international community's viewpoint that organizations such as UNICEF, SCUUK, and other

267. Choudhury, *supra* note 4.

268. Geddo, *supra* note 1.

269. Office of the United Nations High Commissioner for Refugees (hereinafter UNHCR), Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5S5BY7/\\$file/hcr-children-93.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5S5BY7/$file/hcr-children-93.pdf?openelement).

270. Geddo, *supra* note 1.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

NGOs should be permitted to represent URMs. It is imperative that if the DHA allows NGOs to serve as guardians, it makes allowances for URMs to be represented by a different guardian at their interview than when the minor received their Section 22 permit.²⁷⁵ In addition, if a guardian can represent more than one URM at a time, it could help expedite the process to begin the asylum application process. To simplify this issue, the DHA could abolish the guardian requirement for URMs, therefore, allowing them to seek asylum by their own application.

Secondly, the lengthy application process creates another barrier for URMs, but the DHA could make minor adjustments to remedy this issue. It is imperative that URMs' applications for asylum receive priority in order to reach a prompt and fair decision.²⁷⁶ Ideally, DHA would appoint a special committee to review and conduct interviews concerning URMs' asylum applications because they would be more familiar with child development, trauma, and their cultural background.

In addition, the DHA could confer refugee status upon all URMs.²⁷⁷ In fact, the Refugees Act broadly defines refugee as a person who may have been displaced as a result of "events seriously disturbing public disorder."²⁷⁸ However, this action seems unlikely considering the viewpoint that recognizing Zimbabweans as refugees would interfere with South Africa's role as a mediator in the Zimbabwean conflict.²⁷⁹

Problem: *URMs do not understand they will lose their refugee status if they return to Zimbabwe.*

Under Section 5 of the Refugees Act, an applicant who chooses to return to a country of origin forfeits his or her refugee status.²⁸⁰ Unlike other refugee populations, Zimbabweans migrated to South Africa for economic reasons.²⁸¹ Their migration was not the result of civil war or genocide.²⁸² Zimbabwean URMs express an interest to stay in South Africa to attend school and find work, but they also travel home regularly to visit their families and take money to them.²⁸³ Many URMs understand that refugee status gives them the right to live in South Africa and attend school, but they do not understand that they will lose their refugee status if they return home.²⁸⁴ Therefore, this provision of the Refugees Act excludes many URMs who want to maintain contact with their family or take their

275. *Id.*

276. UNHCR, *supra* note 269.

277. FMSP, *supra* note 234.

278. Refugees Amendment Act 33 of 2008, s. 35.

279. FMSP, *supra* note 234.

280. Refugees Amendment Act 33 of 2008 s. 5.

281. Refugees from countries such as Mozambique, Democratic Republic of the Congo, and Somalia came to South Africa because of armed conflict in their own countries. *See* FORCED MIGRATION STUDIES PROGRAMME, *supra* note 227.

282. Kwangwori, *supra* note 37.

283. Chrobok, *supra* note 3; Matsaung, *supra* note 53.

284. Matsaung, *supra* note 53; Kwangwori, *supra* note 37.

earnings home for their families.²⁸⁵

Solution: *The DHA should provide special passes that would allow URMs to travel home to visit their families, without forfeiting their refugee status.*

In response to the current situation, the DHA should institute a process whereby URMs could travel home to see their families if they had a Section 22 permit without forfeiting their refugee status. If the government allowed URMs to travel between South Africa and Zimbabwe, URMs would have a means to enter and exit the country legally. This would allow the DHA and DSD to know of their whereabouts and provide services. In light of the lack of education around this issue, it would be ideal for URMs to have the opportunity to apply for the temporary residence permit under the Immigration Act to circumvent any confusion related to their refugee status.²⁸⁶

3. Disaster Management Act: A Plan for Emergency Response

Problem: *The government has failed to utilize the Disaster Management Act as a means to provide emergency services to URMs.*

Ideally, the DHA would adapt the Immigration Act and Refugees Act to meet the needs of the Zimbabweans migrating for economic reasons. However, an additional piece of legislation, the Disaster Management Act, could be a valuable resource in addressing the issue of Zimbabwean migration and providing specific services for URMs.²⁸⁷ The Disaster Management Act was enacted in 2002 to offer a legal framework in which the government can provide for the welfare and protection of all people in South Africa in an emergency situation.²⁸⁸ Under the Act, an emergency can be declared at the municipal, provincial, or national level.²⁸⁹ The Act applies to a situation where settlement “causes or threatens to cause: (1) death, injury, or disease; (2) damage to property, infrastructure or the environment; or (3) disruption of the life of a community that is of such a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.”²⁹⁰ In relation to the current situation, URMs, do not have the resources to cope with the effects of their problems associated with living in South Africa.

This framework was employed to create a national disaster management contingency plan, a Limpopo provincial plan, and a municipal level plan in the Musina area, but no disaster has ever been declared.²⁹¹ The fact that the government had the foresight to formulate a plan to address this growing problem demonstrates recognition of the problem. However, failure to utilize the plan as more URMs have entered the country illustrates another example of the

285. Refugees Amendment Act 33 of 2008 s. 5.

286. CORMSA, *supra* note 167.

287. Polzer, *supra* note 249, at 7.

288. *Id.* at 12.

289. See Disaster Management Act 57 of 2002

290. Disaster Management Act 57 of 2002, s. 1.

291. Polzer, *supra* note 249, at 13.

government's failure to protect the people within its borders.²⁹²

Solution: *The South African Government needs to develop and implement a plan to address the mass migration of URM's into South Africa.*

Ideally, a disaster plan would recognize the specific concerns regarding URM's. An important part of the plan would include provisions to provide shelter for the thousands of URM's who are in the country. In addition, as granted by the South African Constitution, URM's have the right to health care, social assistance, education, adequate housing, and freedom from arbitrary arrest and education.²⁹³

Declaration of a disaster would allow the national government more oversight as to the services offered at the provincial and municipal level; as it stands, the national government has little power to force the provinces and municipalities to take specific action.²⁹⁴ If the government declared a disaster at the municipal, provincial, or national level, it would allow the government to partner with communities and NGOs to implement a plan of action regarding the issue of Zimbabwean URM's in South Africa.²⁹⁵ Any action taken under the Disaster Management Act would be a temporary solution that would provide necessary services and resources to URM's, while the government puts measures in place to ensure a sustainable solution that will provide for the safety and well being of Zimbabwean URM's.

B. Improving Humanitarian Services

Reform and adaptation of existing legislation is important to helping URM's; however, implementation and improved services is another crucial component of any sustainable solution in South Africa. It is insufficient to develop a plan or program, if its implementation is ineffective and inadequate to reach the target population. Part of the present crisis in South Africa is a direct result of poor follow through on the part of government entities.²⁹⁶ In 2007, the Democratic Alliance, a South African political party, recommended the establishment of a transit centre near the Zimbabwean border.²⁹⁷

There is no question that the living conditions were deplorable and unsanitary at the Showgrounds.²⁹⁸ However, the government was to blame for the horrific conditions because they refused to allow permanent structures, ablution services,

292. Nathane, *supra* note 10.

293. S. AFR. CONST. ch. 2, art. XXV.

294. Breen, *supra* note 38.

295. Polzer, *supra* note 249, at 13.

296. Geddo, *supra* note 1; Nathane, *supra* note 10.

297. FMSP, *supra* note 234.

298. The Consortium of Refugees and Migrants in South Africa ("CORMSA") supported the closing of the Showgrounds, but not without a long term plan in place; Breen, *supra* note 38.

or security at the Showgrounds.²⁹⁹ The closing of the Showgrounds symbolizes DHA's non-responsiveness.³⁰⁰ Upon closure, some Zimbabweans were given Section 23 transit permits valid for fourteen days to travel to an RRO in another part of the country, such as Polokwane or Johannesburg.³⁰¹ Undocumented Zimbabweans that remained in Musina would be subject to arrest and deportation and be unable to access any of the necessary services to start the asylum application process.³⁰²

In regards to URMs, the DHA and DSD abandoned their responsibility to this vulnerable population.³⁰³ UNHCR offered transportation to some URMs, but because of the large numbers of URMs, many were left without aid or services.³⁰⁴ Eliminating services in Musina will not discourage or prevent URMs from entering the country; it will only make it more difficult for them to find safety and realize any legal rights.³⁰⁵ Therefore, in light of the closing of the Showgrounds, the need for effective implementation of services and programs has become even more dire.

1. Shelters and Drop-in Centers: The Need for More Places of Safety

Problem: *The DSD has not committed the necessary resources to provide temporary and permanent housing for Zimbabwean URMs.*

One of the major barriers to serving the increasing URM population in South Africa is the lack of places of safety and drop-in centers for minors.³⁰⁶ The DSD is responsible for ensuring that if a minor is determined to be in need of care, then he or she must have a suitable, safe placement.³⁰⁷ After the Showgrounds closed, the two shelters, Uniting Reformed Methodist Church Shelter and the Concerned Zimbabweans Citizens' Shelter remained open.³⁰⁸ However, between these two shelters, there is only room for approximately 170 boys.³⁰⁹ Since there are approximately 600 URMs in Musina, there is a pronounced need for more shelters.³¹⁰ In addition, neither one of these shelters is licensed by the DSD because they cannot meet the licensing requirements.³¹¹ However, without government funding, the shelters cannot make the necessary improvements to meet the government standards and ensure that the children have a clean, safe place to

299. Emily Wellman, *Is how a country treats the most vulnerable of its people not a test of its humanity?* (2009), available at <http://www.polity.org.za/article/is-how-a-country-treats-the-most-vulnerable-of-its-people-not-a-test-of-its-humanity-2009-03-25>

300. *Id.*

301. *Id.*

302. Breen, *supra* note 38.

303. Nathane, *supra* note 10.

304. Geddo, *supra* note 1.

305. Breen, *supra* note 38.

306. Chrobok, *supra* note 3.

307. Nathane, *supra* note 10.

308. Breen, *supra* note 38.

309. Kwangwori, *supra* note 37; Matsaung, *supra* note 53.

310. Zosa De Sas Kropiwnicki, *Proposal: Emergency Assistance to Migrant Children in Musina, Limpopo*, (on file with author) (2008); Chrobok, *supra* note 3.

311. Geddo, *supra* note 1.

live.³¹² While these shelters in Musina remain open to date, URM's cannot apply for asylum without a RRO.³¹³

Solution: *The DSD needs to commit resources to help NGOs and other organizations open shelters for Zimbabwean URM's.*

In order to ensure the safety of all children, especially URM's, the DSD needs to establish many more shelters across the country.³¹⁴ One possible solution would be to create a probationary period for shelters to become licensed.³¹⁵ In this period, they would be able to receive some government funding to make the necessary improvements and also provide shelter for URM's who are living in the streets.³¹⁶ Part of a sustainable solution for URM's in South Africa is finding homes for these minors to provide housing and eliminate the possibility of exploitation.

2. Education: Increasing Accessibility

Problem: *School officials refuse to let Zimbabwean URM's enroll in school because they do not have documentation or school uniforms.*

One of the primary reasons Zimbabwean children migrate to South Africa is for the promise of education. Prior to the economic conflict, the education system in Zimbabwe was the best in southern Africa.³¹⁷ Under the South African Constitution, all children in South Africa are entitled to an education. However, in actuality, several barriers prevent Zimbabwean URM's from taking advantage of this right.³¹⁸ In order for a URM to attend school, school officials require paperwork showing a child's asylum or immigration status.³¹⁹ As discussed earlier, most URM's enter South Africa illegally and face considerable challenges to attain legal status. Moreover, in the rare instances where URM's can obtain documentation, their transient lifestyle makes it nearly impossible to keep track of such documents over time. Thus, most URM's do not have the required paperwork to attend school.³²⁰ In addition, even if a child is able to enroll in school, they may be precluded from attending school because they do not have a school uniform.³²¹

In February, all of the secondary schools in Musina were full and not accepting any additional students.³²² In response to the Department of Education's lack of action regarding URM's, UNICEF provided money to purchase school supplies for the children and planned to build additional classrooms.³²³ Because of the shortage of classrooms, SCUUK established places of safety for adolescents at

312. *Id.*

313. Breen, *supra* note 38.

314. Geddo, *supra* note 1.

315. *Id.*

316. *Id.*

317. Kwangwori, *supra* note 37.

318. FMSP, *supra* note 234.

319. Matsaung, *supra* note 53.

320. *Id.*

321. *Id.*

322. Chrobok, *supra* note 3.

323. *Id.*

the Showgrounds.³²⁴ During the day, teachers taught the children, but these lessons were focused on life skills issues such as health, safety, and asylum application.³²⁵ These actions and services were provided before the Showgrounds closed.³²⁶ At this point, it is unknown as to the extent UNICEF and SCUK will be able to continue offering these programs.

Solution: *School officials should waive the documentation and school uniform requirement in order to provide URMs with their constitutional right.*

In response to the problem, improving access to education should be a priority for the South African Government. While there are limited resources to enroll children in school, the Government must partner with NGOs to provide education in ad hoc settings such as churches, tents, etc.³²⁷ While this is not an idyllic setting, it will help accomplish the goal of providing education to all children in South Africa. Additionally, it is imperative that provincial and municipal governments abolish the paperwork requirement for children to enroll in school. Moreover, URMs should be able to forego the school uniform requirement if a child cannot afford to purchase the clothes. Making these simple adjustments and allowances will allow for more URMs to gain the education that they are legally entitled to under South African Law.

CONCLUSION

Presently, there are thousands of URMs in South Africa who fled Zimbabwe because of political and economic unrest. While they came to South Africa seeking food, work and education, the South African government has yet to respond to their needs in a meaningful manner. Moving forward, it is critical that the South African government provide ongoing protection and services to this vulnerable population. In order to affect long-term change, the government must modify the existing asylum application process to either make it easier for URMs to be appointed a guardian or abolish the guardian requirement entirely. Alternatively, the DHA could also allow URMs to apply for permits under Section 31(2)(b) of the Immigration Act. In addition, utilizing the Disaster Management Act would allow the government to declare a crisis and provide emergency relief to URMs. These changes to existing legislation would make it easier for URMs to attain legal status and ensure their protection and full realization of their rights under the law.

In addition to these legislative changes, the government's practices must reflect an intent to protect URMs from exploitation. More social workers are needed in order to fulfill the statutory mandate of providing for children in need of care under the Children's Act. Case management and family tracking will help URMs locate safe places to stay and connect with family members who live in South Africa. Currently, there are an insufficient number of shelters and places of safety to accommodate the increasing numbers of URMs. The DSD needs to

324. Choudhury, *supra* note 4.

325. *Id.*

326. *Id.*

327. Chrobok, *supra* note 3.

approve new shelters on a probationary basis; therefore, the government should provide funds to shelters to make the necessary improvements and become a fully registered place of safety.

Finally, because the South African Constitution guarantees a right to education to all children in the Republic, the government must increase the number of schools and teachers to ensure all children can attend school. Considering the extenuating circumstances of URMs, schools must abolish the paperwork and uniform requirements for URMs. Until these changes are made, the country cannot create a sustainable solution for Zimbabwean URMs or future URM populations.