



## Undocumented Migrants and Foreign Children: Suffering in Search of a Better Life

*"These brothers and sisters of ours were trying to leave difficult situations to find a little serenity and peace; they sought a better place for themselves and their families, but instead they found death. How many times do those who seek this not find understanding, reception or solidarity?"*

*Pope Francis, speaking at a Mass in Lampedusa, Italy, on the plight of migrants<sup>1</sup>.*

### 1. Introduction

For undocumented migrants, seeking a better life in a foreign country often entails enormous risks. In Europe, thousands of people have died attempting to enter the continent via leaky, unseaworthy boats. In a single incident in 2013, over 300 migrants drowned when their boat capsized off the island of Lampedusa, near Italy. Pope Francis decried this event as a 'disgrace' and condemned the 'global indifference' to the plight of migrants<sup>1</sup>. Closer to home, undocumented migrants who enter South Africa face perils such as drowning, robbery, rape and even wild animal attacks while crossing the border. Two recent Round Table discussions, hosted by the Catholic Parliamentary Liaison Office in collaboration with the Scalabrini Centre and the Scalabrini Institute for Human Mobility in Africa<sup>2</sup>, brought together a wide array of practitioners working within the fields of family law and human migration to engage with these issues.

### 2. An Unstoppable Tide

The suffering and difficulties faced by migrants must be understood in conjunction with an ongoing tendency towards the 'securitization'<sup>3</sup> of borders in places like the European Union, the USA and South Africa. This entails seeing undocumented migration as a problem that must be 'beaten' with security measures such as fences, border patrols and violence. Border securitization

follows a logic of inclusion and security for some, but equally, exclusion and *insecurity* for others.

However, migration is usually driven by factors completely unrelated to the situation at the borders of the receiving country. It is often stoked by violence, insecurity and economic conditions in the sending country. As Rene Manenti, an expert on European migration has pointed out, the composition and numbers of migrants travelling to Europe has fluctuated dramatically in response to events such as the overthrow of Gaddafi in Libya, the outbreak of conflict in Syria, and the revolution in Egypt. European Union policies and responses are generally reactive, and while agreements with sending countries can occasionally slow the tide, they are usually rendered irrelevant by some fresh spasm of violence or repression that results in hundreds of thousands of people fleeing their home countries and seeking a better life for themselves in the European Union.

The implication of this is that states need to accept migration as a phenomenon that cannot just be halted. Simply sealing borders is a financial impossibility, as well as a morally problematic proposition. The US-Mexican border is heavily patrolled, and anti-immigration rhetoric and politics in America have become extremely pronounced. America has enormous resources to devote to 'securing' the border, yet huge numbers of undocumented migrants still travel into the US from Mexico and Latin America every year,

seeking a better life. The US cannot stop this flow, despite employing armed guards, fences, cameras and unarmed drones equipped with thermal cameras to detect people crossing the border. As long as poverty and instability exist in some regions, and wealth and security exist in others, the flow of humanity will continue. The situation in South Africa has many parallels with those in the EU and the US – large numbers of migrants, poor and unstable sending regions, and significant hazards confronting those who attempt to cross the borders.

Jacob Matakanye runs the Legal Advice Office in Musina, on the border of South Africa and Zimbabwe. He has been running the centre since 1988, and has been involved in migration issues for many years, which leaves him uniquely qualified to speak to the situation at the border.

Mr Matakanye points out that one major problem that migrants face in the region is the ‘no man’s land’ between South Africa and Zimbabwe. The Limpopo River forms a natural barrier between these two countries. Migrants are often attacked on the banks of the river by criminal gangs. Mr Matakanye has found that both countries usually decline to accept jurisdiction over these cases, arguing that the other country should deal with them. Finally, when these migrants do arrive in South Africa they are often exploited. Farmers will sometimes refuse to pay them, or pay them well below the mandated minimum wage. If they demur, the farmers can simply report them to the Department of Home Affairs for deportation, thus avoiding paying them at all.

### **3. Foreign Children**

One particularly vulnerable subset of migrants is foreign children entering South Africa, particularly those who come as refugees, or who are unaccompanied (travelling without a legal guardian) or separated from their parents<sup>4</sup>.

Issues involving the rights of these foreign children have recently gained prominence, with several pertinent court cases reaching the newspapers. Lawyers for Human Rights and the Centre for Child Law at the University of Pretoria have successfully litigated cases involving refugee children or stateless children. One case involved a child who was left stateless due to her home country, Cuba, refusing to recognise her as a citizen. The South African government, which had

resisted issuing her with suitable documentation, were ordered to grant her South African citizenship, and to begin effecting changes to the Citizenship Act in order to deal with future cases of this type<sup>5</sup>.

In a separate but related issue, new regulations from the Department of Home Affairs have come into effect stating that any child entering or leaving the Republic must be in possession of both a passport and an authorised copy of an unabridged birth certificate<sup>6</sup>. Additionally, children who are not accompanied by both parents must present a written affidavit from the absent parent(s) granting permission for the child to travel. ‘Security’ reasons have been mentioned as justification for these new regulations, as well as the necessity of protecting children from human trafficking or parental abduction, but the move has been slammed by tourist operators and airlines as constituting an unnecessary burden that will hinder foreign tourism and harm their businesses. While the protection of children from trafficking is of course extremely important, it is doubtful whether the regulations will operate as intended, and they will certainly inconvenience many legitimate travellers.

On a positive note, in June 2014 the Minister of Social Development, Bathabile Dlamini, stated that foreign children were entitled to grants and support from the state, and urged their caregivers to register them with the South African Social Security Agency in order to access social grants<sup>7</sup>. She took the opportunity to remind everyone that all children within South Africa have equal rights.

This is a positive statement that is to be applauded, since it signals a recognition by the Department of Social Development that vulnerable foreign children can access the social grants and state support that they need. It is important to note that documentation is an important part of the process of ensuring that children’s rights are supported, however, and on this issue a great deal needs to be done. While the Minister’s statements will apply to documented foreign children (such as recognised refugees), for undocumented children the situation is far more tenuous. Without documentation of some sort, accessing social grants and support becomes very difficult if not outright impossible.

#### 4. The Legal Situation for Children

When discussing this issue it is necessary to distinguish between refugee children (who are at least legally covered by their refugee status) and vulnerable children who have arrived for other reasons, such as economic migrants. This latter group of children is particularly vulnerable since they often cannot access any relevant documentation, and may be subjected to deportation and/or arrest.

This is particularly problematic. There are important and widely agreed upon legal principles surrounding children and their treatment, and this treatment would appear to violate these principles. For example, as was noted in a previous Briefing Paper on the topic:

“The United Nations Convention on the Rights of the Child states clearly that the best interests of the child should be considered paramount; however, this seldom translates into practice on the ground. Furthermore, the Convention forbids governments from discriminating, or allowing discrimination, against children on the basis of nationality, ethnicity or social status.<sup>8</sup>”

Furthermore, the Constitution of South Africa states that:

“Every child has the right to family care/parental care, or to appropriate alternative care when removed from family environment; basic nutrition, shelter, basic health care services and social services; be protected from maltreatment, neglect, abuse or degradation.”

(Section 28(1)(b-d))

The important point about these Constitutional provisions is that they apply to *every* child, not merely to South African children, or South African children and permanent residents, or documented migrants. Consequently, South Africa has legal duties to children who enter the country, including those who have arrived unaccompanied, who have been trafficked, or who have been rendered stateless or lack adequate documentation. These principles have been further entrenched and expressed by the Children’s Act of 2005<sup>9</sup>, which seeks to unify and regulate matters related to the protection of children’s rights.

Consequently, when discussing the issue of unaccompanied and separated minors, it is important to remember the primacy of the children’s rights, and their best interests. While the state does have a right to regulate migration across its borders and maintain the integrity of its territory, it also has responsibilities to people who enter its borders, and these responsibilities are heightened in cases such as these, where children are rendered vulnerable by the lack of a care giver and suitable documentation.

As things stand, the number of unaccompanied and separated minors entering South Africa is unclear. As with many cases involving undocumented migration, concrete statistics are often hard to come by. This has the side effect of making it harder to articulate the necessity of support for vulnerable foreign children as a priority.

People working in the field have expressed frustration over the lack of resources that social workers have for dealing with these cases<sup>10</sup>. Following up on a child’s background when they come from the DRC or Uganda can be a complicated and difficult endeavour, especially for social workers who are already heavily burdened. However, the interests of the child are not less important, merely because their case is more complex.

In some cases children are sent to places of safety by a court order; this means that, until they turn 18, they are protected and can rely upon the court order for documentation purposes. However, once they turn 18 they are often subject to deportation, since they lose their eligibility for protection as a minor under the court order.

Although not a major source of cases, this group of children do deserve better. To raise these children in the welfare system, only to abandon them and deport them to their originating countries as soon as they turn 18 can only be described as cynical and counterproductive. Many of these young people have been raised in South Africa for a large portion of their lives; they may not speak non-South African languages; they may have no relatives or support networks in their originating countries; and many of them have effectively been raised as South Africans, and have known no other home.

In an attempt to grapple with some of these issues, organizations such as the Scalabrini Centre have

been working together to share knowledge and develop a common position. This involves considering the needs of different groups of foreign children who have entered the country unaccompanied or separated from their parents, and examining the potential legal remedies for their situations. Going forward, it appears that one of the major avenues of their advocacy campaign will involve appealing to the Minister of Home Affairs to adopt a systematic approach to responding to special appeals on behalf of foreign children who are left undocumented or even stateless.

## 5. Alternatives for Undocumented Migrants

As things stand, there are few alternatives for people wanting to enter South Africa. Refugees are legally covered<sup>11</sup> by international treaties as well as the Refugees Act 130 of 1998, but economic migrants who are not highly skilled have limited<sup>12</sup> or no options for legal entry. The Zimbabwe Documentation Project has regularised the status of some 250 000 Zimbabweans, but there have been no other initiatives of this type. After some initial doubt, the Department has announced that the ZDP will be renewed for a further three years, during which time people will be expected to regularize their status.

Statements from both the former Minister and the current Minister suggest that the government is cognizant of the problem, and may be receptive to a new avenue for such migrants. Quite what this avenue would look like is the real question, and the Department has not been forthcoming about its intentions in this regard.

Generally speaking, the Department seems to be firmly set on a course of treating immigration as a major security problem, and undocumented migration as a threat to the country. The new regulations show a very clear trend towards heightened security around border issues, and are a strong indication of a continuing trend towards securitization. This approach could well carry over to issues of migrant labour.

It should be understood that the Department does not operate in a vacuum, and in some respects a restrictive approach towards economic immigrants would no doubt receive support from many South Africans who battle with a moribund economy and high unemployment rates. When government officials and Members of Parliament

display a 'hawkish' approach to immigration they are not doing so completely on their own – they are reflecting beliefs that can be widely found among ordinary South Africans. However, these sentiments miss the point that migrants can bring an enormous contribution to the country. Internationally, there is evidence from the United States that undocumented immigrants contribute significantly to the tax base.<sup>13</sup> Closer to home, South Africa faces a widely acknowledged skills shortage. Educational reform is not just slow in coming, but has long lead times, and in itself requires skilled personnel, such as maths and science teachers, who could also be recruited from immigrant populations. There is also empirical evidence that immigrants create jobs in the informal sector by starting micro enterprises and employing South Africans in the process<sup>14</sup>.

Such feelings may also be rooted in xenophobia, which should be opposed at every turn, and they certainly do not accord with the notion, common to all our religious traditions, of welcoming the stranger in our midst. However, as a political reality this is a constant factor which must be taken into account when seeking to understand this kind of policy formation.

## 6. Conclusion

In the words of Dr Zaheerah Jinnah, "Migration cannot be stopped and it will not end<sup>15</sup>." This is a truth that is well worth recognising, and that the Department of Home Affairs should seriously engage with. The question is not how to prevent migration, but how to handle it in a manner that allows for the dignified and humane treatment of migrants, while maintaining the necessary policing of issues such as human trafficking, cross-border smuggling and entry by poachers and international crime syndicates.

Consequently, it is necessary to consider how to handle migrations more humanely, rather than simply continuing to securitise migration and 'seal' borders. While the state has a legitimate interest in border control, exclusion by default is not a humane or moral principle on which to base policy decisions.

Children are particularly vulnerable to being victims of this approach. Without some form of legal documentation, they can be subjected to abuse, trafficking and arbitrary deportation. This is a serious issue that must be addressed in a more

systematic and thorough fashion. The legal and moral arguments for this approach are in place, but a more comprehensive documentation system needs to be implemented in order to deal with this problem.

Southern Africa has a very long history of people migrating to seek economic opportunity. Policies need to understand this reality, and respond to it in a pro-active fashion that respects human rights and human dignity.

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<sup>1</sup> <http://www.bbc.com/news/world-europe-23224010>

<sup>2</sup> For a summary of the CPLO / SIMHA event and copies of the presentations, see SIMHA's website at: <http://sihma.org.za/review/sihma-cplo-seminar-human-cost-undocumented-migration-alternatives-irregular-entry-south-africa/>

<sup>3</sup> For an in depth discussion on the logic of border securitization, see Amy Garry's work on securitization. Her key insight is that increased security at borders is not in fact security for all, but only security for some. Securitising borders involves policies of exclusion and hostility. <http://www.e-ir.info/2013/08/20/the-securitisation-of-the-border-are-we-really-protected/>

<sup>4</sup> These issues are not new. The CPLO has previously issued Briefing Paper 232 on Unaccompanied Child Refugees, available at: [www.cplo.org.za/?wpdmdl=63&&ind=4](http://www.cplo.org.za/?wpdmdl=63&&ind=4)

<sup>5</sup> <http://www.iol.co.za/news/crime-courts/girl-of-cuban-parents-gains-sa-citizenship-1.1716126#.U9DjeWPl6Gw>

<sup>6</sup> It is not clear if foreign language birth certificates will have to be accompanied by an authorised translation, although this is likely.

<sup>7</sup> The Minister was speaking during Child Protection Week, at the village of Humulani near Phalaborwa in Limpopo. A large foreign population lives in Humulani. <http://www.gov.za/speeches/view.php?sid=45934>

<sup>8</sup> Ogle, Janine. Briefing Paper 232: Unaccompanied Child Refugees. <http://www.cplo.org.za/?wpdmdl=63&&ind=4>

<sup>9</sup> See the Children's Act preamble: <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>. For more information on the Children's Act, see Briefing Paper 105, available at:

[www.cplo.org.za/?wpdmdl=56&&ind=17](http://www.cplo.org.za/?wpdmdl=56&&ind=17), and the submission on the Children's Act Amendment Bill, available at: [www.cplo.org.za/?wpdmdl=56&&ind=4](http://www.cplo.org.za/?wpdmdl=56&&ind=4)

<sup>10</sup> Experts from an array of organizations working with foreign children expressed these sentiments at a Round Table held on the 30 June 2014 in Cape Town.

<sup>11</sup> This is not meant to claim that refugees always receive ideal treatment or that they do not face obstacles and difficulties. However, the existing refugee legal framework needs to be recognised for being fairly progressive and for providing some protection to refugees.

<sup>12</sup> Options such as spousal visas, etc. may be available to some economic migrants due to their personal circumstances, but there is no general provision for this category of people.

<sup>13</sup> <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-pay-taxes-too>

<sup>14</sup> Kalitanyi, V and Visser, K. *African immigrants in South Africa: Job takers or job creators?* South African Journal of Economic and Management Sciences, vol 13. No. 4 2010. [http://www.scielo.org.za/scielo.php?pid=S2222-34362010000400001&script=sci\\_arttext](http://www.scielo.org.za/scielo.php?pid=S2222-34362010000400001&script=sci_arttext)

<sup>15</sup> Dr Jinnah made this statement at the Round Table on 30<sup>th</sup> of June. See Endnote 3 for a link to the relevant presentations.