



The challenges of undocumented refugee children in accessing the right to basic education in South Africa

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ABSTRACT

South Africa receives a large influx of refugees who flee from their countries of nationality due to the intolerable conditions in those countries, in search of safety for themselves and their children. The documentation process for refugees is strewn with various obstacles a fact which impedes refugee children's access to basic education and thus prevents the realisation of other rights. This study identifies and evaluates the relevant international and regional legal instruments adopted by the United Nations (UN) and the Organisation of African Unity (OAU) that provide a legal definition of refugees, give guidance on the minimum standards of treating refugees and grant rights to refugees (one of which is basic education). These are the *1951 Convention relating to the Status of Refugees* and the *OAU Convention Governing Specific Aspects of the Refugees Problems in Africa* (1969). Further, it discusses the rights of children in the *UN Convention on the Rights of the Child* (1989) and the *African Charter on the Rights and Welfare of Children* (1990), which offer guidance when dealing with refugee children. Moreover, the dissertation will study domestic laws in South Africa that protect refugee children and their right to basic education, particularly the *Constitution of the Republic of South Africa*, 1996 and the *Refugees Act* 130 of 1998. In analysing the legal framework, the overarching objective is to investigate whether undocumented refugee children are accessing their right to basic education as provided. The aim is to find if South Africa is under an obligation to ensure that undocumented refugee children access basic education and evaluate domestic laws in the light of international and regional obligations to safeguard refugee children's access to basic education. This study proposes that South Africa must meet its international, regional and domestic obligations to refugee children through effective implementation; in the application process for refugee status and ensuring admission policies regulating admission to accommodate refugee children.

Keywords: refugees, refugee children, asylum-seeker, *non-refoulment*, basic education, primary education.

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
AHMR	African Human Mobility Review
CDE	Convention against Discrimination in Education
CESCR	Committee on Economic, Social and Cultural Rights
CRC	United Nations Convention on the Rights of the Child
DBE	Department of Basic Education
DHA	Department of Home Affairs
DSD	Department of Social Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PELJ	Potchefstroom Electronic Law Journal
RRO	Refugee Reception Officer
RSDO	Refugee Status Determination Officer
SAMP	Southern African Migration Programme
SAYIL	Southern African Yearbook of International Law
OAU	Organisation of African Unity
WDE	World Declaration on Education
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNESCO United Nations Educational, Scientific and Cultural Organisation

UNHCR United Nations High Commissioner for Refugees

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1. Chapter 1: Introduction

Early in 2017, Times Live reported a story involving Eastleigh Primary School in Edenvale, east of Johannesburg, where letters issued by the school summoned the parents of foreign children,¹ to verify documents. Failure to do so would result in their children being denied access to the school.² According to the article, a human rights lawyer is quoted as having said, "...unfortunately the Eastleigh Primary School incident is not an isolated event".³ Times Live had also recounted that each school year (particularly in 2017) they had received reports of children who have been denied admission and attendance in schools, the children including refugee children and asylum seeking children.⁴ Although this news article does not accurately portray of the state of affairs in all South African primary schools and the policies of the Department of Education, it reveals the challenge facing undocumented refugee children in accessing basic education. This study aims to investigate South Africa's obligations in terms of the international, regional and domestic legal framework, to protect undocumented refugee children who find themselves being denied enjoyment of the right to basic education as reflected by this report of the situation at Eastleigh Primary School.

It has been observed that refugee children account for about 56% of the refugee population in Africa.⁵ South Africa experiences constant entries of refugees due to conflicts in countries like DRC and Somalia.⁶ It is reported that 62,159 refugee

¹ Goba 24/02/2017 <http://www.timeslive.co.za/local/2017/02/24/Outrage-over-school-letter-threatening-to-bar-pupils-with-foreign-parents>. According to the article, the school addressed the letters to all foreign parents to verify their documents including those seeking refuge in South Africa.

² Goba 24/02/2017 <http://www.timeslive.co.za/local/2017/02/24/Outrage-over-school-letter-threatening-to-bar-pupils-with-foreign-parents>.

³ Goba 24/02/2017 <http://www.timeslive.co.za/local/2017/02/24/Outrage-over-school-letter-threatening-to-bar-pupils-with-foreign-parents>.

⁴ TMG Digital 02/03/2017 <http://www.timeslive.co.za/world/2017/03/02/Children-of-foreign-families-have-rights-at-SA-schools-Heres-how-they-are-protected>.

⁵ UNHCR June 2001 <http://www.unhcr.org/statistics/statistics/3b9378e42d.pdf>.

⁶ UN Office for the Coordination of Humanitarian Affairs 07/02/2017 <https://reliefweb.int/report/world/regional-outlook-horn-africa-and-great-lakes-region-april-june-2017>.

applications were received in South Africa in 2015, that it was anticipated that the number would remain the same for 2016-2017, and that it was estimated that the country was host to 1,096,063 asylum seekers, including 121,645 refugees, in the same year.⁷ It is apparent that there is a huge gap between the asylum seekers and the recognised refugees, which reveals that there are challenges in obtaining documentation. The South African government has also observed that refugee children struggle to gain documentation and the officers sometimes do not assist which results in the children's lack of access to social services and education.⁸ The *UNHCR* has also taken cognisance of the fact that public schools are at times reluctant to admit refugee children.⁹ South Africa's obligations to refugee children are pronounced in the international, regional and domestic legal framework.

The *Universal Declaration of Human Rights* of 1948 (*UDHR*), the *UN Convention relating to the status of refugees of 1951 and its 1967 Protocol (Refugee Convention)*, as well as the *OAU Convention governing Specific Aspects of the Refugee Problems in Africa* of 1974 (*OAU Refugee Convention*) allow people to seek refuge and provide for the definition of a refugee. The *OAU Refugee Convention* adopts the *Refugee Convention's* definition of a refugee, but adds a section that provides more protection to refugees in Africa. In order to be able to obtain protection in countries of refuge (the countries that the refugees flee to for safety and protection), a person who seeks refuge must be facing circumstances that fall within the prescribed elements of the definition in the *Refugee Convention* and the *OAU Convention*. Where a person falls within the definition of a refugee, a state is obliged to provide protection and apply the minimum standards of treating refugees that are found in these instruments. Refugees are protected by the *non-refoulement* principle which is a customary law rule stating that countries may not turn away refugees seeking safety within their borders.

⁷ *UNHCR* August 2016 <http://www.refworld.org/docid/5a12b5482.html>.

⁸ Department of Women, Children and People with Disabilities 2016 https://www.unicef.org/southafrica/resources_5237.html.

⁹ *UNHCR* September 2015 <http://www.unhcr.org/afr/protection/operations/524d87689/south-africa-fact-sheet.html>.

In addition, the *Refugee Convention* contains rights that can be enjoyed by refugees in the country of refuge including the right to education.

The protection of refugee children is embedded in the international, regional and domestic legal framework. The most comprehensive documents in the provision of children's rights are the *UN Convention on the Rights of Children* of 1989 (*CRC*) and the *African Charter on the Rights and Welfare of Children* of 1990 (*ACRWC*). These instruments impose obligations on states to respect the rights of children contained within the instruments and to provide education to all children.¹⁰ There is an obligation on state parties to adopt measures that ensure refugee children receive protection that enables them the enjoyment of the rights in the *CRC* and provide assistance in obtaining documentation and accessing basic education.¹¹

The *CRC* and *ACRWC* provide for the formation of a committee to monitor the implementation of rights and to make recommendations in the form of a General Comment, which ensures the protection of children's rights under the instruments.¹² General Comment 6 of the *CRC* in particular, gives guidance on how states must treat unaccompanied and separated children (inclusive of refugee children) who are outside their country of origin and it acknowledges that these children are vulnerable and are often denied their rights including the right to education due to their lack of proper documentation.¹³ It has also been held by the Committee on Economic, Social and Cultural Rights (*CESCR*) that education must be made accessible to all children without discrimination.¹⁴ Accordingly, South Africa must identify and protect such refugee children and safeguard their right to basic education.

¹⁰ A 11 of the *African Charter on the Rights and Welfare of the Child* (1990); A 28 of the *UN Convention on the Rights of the Child* (1989).

¹¹ A 22 of the *UN Convention on the Rights of the Child* (1989); A 23 of the *African Charter on the Rights and Welfare of the Child* (1990).

¹² A 45 of the *UN Convention on the Rights of the Child* (1989); A 42 of the *African Charter on the Rights and Welfare of the Child* (1990).

¹³ *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, *CRC/GC/2005/6* para 3.

¹⁴ *CESCR General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, *E/C.12/1999/10* para 6.

Within the domestic system, the *Constitution of the Republic of South Africa*, 1996 (*Constitution*), the *Children's Act* 38 of 2005 (*Children's Act*) and the *Refugees Act* 130 of 1998 (*Refugees Act*) contain provisions which protect refugee children.¹⁵ These enactments also incorporate the *CRC* and the *Refugee Convention*, which fortify the country's duties towards refugee children. The *Refugees Act* establishes procedures for the application of refugee status, but often the processes are not easy for the refugees to get documentation.¹⁶ The *South African Schools Act* 84 of 1996 (*Schools Act*) and *National Education Policy Act* 97 of 1996 further provide for children's right to basic education and regulate admission policies that enable access to basic education. The admission policies must operate within the confines of the *Constitution* and the international and regional laws. The difficulties faced by refugees in applying for documentation in turn affects access to basic education because the parents of refugee children will not be able to supply the documents required for admission.

South Africa's domestic laws emulate the international and regional law in protecting the rights of refugee children. Section 28 of the *Constitution* grants several rights to every child without any discrimination, including the right to basic education. In *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) the court held that this right is "immediately realisable", which means that the right has no internal limitations, such as those that might otherwise arise from the unavailability of resources.¹⁷ Despite the fact that basic education is a socio-economic right (a second generation right), its realisation is not dependent on progressiveness as is the realisation of other socio-economic rights.¹⁸ Public schools must admit learners and serve their educational requirements without unfair discrimination.¹⁹

¹⁵ Section 28 of the *Constitution of the Republic of South Africa*, 1996 in particular is dedicated to the provision of children's rights including their basic needs of shelter and adequate nutrition, amongst others. Section 150 of the *Children's Act* 38 of 2005 provides for the care of children without family care while the *Refugees Act* 130 of 1998 enables children to be recognised as refugees as dependants.

¹⁶ Amit 2012 *African Centre for Migration & Society* 7.

¹⁷ *Governing Body of the Juma Masjid Primary School v Essay* (2011) 8 BCLR 761 (CC) at para 37.

¹⁸ Churr 2015 *PELJ* 2415.

¹⁹ Section 5(1) of the *South African Schools Act* 84 of 1996.

It has been stated by the *CESCR* that education as a human right is also a means to enjoying all the other rights provided.²⁰ Consequently, the realisation of the right to basic education is a precondition to the realisation of all the other rights that are set out in the *CRC*, the *ACRWC*, the *Refugee Convention* and the *Constitution*, particularly for the more vulnerable refugee children, in spite of their undocumented status.

This dissertation seeks to determine whether undocumented refugee children in South Africa are accessing basic education, in light of South Africa's international, regional and domestic legal obligations. The aim of this study therefore is to investigate whether the domestic legal framework offers protection to undocumented refugee children in accessing basic education in light of the state's international and regional obligations. This study will scrutinise the challenges that refugees encounter in obtaining documentation that recognises them as such. This study will examine the right to basic education and investigate the impact that a lack of documentation has on refugee children's access to basic education in the context of the legal framework. The study also aims to examine the duty of the state to take steps to protect refugee children by assisting them to obtain documentation, by ensuring their access to schools, and by monitoring the effective implementation of the relevant laws.

The study will make use of a desktop review of literature relevant to the research. This will include primary sources, that is, legislation, international and regional instruments and case law, and secondary sources such as textbooks and journal articles on the protection of undocumented refugee children's right to basic education.

Chapter 2 will examine the definition of a refugee and the rights granted to refugees in order to reveal the extent to which refugees are protected in international and regional instruments. It will also examine international and regional documents that grant children rights and the obligations of the state towards protecting refugee children. This chapter will include an analysis of the rights offered to refugees, with an emphasis on the right to basic education. Chapter 3 will explore South African

²⁰ *CESCR General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 1.

legislation and policies which protect refugees. It will reveal the reality of the challenges faced by refugees in obtaining legal documentation in South Africa and evaluate the domestic legislation that protects refugees in the background of international and regional law. Chapter 4 will analyse the domestic legal framework of South Africa and evaluate whether it protects accessibility of basic education to undocumented refugee children. It will also show how challenges to obtaining documentation result in an obstacle to refugee children in accessing basic education. This chapter will also evaluate whether domestic laws and their implementation in South Africa are meeting its international and regional obligations when it comes to protecting undocumented refugee children in accessing basic education. The final chapter will summarise and also contain concluding remarks and recommendations.

2. Chapter 2: International and regional protection of refugees and their right to basic education

2.1 Introduction

Refugee protection begins at the international level, a fact that has influenced regions to provide for instruments within their different contexts over and above the existing international and regional instruments. The main purpose of this chapter is to discuss the protection of refugees globally by analysing the relevant instruments. Even though international instruments such as the *UDHR* and the *Refugee Convention* are extensive in protecting refugees, Africa has extended context-specific protection in Africa through the *OAU Refugee Convention*. It is important to study these instruments to substantiate South Africa's legal obligations to refugees who enter the country for protection. As the focus of this study is on refugee children, instruments that protect children will also be discussed to determine the extent of their rights. The discussion will include an assessment of the rights extended to refugees, with an emphasis on education. This will require an analysis of various instruments such as the *International Covenant of Economic, Social and Cultural Rights* of 1966, (*ICESCR*) and the *African Youth Charter* of 2006 (*AYC*) to determine the content and levels of education stipulated in these instruments and so determine the scope of basic education to be offered and subsequently, the state's obligations.

2.2 Defining refugees

There is "global consensus" on the treatment of persons (refugees) who leave their homes because of disturbances within their country of origin.²¹ Generally, refugees are people who leave their homes because of intolerable living circumstances, going to a place of safety (an asylum)²² or a country of refuge. The intolerable circumstances

²¹ Feller et al *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* 3.

²² Goodwin-Gill *The Refugee in International Law* 1.

vary from natural disasters to war and oppression. Because of this, the assumption is that the refugees require protection.²³

A refugee is defined in the *Refugee Convention* as a person who;

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁴

The *1967 Protocol relating to the Status of Refugees* in its preamble recognises that other situations had arisen after 1951 which required the protection of certain people as refugees. Hence, the definition now applies to all refugees without time limitations. Such persons must be unable or unwilling to find protection in their own country due to the prevailing unbearable living conditions in that country.²⁵ The grounds of persecution are important because they are a legal criteria that justifies the protection of and the provision of assistance to deserving refugees,²⁶ and it they ensure that unqualified people do not take advantage of the protection offered to refugees.

A person can lose refugee status if the circumstances leading to the persecution are no longer existent or when the person decides to be protected by their country of nationality.²⁷ The protection of refugees should be governed by the principle of non-discrimination which is enunciated in article 3 of the *Refugee Convention*. Three grounds of discrimination are mentioned: race, religion, and the refugee's country of origin.²⁸ These grounds correlate with the listed grounds of persecution listed above. One will not be considered to be a refugee if one is found to have committed crimes in terms of international law or actions contrary to the principles of the *UN*, or to have

²³ Goodwin-Gill *The Refugee in International Law* 1.

²⁴ A 1A(2) of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

²⁵ A 1A(2) of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

²⁶ Goodwin-Gill *The Refugee in International Law* 2.

²⁷ A 1C of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol* also contains other instances where a refugee can lose their status.

²⁸ A 3 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

committed serious non-political crimes outside the country in which one is seeking refuge.²⁹

2.3 *Non-refoulment principle*

State sovereignty allows states to decide who may enter and stay in their countries and to place certain restrictions and/or obligations upon those who stay.³⁰ States can rightfully refuse aliens (people from other countries) permission to enter their territory and can decide to deport aliens who are in the country illegally, but must do so in a lawful manner (that is, in accordance with international, regional and domestic laws).³¹ The approach is different when it comes to refugees where *non-refoulment* applies, which is a principle of customary international law.³²

According to the *non-refoulment* principle, states shall not turn away refugees seeking protection in their country, where such an act would threaten their life or freedom through persecution.³³ Moreover, deporting a person to a place where they would be likely to suffer irreparable harm would be in contravention of articles 6 and 7 of the *International Covenant on Civil and Political Rights* of 1966 (*ICCPR*).³⁴ The *ICCPR* guarantees the right to life and to freedom from inhuman or degrading punishment to everyone.³⁵ Hence, if sending a person back to that person's country would present a likelihood of persecution, that act would be in contradiction of the *non-refoulment* principle, to which all states are bound.

²⁹ A 1F of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

³⁰ Strydom *et al International Law* 267.

³¹ Strydom *et al International Law* 267.

³² Goodwin-Gill "The International Law of Refugee Protection" 40.

³³ A 33 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*, the persecution would be on the basis of the same grounds that enable them to be considered refugees which are found in A 1 A (2) mentioned above; article 2 (3) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* 1969.

³⁴ UN Human Rights Committee *General comment no. 31 [80]*, *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 12.

³⁵ A's 6; 7 of the *International Covenant on Civil and Political Rights* (1966).

2.4 International protection of refugees

The *UDHR* provides for the right to seek and enjoy asylum,³⁶ and the main instrument to grant comprehensive protection to refugees is the *Refugee Convention*. The need for an instrument protecting refugees arose from general concern about the fate of people displaced during and immediately after the Second World War, and it was adopted in 1951 with limitations³⁷ which were removed by its 1967 Protocol.³⁸ Apart from granting people the right to seek refuge in other countries, the *Refugee Convention* affords several rights to refugees while they reside in the country of refuge, for instance, the right to education. It is important to note that the *Refugee Convention* takes the position that it does not exclude any additional protection of other fundamental rights that can be afforded to refugees which can be granted by any country which is a party to the instrument.³⁹

States are encouraged to cooperate with the United Nations High Commissioner for Refugees (*UNHCR*) when exercising their functions under the *Refugee Convention*. The *Statute of the United Nations High Commissioner for Refugees* of 1950 encourages governments to cooperate and work with the *UNHCR* by ratifying instruments that protect refugees and taking steps to implement them.⁴⁰ Concerns of the *UNHCR* in protecting refugees include the determination of refugee status and assuring the access of refugees to educational institutions.⁴¹ The *UNHCR* recently set objectives to promote the inclusion of refugees into National Development Frameworks and also into national systems like education.⁴² There is ample protection for refugees in international law, which entitles them to rights in the countries in which they seek refuge.

³⁶ A 14 of the *Universal Declaration on Human Rights* (1948).

³⁷ Article 1A(2) of the 1951 Convention relating to the Status of Refugees. The limitation referred to those people who had become refugees owing to events happening before 1 January 1951 in Europe.

³⁸ A 1(2) of the *1967 Protocol relating to the Status of Refugees*.

³⁹ A 5 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁴⁰ *Statute of the United Nations High Commissioner for Refugees* (1950).

⁴¹ Goodwin-Gill *The Refugee in International Law* 136.

⁴² *UNHCR* 16/01/2017 <http://www.unhcr.org/afr/excom/announce/5894558d4/unhcrs-strategic-directions-2017-2021.html>.

2.5 Regional protection of refugees

Through the *OAU Refugee Convention*, Africa achieved the adoption of an instrument that acknowledges the universality of the *Refugee Convention* and caters for the rising number of refugees in the region by granting them protection and attempting to solve their peculiar needs.⁴³ The *OAU Refugee Convention* in its preamble states that it takes a humanitarian approach towards refugees' problems and considers the granting of asylum as a humanitarian act.⁴⁴ In Africa, the definition of a refugee is expansive due to the inclusion of an additional section to provide more protection considering the specific situations Africans experience. Article 1 (2) of the *OAU Refugee Convention* provides that:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This article widens the circumstances in which permit people fleeing their countries for protection elsewhere, to be given the status of a refugee and receive protection accordingly. In addition, the *OAU Refugee Convention* gives protection to refugees who flee their country because the part of the country in which they reside has been disrupted, even though other parts may still be peaceful.⁴⁵ Such a proviso is not found in the *Refugee Convention*.

Similarly, the *OAU Refugee Convention* like the *Refugee Convention* contains a section that lists people who cannot be considered as refugees. These are people who have committed certain crimes, such as war crimes, crimes against humanity and non-political crimes that are considered serious.⁴⁶ The *OAU Refugee Convention* also provides that states will not return refugees to their country of nationality if doing so

⁴³ The preamble of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

⁴⁴ A 2(2) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

⁴⁵ Article 1(2) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

⁴⁶ A 1(5) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969) similar provision in the *Refugee Convention* article 1 F.

will threaten their life, physical integrity or liberty,⁴⁷ which entrenches the *non-refoulment* principle in regional law. Refugees can be repatriated voluntarily, through the cooperation of both the country of refuge and the country of the refugee's nationality.⁴⁸ Feller⁴⁹ believes that the *OAU Refugee Convention* is a "significant advance" on the *Refugee Convention* because of its broad definition of refugees and its provision of the solution of voluntary repatriation to share the burden of refugee problems.

2.6 Criteria for refugee status determination

The discussion above has provided the definition of a refugee and noted the differences apparent in the *Refugee Convention* and the *OAU Refugee Convention* on the matter. A person who wants to be recognised and to enjoy the rights of refugees should have experienced the situations that are described within the definitions.⁵⁰ States must ensure the identification of persons who fall under that definition and shelter people who deserve the protection offered to refugees. The determination of refugee status is done on a case-by-case basis, although such status can sometimes be conferred on a large group of people.⁵¹ The determination of a refugee's personal status is a matter for the domestic law of the country of refuge,⁵² which will also provide them with identity documents.⁵³

For an individual to be considered a refugee and enjoy protection in a country of refuge, the person must have a "well-founded fear of persecution". The question asked when adjudicating asylum claims is what would qualify as a well-founded fear. Goodwin-Gill⁵⁴ is of the opinion that it means that there must be a serious possibility that the applicant will be persecuted in the person's country of origin if the person

⁴⁷ A 2(2) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

⁴⁸ A 5 of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

⁴⁹ Feller 2001 *Journal of Law and Policy* 133.

⁵⁰ Goodwin-Gill *The Refugee in International Law* 22.

⁵¹ Goodwin-Gill and McAdam *The Refugee in International Law* 49.

⁵² A 12 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁵³ A's 27; 28 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁵⁴ Goodwin-Gill, Goodwin-Gill 1982 *Michigan Yearbook of International Legal Studies* 299.

returns; there must be a future possibility of harm. Grahl-Madsen⁵⁵ is of the view that the analysis should be more objective than subjective (looking at a person's frame of mind), and that the decision as to whether or not there is "a well-founded fear" should be made on the basis of reasonableness.

The *UNHCR* has provided guidelines to be employed in the assessment of such claims. On having a 'well-founded fear', it provides that there should be both subjective and objective elements to the claim. It states that there should be a subjective element that looks at the individual applicant (the case-by-case basis approach) and the particular conditions, plus an objective element looking at the conditions of the country and the general intolerability of the living conditions in the country.⁵⁶ The subjective element would be met where the applicant's description of his or her experiences is credible.⁵⁷

The person must fear actual persecution as opposed to abstract persecution. The *UNHCR* perceives that persecution has not been universally defined but it occurs where harm is imposed or there is a serious and actual threat to harm a person's life or freedom, usually involving serious violations of human rights.⁵⁸ As mentioned earlier, the reasons for persecution are listed as race, religion, nationality, membership of a particular social group, and political opinion.⁵⁹ To that, the *OAU Refugee Convention* adds external aggression, occupation, foreign domination, or events seriously disturbing public order.⁶⁰ It can be argued that there is no indication that this list of reasons is open-ended and hence the list must be perceived as being closed.

Next, there is the question of which standard of proof is to be used in hearing the claims, which must be adduced by the person seeking asylum. It has been held that the proof must be established on a balance of probabilities.⁶¹ The *UNHCR* advises that proof does not have to be beyond any reasonable doubt but there must be a

⁵⁵ Grahl-Madsen *The Status of Refugees in International Law* 173.

⁵⁶ *UNHCR* December 2011 <http://www.refworld.org/docid/4f33c8d92.html> para 40; 42.

⁵⁷ Strydom *et al International Law* 301.

⁵⁸ *UNHCR* December 2011 <http://www.refworld.org/docid/4f33c8d92.html> para 51.

⁵⁹ A 1A(2) of the *1951 Convention relating to the Status of Refugees*.

⁶⁰ A 1(2) of the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa* (1969).

⁶¹ Goodwin-Gill and McAdam *The Refugee in International Law* 54.

reasonable possibility of the fear of persecution.⁶² Finally, the person who is to be granted asylum must be unable or unwilling to seek protection from that person's own country. Once a person's circumstances are judged to accord with the definition of refugees, states are obliged to apply the minimum standards in the treatment of refugees to such a person, who can also enjoy other rights as provided.

2.7 Minimum standards in the protection of refugees

Several rights are afforded to persons who are accorded refugee status which include the right to own property,⁶³ to have access to courts and legal assistance,⁶⁴ to be employed,⁶⁵ and also to access public education.⁶⁶ The inclusion of socio-economic rights is hailed by Hathaway,⁶⁷ as it is imperative for economic integration and self-sustenance. Refugees have a right to approach the courts in the country of refuge for any legal matters and they are also entitled to legal assistance as if they were citizens.⁶⁸ When they enter the country of refuge, refugees are required to present themselves before the relevant authorities as soon as possible and they must not be punished for illegal entry.⁶⁹ Refugees shall be issued with identity documents,⁷⁰ which would assist them in the protection of their fundamental rights and to gain access to the additional forms of assistance made available to refugees. The most important right that will be discussed in detail for the purposes of this study is the right to education.

It is necessary to scrutinise the instruments which provide for education rights, as they employ various terms such as elementary, primary, secondary, fundamental and basic to describe types and/or stages in education. The *UDHR* gives a substantial right to education to everyone. It provides that everyone has a right to education, which

⁶² UNHCR 16 December 1998 <http://www.refworld.org/docid/3ae6b3338.html>.

⁶³ A 13 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁶⁴ A 16 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁶⁵ A 17 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁶⁶ A 22 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁶⁷ Hathaway *The Refugee in International Law* 95.

⁶⁸ A 16 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁶⁹ A 31(1) of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁷⁰ A 27 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

shall be free and compulsory in the elementary stage.⁷¹ This right to elementary education is distinguished from technical and professional education, which instead of being made free and compulsory has to simply be made generally available and equally accessible. It is clear that the right to elementary education is couched in stronger terms and the state's obligation in fulfilling it is urgent, but it is also not clear what elementary education involves. Further, elementary education is for everyone whereas technical and professional education are reserved on the basis of merit.

The term elementary education is also found in article 22 of the *Refugee Convention* which states that refugees have the right to elementary education which shall be granted to them on the same level as to the nationals of the country of refuge.⁷² A distinction is made with regards to education which is not elementary, that it should be accessed in favourable conditions (conditions that are the same for other aliens/foreigners/immigrants residing in that country).⁷³ Therefore, the standard for accessing elementary education is more favourable than that for accessing other levels and forms of education, showing the importance with which it is regarded. The elevation of elementary education has also been explained as urgent, and its provision as the most effective way to assimilate refugees into the society in which they seek refuge.⁷⁴ Hathaway⁷⁵ is of the view that article 22 of the *Refugee Convention* grants elementary education to all refugees, including those staying unlawfully in the country of refuge.

In the *Convention against Discrimination in Education* of 1960 (*CDE*), state parties are obliged to put in place national policies which result in granting education on an equal basis, with the aim of barring discrimination in education matters.⁷⁶ Article 1 lists grounds of discrimination including race and national/social origin which have the

⁷¹ A 26(1) *Universal Declaration on Human Rights* (1948).

⁷² A 22(1) of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*. In Dugard *International Law: A South African Perspective* 282, it is stated that the term national means the same as citizen.

⁷³ Article 22(2) of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*, the other right to education which is not elementary is not clearly defined.

⁷⁴ Weis *The Travaux Préparatoires* Analysed 118.

⁷⁵ Hathaway *The Rights of Refugees under International Law* 597.

⁷⁶ The preamble of the *Convention against Discrimination in Education* (1960).

effect of preventing a group of persons from accessing education.⁷⁷ Primary education is to be free and compulsory, secondary education made available and accessible and further education has to be accessible to all depending on individual capacity.⁷⁸ In addition, the *International Covenant on Social, Economic and Cultural Rights* of 1966 (*ICESCR*) also recognises the right to education and the aspects of primary, secondary and further education are framed in the same way as in the *CDE*.⁷⁹ Arendse⁸⁰ states that the *ICESCR* is a very significant treaty entrenching education rights, and that South Africa will benefit from the guidance of such a treaty in developing its fairly young socio-economic rights jurisprudence.

Article 28 of the *CRC* gives an equal opportunity in education to everyone and obliges states to progressively achieve free and compulsory primary education and to make secondary education available and accessible.⁸¹ Both the *African Charter on Human and People's Rights* of 1981 and the *African Youth Charter* of 2006 grant everyone an entitlement to the right to education.⁸² None of the instruments mentioned so far make reference to basic education. The term is found in the *ACRWC* which affords every child free and compulsory basic education.⁸³ Further, the *World Declaration on Education for All* of 1990 (*WDE*) in its preamble recognises the importance of basic education in attaining higher levels of education. It provides that everyone has the right to have their basic learning needs met,⁸⁴ and that basic education should be viewed as a foundation for further learning.⁸⁵

The United Nations Educational, Scientific and Cultural Organisation (*UNESCO*) compiled a report in an undertaking to define basic education. The report indicated

⁷⁷ A 1(a) of the *Convention against Discrimination in Education* (1960).

⁷⁸ A 4(a) of the *Convention against Discrimination in Education* (1960).

⁷⁹ A 13 of the *International Covenant on Social, Economic and Cultural Rights* (1966).

⁸⁰ Arendse 2011 *PELJ* 100.

⁸¹ A 28(1) of the *UN Convention on the Rights of the Child* (1989).

⁸² A 17 of the *African Charter on Human and People's Rights* (1981); article 13 (1) of the *African Youth Charter* (2006).

⁸³ A 11(3)(a) of the *African Charter on the Rights and Welfare of Children* (1990).

⁸⁴ A 1(1) of the *World Declaration on Education for All* (1990) states that the needs include literacy, numeracy, oral expression and problem solving.

⁸⁵ A 1 (4) of the *World Declaration on Education for All* (1990).

that basic education comprised primary and lower level secondary education,⁸⁶ which would be the first 9 years of formal schooling. *UNESCO* also inferred that basic education was part of the elementary stage of learning provided in the *UDHR*. The right to primary education in the *CRC* and the *ICESCR* is prioritised over that to further forms of education, as it enables the realisation of other, higher forms of education.⁸⁷ The *CESCR* has held that while primary education is not basic education, there is a connection between the two forms of education,⁸⁸ because primary education is the first part of basic education.

Churr⁸⁹ notes the difficulty in defining basic education and affirms that it focuses on the early stages of learning, be it of a child or an adult. Boezaart⁹⁰ defines basic education as functional literacy, including the ability to read, to write, to do arithmetic, and to hold elementary knowledge in culture, economy and politics. This correlates with the views of the *WDE*. It is apparent from the analysis above that basic education is the initial level of education, that the term is used interchangeably in various instruments with terms like primary education and elementary education, and that it also includes the lower level of secondary education.

2.8 Protection of refugee children

Refugee children are more vulnerable due to their age and "unclarified custodial status", which presents particular challenges, and education is necessary to prepare them for their future.⁹¹ In the *Refugee Convention*, children are described as being dependants are able to gain protection through their parents. For example, they can

⁸⁶ *UNESCO* December 2007

<http://www.unesco.org/education/wef/en-conf/Jomtien%20Declaration%20eng.shtm>, this report also suggests that the term elementary education has been in recent years been replaced by the term basic education.

⁸⁷ Arendse 2011 *PELJ* 100.

⁸⁸ *CESCR General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 9.

⁸⁹ Churr 2015 *PELJ* 2410.

⁹⁰ Boezaart *Child Law in South Africa* 407.

⁹¹ Steinbock 1993 *Tolley's Journal on Child Law* 12.

be included in the travel documents of their parents or another adult refugee.⁹² Children are also granted the same rights as their parents, who have the freedom to ensure their children's religious education is provided in the country of refuge in accordance with their beliefs.⁹³ The early international and regional instruments before the *CRC* was adopted lack child-specific provisions because historically children were not seen as rights-bearers, but rather as mere extensions of the family unit.⁹⁴ Children's interests were protected only where it had a bearing on their father's interests or the community.⁹⁵ Therefore, it is not surprising that the *Refugee Convention* does not explicitly cater for refugee children despite their innate vulnerability in such circumstances.

Apart from the protection of refugees afforded in instruments such as the *Refugee Convention*, further protection for refugee children is also found in other international and regional human rights instruments which grant protection to all children, particularly the *CRC* and *ACRWC*. These are comprehensive documents which provide rights for children on the international and regional levels respectively. State parties to the *CRC* or *ACRWC* are under an obligation to take "appropriate measures" for the protection of children seeking refuge or already considered as refugees, who are either accompanied by their families or unaccompanied, so that they are able to enjoy the rights set out in the *CRC* and other international instruments.⁹⁶ These measures include cooperation with international or non-governmental organisations like the *UNHCR* to protect refugee children, to assist children to reunite them with their parents or families, and generally to protect, like any other child deprived of a family environment.⁹⁷

⁹² Schedule of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol* at para 2. The provision of the travel documents is afforded to refugees in article 28 of the *Refugee Convention*.

⁹³ A 4 of the *1951 Convention relating to the Status of Refugees and its 1967 Protocol*.

⁹⁴ Eekelaar 1986 *Oxford Journal of Legal Studies* 163.

⁹⁵ Eekelaar 1986 *Oxford Journal of Legal Studies* 167.

⁹⁶ A 22(1) of the *UN Convention on the Rights of the Child* (1989); A 23 (1) of the *African Charter on the Rights and Welfare of Children* (1990).

⁹⁷ A 22(2) of the *UN Convention on the Rights of the Child* (1989).

2.8.1 Fundamental rights of children

The rights contained in the *CRC* and the *ACRWC* are to be enjoyed by all children without discrimination.⁹⁸ The non-discrimination clause is one of the four general principles (the best interests of the child, the right to be heard, the right to life and the right to development) which are often used to interpret rights provided under these instruments. State parties are obligated to ensure the development and survival of a child under article 6 of the *CRC*. Ensuring the development of children involves fostering their intellectual, mental and physical growth through education as provided for in article 28. Children are also to be given the freedom to express the views, to be heard in matters concerning themselves, and to have their views taken seriously.⁹⁹ In every matter concerning a child, their "best interests shall be a primary consideration" according to the *CRC*,¹⁰⁰ and the primary consideration under the *ACRWC*.¹⁰¹

Despite the instruments which guarantee the protection of refugee children, the international and regional standards set are sometimes ineffective due to lack of implementation and unaccountability.¹⁰² The *Refugee Convention*, as the chief instrument protecting refugees, omits to consider special protection for refugee children, who can be given refugee status only by virtue of their parents' falling under the legal definition of refugees. Nevertheless, the *CRC* and the *ACRWC* have gone a long way towards providing comprehensive rights which every child can enjoy and ensuring special protection to refugee children to assist them in order that they may enjoy their rights.

⁹⁸ A 2 of the *UN Convention on the Rights of the Child* (1989); (1990) A 3 of the *African Charter on the Rights and Welfare of Children* (1990).

⁹⁹ A 12 of the *UN Convention on the Rights of the Child* (1989); A 7 of the *African Charter on the Rights and Welfare of Children* (1990).

¹⁰⁰ A 3(1) of the *UN Convention on the Rights of the Child* (1989).

¹⁰¹ A 4(1) of the *African Charter on the Rights and Welfare of Children* (1990).

¹⁰² Summary Note on *UNHCR's Strategy and Activities Concerning Refugee Children* 15 *International Journal of Refugee Law* 2003 at 149.

2.8.2 *Unaccompanied and separated refugee children*

The Committee on the Rights of the Child (the Committee) published a General Comment on the treatment of unaccompanied and separated children who are outside their country of origin. The rights in the CRC should be afforded by state parties to all children including asylum-seeking, refugee and migrant children irrespective of their status, and no discrimination is to be directed towards these children.¹⁰³ The General Comment realises that unaccompanied and separated children are often discriminated against in accessing social services including education, especially where there is a lack of proper documentation.¹⁰⁴ Their interests are best secured by appointing a guardian who can take care of their educational needs amongst other things.¹⁰⁵ Henceforth, states should take extra special protection measures when dealing with such children.

2.8.3 *Obligations of the state*

To satisfy their obligations in educational matters, states must ensure that education is made accessible, available, acceptable and adaptable to learners.¹⁰⁶ Accessibility demands the application of the principle of non-discrimination, economic accessibility (affordability) and physical accessibility (a safe and convenient location).¹⁰⁷ Whereas under the *ICESCR* state parties are expected to take steps leading to progressive realisation of rights, the duty to exercise non-discrimination and the provision of primary education are immediate.¹⁰⁸ The obligations of states in education are to protect, respect and fulfil, which necessitates providing for education, prohibiting any hindrances from third parties and abstaining from any interference or retrogressive

¹⁰³ CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 para 8.

¹⁰⁴ CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 para 3.

¹⁰⁵ CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 para 33.

¹⁰⁶ CESCR General Comment No. 13: *The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 8.

¹⁰⁷ CESCR General Comment No. 13: *The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 6.

¹⁰⁸ CESCR General Comment No. 13: *The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 43, 51.

measures by the state itself.¹⁰⁹ States have a duty to pay particular attention to the needs of vulnerable refugee children who have been separated from their families as they have undergone traumatising experiences and require special care.¹¹⁰ Procedures to seek asylum should be age sensitive¹¹¹ so should be the interpretation of the definition of refugees and their asylum applications should be prioritised.¹¹²

2.9 Conclusion

This chapter has discussed the instruments in both the international and regional spheres that regulate the identification and treatment of refugees. It has been noted that the regional protection adopts the international definition and extends it to accommodate African circumstances, thereby affording better protection of refugees. The various instruments that provide for education were also analysed in order to ascertain what basic education is and what the provision of basic education to refugee children entails. International and regional law is important to establish the obligations of South Africa towards refugee children. Essentially, the *Refugee Convention* provides minimum standards for the treatment of refugees. As discussed above, where a country of refuge offers protection and rights, nothing in the *Refugee Convention* restricts refugees from enjoying such protection.¹¹³ The next chapter will explore the protection and rights offered to refugees in the South African domestic legal framework. It will also analyse the procedures for applying for refugee status in South Africa.

¹⁰⁹ CESCR General Comment No. 13: *The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 46, 47.

¹¹⁰ CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 para 7.

¹¹¹ CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 para 59.

¹¹² CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 para 70.

¹¹³ See para 2.4 above.

3. Chapter 3: Protection of refugee children in South Africa

3.1 Introduction

According to the *Constitution*, the interpretation of legislation in South Africa must be consistent with international law.¹¹⁴ Courts, tribunals and forums are obliged to refer to international law when interpreting the rights within the *Constitution*.¹¹⁵ The Constitutional Court has also held that international instruments must be used to interpret rights in the *Constitution* and provide guidance.¹¹⁶ This includes the forums used by refugees in applying for legal documentation. The protection of refugees in international and regional instruments is extended to those who seek refuge in South Africa, which is bound to the standards set in those instruments in its treatment of refugees.

Article 12 of the *Refugee Convention* states that the country of refuge shall determine the personal status of the person seeking refuge, meaning that the procedures of each country shall determine how a person is recognised as a refugee, subject to the guidance of the *Refugee Convention* and the *OAU Convention*. In respect of children, the *CRC* and the *ACRWC* to which South Africa has also ratified create further binding obligations in respect of refugee children.¹¹⁷ This chapter will discuss the legal framework in South Africa which offers protection to refugees. The procedures to acquire refugee status documentation will be assessed, along with an analysis of the challenges faced by refugees in obtaining documentation and the impact of obtaining documentation on the attainment of rights. The challenges that face refugees in obtaining documentation will also be investigated with particular reference to how they affect refugee children in accessing basic education, leading to an evaluation of relevant domestic law.

¹¹⁴ Section 233 of the *Constitution of the Republic of South Africa*, 1996.

¹¹⁵ Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

¹¹⁶ *S v Makwanyane* (1995) (3) SA 391 para 35.

¹¹⁷ The *CRC* was ratified in 1995, the *ACRWC* in 2000.

3.2 Legislative framework

The *Constitution* in its preamble encourages unity in diversity, and in effect it proposes that South Africa must accommodate all kinds of people (including non-citizens and refugees in particular) within its borders. The legal framework of the country that regulates the treatment of refugees must be consistent with the provisions of the *Constitution*, because the *Constitution* is the supreme law.¹¹⁸ The rights contained in the *Constitution* are to be enjoyed by everyone within South Africa,¹¹⁹ except for those reserved for citizens only, such as particular political rights, including the right to be a member of a political party, to vote and to hold a public office.¹²⁰ Under the Bill of Rights, the protection of the law in the treatment of people is granted to everyone on an equal basis, and unfair discrimination is prohibited.¹²¹ Discrimination may be based on a number of listed grounds, including race, ethnicity, culture or birth.¹²² Also, section 28 of the *Constitution* provides that children's rights are to be enjoyed by every child, irrespective of the child's status or that of the child's parents.

According to section 28(2) of the *Constitution*, a child's best interests must be of paramount importance in any matter concerning the child. This section must be viewed as a right on its own and not merely as a guiding principle in the interpretation of other rights in the *Constitution*¹²³ and in legislation. This principle is important in determining the treatment of refugee children in their applications for documentation and in their bid to attain the rights set in the *Constitution* and other international and regional instruments. Among the plethora of children's rights set out in section 28 of the *Constitution* that refugee children can enjoy are the right to shelter, basic health care and social services, and the right to not be detained except as a measure of last resort. The right to basic education is also found in section 29(1)(a) of the *Constitution* and will be dealt with in more detail in the next chapter.

¹¹⁸ Section 2 of the *Constitution of the Republic of South Africa*, 1996.

¹¹⁹ For instance, sections 9; 10 of the *Constitution of the Republic of South Africa*, 1996 entrenches the rights to equality and human dignity to everyone.

¹²⁰ Section 19 of the *Constitution of the Republic of South Africa*, of 1996.

¹²¹ Section 9 of the *Constitution of the Republic of South Africa*, of 1996.

¹²² Section 9(3) of the *Constitution of the Republic of South Africa*, of 1996.

¹²³ Boezaart *Child Law in South Africa* 280.

As mentioned above,¹²⁴ refugees are entitled to legal assistance in the courts, just as the nationals of the country of refuge in which they reside. In a situation where substantial injustice is likely to occur, the Constitution affords children the right to a legal representative provided by the state in civil proceedings;¹²⁵ and everyone has a right to approach the courts.¹²⁶ The right to legal assistance at the state's expense also applies to a person who is being accused of committing an offence.¹²⁷ It follows that refugee children can access legal assistance to protect their rights upon their infringing the law.

3.2.1 *The Refugees Act*

The *Refugees Act* gives domestic effect to the international and regional standards in South Africa, and in its preamble it acknowledges that the state is under an obligation to follow the standards set out in terms of the *Refugee Convention*, the *OAU Refugee Convention*, and other human rights instruments like the *UDHR*. It was passed to repeal the *Aliens Control Act* 96 of 1991, which did not offer any special protection to refugees but dealt with the regulation of all kinds of immigrants. It is therefore clear that the minimum standards in the treatment of refugee in international law discussed above must be employed when dealing with refugees in South Africa.¹²⁸ The *Refugees Act* was enacted also to regulate applications for asylum status and to provide rights and obligations to those granted refugee status.¹²⁹ The *Refugees Act* furthermore emphasises that refugees can enjoy the rights that are set out in Chapter 2 of the *Constitution*.¹³⁰

In the *Refugees Act*, an asylum seeker is defined as a person seeking refuge and a refugee is a person who has been granted asylum status in South Africa.¹³¹ A child is a person under the age of 18 years and importantly, a dependant includes an

¹²⁴ See para 2.7 above.

¹²⁵ Section 28(1)(h) of the *Constitution of the Republic of South Africa*, 1996.

¹²⁶ Section 34 of the *Constitution of the Republic of South Africa*, 1996.

¹²⁷ Section 35(3)(g) of the *Constitution of the Republic of South Africa*, 1996.

¹²⁸ See para 2.7 above.

¹²⁹ Katz 'Refugees' 359.

¹³⁰ Section 27(b) of the *Refugees Act* 130 of 1998.

¹³¹ Section 1 of the *Refugees Act* 130 of 1998.

unmarried and dependent child of an asylum seeker or refugee.¹³² People who are qualified to be granted asylum status are defined in a manner that combines the definitions of both the *Refugee Convention* and the *OAU Refugee Convention*.¹³³ A dependant of a person whose circumstances comply with that definition will also be granted asylum.¹³⁴ The *Refugees Act* states that persons seeking refuge may not be denied entry into South Africa if returning to their country of nationality would subject them to persecution or threaten their lives and freedom.¹³⁵ This section echoes the *non-refoulment* principle, ensuring that refugees will not be sent away when they enter the country to seek safety and refuge.

There are certain kinds of people who are disqualified from holding refugee status in line with international and regional law.¹³⁶ These are people who have committed crimes against peace or humanity in terms of international law, committed an apolitical crime that is punishable by imprisonment, a person guilty of acts against the principles of the *UN* and the *OAU* and a person who is under the protection of another country.¹³⁷ Moreover, people's refugee status may cease if they re-avail themselves of the protection of their country of nationality, reacquire their nationality where it had been previously lost, obtain the citizenship of another country which gives them protection, become citizens of South Africa, voluntarily establish themselves in their country of nationality, or where the circumstances of their persecution have ceased.¹³⁸

Refugees are entitled to identity and travel documents, they can also seek employment, and have access to health care and basic primary education equal with that of South African citizens.¹³⁹ The *Refugees Act* is a laudable piece of legislation

¹³² Section 1 of the *Refugees Act* 130 of 1998.

¹³³ Section 3 of the *Refugees Act* 130 of 1998 states these are people who have experienced or are threatened with persecution because of their political opinion, race, religion, nationality or social group; or where their freedom is threatened due to external aggression, occupation, events disrupting peace and foreign domination. Such people must be unable or unwilling to receive protection from their countries of nationality. See paras 2.2; 2.5 above on the international and regional definition of refugee.

¹³⁴ Section 3(c) of the *Refugees Act* 130 of 1998.

¹³⁵ Section 2 of the *Refugees Act* 130 of 1998.

¹³⁶ See paras 2.2; 2.5 above.

¹³⁷ Section 4 of the *Refugees Act* 130 of 1998.

¹³⁸ section 5(1) of the *Refugees Act* 130 of 1998

¹³⁹ Section 21 of the *Refugees Act* 130 of 1998.

protecting refugees, one of the strongest in Africa, based on freedom of movement and local integration.¹⁴⁰ The principles of *non-refoulement*¹⁴¹ and non-discrimination are also explicitly engrained in the *Refugees Act*, as they are in the international and regional framework. A refugee is obliged to abide by South African law.¹⁴²

3.2.2 Status determination procedure

The establishment of refugee reception offices is provided for in the *Refugees Act*. They are to be staffed with refugee reception officers to assist with applications, and refugee status determination officers (RSDO) to determine refugee status. There is an independent standing committee which is to function without bias and its duties include supervising the refugee reception offices, formulating procedures for asylum applications, liaising with the *UNHCR*, reviewing RSDO's decisions, deciding on questions of law referred by the RSDO's, and importantly determining the conditions of study or work of those granted asylum.¹⁴³ A Refugee Appeal Board (RAB) is also established to hear appeals of decisions made by an RSDO, to determine questions of law and it must function independently, without bias.¹⁴⁴ The Department of Home Affairs (DHA) is the government department tasked with the administration of refugees' documentation.

The application for asylum takes place at a refugee reception office, with the assistance of the refugee reception officers, who must ensure that the application forms are filled in correctly, must ask whatever questions are necessary, and must then submit the application to the RSDO, who makes the decision.¹⁴⁵ Whilst awaiting the final determination of refugee status, the asylum seeker is granted an asylum seeker permit in terms of section 22(1), which permit will be extended from time to time until the final determination of refugee status. An asylum seeker may be arrested

¹⁴⁰ Johnson 2015 *AHMR* 208.

¹⁴¹ Section 2 of the *Refugees Act* 130 of 1998.

¹⁴² Section 2 of the *Refugees Act* 130 of 1998.

¹⁴³ Sections 8, 11 of the *Refugees Act* 130 of 1998.

¹⁴⁴ Sections 12; 14 of the *Refugees Act* 130 of 1998.

¹⁴⁵ Section 21 of the *Refugees Act* 130 of 1998.

and detained pending a final decision on the application, for reasons set out in section 22(6),¹⁴⁶ but detaining a child must be a measure of last resort.¹⁴⁷

In determining the merits of an asylum application, the RSDO can grant refugee status or deny it on the grounds that the application is manifestly unfounded or abusive, or simply unfounded, or may refer any questions related to the law to the standing committee¹⁴⁸ and must furnish reasons for the decision. A standing committee must review the decision and an asylum seeker whose application for asylum status has been rejected may appeal that decision to the RAB,¹⁴⁹ where the decision can be confirmed or set aside.

The asylum seeker is also able to challenge the decision in the courts, through the *Promotion of Administrative Justice Act* 3 of 2000, which grants the right to challenge administrative acts which are unlawful, unreasonable and procedurally unfair, made by an organ of state such as the DHA.¹⁵⁰ The refugee challenging a status determination decision can access legal assistance from the state, as mentioned above.¹⁵¹ The courts have the power to ask the administrator to give reasons for his or her decision, to direct the administrator to do what the court requires, to set aside the decision made, and to declare the rights of the refugee.¹⁵² The court will review the decision if it was biased, not rational, not allowed by law, unfair, contravenes relevant procedures, and where there was an error of law or a failure to make a decision.¹⁵³

¹⁴⁶ If the person's application has been rejected, they have been found ineligible for refugee protection, they have contravened conditions of the permit and where their application has been found to be fraudulent or abusive or unfounded.

¹⁴⁷ Section 29(2) of the *Refugees Act* 130 of 1998.

¹⁴⁸ Section 24 of the *Refugees Act* 130 of 1998.

¹⁴⁹ Sections 25, 26 of the *Refugees Act* 130 of 1998.

¹⁵⁰ Section 6(1) of the *Promotion of Administrative Justice Act* 3 of 2000.

¹⁵¹ See para 3.2 above.

¹⁵² Section 8(1) of the *Promotion of Administrative Justice Act* 3 of 2000.

¹⁵³ Section 6(2) of the *Promotion of Administrative Justice Act* 3 of 2000.

3.2.3 Eligibility test

When RSDO's are determining whether a person qualifies to be given the status of a refugee, they have to consider whether there is actually a reasonably "well-founded fear", on the grounds set out in the definition of a refugee. The legal framework does not specify what a well-founded fear of persecution consists of and how it is determined. However, as said in the previous chapter, the *UNHCR* gives guidance on this issue,¹⁵⁴ which must be applied in South Africa.

The courts have determined the eligibility tests for refugee applications. In *Tantoush v Refugee Appeal Board* (2008) 1 SA 232 (T), the RSDO had failed the applicant's claim because there was no well-founded fear of persecution, as the applicant had fled from prosecution arising from criminal activities rather than from the outcome of political activity.¹⁵⁵ The court on that matter held that in making decisions it is also vital to inquire into the credibility of the asylum-seeker's version of events, weighing the "inherent probabilities", any external or internal contradictions in the version, consistency with other evidence, and the overall truthfulness of the testimony (which goes to the subjective element).¹⁵⁶ There must be an enquiry into the objective facts,¹⁵⁷ which involves looking at what is happening in the country generally. This perspective is in accordance with the *UNHCR* guidelines.

Although there is no specific provision in the international, regional or domestic frameworks relating to the assessment of children's eligibility for refugee status, there are situations where the harm inflicted on a child legitimises claims to refugee status, instances of the harms being recruitment as child soldiers, female circumcision, and the selling of children for economic exploitation.¹⁵⁸ These instances can be deemed as forms of persecution children endure due to their membership of a particular group (that is, children), but are often ignored as there is a gap in the relevant legal

¹⁵⁴ See para 2.6 above.

¹⁵⁵ *Tantoush v Refugee Appeal Board* (2008) 1 SA 232 (T) para 38.

¹⁵⁶ *Tantoush v Refugee Appeal Board* (2008) 1 SA 232 (T) para 101.

¹⁵⁷ *Tantoush v Refugee Appeal Board* (2008) 1 SA 232 (T) para 101.

¹⁵⁸ Goodwin-Gill "Refugee Rights and Security" 169.

framework (international, regional and domestic). A "social group" has been described as follows:

Thus, a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹⁵⁹

Therefore, children can be viewed as a social group which can be targeted for persecution, which would enable them to apply for asylum in their own right. Further, it is my opinion with reference to section 3 of the *Refugees Act* that where children belong to a particular group targeted for persecution because its race, religion or nationality and where their freedom is threatened due to external aggression, occupation of their areas by hostile powers, events disrupting peace, and foreign domination, they must be allowed to make refugee claims of their own volition. This would protect the best interests of children who face persecution due to the religious beliefs they hold, for instance, where they are not accompanied by their parents or primary caregivers.

3.3 Unaccompanied and separated refugee children

Children have a right to social care and alternative care when they do not have parents or any family caregivers,¹⁶⁰ which right must be realised for unaccompanied and separated refugee children. Unaccompanied children are those who have been separated from their parents and relatives are not under the care of any adult person, whereas separated children are within the care of relatives though separated from their parents.¹⁶¹ This group of children requires special attention from the state. In terms of the *Refugees Act*, unaccompanied children must be referred to the Children's Court and receive assistance in making application for refugee status.¹⁶² Often,

¹⁵⁹ UNHCR December 2011, HCR/1P/4/ENG/REV. 3, <http://www.refworld.org/docid/4f33c8d92.html>.

¹⁶⁰ Section 28(1)(b), 28(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

¹⁶¹ CRC General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6 para 6.

¹⁶² Section 32 of the *Refugees Act* 130 of 1998.

unaccompanied children are unable to access social services because they have difficulty obtaining documentation and they have no families to assist them.¹⁶³

The plight of undocumented unaccompanied children became evident in the case of *Centre for Child Law v Minister of Home Affairs* (2005) 6 SA 50 (T) where unaccompanied children awaited deportation and were detained at a repatriation camp along with adults. At that time the *Child Care Act* 74 of 1983 (*Child Care Act*) was still in operation, and section 13 required that children without the care of parents or guardians be referred to the children's court, which was not done because the Commissioner of the Children's Court believed that as foreign children they fell outside the scope of the *Child Care Act*. The court held that this was a "serious infringement" of the *Constitution* and the *Child Care Act*.¹⁶⁴ The state had a duty to provide and assist these children. The Commissioner was therefore ordered to relocate them to a place of safety, appoint a legal representative on their behalf, and bring them before the children's court.¹⁶⁵

Further, there was another case involving two Rwandan girls who were fleeing from their country to seek refuge in South Africa and had been transported by a truck driver who had promised to assist them but later abused them sexually. The girls had escaped from the man and sought help from the police and DHA, but had not been assisted accordingly. The Centre for Child Law had been appointed to represent the girls but by the time the matter was adjudicated in court the girls had disappeared without a trace.¹⁶⁶ Van der Burg accordingly argued that that:

It is my submission that the aforementioned case illustrates the lack of procedural guidelines, interdepartmental strategies, implementation mechanisms, application of Constitutional imperatives and provision of appropriate legal representation for undocumented foreign migrant children in South Africa. These procedural gaps occur despite the existence of the relevant international and South African legal framework which should ensure protection of undocumented foreign migrant children in South Africa.¹⁶⁷

¹⁶³ Magqibelo *et al* 2016 *Social work (Stellenbosch. Online)* 76.

¹⁶⁴ *Child Law v Minister of Home Affairs* (2005) 6 SA 50 (T) para 22.

¹⁶⁵ *Child Law v Minister of Home Affairs* (2005) 6 SA 50 (T) para 31.

¹⁶⁶ Van der Burg 2006 *Law Democracy and Development* 83.

¹⁶⁷ Van der Burg 2006 *Law Democracy and Development* 83.

Moreover, the case of *Van Garderen v the Refugee Appeal Board* (2008) 1 SA 232 (T) involved three minors who had come from Congo to South Africa with their father who had since passed away, and their application for asylum had been dismissed by the RSDO on the grounds that the situation in Congo had changed positively so they no longer needed protection in South Africa.¹⁶⁸ The court held that the minors had a reasonable fear of going back to Congo as there was still civil unrest and no adequate protection for children, hence it set aside the decision of the RAB and ordered that the children be documented. Beukes accordingly holds that:

The *Van Garderen* judgment represents a particularly vivid illustration of the hardships more often than not encountered by refugees and asylum seekers in South Africa. It also highlights the reality that the recognition of the rights of refugees and asylum seekers and concomitant legal obligations to which South Africa has subscribed will remain illusory so long as irregularities and inefficiencies within the status determination process persist.¹⁶⁹

It is evident that even though the law is clear on the treatment of unaccompanied children, they still find themselves stranded, even where they have legitimate claims to be granted asylum in South Africa.

Unaccompanied and separated children may be eligible to apply for refugee status because they have suffered persecution such as forced conscription as child soldiers and also early marriage as child brides.¹⁷⁰ The *Children's Act* provides for the care of such children.¹⁷¹ Social workers usually take them to a place of safety but often do not assist them in obtaining documentation as refugees even were such claims exist.¹⁷² There is a clear legal framework to protect unaccompanied children but adequate implementation is lacking.¹⁷³ In addition, there are guidelines that have been adopted by the Department of Social Development (DSD). These guidelines state that unaccompanied children should be identified, referred to a social worker or police

¹⁶⁸ *Van Garderen v the Refugee Appeal Board* (2008) 1 SA 232 (T).

¹⁶⁹ Margaret Beukes 2006 *SAYIL* 524.

¹⁷⁰ Ncumisa & Mfubu 2016 *AHMR* 430.

¹⁷¹ Section 150 of the *Children's Act* 38 of 2005.

¹⁷² Ncumisa & Mfubu 2016 *AHMR* 431.

¹⁷³ Swart 2009 *African Human Rights Law Journal* 119.

official, placed in a safe place, assessed and assisted with obtaining the relevant documentation.¹⁷⁴

It is clear from the cases discussed above that unaccompanied children indeed require care when they arrive in South Africa, and that such care properly involves the cooperation of all the relevant government departments - as it is the state's duty to protect them according to the constitutional obligations applicable to children and also their internationally and regionally ingrained rights. The courts have also held that children who have been separated from their parents can be considered dependants of the adult primary caregivers with whom they came to South Africa.¹⁷⁵ If the separated children were not regarded as dependants of their relatives or primary caregivers, this would leave them undocumented, a situation that would not serve their best interests.¹⁷⁶

3.4 Challenges faced by refugees when obtaining documentation

Entitlement and access to the basic rights afforded to refugees is available when they have been granted the relevant documentation in the form of an asylum seekers permit or refugee's permit. As stated above, according to the Refugees Act, a refugee is a person who has been granted refugee status.¹⁷⁷ The processes at refugee reception offices have been tainted with arbitrariness and reports of corruption documented by non-governmental organisations and academics who inquire into the challenges faced by refugees in applying for documentation.

In a survey conducted by Lawyers for Human Rights it was found that there are often long queues for those waiting to make applications, coupled with inadequate procedures and an indiscriminate power to determine refugee status; which opens up

¹⁷⁴ Department of Social Development, *date unknown*
http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=699&Itemid=39.

¹⁷⁵ *Mubake v Minister of Home Affairs* (2016) 2 SA 220 (GP) para 24.

¹⁷⁶ *Mubake v Minister of Home Affairs* (2016) 2 SA 220 (GP) para 23.

¹⁷⁷ See para 3.2.1 above.

room for corruption by the refugee reception officers and RSDO's.¹⁷⁸ It has been noted that the policies regulating the asylum-seeking procedures are not always fair and efficient,¹⁷⁹ because it can take years for asylum status to be finally determined, and in the meantime the asylum seeker has to make regular visits to the refugee reception offices to extend the asylum seeker permit.

Another research study conducted by the African Centre for Migration and Society revealed that asylum seekers are unable to renew their permits on time, the presence of long queues presents an opportunity for corruption, they find it difficult to fill in the application forms, and they lack the funds needed to pay their fines where they have not renewed their permits timeously¹⁸⁰ The delays result in asylum seekers spending days on end queuing for the renewal of the asylum seeker permits and at the same time missing work, and of course if they lose their jobs they will be unable to pay the fine for late renewals

Despite the allegations that there are people who come to South Africa to seek asylum when they are in fact looking for economic betterment, the findings are that the most asylum seekers are not motivated by economic reasons alone, but also by their experience of other hardships in their countries of nationality, like war and political chaos.¹⁸¹ A quarter of the interviewees also indicated they had been arrested previously for lack of documentation due to the delays in the application and renewal processes. They need to possess valid documentation in order to avoid being deported,¹⁸² which would be in contradiction of the principle of *non-refoulement*. The DHA requires asylum seekers to provide proof of their identity emanating from their

¹⁷⁸ Amit 2015 <http://www.lhr.org.za/publications/queue-here-corruption-measuring-irregularities-south-africa%E2%80%99s-asylum-system>. In this survey, 928 asylum seekers were interviewed at refugee reception offices in Pretoria, Cape Town, Durban and Musina.

¹⁷⁹ Johnson 2015 *AHMR* 218.

¹⁸⁰ Amit 2012 "No Way In; Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices".

¹⁸¹ Amit 2012 "No Way In; Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices". Fewer than half of the people interviewed indicated economic reasons for seeking refuge.

¹⁸² Amit 2012 "No Way In; Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices".

country of nationality when making application for asylum seeker permits,¹⁸³ which is at times not possible to provide, because they would have left their homes in a hurry because of the circumstances that forced them to flee. Such circumstances make it difficult for the refugees to settle and enjoy the rights that are guaranteed in the *Constitution* and the *Refugees Act*.

Documentation is evidence of a person's eligibility to receive protection as a refugee, and therefore key to the enjoyment of rights, including the right to education. Asylum permits are necessary to gaining access to social services.¹⁸⁴ The parents of refugee children face challenges in applying for documentation because of the overburdened and ineffective system to which they have to apply.¹⁸⁵ They ultimately find it difficult to enrol their children in schools without the documents, while at times the refugee papers are also not accepted by some schools.¹⁸⁶

3.5 Refugee protection: South African legal framework versus international and regional law

The domestic legislative framework, is commendable in its protection of refugees.¹⁸⁷ It allows for the local integration of refugees, who can work or study even while awaiting final determination as holders of asylum seeker permits, instead of containing them in detention centres for refugees, as is done in other countries. It is important to emphasise that South Africa has received and still receives a large number of refugees.¹⁸⁸ This arguably imposes a heavy strain on the state's resources, including its financial resources. The state has to establish centres for refugee reception, employ adequate and trained staff, and the applications have to be done free of charge. The DHA officials who were interviewed pointed out that there is a lack of staff and office equipment to deal with the applications, which leads to persistent backlogs resulting

¹⁸³ DHA date unknown <http://www.home-affairs.gov.za/index.php/refugee-status-asylum>.

¹⁸⁴ Magqibelo L *et al* 2016 *Social work (Stellenbosch. Online)* 75.

¹⁸⁵ Crush and Tawodzera 2011 *Migration Policy Series* 9.

¹⁸⁶ Crush and Tawodzera 2011 *Migration Policy Series* 9.

¹⁸⁷ See para 3.2 above.

¹⁸⁸ See para 1.1 above.

in applications taking a long time to be finalised.¹⁸⁹ The state, however, can make use of the *UNHCR* to assist in the implementation of the relevant laws and can also receive financial assistance in order to meet its obligations.

The corruption of the officers in the receptions centres results the country's being unable to align with its constitutional and international obligations, resulting in governance lacking in fairness, accountability and equality.¹⁹⁰ The White Paper on International Migration for South Africa recognises that there is a failure by South Africa to identify applicants who need special protection and require immediate assistance.¹⁹¹ Besides the international obligations that South Africa is bound to in protecting refugees, it also has moral and reciprocal duties to protect the rights of refugees.¹⁹²

As a country with state sovereignty, South Africa is justified in controlling the influx of people into the country, to control the rise in the population, but it should do so within the limits of international law.¹⁹³ Besides the international obligations that South Africa is bound to in protecting refugees, it also has moral and reciprocal duties to protect refugee rights.¹⁹⁴ Even though South Africa's laws are the most progressive in Africa and beyond, when it comes to the protection of children's rights the country fails to meet its international/regional/domestic obligations due to lack of coordination of government departments and difference between the actual law and the implementation of that law.¹⁹⁵

¹⁸⁹ Enwere Corlivics Onuoha Human rights and refugee protection in South Africa (1994-2004) (Master of Arts in Human Rights and Democratisation University of the Witwatersrand 2006) 85.

¹⁹⁰ Amit, Lawyers for Human Rights, 2015 <http://www.lhr.org.za/publications/queue-here-corruption-measuring-irregularities-south-africa%E2%80%99s-asylum-system>.

¹⁹¹ DHA July 2017 <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>.

¹⁹² Naicker and Nair 2000 *Refugees, Conflict & Conflict Resolution*.

¹⁹³ Goodwin-Gill Refugee, Rights and Security in Jane McAdam Forced Migration, Human Rights and Security 1st ed (Hart publishing) 2008 at 3.

¹⁹⁴ Naicker and Nair 2000 *Refugees, Conflict & Conflict Resolution*.

¹⁹⁵ Ncumisa & Mfubu 2016 *AHMR* 423. According to the authors, the lack of coordination is between the DSD and the DHA.

3.6 Conclusion

It is evident that South African laws embrace the protection of refugees as established in international and regional instruments. The *Refugees Act* provides for procedures to obtain documentation and recourse for refugees who have been denied refugee status. It further embraces the protection for refugees that is found in international and regional law, together with the *Constitution*. It has been noted that refugees face challenges in obtaining documentation, which is an obstacle to their enjoyment of their rights in the legal framework. Therefore, although the domestic legal framework protects refugees, the lack of adequate implementation results in South Africa's failing to meet its international and regional obligations.

The right to basic education is one of the constitutional rights that refugee children can enjoy, and it will be analysed in the next chapter, particularly with reference to refugee children. The chapter will also examine the connection between the challenges to obtaining documentation and access to basic education in South Africa.

4. Chapter 4: Undocumented refugee children's right to basic education in South Africa

4.1 Introduction

In the *Refugees Act* and the *Constitution*, one of the rights offered to a refugee in South Africa is the right to education. This chapter will analyse the content of the right to basic education, the state's obligations in ensuring access to basic education for undocumented refugee children, and the reality experienced by undocumented refugee children in accessing the right.

Education is important in that it promotes personal development, gives the learner the skills needed to qualify him or her to find employment, and occurs in an environment appropriate to the cultivation of human rights.¹⁹⁶ Beiter¹⁹⁷ further states that education "facilitates economic and social integration", which is important for refugees. The enjoyment of other rights like the right to vote may be exercised by people with a minimum level of literacy hence education is an important right.¹⁹⁸ The ratification of the *CRC* by South Africa in 1995 provided a welcome platform for the provision of children's rights in South Africa, which are provided primarily in the *Constitution*, including the right to access to education.¹⁹⁹ South Africa has an obligation to ensure that a child seeking asylum or one recognised as a refugee enjoys the rights inscribed in the *CRC*.²⁰⁰ It is important to emphasise that the best interests of a child in accessing basic education must be of paramount importance.²⁰¹ Along with the *Constitution*, other laws have been put in place to provide further support and protection to children, including the *Schools Act* whose applicability extends to refugee children.

¹⁹⁶ Chürr 2015 *PELJ* 2406.

¹⁹⁷ Beiter *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* 29.

¹⁹⁸ Veriava "The Right to Education" 57.

¹⁹⁹ A 28 of the *UN Convention on the Rights of the Child* (1989) recognises the right of every child to education.

²⁰⁰ A 22(1) of the *UN Convention on the Rights of the Child* (1989).

²⁰¹ Section 28(2) of the *Constitution of the Republic of South Africa*, 1996.

4.2 The right to basic education

The *Constitution* states that the Bill of Rights applies to the government and to all organs of the state,²⁰² such as the Department of Basic Education (DBE).²⁰³ All legislation and policies must accordingly be consistent with the *Constitution*.²⁰⁴ The provision of the right to basic education, including adult basic education, is found in section 29(1)(a) of the *Constitution*.

The rights in the *Constitution* are divided into two basic types, that is, first generation rights (civil and political rights such as the right to equality provided in section 9) and second generation rights (socio-economic rights such as the right to basic education provided in section 29). Socio-economic rights (second generation rights) are human rights that improve the basic social conditions that people live in.²⁰⁵ The duty to realise the right to basic education falls on the state. According to section 7(2) of the *Constitution*, the state must protect, promote and fulfil the rights contained in the *Constitution*. The executive arm of the government bears the duty of implementing legislation and policies.²⁰⁶ The duties of the state have both negative and positive connotations. They include the imperative to refrain from interfering with the rights of private persons, and to take positive steps to ensure the fulfilment of the right to basic education.²⁰⁷

The scope of the state's obligations to achieve the right to basic education is best understood by comparing it to other socio-economic rights. Further education is also provided for, but is subject to progressive realisation depending on availability and accessibility.²⁰⁸ The framing of the right to further education resembles other socio-economic rights in the *Constitution*, such as the right to housing²⁰⁹ and the right to

²⁰² Section 8(1) of the *Constitution of the Republic of South Africa*, 1996.

²⁰³ DBE, <https://www.education.gov.za/AboutUs/AboutDBE.aspx> accessed 30/11/2017, the DBE states as one of its values that it must uphold the Constitution.

²⁰⁴ Currie and De Waal *The Bill of Rights Handbook* 42.

²⁰⁵ Currie and De Waal *The Bill of Rights Handbook* 564.

²⁰⁶ Section 85(2) of the *Constitution of the Republic of South Africa*, 1996.

²⁰⁷ *The Gauteng Provincial Legislature, In re: Dispute concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995* (1996) 4 BCLR 537 para 9.

²⁰⁸ Section 29(1)(b) of the *Constitution of the Republic of South Africa*, 1996

²⁰⁹ Section 26(2) of the *Constitution of the Republic of South Africa*, 1996.

health care²¹⁰ in limiting the right to progressive realisation.²¹¹ Socio-economic rights are usually worded with an internal limitation referring to the availability of resources and progressive realisation.²¹² In that light it is noteworthy that the constitutional right to basic education is a socio-economic right which does not contain such a limitation. Since the right to basic education is not internally qualified, the only justifiable limitation is by law of general application in terms of section 36 of the *Constitution*.

The right to equal protection and benefit of the law is entrenched in section 9 of the *Constitution*. Equality applies in realising the right to basic education. Where it is provided by the law, refugee children must benefit. Unfair discrimination is prohibited on listed grounds, including ethnic or social origin.²¹³ Other prohibited grounds not mentioned are also applicable when they perpetuate systemic disadvantage, undermine a person's human dignity, or adversely affect the equal enjoyment of rights.²¹⁴ Policies and practices pertaining to the admission of learners to schools should therefore not be discriminatory. Refugee children are specifically entitled to primary education in South Africa in terms of section 27(g) of the *Refugees Act*.

As stated previously,²¹⁵ basic education and primary education are not synonymous but it is clear that primary education is the initial phase of basic education. The International Standard Classification of Education is a document compiling education statistics worldwide and classifies different levels of education. The document states that primary education serves to develop skills in literacy, numeracy and social development; and also states that primary education is the first stage of basic education.²¹⁶ It classifies level 1 as primary, elementary or basic education.²¹⁷ Hence,

²¹⁰ Section 26(1)(a) of the *Constitution of the Republic of South Africa*, 1996.

²¹¹ Section 27(2) of the *Constitution of the Republic of South Africa*, 1996.

²¹² Section 7(3) of the *Constitution of the Republic of South Africa*, 1996 states that rights will contain a limitation within the right itself or can be limited by section 36.

²¹³ Section 9(3) of the *Constitution of the Republic of South Africa*, 1996.

²¹⁴ Section 1 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

²¹⁵ See para 2.7.1 above.

²¹⁶ *International Standard Classification of Education ISCED* 2011 adopted by the *UNESCO* General Conference at its 36th session in November 2011.

²¹⁷ *International Standard Classification of Education ISCED* 2011 adopted by the *UNESCO* General Conference at its 36th session in November 2011.

primary education is a part of basic education that should be compulsory and undocumented refugee children must be given access to it.

Basic primary education is to be accessed by refugees as freely as South African citizens.²¹⁸ In line with international law, the *Schools Act* provides that there shall be compulsory attendance for children from the year in which the learner reaches seven years of age until the school year in which the learner reaches 15 years or the 9th grade, whichever occurs first.²¹⁹ The element of compulsoriness ensures that every child is admitted in order to attend classes in school, regardless of the state of their documentation, and where schooling is free the financial obstacles are removed; hence, access to education is assured. Van Bueren²²⁰ indicates that the principle of compulsory education applies to all children and it is in the child's best interests not to be refused access to basic education. It can therefore be argued that these provisions make primary education plus the first two years of secondary education compulsory for all children, including undocumented refugee children.

4.3 Access to basic education

There are four elements of education (4A's) that were developed by Katherine Tomaševsk who was a Special Rapporteur on the right to education of UN Commission on Human Rights; these are availability, accessibility, acceptability and adaptability. Availability requires the state to establish schools, fund schools and provide trained teachers; acceptability necessitates good quality education that recognises children's rights, while adaptability refers to accommodating different kinds of children (such as minority, indigenous, or disabled children).²²¹

In general, accessibility refers to the removal of obstacles to accessing education.²²² It involves the elimination of any legal or administrative barriers in providing access

²¹⁸ Section 27(g) of the *Refugees Act* 130 of 1998.

²¹⁹ Section 3 of the *Schools Act* 84 of 1996.

²²⁰ Van Bueren *The International Law on the Rights of the Child* 237.

²²¹ Tomaševsk 2001 <http://www.right-to-education.org/resource/primer-no-3-human-rights-obligations-making-education-available-accessible-acceptable-and>.

²²² De Beco May 2009 http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_RTE_indicators_Concept_Paper_De%20Beco_2010.pdf.

to education, financial obstacles, obstacles to compulsory schooling and discriminatory practices in accessing education.²²³ According to Tomaševsk, the right to education is a socio-economic right in as much as it is also a civil-political right, and that fortifies its justifiability; in addition it enhances the enjoyment of other rights.²²⁴ The *SAHCR Charter of Children's Basic Education Rights* of 2012 took notice of the 4A framework in order to enunciate South Africa's obligations towards basic education. This interpretation of accessibility to education requires South Africa to remove obstacles that prevent refugee children from enjoying their right to basic education.

4.4 School admission requirements in South Africa

The *Schools Act* provides that learners must be admitted into schools without discrimination,²²⁵ in accordance with the constitutional principle of non-discrimination. A child shall not be denied admission to a school on the basis that the parent is unable to pay fees.²²⁶ Admission to public schools is regulated by the governing body of the school in accordance with the provisions of the *Schools Act* in addition to any other provincial laws.²²⁷ These provisions are consistent with the state's duty to ensure that basic education is accessible to all children.

The documents necessary for admission into schools are a certified copy of the birth certificate, a certified copy proving the immunisation of the child, and where applicable a transfer card and the most recent report card.²²⁸ The admission of non-citizens must accord with the same regulations as that of citizens, and in addition the parents of refugee children must prove that they have applied for relevant documentation at the Department of Home Affairs.²²⁹ If the documentation required is not produced the school principal must advise the parent of the learners where to apply for the

²²³ Tomaševsk 2001 <http://www.right-to-education.org/resource/primer-no-3-human-rights-obligations-making-education-available-accessible-acceptable-and>.

²²⁴ Tomaševsk 2001 <http://www.right-to-education.org/resource/primer-no-3-human-rights-obligations-making-education-available-accessible-acceptable-and>.

²²⁵ Section 5(1) of the *South African Schools Act* 84 of 1996

²²⁶ Section 5(3) of the *South African Schools Act* 84 of 1996.

²²⁷ Section 5(5) of the *South African Schools Act* 84 of 1996.

²²⁸ Section 5(1) of the *Admission of Learners to Public Schools* Published under General Notice 4138 of 2001 (PG 129 of 13 July 2001).

²²⁹ Section 6 of the *Admission of Learners to Public Schools* Published under General Notice 4138 of 2001 (PG 129 of 13 July 2001).

documentation and in the meantime admit the child conditionally while the parent is acquiring the required documentation.²³⁰ This is the procedure to be followed by principals of schools like Eastleigh Primary School when dealing with undocumented refugee children: they need to advise the parents to approach the DHA for documentation and provisionally grant the children access to their schools.²³¹ Instead of turning away undocumented refugee children the schools have an obligation to inform the parents of their right to apply for asylum and then to enrol the learner conditionally, not to deny admission.

4.5 Case law on the right to basic education

The right of asylum seekers to study was deliberated in the case of *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 (SCA).²³² According to section 22 (1) of the *Refugees Act*, the standing committee may impose conditions on persons who have been granted asylum seeker status while they reside in South Africa, that are consistent with international law and the *Constitution*. The standing committee had therefore imposed restrictions on the right to study for asylum-seekers, and the respondent sought to challenge that condition on the basis that it was contrary to the *Constitution*.

It was held that the general prohibition against study by the standing committee was unlawful because it undermined human dignity and infringed on section 29 of the *Constitution*, which gives education rights to everyone.²³³ Moreover, the court states that a child who is in South Africa to lawfully seek asylum cannot be justifiably deprived of "human fulfilment" through enjoying education rights.²³⁴ This decision led to the amendment of the *Refugees Act* in order to ensure the enjoyment of the right to study thereby ensuring the realisation of education rights.

²³⁰ Section 5 of the *Admission of Learners to Public Schools* Published under General Notice 4138 of 2001 (PG 129 of 13 July 2001).

²³¹ See para 1.1 above on the Times Live report concerning Eastleigh Primary School.

²³² *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 (SCA).

²³³ *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 (SCA) para 36.

²³⁴ *Minister of Home Affairs v Watchenuka* (2004) 4 SA 326 (SCA) para 36.

As a socio-economic right, the right to basic education has financial and other implications for the state, but the South African courts have confirmed the justiciability of the right. Berger,²³⁵ suggests that when in *Government of the Republic of South Africa v Grootbroom* (2001) 1) SA 46 (CC) the court considered the justifiability of the right to housing as a crucial right, it did not engage in a limitations analysis, which implies that they would also do the same with the right to basic education.

The following discussion will focus on a few cases that have given content to the right to basic education and enunciated the extent of the state's obligations in assuring the enjoyment of the right.

In a case which concerned language policies in school,²³⁶ the issue to be decided by the court was if the head of department rightfully acted by appointing an interim committee which suppressed the powers of the school governing board in order to change the school's language policy. There were English students in the community who had failed to attain admission in other English-medium schools as they were already filled to capacity, and when attempts were made to admit them to an Afrikaans-medium school which had the capacity to enrol them, they were denied admission on the basis that they had chosen not to learn in Afrikaans.²³⁷ It was said the power of school governing bodies is not unlimited especially where it is exercised unreasonably in contravention of rights to children.²³⁸ This decision shows that the governing bodies of schools should not exercise their powers in such a way as to unreasonably limit the right to basic education of refugee children.

The case of *Governing Body of the Juma Musjid Primary School v. Essay* (2011) 8 BCLR 761 (CC) (*Juma Musjid* case) expounded on the state's obligations pertaining to the right to basic education. An appeal was made against an eviction order granted in

²³⁵ Berger 2003 *Columbia Law Review* 637.

²³⁶ *Head of Department: Mpumalanga Department of Education v. Hoërskool Ermelo* (2010) 3 BCLR 177 (CC).

²³⁷ *Head of Department: Mpumalanga Department of Education v. Hoërskool Ermelo* (2010) 3 BCLR 177 (CC) para 18.

²³⁸ *Head of Department: Mpumalanga Department of Education v. Hoërskool Ermelo* (2010) 3 BCLR 177 (CC).

the High Court in favour of private land owners (the trustees of Juma Masjid Trust) where a primary school was situated. In this case, the competing rights were the right to property granted in section 25 of the *Constitution* and the right to basic education in section 29 1(a) of the *Constitution*. This gave the court an opportunity to interpret the right to education as a socio-economic right. The issues that the court had to consider included whether the trustees owed any constitutional duties to the learners right to basic education and whether their right to evict the school had to be developed to accommodate the learners rights.²³⁹ The applicants argued that the High Court had failed to consider the best interests of the child in granting the eviction order 26,²⁴⁰ while the trustees desired that the eviction order stand to respect their property rights.

In interpreting the right to education, the court made a clear distinction between the rights of basic education and further education by declaring that the right to basic education was "immediately realisable" as it had no internal limitations, in contrast to the other socio-economic rights in the Constitution.²⁴¹ On the other hand, further education was subject to the internal limitations of "progressive realisation" and the "availability of resources", where the state was obliged to take reasonable measures to achieve the enjoyment of the right.²⁴² In this case the MEC had a positive duty to provide for access to basic education by making alternative arrangements for the learners,²⁴³ while the trustees also had a negative duty to respect the rights of the learners to basic education, even though the act of seeking eviction was reasonable.²⁴⁴

This case was important because it interpreted the right to basic education as one that requires immediate and urgent action on the part of the state, meaning that access to basic education by refugee children must not be prevented by its progressive realisation.

²³⁹ *Governing Body of the Juma Masjid Primary School v Essay* (2011) 8 BCLR 761 (CC) para 7.

²⁴⁰ *Governing Body of the Juma Masjid Primary School v Essay* (2011) 8 BCLR 761 (CC) para 26.

²⁴¹ *Governing Body of the Juma Masjid Primary School v Essay* (2011) 8 BCLR 761 (CC) para 37.

²⁴² Section 29(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

²⁴³ *Governing Body of the Juma Masjid Primary School v Essay* (2011) 8 BCLR 761 (CC) para 45.

²⁴⁴ *Governing Body of the Juma Masjid Primary School v Essay* (2011) 8 BCLR 761 (CC) para 60.

In addition, the courts have also dealt with a case where a school governing body had adopted a policy which expelled from school for a certain amount of time a learner who fell pregnant.²⁴⁵ The court acknowledged that the learner in this case had a right to basic education which was unlimited except by law of general application,²⁴⁶ and the court concluded that the expulsion of the pregnant learner was a limitation by policy, not law, and therefore it could not be justified.²⁴⁷ Thereby the school had failed to fulfil its obligations in terms of section 7(2) of the *Constitution*.²⁴⁸ It is clear from this case that school policies can be overturned where they unjustifiably interfere with access to basic education, which can include those policies that refuse undocumented refugee learners admission to schools.

In the case of *Minister of Basic Education v. Basic Education for All* (2016) 1 All SA 369 (SCA) learners in Limpopo had not been provided with textbooks by the Department of Education, which textbooks were required because of the implementation of a new curriculum. The lack of textbooks interfered with their right to basic education. The respondents sought an order to force the government to provide the textbooks. The issue to be decided by the court in this case was whether the right to basic education was being impaired by the non-provision of textbooks to the learners.²⁴⁹ The appellant's argument was that the right to basic education as provided by the Constitution was not "cast in absolute terms" and that the right to basic education did not mean providing each learner with a textbook whereas the respondents contended that the non-provision of textbooks infringed upon the learners rights to education, equality and dignity.²⁵⁰

The court considered the reasoning in the *Juma Masjid case* that the right to basic education is without internal limitations, unlike other socio-economic rights, and its

²⁴⁵ *Head of Department, Department of Education, Free State Province v. Welkom High School* (2013) 9 BCLR 989 (CC)

²⁴⁶ In terms of section 36 of the *Constitution of the Republic of South Africa*, 1996.

²⁴⁷ *Head of Department, Department of Education, Free State Province v. Welkom High School* (2013) 9 BCLR 989 (CC) para 175.

²⁴⁸ *Head of Department, Department of Education, Free State Province v. Welkom High School* (2013) 9 BCLR 989 (CC) para 208.

²⁴⁹ *Minister of Basic Education v. Basic Education for All* (2016) 1 All SA 369 (SCA) para 3.

²⁵⁰ *Minister of Basic Education v. Basic Education for All* (2016) 1 All SA 369 (SCA) para 21.

further distinction from the right to further education, access to which is restricted by the availability of resources.²⁵¹ In this case the court was of the view that every learner was to be provided with a textbook to ensure compliance with section 29(1) (a) of the *Constitution*.²⁵² The willingness of the court to inform the government of its obligation to provide textbooks immediately in order to fulfil the right to basic education shows that there is a difference between this right and other socio-economic rights, which can be employed to ensure the government removes any obstacles to the attainment of basic education by refugee children. The state's obligations in providing basic education for refugee children also extend to the provision of necessary learning materials like textbooks.

4.6 Undocumented refugee children's obstacles in accessing basic education

When refugee children have no legal documentation, this poses a challenge in their quest to access basic education, as they are denied enrolment into schools,²⁵³ which means that they are denied an opportunity to be integrated into society. When the authorities fail to provide documentation, they also fail to protect the rights of children.²⁵⁴ Difficulties in enrolling children are encountered where refugees do not have documents such as birth certificates or immunisation cards, which they do not have because of the circumstances which prompted their hurried flight from their countries of nationality.²⁵⁵

A study was conducted by the Centre for Education Rights and Transformation (University of Johannesburg) on the education rights of refugees, asylum seekers and migrants, to determine the obstacles they faced in accessing education. The study reveals that refugees face challenges when obtaining documentation which in turn makes it difficult for them to enrol their children in schools, as they cannot prove they

²⁵¹ *Minister of Basic Education v. Basic Education for All* (2016) 1 All SA 369 (SCA) para 36.

²⁵² *Minister of Basic Education v. Basic Education for All* (2016) 1 All SA 369 (SCA) para 50.

²⁵³ Magqibelo L *et al* 2016 *Social work (Stellenbosch. Online)* 77.

²⁵⁴ Ncumisa & Mfubu 2016 *AHMR* 440.

²⁵⁵ Sobantu and Warria 2013 *Social Work/Maatskaplike Werk* 573; Spreen and Vally 2012 *Southern African Review of Education* 79.

have made application to legalise their stay in South Africa.²⁵⁶ This study found that the lack of documentation is one of the main causes that bars access to education and the article ties the accessibility of education to school fees, transport and documentation.²⁵⁷ Unaccompanied minors are more vulnerable as they are faced with extra challenges in obtaining documentation, because they need to have a guardian or social worker to help them. They are more at risk of failing to obtain social services and education.²⁵⁸

4.7 Right to basic education: South African legal framework versus international and regional law

The international instruments ratified by South Africa do not provide for the right to education. The *CRC* provides that children's right to education shall be achieved progressively.²⁵⁹ According to the *ICESCR*, state parties shall progressively realise the rights contained in the instrument to the maximum extent of their resources, including the right to education.²⁶⁰ In regional law, the *ACRWC* also limits the right to free and compulsory basic education because the state parties must take measures to gradually achieve full realisation of the right.²⁶¹ The international and regional legal framework limits the realisation of the right to primary education and therefore the right to basic education.

The South African legislative framework, on the other hand, places a more solid obligation on the state when dealing with basic education, which is not limited by progressive realisation or the availability of resources, primarily in the *Constitution*. The *Schools Act* aligns with international law by making primary education compulsory and free. Moreover, case law further justifies the right to basic education by interpreting the law in the *Juma Masjid* case in such a way as to make the right to access to basic education immediately realisable. The enrolment of refugee children

²⁵⁶ Foundation for Human Rights 2012 <http://www.fhr.org.za/resources/refugees-and-migrants/>.

²⁵⁷ Spreen and Vally 2012 *Southern African Review of Education* 13.

²⁵⁸ Spreen and Vally 2012 *Southern African Review of Education* 21.

²⁵⁹ A 28(1) *UN Convention on the Rights of the Child* (1989).

²⁶⁰ A 2(1) *International Convention on Social, Economic and Cultural Rights* (1966).

²⁶¹ A 11(3) (a) *African Charter on the Rights and Welfare of Children* (1990).

is also guaranteed in the *Schools Act* and *Admissions Policy for Public Schools Act*. Although the domestic legal framework enables access to basic education for refugee children, it does not take into account the challenges faced by refugee parents in applying for asylum. In practice the children fail to access basic education as they are denied admission to schools by officials.

4.8 Conclusion

Refugee learners in South Africa enjoy the right to basic education provided in section 29 of the Constitution, which is unfettered in its application. The courts have given content to and assessed the scope of the right basic education, concluding that it has no internal limitations, unlike other socio-economic rights. The chapter has further clarified what it means to access basic education, which includes ensuring physical access by admitting children into school and also what the admission requirements are in South Africa. The findings reveal that access to basic education must be unconstrained by school governing bodies that use their powers unreasonably and in a manner that is inconsistent with the *Constitution's* provisions. However, because parents and the primary caregivers of refugee children face challenges in obtaining the documentation required for school admission, refugee children do not enjoy the right to basic education provided to them in international, regional and domestic law.

The next chapter concludes the dissertation and offers recommendations that could ensure the protection and enjoyment of their educational rights by refugee children.

5. Chapter 5: Conclusion and Recommendations

The research question that the study aimed to answer is whether undocumented refugee children in South Africa are accessing basic education as provided by the international, regional and domestic legal framework. The challenges faced by undocumented refugee children in accessing basic education in South Africa have been highlighted by media reports that reveal that undocumented refugee children are denied enrolment at schools. These challenges stem from the fact that the application procedures for asylum are fraught with difficulties.

Refugees that come to South Africa are protected by international and regional law which also grants them access to social services and other rights including education. Instruments such as the *UDHR*, the *Refugee Convention* and the *OAU Refugee Convention* identify refugees as people deserving protection and have been ratified by South Africa. The *CRC* and the *ACRWC* extend further protection to refugee children, who are entitled to special protection. The right of refugees to education is found in the *ICESCR* in addition to the aforementioned instruments.

The *Constitution* provides for rights whose enjoyment is not limited to South African citizens only but also to refugees. The rights to equality and non-discrimination are essential considerations that govern the minimum standards applicable to the treatment of refugee children. Moreover, the best interests of the child must be of paramount importance in all matters concerning the child.

The *Refugees Act* extends the protection mentioned above to people who enter South Africa seeking refuge. In order to enjoy the rights provided, the refugees must be recognised as such through asylum identity documents which are determined at refugee reception offices; but the parents/caregivers of refugee learners encounter obstacles in obtaining the documentation. Further, refugees fleeing their countries of nationality will most likely leave their homes in a hurry, which can sometimes mean that they do not have documentation from their countries. This therefore leads to refugee children being denied enrolment at schools because they require

documentation such as birth certificates and immunisation cards to gain admission as refugees.

Basic education has been described as imparting basic skills like literacy and numeracy, which are pathways to further education and keys that open doors to the enjoyment of other rights. It has also been noted that primary education is a part of basic education, which must be free and compulsory for all children, according to the *ICESCR*, *CRC*, *ACRWC* and the *Schools Act*. According to the constitutional court in the *Juma Musjid case*, the state's obligation to provide for basic education is urgent and immediate as opposed to subject to gradual fulfilment. The interpretation of the right to basic education as a crucial right by the courts creates a strong obligation to ensure that even undocumented refugee children must enjoy the right to basic education without delays.

In addition, the 4'As typology developed by Tomaševsk includes an accessibility indicator which may be used to assess the extent of the state's duties pertaining to the right to education. Accessibility requires that obstacles to attending school be removed and that discriminatory practices be eliminated. The requirement that documents be produced when enrolling at schools proves to be a difficulty for refugee children and prevents undocumented refugee children from accessing basic education. The provision of basic education to refugees on the same terms as citizens of South Africa entails that refugee children must not face obstacles in enrolling at schools in order to access education.²⁶²

Refugees encounter various obstacles as they seek to apply for asylum at refugee reception offices. At times the offices are under-staffed and under-resourced to such an extent that the officials are unable to deal with the applications timeously. Due to the assumption that undeserving immigrants abuse the asylum-seeker process to legalise their stay in South Africa, the officials are also hesitant to grant refugee documents. They further abuse their discretionary powers in deciding the applications. There have been reports of corruption on the part of the refugee reception officers

²⁶² Crush and Tawodzera 2011 *Migration Policy Series* 9.

and refugee status determination officers who are responsible for assisting and making determinations for asylum-seekers. This poses a major obstacle in attaining documentation, and refugee children will also lack the requisite documentation for admission into schools.

The international and regional instruments that South Africa has acceded to, in addition to the *Constitution* and the *Refugees Act*, impose obligations on the state to protect and fulfil the rights granted to refugees. The *Schools Act* also provides compulsory and free primary education can be enjoyed by refugees. However, compulsory primary education is being limited when undocumented refugee children are denied access to schools. There is a lack of effective execution of these provisos in refugee reception offices and schools. The admissions policy requests documents which it might be impossible for refugees to possess, like birth certificate which are left behind in their countries when they flee from calamities like civil wars. Furthermore, there is not enough flexibility when it comes to the refugee parents being given ample time to sort out their documentation. As noted above, the application processes may take an excessively long time. The fact that a parent of a refugee learner fails to produce documents that prove asylum status is not a justifiable barrier to realising the right to access to basic education.

It seems there is a lack of knowledge about the rights of refugees amongst the DHA officials who preside over the administration of asylum applications, and school staff who enrol children. The refugees themselves do not always know their rights. Through the DHA the government must embark on awareness campaigns with the purpose of giving information to refugees about their rights in applying for asylum and enrolling their children at schools. Such campaigns can be done at refugee reception offices, schools and communities with high refugee populations. The targeted peoples for such campaigns should be all school staff, refugee reception officers, refugee status determination officers, refugee learners and refugees in general.

The policies that regulate the admission of learners into schools must be revised to accommodate refugee learners whose parents are in the process of obtaining documentation. Since the processes sometimes take time, the admission policy must

also give more time to the parents to present the school with proof of the required documentation in the form of asylum-seeker permits or refugee status documents instead of denying children access to schools like the Eastleigh Primary School. Flexibility is also necessary when it comes to producing documents like birth certificates and immunisation cards. Monitoring mechanisms of the implementation of the law must be put in place in order to secure the rights of refugee children in South Africa.

It has been identified that there is a lack of co-ordination between the Department of Home Affairs and the Department of Home Affairs in their interpretation of the rights of migrant learners.²⁶³ Such co-ordination must be forged in order to generate practical solutions that facilitate the enrolment of undocumented refugee children into schools while at the same time making sure that the parents submit their asylum applications in order to legalise their stay in South Africa.²⁶⁴ Co-ordination is imperative in creating durable solutions for undocumented refugee children's access to basic education. When it comes to unaccompanied refugee children, in addition to dealing with them through social welfare, there should be a focus on attending to their need for documentation.²⁶⁵ Undocumented refugee children are disadvantaged because they have left their countries of nationality to seek safety and they should therefore be given special attention by the state.²⁶⁶ The DHA should also seek to cooperate with the *UNHCR* for assistance in processing asylum applications.

Moreover, it is possible for undocumented refugee children to seek redress in the courts. This will ensure that officials at the DHA are trained to respect refugee rights, to make determinations objectively and with competence, and also to allow school

²⁶³ Spreen and Vally 2012 *Southern African Review of Education* 86.

²⁶⁴ *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 para 27

²⁶⁵ Ncumisa & Mfubu 2016 *AHMR* 439.

²⁶⁶ *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 para 30.

governing bodies to frame admission policies that respect the rights of refugee children.

In conclusion, it is clear that although the international, regional and domestic laws protect refugee children's rights, undocumented refugee children are not enjoying the right to basic education. The policies that require the provision of documents to enrol refugee children at schools fail to consider the unique circumstances that refugee children encounter, which require flexibility in the policies regulating their admission into schools, so that they may enjoy the right to basic education. Due to their vulnerability and their special circumstances, refugee children need special attention and need to be allowed admission to schools while their parents are given ample time to sort out their asylum applications. The denial of access to education to undocumented refugee children hinders the local integration of refugees, even if they eventually obtain their asylum seeker permits. This is because education is crucial to the enjoyment of other rights and leads to self-sustenance while contributing to the economy of the country. The paramountcy of a child's best interests in granting them admission into schools despite their lack of documentation is consistent with the legal framework and should always be considered. It is certainly not in the best interests of refugee children to deny them access to basic education (including compulsory primary education) due to their undocumented status, which is a result of the constraints to asylum applications faced by their parents/caregivers.

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