



The Socio-economic Entitlements of Refugee Children in South Africa

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ABSTRACT

This research paper examines the impact of migration on development in South Africa, focusing on the legal and socio-economic challenges migrant children face. Migration, driven by economic opportunities and conflict, affects South Africa's economy and social services. While migrants contribute to essential sectors, their presence can create job competition and wage suppression. The study highlights significant gaps in policy regarding the protection of migrant children, especially unaccompanied minors, and the barriers they face in accessing education and healthcare. Although the South African Constitution and the Refugees Act outline protections for these children's rights, implementation challenges persist. This article explores the intersection of legal provisions and the needs of migrant children, aiming to inform solutions and enhance their protection under South African law.

Keywords: Migration, children, socio-economic challenges, South African Constitution, Refugees Act

Migration and Development

Migration refers to the movement of people from one location to another, whether within a country (internal migration) or across international borders (international migration). Economic opportunities, conflict, environmental changes, and the pursuit of better living conditions often drive it. The United Nations Economic Commission for Africa (2020) highlights that while migration can contribute to achieving the Sustainable Development Goals (SDGs), mismanagement may hinder progress, particularly in education, health, and inequality. Landau (2012) discusses how a lack of proper documentation limits migrants' access to essential services and legal protections, creating a vulnerable population of children who often remain invisible

to social security systems. The Migrants' Rights Monitoring Project (2021) identifies significant gaps in South Africa's policy framework regarding the protection of migrant children, particularly concerning their access to education, healthcare, and social services.

Migration's impact on South Africa's economy is complex. Crush and Tawodzera (2017) note that while migrants fill critical gaps in sectors such as agriculture and domestic work, they may also create job competition, leading to social tensions and wage suppression, especially in informal sectors. This duality underscores the intricate role of migration

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in economic development. The case of *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* (2007) exemplifies the tension between protecting local employment opportunities and upholding the rights of migrants to work. Most adult migrants travel with minor children, and some minors migrate unaccompanied. Vearey (2014) emphasises the strain on the South African healthcare system, noting that undocumented migrants in cities like Johannesburg face substantial barriers to accessing care, adversely affecting children's well-being. The Limpopo Department of Health has reported significant pressure on health facilities in Musina due to inefficiencies at the Beitbridge border gate between South Africa and Zimbabwe. While local businesses benefit from the influx of undocumented Zimbabwean migrants, the local hospital struggles to cope with the demand for services. Despite these challenges, the health department has committed to providing medical care to all individuals, irrespective of their documentation status.

The inefficiencies at the Beitbridge border significantly affect the rights of unborn children and their mothers. Pregnant women, particularly those without valid documentation, face considerable obstacles in accessing prenatal care. The overwhelmed health facilities in Musina hinder the provision of essential prenatal services, which are critical for monitoring pregnancies. Insufficient prenatal care increases the risks of maternal and fetal complications, undermining the right to life for unborn children. Delays in receiving necessary medical interventions exacerbate pregnancy-related health issues, affecting both maternal and fetal well-being.

International human rights standards assert that access to essential maternal and child health services is a fundamental right, regardless of legal status. The systemic overload of healthcare facilities challenges these rights, especially for undocumented migrants who encounter compounded barriers to care, raising both legal and ethical concerns. Socioeconomic rights, such as access to healthcare, are intertwined with civil and political rights. For instance, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides for the right to

health services, jeopardised by a lack of prenatal care (United Nations Committee on Economic, Social and Cultural Rights, 2000). Addressing these challenges requires a strategic, coordinated approach to ensure that pregnant women and unborn children receive the necessary healthcare despite systemic pressures on local health infrastructure. This also pertains to reducing medical negligence claims against the Department of Health, which affect public hospitals nationwide.

LEGISLATIVE CONCEPT

The Children's Act

The Children's Act of South Africa defines a minor child as a person under the age of 18 years. For migrant children, the absence of identification documents complicates accurate age determination, necessitating medical age assessments that can only be conducted with court permission, often via a social worker, to protect the child's interests. Migration affects many developed and semi-developed countries, driven by educational opportunities, economic hardships, political persecution, and climate change (Willie & Mfubu, 2024). Minor children may enter South Africa accompanied by adults or unaccompanied. The ongoing detention of foreign children emphasises the urgent need to address the challenges they face upon entering the country, primarily as civil conflicts and trans-border migration have led to an increase in child migrants. This analysis aims to explore the intersection of migration and children's rights within the framework of the South African Constitution, providing insights into potential solutions to the challenges faced by unaccompanied and separated foreign children.

The South African Constitution represents a significant achievement in the country's constitutional evolution, founded on constitutionalism, the rule of law, democracy, accountability, separation of powers, cooperative governance, and devolution of power (Currie & De Waal, 2005). These principles are a benchmark against which laws and actions are evaluated; any inconsistencies may be declared invalid. They form the bedrock of the Constitution,

influencing the interpretation of various provisions, particularly those within the Bill of Rights, which must be interpreted in alignment with these fundamental principles. The Constitution is the supreme law of the Republic, imposing obligations that must be fulfilled (Constitution of the Republic of South Africa, 1996). South Africa's societal values are rooted in human dignity, equality, and the advancement of human rights and freedoms. Chapter 2 encompasses various socio-economic rights, including housing, healthcare, food, water, and social assistance (Currie & De Waal, 2005). Additionally, children are guaranteed rights as outlined in sections 28(1)(c) and 29(1)(a) of the Constitution, encompassing shelter, primary healthcare services, nutrition, social services, and basic education (Currie & De Waal, 2005). Currie and De Waal (2005) argue that reasonable measures, progressive realisation, or resource limitations do not constrain children's rights. Section 28(1)(c) lacks an internal limitation clause, suggesting a guarantee of "basic" services necessary for a dignified existence. Proudlock (2009) emphasises that realising these rights aims to achieve equality and improve the lives of all citizens, unlocking every individual's potential.

The Bill of Rights enshrines various protections and objectives, imposing negative obligations on some actors while requiring positive actions from others. The duty to respect mandates that states refrain from interfering with individuals' rights, while the duty to protect requires safeguarding these rights from third-party infringements. Promotion entails raising awareness of rights and prioritising socio-economic rights in administrative decision-making. Lastly, the duty to fulfil mandates the implementation of legislative, administrative, budgetary, judicial, and other measures necessary to enhance access to rights (Currie & De Waal, 2005). Failure to adequately fulfil these obligations can result in violations of existing rights.

The Refugees Act

The Refugee's Act was enacted to align South Africa's refugee policies with international legal standards

and provide for asylum seekers' reception. It serves as the primary legislative framework governing refugee rights in the country, complementing the Immigration Act of 2002 (Dugard, 2018). The Act draws from the norms established by the UN Refugee Convention and the 1969 OAU Refugee Convention. According to Section 3 of the Refugees Act, individuals qualify for refugee status if they have fled their country due to a well-founded fear of persecution or civil conflict, serious human rights violations, or armed conflict. Grounds for this fear include political opinion, race, gender, ethnic origin, social group membership, religious beliefs, and nationality (Refugees Act, 1998). Refugees may also obtain status due to external aggression, occupation, or disturbances in public order (Refugees Act, 1998).

As outlined in Section 4, specific individuals are excluded from refugee protection, including those who have committed crimes against peace or humanity, severe non-political crimes, or who already enjoy protection from another country (Refugees Act, 1998). Section 5 addresses the termination of refugee status, application procedures, and other regulatory aspects essential for qualifying for refugee status. Upon granting refugee status, individuals receive formal recognition and legal protections, including rights detailed in Chapter 2 of the Constitution, except those reserved for citizens (Kleinsmidt & Manicom, 2010). After five years of continuous residence, refugees can apply for permanent residency, subject to the Minister's discretion regarding their refugee status (Kleinsmidt & Manicom, 2010). Refugees, including their children, automatically gain the right to seek employment and must apply in a prescribed manner for identity and travel documents (Refugees Act, 1998). Children born to refugee parents must be registered as dependents according to the Birth and Death Registration Act (Birth and Death Registration Act, 1992). However, the Refugees Act primarily addresses administrative issues concerning dependents, needing more specific provisions regarding their care entitlements. The right to social assistance will be examined in further detail.

The Constitution

Socio-economic rights often need help with their status within human rights discourse. A central inquiry focuses on the nature of obligations associated with these rights. Each set of rights triggers specific obligations: a primary duty to respect, a secondary duty to protect, and a tertiary duty to fulfil (Fredman, 2018). This perspective reveals significant overlaps between these rights, emphasising that rights such as the right to life (a first-generation right) can encompass second-generation rights, including health, decent livelihood, and housing (Shue, 1996). The Children's Act aims to translate the rights enshrined in the Convention on the Rights of the Child into statutory entitlements, emphasising the protection of children's rights under Section 28 of the Constitution (Children's Act, 2005). All proceedings involving children must uphold their rights as outlined in the Bill of Rights and prioritise the child's best interests (Children's Act, 2005). The Act mandates that children be treated with dignity and protects them from unfair discrimination (Children's Act, 2005). Children have the right to access health information, seek legal assistance, and are recognised as adults upon reaching 18 years of age, with parental responsibilities encompassing care and maintenance (Children's Act, 2005).

The Social Assistance Amendment Act of 2008 fails to address the exclusion of foreign nationals from social assistance benefits (Government Notice No 256, 2012). The only mechanism for refugees to enforce their right to social assistance is through Government Notice No. 35205 of 2012, which amended the Social Assistance Act to include "refugees" alongside "citizens and permanent residents" (Government Notice No 256, 2012). This amendment suggests that refugees with asylum seeker permits may access social grants, but those awaiting status verification face significant barriers, often resulting in prolonged waiting periods (Willie & Mfubu, 2024). The following section will delve into relevant case law concerning socio-economic rights and the Constitutional Court's rulings on related disputes.

Key South African Constitutional Cases on Socio-economic Rights

The case of *Government of the Republic of South Africa v Grootboom* (2001) serves as a foundational legal precedent concerning socio-economic rights in South Africa. The case involved a group of individuals, including children, who were forcibly evicted from private land and subsequently sought temporary shelter after facing dire housing conditions. They petitioned the Western Cape High Court for immediate relief from the state regarding their housing needs, arguing that their constitutional rights were violated (Grootboom, para. 3).

The High Court ruled that the state had not violated Section 26, which guarantees the right to housing, but found a breach of Section 28(1)(c), which protects children's right to shelter. On appeal, the Constitutional Court held that the government's housing policies were inadequate under Sections 26(1) and (2), emphasising the state's obligation to provide adequate housing over time. Notably, the Court rejected a minimum core approach to socio-economic rights advocated by the amicus curiae, asserting that it lacked sufficient evidence to define a minimum core for the right to adequate housing (Grootboom, paras 9–11, 34–46). The Court ultimately mandated that the state adopt and implement a reasonable housing policy within its available resources, particularly for those facing imminent eviction (Grootboom, para. 40).

In *Khosa v Minister of Social Development* (2004), the Constitutional Court examined the constitutionality of social assistance legislation that excluded permanent residents from social grants based on citizenship. The applicants, permanent residents of Mozambican origin, argued that this exclusion violated both their right to social assistance (Section 27) and the right against unfair discrimination (Section 9) (Khosa, para. 49). The Court emphasised that the right to social security applies to "everyone," including permanent residents, and ruled that the exclusion was irrational, impacting the applicants' dignity and equality rights (Khosa, paras 53, 85). The judgment highlighted that differentiating based on citizenship in social grants must be rational and

justified; the lack of justification for this exclusion rendered it unconstitutional (Khosa, para. 52).

Subsequently, the *Minister of Health v Treatment Action Campaign* (2002) addressed the government's failure to provide adequate measures for preventing mother-to-child transmission of HIV. The case challenged the limited access to the antiretroviral drug Nevirapine, which was only available at specific research sites. The applicants contended that this restriction violated their right to healthcare (Section 27) and children's rights to essential health services (Section 28(1)(c)) (Treatment Action Campaign, para. 10). The Constitutional Court found that the government's policy was unreasonable and did not meet its constitutional obligations. It ruled that limiting access to Nevirapine was irrational, given the proven efficacy of the drug and the absence of a compelling reason to restrict its use (Treatment Action Campaign, para. 135). The Court ordered the state to remove these restrictions and facilitate drug access at all public health facilities (Treatment Action Campaign, para. 135).

The *Centre for Child Law v Minister of Home Affairs* (2005) is a case about the unlawful detention of unaccompanied foreign children in South Africa. The application highlighted the failure of the state to ensure that these children were promptly brought before a children's court, leading to prolonged detention under inhumane conditions (Centre for Child Law, para. 4). The Court recognised that everyone within South Africa's borders is entitled to constitutional protection and affirmed that the best interests of the child must be paramount (Centre for Child Law, para. 21).

The Court ruled that the relevant state departments had failed to comply with the provisions of the Child Care Act, thus violating the rights of the detained children. This case underscored the state's positive duty to protect vulnerable individuals, particularly children, emphasising that socio-economic rights extend beyond mere access to resources to encompass the protection and enforcement of fundamental human rights (Centre for Child Law, para. 20). These cases collectively illustrate the South African Constitutional Court's commitment

to enforcing socio-economic rights, reinforcing the notion that the state has a constitutional obligation to provide for the most vulnerable members of society. Each case underscores the significance of reasonable and just policies in realising these rights.

Socio-economic Rights and Equality in South Africa

South Africa's Constitution emphasises equality and the advancement of human rights to transform society, eliminate discrimination, and foster positive measures for equality. Section 9 commits the nation to achieving equality. The Constitutional Court, in *Minister of Finance v Van Heerden*, highlighted that substantive equality requires examining the actual social and economic conditions of individuals and groups rather than relying solely on formal equality (Van Heerden, 2004). Substantive equality is critical, as it aligns with the Constitution's foundational values and historical context of inequality. This approach ensures that all individuals, including refugee children, can access entitlements specified in sections 26, 27, 28, and 29 (1)(b) of the Constitution, emphasising that these rights apply universally unless stated otherwise (Currie & De Waal, 2021). The *Access and Minister of Social Development* case reiterated this, affirming that non-citizens are entitled to rights within the Bill of Rights (Khosa, 2004).

Despite these protections, Van Garderen and Winterstein (2008) argue that a lack of government policy on welfare and health services for refugee children forces them to rely on non-state actors for assistance. Barriers include bureaucratic challenges and social obstacles. The *Khosa* case illustrated that social grants should extend to non-citizens when their circumstances necessitate support, as denying such assistance impinges on dignity and exacerbates dependency (Khosa, 2004). In *Harksen v Lane*, the Constitutional Court delineated an inquiry into equality violations, where it identified that socio-economic rights—such as those in section 27 concerning healthcare, food, water, and social security—impose obligations on the state akin to those in section 26 (Harksen, 1998). Notably, these

rights cannot be retrogressively infringed, and reasonable legislative measures must be enacted to achieve progressive realisation. The Court's minimal treatment of socio-economic rights in cases like the *Treatment Action Campaign* suggests a reluctance to define the positive dimensions of these rights, focusing instead on the reasonableness of the state's measures (Majiedt, 2022). Furthermore, socio-economic rights litigation frequently addresses omissions rather than direct violations, complicating the application of the limitation clause, which is traditionally associated with negative rights (Currie & De Waal, 2021).

The Convention on the Rights of the Child (CRC) asserts that children's rights should not be limited by the requirement for reasonable and progressive measures, emphasising that children's vulnerability, lack of maturity, and innocence necessitate protection. The CRC acknowledges that children cannot engage in human rights discussions as adults do. However, in 2003, the CRC Committee commented on "General Measures of Implementation," which introduced the notion of progressive realisation of rights. This framework obligates states to demonstrate that they are utilising their available resources to the fullest extent to uphold children's rights, often necessitating allocating a portion of national budgets towards this end. Stewart (2009) argues that these guidelines obligate courts to address budgetary considerations, a point that has been notably circumvented in cases such as *Grootboom* and *Treatment Action Campaign*.

The *Grootboom* case utilised a structural interdict to enforce positive obligations, illustrating the Court's capacity to define reforms while allowing state agencies to choose compliance means (Grootboom, 2001). This decision underscores the importance of assessing resource availability in socioeconomic rights claims, as courts should evaluate budgetary allocations to determine if resources can meet asserted needs (Majiedt, 2022). Critics note that the overlap between children's socio-economic rights and other rights complicates judicial interpretation. Pieterse (2003) argues that limiting children's rights undermines their distinct legal status,

while Stewart (2009) contends that courts should prioritise children's socio-economic rights, given their inherent vulnerability. The child's best interests principle, articulated in section 28(2), should guide interpretations of children's rights (Skelton, 2009). The obligation to protect children's rights is especially pertinent for refugee children, who face significant barriers in accessing services like housing, healthcare, and education. These challenges are exacerbated by their economic dependency on guardians who may be struggling themselves (Stewart, 2009). Therefore, while resource constraints are a reality, the immediate and direct realisation of socio-economic rights for refugee children is crucial.

CONCLUSION

This paper underscores the imperative of addressing inequalities stipulated in Sustainable Development Goal 10, particularly concerning refugee children in South Africa. It asserts that the South African government must prioritise the socio-economic rights of refugee children equally alongside local children. This principle is rooted in the non-discrimination clause of Section 9 of the Constitution, which mandates that refugee children should not face unfair discrimination based on their foreign status. The text references the Centre for Child Law case, emphasising that refugee children are vulnerable and require protection from abuse and neglect. It posits a state duty of care for these children, especially when parents or guardians lack the means to ensure their welfare. Notably, it argues that, unlike other socio-economic rights, children's rights should not be limited, as established in the *Grootboom* case. This necessitates an immediate realisation of children's rights rather than a progressive approach applicable to others. Section 28 of the South African Constitution prioritises the child's best interests, reinforcing the state's obligation to realise these rights, particularly when guardians are economically disadvantaged. Thus, the text advocates for inclusive legislation that acknowledges refugee children's specific challenges and ensures their access to essential services.

REFERENCES

- Brand, D. 2005. Introduction. In D. Brand & S. Heynes (Eds.), *Socio-economic rights in South Africa* (pp. 9-11). Juta.
- Currie, I. and De Waal, J. 2005. *The Bill of Rights handbook*. Juta.
- Currie, I. and De Waal, J. 2021. *The Bill of Rights handbook* (6th ed.). Juta.
- Currie, I. and De Waal, J. 2021. *The Bill of Rights handbook* (7th ed.). Juta.
- Currie, I. and De Waal, J. 2021. *The Bill of Rights handbook* (8th ed.). Juta.
- Dugard, J. 2018. *International law: A South African perspective*. Juta.
- Liebenberg, S. 2010. *Socio-economic rights: Adjudication under a transformative constitution*. Juta.
- Skelton, A. 2009. Constitutional protection of children's rights. In T. Boezaart (Ed.), *Child law in South Africa* (pp. 40). Juta.
- Majiedt, J. 2022. Dreams and aspirations deferred: The Constitutional Court's approach to fulfilling socio-economic rights in the Constitution. *Law, Democracy and Power*, 4: 24.
- Proudlock, P. 2009. Children's socio-economic rights. In T. Boezaart (Ed.), *Child law in South Africa* (pp. 291). Juta.
- Scalabrini Institute for Human Mobility in Africa. 2019. *Foreign children in care: South Africa a comparative report of foreign children placed in child and youth care centres in Gauteng, Limpopo and Western Cape provinces of South Africa*.
- Scalabrini Institute for Human Mobility in Africa. 2024. *Willie and Mfubu caught in a catch-22: Child migrants in South Africa – Are short-term plans and implementation gaps putting foreign children at risk?*
- Stewart, J. 2009. Unaccompanied minor refugee children: Protection of their socio-economic rights under human rights law. *AHRLJ*, 121-144.
- Stewart, I. 2008. "Interpreting and Limiting the Basic Socio-economic Rights of Children in Cases Where They Overlap with the Socio-economic Rights of Others." *South African Journal on Human Rights*, 24(3): 478-496.
- Van Garderen, E. and Winterstein, R. 2008. Refugee children. *AHRLJ*, 219-235.
- Willie, C. and Mfubu, N. 2024. *Caught in a catch-22: Child migrants in South Africa – Are short-term plans and implementation gaps putting foreign children at risk?*
- CESCR General Comment No. 3 on the nature of States Parties' obligations (Fifth Session, 1991). U.N. Doc E/1991/23.
- Convention on the Rights of the Child of 1989 General Assembly Resolution 44/25.
- United Nations Economic Commission for Africa 'Migration and Sustainable Development in Southern Africa' (2020) UNECA 9.
- United Nations. (2015) *Sustainable development goals*.
- Birth and Death Registration Act No. 51 of 1992.
- Children's Act No. 38 of 2005.
- Constitution of the Republic of South Africa (1996).
- Government Notice No. 256 of 29 March 2012.
- Government Notice No. 35205 of 2012.
- Centre for Child Law v Minister of Home Affairs 2005 6SA50(T).
- Grootboom v. Oostenberg Municipality, 2001(1) SA 46 (CC).
- Harksen v Lane 1998 (1) SA 300 (CC).
- Khosa v Minister of Social Development 2004 (6) BCLR 569 (CC).
- Minister of Health v Treatment Action Campaign, 2002 (5) SA 721 (CC).
- Van Heerden v. Minister of Finance, 2004 (11) BCLR 1125 (CC).
- Pillay, S. (2002). Implementation of Grootboom: Implications for the enforcement of socio-economic rights. *LDD*, 256.

