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INTERNATIONAL LAW, AFRICAN COURTS, AND PROTECTION OF THE RIGHTS OF REFUGEE CHILDREN

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ABSTRACT

Africans migrate internally and externally for economic, social, political, and other reasons. People may migrate freely in search of better opportunities to acquire more skills through education and training that can enhance their ability to improve their living standards. However, they may be forced to flee to other lands because of the fear of persecution and even death in their homelands. Many Africans have been forced to flee their homes, often with their children, because of armed conflict and gross human rights violations. In the process, these Africans have become refugees and asylum seekers in foreign lands. In 2023, it was determined that the number of Africans who have been forcibly displaced in recent times has reached over forty million and that a significant percentage of them are women and children. The UNHCR recognizes refugee children as bearers of rights enshrined in various international and regional human rights instruments. Unfortunately, many refugee children often find themselves living in inhospitable and overcrowded camps, deprived of their human rights and fundamental freedoms. The children who are born to refugee and asylum-seeking parents become refugees themselves and are extremely susceptible to becoming stateless. While

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an examination of case law from three African countries shows that courts throughout the continent are making significant contributions to the emerging jurisprudence on the rights of refugee and asylum-seeking children, these cases also reveal several challenges to the protection of the rights of refugee children and those who are born to refugee parents. In addition, many refugee children are unable to gain access to welfare-enhancing and life-saving services, such as healthcare, education, clean water, and security. Those who are born to refugee parents face the real possibility of becoming stateless. African states are, therefore, encouraged to reform their constitutions and citizenship statutes to significantly enhance the ability of refugee children to access public services, as well as for the children of refugee parents to acquire citizenship by birth.

I.INTRODUCTION

People freely migrate for a variety of reasons.[1] Free migration throughout one's country of residence plays a critical role in the "effective and productive utilization of human resources, and, hence, to economic growth."[2] Cross-border migration is also important for the effective and full utilization of human capital.[3] Through both types of migration, human resources can relocate to where they can earn their opportunity costs.[4] However, migration "can involve significant economic and non-economic costs."[5]

The high cost of internal migration, especially in African countries, is often "attributed to bad or nonexistent infrastructure (e.g., roads), as well as the lack of information about job opportunities in different parts of the country."[6] However, what citizenship actually involves in terms of "rights, duties, immunities, privileges and forbearances for its bearers" can also be a major cost of migration.[7] In countries such as Nigeria, Kenya, and Cameroon, various ethnolinguistic groups "claim certain geographic areas as their ancestral homes" and make significant efforts to prevent people from other parts of the country from migrating into these so-called ancestral lands and participating fully in both economic and political institutions.[8] Evidence from Nigeria shows that this opposition to internal migration can be extremely costly, involving not just the loss of property but also that of life.[9] For example, in Jos, Nigeria, deadly riots erupted in 2001 between three ethnolinguistic groups—Afizere, Anaguta, and Berom, who consider themselves indigenes of the Jos Plateau—and the Hausa, recent immigrants from the country's northern region, who are often referred to in Jos as "strangers" or

1. *See, e.g.*, John Mukum Mbaku, *Citizenship Law and Political and Economic Participation in Africa*, 43 N.C. J. INT'L L. 110, 170–71 (2018) (examining the importance of free internal migration or exit on economic and political participation in Africa).

2. *Id.* at 170–71.

3. *Id.* at 171.

4. *Id.* at 170.

5. *Id.* at 171. These costs can include transportation to the new location, the costs of securing new accommodations, as well as the need to learn a new language and integrate into a new culture. *See id.*

6. *Id.*

7. Olufemi Taiwo, *Of Citizens and Citizenship*, *in* CONSTITUTIONALISM AND SOCIETY IN AFRICA 55, 57 (Okon Akiba ed., 2004).

8. Mbaku, *supra* note 1, at 172.

9. *See id.*

"outsiders."[10] During six days of the clashes between the two groups, "more than 1000 people were killed and countless homes, businesses, schools and religious centres destroyed."[11]

This belief by various ethnolinguistic groups that certain geographic areas within the country should be left "exclusively for the benefit of only 'indigenes' and 'native sons'" represents a major constraint to internal migration and the effective utilization of human resources and subsequently, economic growth and development.[12] Opposition to internal migration is not limited to Nigeria. For example, after its disputed 2007 presidential election, violence erupted throughout Kenya.[13] Then US Assistant Secretary of State for African Affairs, Jendanyi Frazer, noted that part of the post-election violence involved the forced exit of about 150,000 people. Most of them are Kikuyu, from Kenya's Rift Valley, which is claimed by the Kalenjins as their ancestral land.[14]

While people may migrate either to another part of the country in which they live or outside of their country of residence to search for more opportunities for self-actualization, others are "forced to flee persecution or human rights violations such as torture."[15] Every year, millions of Africans are forced to flee from armed conflicts or other forms of violence in their own countries.[16] According to the Office of the UN High Commissioner for Refugees ("UNHCR"), "[n]early 2.32 million South Sudanese have fled to neighboring countries, and 2.22 million remain internally displaced in South Sudan due to violent conflict throughout the country."[17] The UNHCR notes that this is "the

10. *See* Kingsley L. Madueke, *From Neighbours to Deadly Enemies: Excavating Landscapes of Territoriality and Ethnic Violence in Jos, Nigeria*, 36 J. CONT. AFR. STUD. 87, 87 (2017); *see also* Mbaku, *supra* note 1, at 172.

11. Madueke, *supra* note 10, at 88.

12. Mbaku, *supra* note 1, at 172.

13. *See* Xan Rice, *US Envoy Says Violence in Kenya is Ethnic Cleansing*, THE GUARDIAN (UK), (Jan. 30, 2008), https://www.theguardian.com/world/2008/jan/31/usa.kenya [https://perma.cc/B8E2-THZF].

14. *See id.*

15. *Refugees, Asylum Seekers and Migrants*, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/ [https://perma.cc/P5XS-CZLE].

16. *See, e.g.*, Office of the U.N. High Commissioner for Refugees (UNHCR), *South Sudan Refugee Crisis Explained*, July 24, 2023, https://www.unrefugees.org/news/south-sudan-refugee-crisis-explained/ [https://perma.cc/X87N-796K] (explaining how violent conflict in South Sudan has created a major humanitarian crisis).

17. *Id.*

largest refugee crisis in Africa and the third-largest refugee crisis in the world."[18]

In its recent report, the UNHCR noted that over eighty-three percent of the people who are fleeing South Sudan are women and children and that the children make up as much as sixty-five percent of South Sudan's total refugee population.[19] These people, the UNHCR explained, have been subjected to and are survivors of "violent attacks [and] sexual assault."[20] Further, "in many cases, children have been separated from their parents and are traveling alone."[21] Many of these refugees have found themselves living in camps in Sudan, Uganda, Ethiopia, Kenya, and the Democratic Republic of Congo.[22]

South Sudan is not the only African country where armed conflict and other forms of violence have created a humanitarian crisis that has led to the mass exodus of citizens either to other parts of the country or to other countries.[23] In 2003, war broke out between the government of Sudan and two rebel groups—the Sudan Liberation Movement ("SLM") and the Justice and Equality Movement ("JEM")—in the Darfur region of Sudan.[24] The two rebel groups had accused the government in Khartoum of oppressing and exploiting Darfur's non-Arab groups.[25] Khartoum's response, which was supported by the Sudanese military, police, and the Arab nomad militia group called the Janjaweed,[26] resulted in the deaths and displacement of thousands of

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. For example, one refugee camp called Kakuma in northwestern Kenya currently hosts more than 160,000 refugees. *See* UNICEF (USA), *What and where is Kakuma Refugee Camp?*, https://www.unicefusa.org/what-unicef-does/childrens-protection/child-migrants-refugees/kakuma-refugee-camp#:~:text=Kakuma%20is%20the%20Swahili%20word,of%20Sudan%E2%80%9D%20with%20humanitarian%20aid. [https://perma.cc/3VWB-FLYQ] (explaining that Kakuma Refugee Camp in northwestern Kenya holds refugees from South Sudan, Somalia, Ethiopia, Burundi, the Democratic Republic of Congo, Eritrea, Uganda, and Rwanda).

23. United Nations High Commissioner for Refugees (UNHCR), *Sudan Crisis Explained*, August 77, 2024, https://www.unrefugees.org/news/sudan-crisis-explained/ [https://perma.cc/9LBQ-F2KX] (explaining the impact of Sudan's civil war on vulnerable groups of citizens).

24. *Q&A: Sudan's Darfur conflict*, BBC NEWS, Feb. 23, 2010, http://news.bbc.co.uk/1/hi/world/africa/3496731.stm [https://perma.cc/CS6L-EEW6].

25. *See id*.

26. *See Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan, Human Rights Watch* (May 6, 2004),

Darfur's non-Arab civilians, including women and children,[27] as well as the indictment of then Sudanese president, Omar al-Bashir, for genocide, war crimes, and crimes against humanity by the International Criminal Court.[28]

On April 15, 2023, war broke out between the Sudanese Armed Forces ("SAF") and the paramilitary Rapid Support Forces ("RSF").[29] The war between the SAF and the RSF, which is still ongoing, has resulted in the forced displacement of more than 8.6 million people, who include internally displaced people ("IDP"), asylum seekers and refugees.[30] Of course, before this crisis erupted, Sudan had already experienced several other armed conflicts, including the Darfur war and the various civil wars that led to the independence of the southern provinces, which became South Sudan on July 9, 2011.[31]

Individuals and groups can be attacked and forced to flee their homes because of their "ethnicity, religion, sexuality or political opinions."[32] The UNHCR notes that there are many reasons why individuals might find it extremely difficult for themselves, their families, and their children to remain in their homes or the country of their birth.[33] According to the UNHCR, "children, [women,] and men flee from violence, war, hunger, extreme poverty, because of their sexual or gender orientation, or from the consequences of climate change or other natural disasters."[34] People can also flee their homes

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https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan [https://perma.cc/WLG7-N6ZF] (examining the joint activities of the Sudanese government and the Arab Janjaweed militias in Western Sudan); *see also* Tsega Etefa, *Explainer: tracing the history of Sudan's Janjaweed militia*, THE CONVERSATION, June 18, 2019, https://theconversation.com/explainer-tracing-the-history-of-sudans-janjaweed-militia-118926 [https://perma.cc/3GST-2N78] (providing an overview of the Janjaweed).

27. It is estimated that more than 400,000 people have been killed in Darfur since the conflict began in 2003 and that women and girls have been systematically raped, and millions of people forced to flee their homes to other parts of Sudan and as refugees to neighboring Chad. *See* Holocaust Museum of Houston, *Genocide in Darfur*, https://hmh.org/library/research/genocide-in-darfur-guide/ [https://perma.cc/G7P8-VRBL].

28. *See Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the Prosecution's Request for a Finding of Non-Compliance, ¶ 2 (Dec. 11, 2017).

29. *See Sudan Crisis Explained*, *supra* note 23.

30. *Id.*

31. *See* U.S. Institute of Peace, *Independence of South Sudan*, https://www.usip.org/programs/independence-south-sudan [https://perma.cc/A6QS-Q76A].

32. *Refugees, Asylum Seekers and Migrants*, *supra* note 15.

33. *Id.*

34. *Id.*

because they face a "combination of these difficult circumstances."[35] Not everyone who leaves home for another part of the country or for another country is doing so unwillingly or because of dangerous circumstances.[36] Individuals may voluntarily migrate in search of opportunities to attend school and acquire more skills so that they can improve their chances of obtaining more economically rewarding employment or starting their own businesses, or they may be seeking to unite with relatives living in urban areas or abroad.[37]

Migration, regardless of its impetus, can produce "refugees," "asylum seekers," and "migrants," terms that are generally used to refer to people who are "on the move, who have left their countries and have crossed borders."[38] Amnesty International ("AI") often notes that while the terms "migrant" and "refugee" are used interchangeably, it is important to distinguish between them because they have different meanings under the law.[39] AI defines a refugee as "a person who has fled their own country because they are at risk of serious human rights violations and persecution there."[40] Many refugees flee their homelands because they believe that "[t]he risks to their safety and life [are] so great that they [feel they have] no choice but to leave and seek safety outside their country because their own government cannot or will not protect them from those dangers."[41] Refugees have rights that are recognized by various international and regional human rights instruments and the laws of many countries, including those in Africa.[42]

An asylum seeker, according to the UNHCR, is "a person who has left their country and is seeking protection from persecution and serious human rights violations in another country, but who hasn't yet been legally recognized as a refugee and is waiting to receive a decision on their asylum claim."[43] Since seeking asylum is a human right, the UNHCR concludes that everyone "should be allowed to enter another

35. *Id.*
36. *Id.*
37. *See id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *See, e.g.*, Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugee Convention].
43. *See Refugees, Asylum Seekers and Migrants*, *supra* note 15.

country to seek asylum."[44] The UNHCR states that "[a]n asylum-seeker is someone who is seeking international protection" and whose "request for refugee status, or complementary protection status, has yet to be processed, or they may not yet have requested asylum but they intend to do so."[45] The UNHCR notes further that "[w]ar, persecution and human rights violations force people to flee their homes" and that "[t]o escape violence or threats to their lives or freedoms, many must leave with just a few moments' notice, carrying little more than the clothes on their backs."[46]

If and when an individual crosses the border and enters into another country to seek safety, they often must apply to the appropriate governmental authorities to be legally recognized or categorized as a refugee. While they are waiting to have their status in the new country normalized by the relevant authorities, they are usually referred to as "asylum-seekers" and must be protected as mandated by international law.[47] The United Nations considers the rights of refugees so important that it has created an agency dedicated to protecting refugees and asylum-seekers and ensuring that their rights are protected.[48] The UN Refugee Agency works to protect the rights of asylum-seekers, ensures that they "can reach safety and have their claim for asylum heard fairly and efficiently," and "advocate[s] for [asylum-seekers'] rights, including education and health care, while they await the outcome of their claim."[49]

The UN Refugee Agency notes that at the end of 2023, there were approximately 6.9 million people worldwide that were awaiting a decision on their asylum claims.[50] The right to seek asylum, states the UN Refugee Agency, "is a human right and every person in the world

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44. *Id.*

45. *See* UNHCR, *Who is an 'asylum-seeker'?*, https://www.unhcr.org/us/asylum-seekers#:~:text=Seeking%20asylum%20is%20a%20human,freedoms%20would%20be%20in%20danger [https://perma.cc/U5JJ-RJBF].

46. *Id.*

47. For example, according to Article 14 of the Universal Declaration of Human Rights (UDHR), "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution" and "[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes of the United Nations." G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14, U.N. Doc A/810 (Dec. 10, 1948).

48. *See* UNHCR, *Who is an 'asylum-seeker'?*, *supra* note 45.

49. *Id.*

50. *Id.*

has the right to apply for asylum if they are fleeing conflict or persecution."[51] In addition, "[t]hey must not be expelled or returned to situations where their lives or freedoms would be in danger."[52] This principle, which is referred to as "non-refoulement," is enshrined in the 1951 Convention Relating to the Status of Refugees. Today, it is considered part of international human rights law and customary international law and hence, must be guaranteed by all UN Member States.[53]

A migrant, on the other hand, explains Amnesty International, is an individual who is living outside his or her home country and who is not an asylum-seeker or refugee.[54] AI notes that even though some people may not fit the legal definition of a refugee or asylum-seeker, they may still be in serious danger if they were to return to their homelands.[55] Migrants, like all other human beings, are still entitled to the protection of their human rights, regardless of the countries to which they have migrated. All governments must ensure that all migrants residing within their jurisdiction are protected "from racist and xenophobic violence, exploitation and forced labour" and that migrants must "never be detained or forced to return to their countries without a legitimate reason."[56]

International law has a very important role to play in securing the rights of refugees and ensuring that they are fully and effectively protected. This is especially critical in the case of refugee and asylum-seeking children, whose vulnerability comes not just because they are refugees or asylum-seekers, but also because they are children.[57] In the section that follows, this article will examine the rights of refugee children under international law.

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51. *Id.*
52. *Id.*
53. *Id.*
54. *Refugees, Asylum Seekers and Migrants*, s*upra* note 15.
55. *See id.*
56. *See id.*
57. *See* Ziba Vaghri et al., *Refugee and Asylum-Seeking Children: Interrupted Child Development and Unfulfilled Child Rights*, 6 CHILDREN (BASEL) 120 (2019) (noting that "[r]efugee and asylum-seeking children should be treated first and foremost as children"), https://pmc.ncbi.nlm.nih.gov/articles/PMC6915556/ [https://perma.cc/JV5C-ZVJT]; *see also* Jeanette A..J. Lawrence et al., *The Rights of Refugee Children and the UN Convention on the Rights of the Child*, 8 LAWS 20, 20 (2019) (examining the rights of refugee children under the U.N. Convention on the Rights of the Child).

II.THE RIGHTS OF REFUGEE CHILDREN UNDER INTERNATIONAL LAW

The UN Convention on the Rights of the Child ("UNCRC") recognizes refugee children as bearers of rights enshrined in the Convention.[58] However, human rights scholars have noted that the rights of refugee children are often "not uniformly honored in the policies and practices of contemporary states."[59] It is noted that "[h]ow well the [UNCRC's] safeguards of refugee children's rights are implemented depends partly on what it means to be 'a refugee child', and partly on how the rights-bearing status of refugee children is recognized, respected, and implemented in state immigration and legal systems."[60] The UNCRC adopts a rights-based approach that grants "special recognition to refugee children as children with special needs."[61] However, "contemporary states favor national well-being and border security over the well-being of refugee children."[62]

To fully understand and appreciate the rights granted by international law to refugee children, it is necessary to define the expression "refugee children." The UNCRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[63] The UNHCR defines a refugee as "someone who has been forced to flee his or her country because of persecution, war or violence" and that a refugee has "a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group."[64] It follows, then, that refugee children are individuals below the age of eighteen years who have been forced to flee their home country because of "persecution, war or violence."[65] The subject matter

58. *See* U.N. Convention on the Rights of the Child, art. 22, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

59. Lawrence et al., *supra* note 57, at 20.

60. *Id.*

61. *Id.*

62. *Id.*

63. UNCRC, *supra* note 58, art. 1.

64. *What is a Refugee?*, UNHCR (July 26, 2024), https://www.unrefugees.org/refugee-facts/what-is-a-refugee/ [https://perma.cc/8RG7-PQFV].

65. *Id.* The U.N. Convention on the Rights of the Child defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." UNCRC, *supra* note 58, art. 1.

of this article is refugee and asylum-seeking children, as well as children born to parents who are refugees and/or asylum-seekers.

In its Preamble, the UNCRC recognizes that the child, "by reason of his physical and mental immaturity, needs special safeguards and care, including legal protection, before as well as after birth."[66] A refugee is an individual who is on the move because of threats to his or her person in their own country.[67] The combination of "child" and "refugee" creates a category of person that requires special protection by both international and domestic law.[68] The 1951 Refugee Convention expressly mentions children.[69] The UNCRC mentions not only children, but also refers to refugee children.[70]

International legal scholars note that Article 22 of the UNCRC "came about in the drafting of the [UNCRC] at a time when international law started to distinguish between refugee children and adult refugees" and that "[c]onsensus on the text of Article 22 was found relatively rapidly following Denmark's initial proposal in 1981."[71] The provision, which was restructured "into its final form in the 1989 Working Group," captured the broad international consensus

66. UNCRC, *supra* note 58, pmbl.

67. 1951 Refugee Convention, *supra* note 42, art. 31.

68. *See* Lawrence et al., *supra* note 57, at 23.

69. *See* 1951 Refugee Convention, *supra* note 42.

70. Article 22 of the UNCRC states as follows:

> 1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. 2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

UNCRC, *supra* note 58, art. 22.

71. Christian Whalen, *Article 22: The Right to Protection for Refugee and Asylum-Seeking Children*, *in* MONITORING STATE COMPLIANCE WITH THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF ATTRIBUTES 357, 358 (Ziba Vaghri et al. eds., 2022).

regarding the refugee children's rights under the UNCRC and other international human rights treaties and humanitarian law.[72]

It is clear then that Article 22 "guarantees the substantive application of all Convention rights to the particular situation of asylum seeking and refugee children, and also guarantees them protection and assistance in advancing their immigration and residency status claims and in overcoming the hurdles posed by international migration channels, including guarantees of due process."[73] The UNCRC imposes an obligation on States Parties to provide special protections to unaccompanied migrant children, as well as those in armed conflict, and enhance their ability to reunify with their parents.[74] The treatment of unaccompanied and separated children outside their country of origin is examined thoroughly by the UN Committee on the Rights of the Child's ("CRC") General Comment No. 6.[75] Of special interest is the adoption of the best interests of the child principle as the standard for dealing with issues concerning children, including unaccompanied and separated children.[76]

Two other general comments of the CRC are relevant here. The first is the Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CRW") and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration.[77] This joint general comment focuses on the human rights of children in the context of international migration and emphasizes the need to ensure that children in these challenging circumstances are still able to realize all their human rights. States Parties are to ensure that "children in the context of international migration are treated first and foremost as children"

72. *Id.* at 358.

73. *Id.*

74. UNCRC, *supra* note 58, arts. 9, 10, 38 & 39.

75. *See* Comm. On the Rights of the Child (CRC), *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

76. *See id*. ¶¶ 19–22.

77. CRC and Committee on Migrant Workers (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, U.N. Doc. CMW/C/GC/3–CRC/C/GC/22 (Nov. 16, 2017).

and must "comply with their obligations set out therein to respect, protect and fulfil the rights of children in the context of international migration, regardless of their or their parents' or legal guardians' migration status."[78] In addition, the Joint General Comment notes that the obligations imposed on States Parties by the UNCRC and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families "cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State, including in international waters or other transit zones where States put in place migration control mechanisms."[79]

The second is Joint General Comment No. 4 of the CMW and No. 23 of the CRC.[80] In this joint general comment, the two Committees emphasize the importance of making certain that the human rights of children "in the context of international migration in countries of origin, transit, destination and return" are fully recognized and protected.[81] Children in transit either to a new country or on return to their homeland have "a fundamental right to liberty and freedom from immigration detention" and that the "detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principles of the best interests of the child."[82] In addition, the Committees emphasize that children should not "be criminalized or subject to punitive measures, such as detention, because of their parents' migration status."[83]

Instead, the Committees state that States Parties should seek ways, including through "legislation, policy and practices" that "fulfill the best interests of the child, along with their rights to liberty and family life."[84] National child protection and welfare institutions and actors, not

78. *Id.* ¶ 11.

79. *Id.* ¶ 12.

80. CRC and CMW, *Joint general comment No.4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights children in the context of international migration in countries of origin, transit, destination and return*, U.N. Doc. CMW/C/GC/4–CRC/C/GC/23 (Nov. 16, 2017).

81. *Id.*

82. *Id.* ¶ 5; *see also* UNCRC, *supra* note 58, arts. 3 & 22.

83. CRC and CMW, *supra* note 80, *No. 7*.

84. *Id.* ¶11.

immigration authorities, should be granted primary responsibility for the care of children in the context of international migration.[85] Therefore, note the CRC and the CMW, when immigration authorities initially come into contact with a migrant child, they should immediately inform child protection and welfare officials and the latter should then screen the child for "protection, shelter and other needs."[86] In doing so, they should take into account "the vulnerabilities and needs of the child, including those based on their gender, disability, age, mental health, pregnancy or other conditions."[87]

The joint general comment also emphasizes due process guarantees and access to justice as prerequisites for the protection and promotion of all human rights. Therefore, it is "of paramount importance that every child in the context of international migration is empowered to claim his/her rights."[88] More specifically, the Committees are of the view that "States should ensure that their legislation, policies, measures and practices guarantee child-sensitive due process in all migration and asylum administrative and judicial proceedings affecting the rights of children and/or those of their parents."[89]

The child's right to a name, identity, and a nationality must be protected.[90] Birth registration not only enhances the realization of a child's rights but can also impact the ability of authorities to prevent child marriage, trafficking, forced recruitment, and child labor.[91] In fact, birth registrations may provide important information that can be used to prosecute and convict individuals who have violated children's rights.[92] Hence, States Parties must ensure that all children within their jurisdictions "are immediately registered at birth and issued birth

85. *See id.* ¶ 13.

86. *Id.*

87. *Id.*

88. *Id.* ¶ 14.

89. *Id.* ¶ 15; *see also* UNCRC, *supra* note 58, arts. 16, 17 & 18; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, arts. 12 & 40, Dec. 18, 1990, 2220 U.N.T.C. 3, U.N. Doc. A/RES/45/158 [hereinafter Migrant Workers Convention].

90. *See* UNCRC, *supra* note 58, arts. 7 & 8; *see also* Migrant Workers Convention, *supra* note 89, art. 29.

91. *See* CRC and CMW, *supra* note 80 ¶ 20.

92. *See id.*

certificates, irrespective of their migration status or that of their parents."[93]

The right to a nationality and safeguards against statelessness are very important to a child's wellbeing. Article 7 of the UNCRC emphasizes the need for States Parties to prevent statelessness by implementing "the rights of a child to be registered, to a name, to acquire a nationality and to know and be cared for by his or her parents."[94] More specifically, States Parties should "strengthen measures to grant nationality to children born in their territory in situations where they would otherwise be stateless."[95] For example, where "the law of a mother's country of nationality does not recognize a woman's right to confer nationality on her children and/or spouse, children may face the risk of statelessness."[96] States are instructed to take "immediate steps to reform nationality laws that discriminate against women by granting equal rights to men and women to confer nationality on their children and spouses and regarding the acquisition, change or retention of their nationality."[97]

States Parties are also obligated to take measures to ensure that "children in the context of international migration and families should not be subjected to arbitrary or unlawful interference with their privacy and family life."[98] For example, deporting a mother from a State Party's territory may constitute an arbitrary or unlawful interference with family life.[99] Thus, any measures to remove a mother from the territory of a State Party must be based on a holistic evaluation that takes into consideration the best interests of the mother's children. Additionally, Article 10 of the UNCRC imposes an obligation on States Parties to ensure that "applications for family reunification are dealt with in a positive, humane and expeditious manner, including facilitating the reunification of children with their parents."[100]

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93. *See id.*

94. *Id.* ¶ 23. This right is also enshrined for all children of migrant workers in Article 29 of the Migrant Workers Convention. *See* Migrant Workers Convention, *supra* note 89, art. 29.

95. CRC and CMW, *supra* note 80 ¶¶ 26, 80.

96. *Id.*

97. *Id.*

98. *Id.* ¶ 28.

99. *See id.*

100. *Id.* ¶ 32.

Children in the context of international migration are usually extremely vulnerable to various forms of violence and abuse,[101] including "neglect, abuse, kidnapping, abduction and extortion, trafficking, sexual exploitation, economic exploitation, child labour, begging or involvement in criminal and illegal activities," regardless of whether they are in "countries of origin, transit, destination and return."[102]

As made clear by various provisions of the Migrant Workers Convention, migrant children must be protected from economic exploitation, which includes engagement in underage and hazardous work.[103] These children must be provided with a standard of living that is "adequate for their physical, mental, spiritual and moral development."[104] Article 27(3) of the UNCRC imposes an obligation on States Parties to take appropriate measures to "assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."[105]

Finally, States Parties are obligated to take appropriate measures to ensure that children in the context of international migration realize their right to health, as enshrined in the UNCRC and the Migrant Workers Convention.[106] In addition, States Parties must ensure that migrating children, whether they are undocumented, stateless, unaccompanied, or otherwise, are able to realize their right to education and professional training on the basis of equality with nationals of the country where those children are living.[107]

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101. *Migrant and displaced children*, UNICEF, https://www.unicef.org/migrant-refugee-internally-displaced-children [https://perma.cc/NH44-VXGH] (noting that migrant children or children on the move "face numerous challenges in transit" and that they are "exposed to aggravated smuggling, subjected to human trafficking, and put at risk of violence and exploitation").

102. CRC and CMW, *supra* note 80, ¶ 32.

103. *See id.* ¶ 45.

104. *Id.* ¶ 49.

105 *Id.* ¶ 49; *see also* UNCRC, *supra* note 58, art. 27(3).

106. CRC and CMW, *supra* note 80, ¶¶ 54; *see also* UNCRC, *supra* note 58, arts. 28 & 45; Migrant Workers Convention, *supra* note 89, arts. 23, 24 & 39.

107. CRC and CMW, *supra* note 80, ¶ 59; *see* Whalen, *supra* note 71, at 359–60 (noting that States Parties must "take positive measures to ensure de facto equality of migrant children in host societies as well as in the case of children returned to their country of origin"); *see also* Fons Coomans, *Education for migrants: an inalienable human right*, 2018 UNESCO COURIER 47 (Oct. 11, 2018), https://courier.unesco.org/en/articles/education-migrants-inalienable-human-right [https://perma.cc/S6HJ-L9VQ] (last updated Aug. 14, 2024) (noting that

Although the application of Article 22 of the UNCRC is limited to "international migration by asylum-seeking and refugee children," the CRC has urged and encouraged States Parties "to provide assistance and protection to internally displaced children . . . consistent with the particular needs of these [internally] displaced children."[108] All refugee and asylum-seeking children and their parents are already in a precarious situation, having been forced into migration by "patterns of discrimination, for example on the basis of ethnic or religious affiliation, language, or sexual orientation."[109] That status places these children within the purview of Article 2's non-discrimination principle.[110] In its General Comment No. 6, the CRC notes that "[t]he principle of non-discrimination, in all its facets, applies in respect of all dealings with separated and unaccompanied children" and that "it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant."[111]

While all children are particularly at risk of being subjected to various forms of exploitation in migration contexts, those who have historically been marginalized (e.g., children with disabilities, children of minority ethnic and religious groups, indigenous children, LBGTQ youth, and current and former child soldiers) are at a much higher risk of being exploited than other children.[112] States Parties, then, must "take positive measures to ensure de facto equality of migrant children in host societies as well as in the case of children returned to their country of origin."[113]

The most important standard for evaluating and deciding on child refugee claims under Article 22 of the UN Convention on the Rights of the Child ("UNCRC") is the "best interests of the child" principle that is enshrined in Article 3(1) of the UNCRC.[114] International human rights scholars argue that this important principle "must be respected

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international human rights law guarantees an education for all, without discrimination and that refugees should be granted the same rights with respect to elementary education as nationals).

108. Whalen, *supra* note 71, at 359.

109. *Id*.

110. *See id*.

111. CRC, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, 18, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005).

112. Whalen, *supra* note 71, at 359.

113. *Id.* at 359–60.

114. *Id.* at 360; *see also* UNCRC, *supra* note 58, arts. 3 & 22.

during all stages of the displacement cycle, and decisions at any of these stages must be appropriately documented through a formal and rigorous best interests determination."[115] This is made clear by the CRC in its General Comment No. 6, which states that "[a] determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs."[116] In order to make such an assessment, it is necessary that the child be granted access to the territory of the State where this will be undertaken.[117]

The best interests of the child standard as it relates to the human rights of children in the context of international migration is also addressed by the CMW and the CRC in their 2017 Joint General Comment in which they explain that Article 3(1) of the UNCRC imposes an obligation on "both the public and private spheres, courts of law, administrative authorities and legislative bodies to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children."[118] In its General Comment No. 14, the CRC explains that the best interests of the child is a "threefold concept": it is a "substantive right," a "fundamental, interpretative legal principle," and a "rule of procedure." It states that the purpose of undertaking an assessment to determine the best interests of the child "is to ensure the full and effective enjoyment of the rights recognized in the [UNCRC] and its Optional Protocols, and the holistic development of the child."[119] The CMW and the CRC instruct States Parties to the UNCRC to ensure that "the best interests of the child are taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and

115. Whalen, *supra* note 71, at 360.

116. CRC, *supra* note 111, ¶ 20.

117. *See id.*

118. CMW & CRC, *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, U.N. Doc. CMW/C/GC/3–CRC/C/GC/22 (Nov. 16, 2017). The CMW and the CRC note that this is made clear in the CRC's General Comment No. 14. *See id*.

119. CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, ¶¶ 6 & 82, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

decision-making on individual cases."[120] Finally, the Committees emphasize that an effective assessment of the child's best interests must include an examination of not just "the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term" and that "decisions should assess continuity and stability of the child's present and future situation."[121]

Notably, the protection of the rights of children is at its weakest in "immigration contexts."[122] The failure of many States to recognize and protect the rights of children, especially their right to "maximum survival and development," represents "the major root cause of migration (legal and illegal) of children, adolescents, and their parents."[123] Thus, in order to properly address the root causes of both legal and illegal migration, it is necessary to safeguard the rights enshrined in Article 6 of the UNCRC.[124]

Migrating children often find themselves in extremely dangerous and threatening situations as they struggle to reach their destinations.[125] States Parties are expected to take special measures to protect children and ensure their safety and well-being. Rather than focus on "repressive detention and deportation practices," the immigration policies of all States Parties must focus on "facilitating and regulating [the] mobility rights of children, including those of refugee children in order to significantly advance the protection and safeguarding of the rights enshrined in Article 6.[126]

Thus, all States Parties must ensure that children in the context of international migration, regardless of their status or that of their parents or guardians, are fully protected from harm, either by state- or non-state actors and are granted necessary assistance to realize their human rights and provided with a quality of life that is adequate "for their physical,

120. CNW & CRC, *supra* note 118, ¶ 29.

121. CRC, *supra* note 119, ¶ 84.

122. Whalen, *supra* note 71, at 360.

123. *Id*.

124. UNCRC, *supra* note 58, art. 6 (stating that "States Parties recognize that every child has the inherent right to life" and that "States Parties shall ensure to the maximum extent possible the survival and development of the child").

125. Whalen, *supra* note 72, at 360.

126. *Id*; *see also* CMW & CRC, *supra* note 118, ¶¶ 40–44.

mental, spiritual and moral development."[127] It is important that children's right to "optimum development" informs their rights in Article 22 of the UNCRC, particularly in relation to "immigration policy affecting the deportation or detention of a child's parent."[128] In their joint general comment, the CMW and the CRC express their concern about "policies or practices that deny or restrict basic rights, including labour rights and other social rights, to adult migrants owing to their nationality, statelessness, ethnic origin or migration status may directly or indirectly affect children's right to life, survival and development."[129]

These types of policies may also interfere with and compromise the design and implementation of migration policies that enhance national development, while simultaneously reflecting provisions of international and regional human rights instruments. Thus, policies designed to impact or regulate "parents' access to social rights, regardless of their migration status," must take into consideration "children's development, and their best interests."[130] In a similar manner, "children's right to development, and their best interests, should be taken into consideration when States address, in general or individually, the situation of migrants residing irregularly, including through the implementation of regularization mechanisms as a means to promote integration and prevent exploitation and marginalization of migrant children and their families."[131]

The Committees also instruct States Parties to take seriously the "non-refoulement obligations" imposed on them by "international human rights, humanitarian, refugee and customary international law."[132] The Committees note that the principle of non-refoulement "has been interpreted by international human rights bodies, regional human rights courts and national courts to be an implicit guarantee flowing from the obligations to respect, protect and fulfill human rights."[133] This principle prohibits States Parties from "removing individuals, regardless of migration, nationality, asylum or other status,

127. CMW & CRC, *supra* note 118, ¶ 43.
128. Whalen, *supra* note 71, at 360.
129. CMW & CRC, *supra* note 118, ¶ 44.
130. *Id*.
131. *Id.*
132. *Id*. ¶45.
133. *Id.*

from their jurisdiction when they would be at risk of irreparable harm upon return, including persecution, torture, gross violations of human rights or other irreparable harm."[134] Finally, the Committees recall that Article 22(1) of the Migrant Workers Convention and other international and regional human rights instruments "forbid collective expulsions" and instead "require that each case that could eventually become an expulsion be examined and decided individually, ensuring the effective fulfillment of all the due process guarantees and the right to access to justice."[135] States Parties, then, should adopt and implement policies to "prevent collective expulsions of migrant children and families."[136]

In terms of their ability to participate fully and effectively in decisions affecting their lives, children in the context of migration are extremely vulnerable. In fact, they are regularly denied *locus standi* in immigration cases and instead, are treated as "mere dependents of adult asylum seekers."[137] The CMW and the CRC in their joint general comment also deal with the issue of participation.[138] They recall that Article 12 of the UNCRC "underscores the importance of children's participation, providing for children to express their views freely and to have those views taken into account with due weight, according to age, maturity and the evolving capacity of the child."[139] In its General Comment No. 12, the CRC underscored the importance of the child's participation in decisions affecting his or her life and welfare, and notes that this right "constitutes one of the fundamental values of the [UNCRC]."[140]

The CRC "underlines that adequate measures to guarantee the right to be heard should be implemented in the context of international migration, as children who come to a country could be in a particularly vulnerable and disadvantaged situation."[141] Children who enter a country along with their parents who are searching for work or are refugees are especially in a situation of vulnerability. Therefore, notes

134. *Id.*
135. *Id.* ¶47.
136. *Id.*
137. Whalen, *supra* note 71, at 360.
138. CMW & CRC, *supra* note 118, ¶ 34.
139. *Id.*
140. CRC, *General Comment No. 12 (2009): The right of the child to be heard*, 2, U.N. Doc. CRC/C/GC/12 (July 20, 2009).
141. CMW & CRC, *supra* note 118, ¶ 35.

the CRC, "it is urgent [for States Parties] to fully implement their right to express their views on all aspects of the immigration and asylum proceedings."[142] In situations of *immigration*, the child must be heard "on his or her educational expectations and health conditions in order to integrate him or her into school and health services" and where the child or her parents are seeking *asylum*, "the child must additionally have the opportunity to present her or his reasons leading to the asylum claim."[143]

Children in these situations must be provided "with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings."[144] Each child should be provided with a "guardian or adviser, free of charge" and in the case of children seeking asylum, it may be necessary to provide them with "effective family tracing and relevant information about the situation in their country of origin to determine their best interests."[145] Stateless children are especially vulnerable and therefore, special attention should be given to them so as to ensure that they are "included in decision-making processes within the territories where they reside."[146]

International legal scholars have identified the core attributes of each human right enshrined in the UNCRC.[147] They have identified four attributes with respect to the rights enshrined in the UNCRC's Article 22.[148] Article 22's first attribute, which involves appropriate protection and humanitarian assistance "guarantees to asylum seeking and refugee children the same substantive rights as are guaranteed to all children."[149] The rights to basic education, health, and welfare of refugee and asylum-seeking children must be protected "to the same extent, and as much as possible, as children who are nationals of the

142. *General Comment No. 12*, *supra* note 140, ¶ 123.

143. *Id.* (emphasis added).

144. *Id.* ¶ 124.

145. *Id.*

146. *Id.*

147. Gerison Lansdown et al., *Introduction*, *in* MONITORING STATE COMPLIANCE WITH THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF ATTRIBUTES 1, 4 (Z. Vaghri, J. Zermatten, G. Lansdown & R. Ruggiero eds., 2022).

148. UNCRC, *supra* note 58, art. 22.

149. Whalen, *supra* note 71, at 362.

host country."[150] These vulnerable children must not only be placed in regular classrooms, but they must be provided with the therapy that they need to recover from their "traumatic journeys and successful integration into a new host culture."[151] States must "avoid discriminatory consequences as between categories of entrants in family reunification cases."[152] In addition, authorities must avoid the detention of children (and their parents) for immigration purposes; instead, they should help "reinforce the child's right to preserve his or her family life."[153]

The second attribute ensures that the rights of refugee children under international and regional human rights instruments that are binding on relevant States Parties are preserved.[154] Special care must be given to the other "public and private international law provisions that may bear on the child's status" in interpreting and determining the validity of claims arising out of the rights enshrined in Article 22.[155] The UNHCR has produced and published guidelines that can be used by States to adjudicate child asylum claims.[156]

In the case of unaccompanied and separated children, Whalen has noted that the Inter-agency Guiding Principles on Unaccompanied and Separated Children clarify "priority focus areas for intervening effectively with these vulnerable youth," with the warning that "they should not be interpreted as minimum standards or used to read down any of the rights of unaccompanied minors under the Convention."[157] In addition, the Office of the UNHCR has developed and adopted Principles and Guidelines on the human rights protection of migrants in vulnerable situations.[158] These principles and guidelines "focus on

150. *Id.* at 363.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. Office of the U.N. High Commissioner for Refugees, *Guidelines on International Protection: Child Asylum under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009).
157. Whalen, *supra* note 71, at 364; *see also* International Committee of the Red Cross, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, UNHCR, https://www.unhcr.org/us/media/inter-agency-guiding-principles-unaccompanied-and-separated-children [https://perma.cc/32ZQ-774G].
158. Office of the U.N. High Commissioner for Human Rights & Global Migration Group, *Principles and Guidelines: supported by practical guidance, on the human rights protection of*

the human rights situation of those migrants who may not qualify as refugees under the Convention relating to the Status of Refugees, yet who are in vulnerable situations and thus in need of the protection of the international human rights framework."[159] Under these guidelines and principles, primary consideration should be given at all times to the best interests of the child.[160]

The third attribute deals with the duty to protect and assist at national and international levels. The obligation imposed on States Parties by the various international and regional human rights instruments to protect and assist "contains a clear duty to provide children with appropriate due process rights throughout the several stages of their asylum and refugee claims procedures."[161] These should include (i) the right of the child to participate in decisions or measures that affect his or her "residence or immigration status"—that is, the child's right to be heard;[162] and (ii) the child's right to be assigned an attorney or legal representation as well as a guardian.[163] In addition, all "[i]nterviews and hearings" to determine the rights of refugee and asylum-seeking children should "be conducted in a child-friendly manner, and should include similarly child-friendly appeal mechanisms."[164] All children who are seeking asylum should be provided, free of charge, legal aid by lawyers who are trained and skilled in "child rights" and are fully acquainted with and are "accustomed to working in culturally sensitive multidisciplinary teams involving psychologists, social workers and trauma-informed care providers."[165]

The fourth attribute deals with the best interests of the child standard and the principle of family unity.[166] It is noted that the best

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migrants in vulnerable situations, MIGRANT PROTECTION PROJECT (2017), https://migrantprotection.iom.int/en/resources/guideline/principles-and-guidelines-supported-practical-guidance-human-rights-protection [https://perma.cc/B9AK-HFGD].

159. *Id.*; *see also* Human Rights Council, *Promotion and protection of the human rights of migrants in the context of large movements: Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/33/67 (Oct. 13, 2016) (being a report of the U.N. Commissioner for Human Rights on rights of migrants in the context of large movements).

160. MIGRANT PROTECTION PROJECT, *supra* note 158.

161. Whalen, *supra* note 71, at 364.

162. *Id.*; *see also* UNCRC, *supra* note 58, art. 12.

163. Whalen, *supra* note 71, at 364.

164. *Id.*

165. *Id.*

166. *Id.* at 365.

interests of the child standard requires the adoption of "a holistic child rights-based approach" to the determination of the rights of refugee and asylum-seeking children.[167] Decisions on family reunification must comply with international human rights law, particularly the principle of non-refoulement, which implies that a refugee child or one seeking asylum must not and cannot be deported to a country "where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed."[168] In its General Comment No. 6, the CRC reminds States Parties of their *non-refoulement* obligations and indicates that these obligations apply "irrespective of whether serious violations of those rights guaranteed under the [UNCRC] originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction."[169]

Although many countries in Africa have taken steps to provide various protections for refugee and asylum-seeking children, many of them are still at risk of having their rights violated or discriminated against with respect to, for example, access to education and healthcare. In the section that follows, this article will examine the protection of the rights of refugee and asylum-seeking children in Africa.

III.THE PROTECTION OF THE RIGHTS OF REFUGEE AND ASYLUM-SEEKING CHILDREN IN AFRICA

A. Introduction

It has been argued that efforts to protect the rights of refugee children in Africa should "be viewed from the perspective of the 'best interests' of the child" principle, which is enshrined in various international and regional human rights instruments.[170] This principle,

167. *Id.*

168. *Id.*

169. CRC, *supra* note 111, at 27.

170. Cristiano d'Orsi, *Legal protection of refugee children in Africa: positive aspects and shortcomings*, 3 AFR. HUM. RTS. YEARBOOK 298, 300 (2019). Some of these human rights instruments include the UNCRC (art. 3(1)) and the African Child Charter (art. 4(1)). Article 4(1) of the African Child Charter states that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." *See* African

as enshrined in the African Child Charter, applies to all children, including those who are refugees and those who are seeking asylum.[171] It applies in all actions concerning refugee children regardless of whether the actions are taken by state or non-state actors.[172] Human Rights scholar, Thoko Kaime, has "submitted that the African [Child] Charter provides better protection to children since it captures the actions of any person or authority without making any distinction" and hence, the principle "must be applied in all actions concerning children, regardless of whether those actions are undertaken by private or public entities."[173]

Kaime has argued, however, that there exists a level of "indeterminacy" surrounding the principle since there is no elaboration of "the range of factors that must be considered in determining what is in the child's best interests."[174] The best interests of the child principle was first enshrined in the UNCRC.[175] In its General Comment No. 14 on Article 3(1), the CRC explains that the "'best interests of the child' is a right, a principle and a rule of procedure based on an assessment of all elements of a child's or children's interests in a specific situation."[176]

The CRC then examines the elements that must be considered when assessing the child's best interests. These include (i) the child's views; (ii) the child's identity; (iii) preservation of the family environment and maintaining relations; (iv) care, protection and safety of the child; (v) situation of vulnerability; (vi) the child's right to health; and (vii) the child's right to education.[177] In addition to examining ways in which these elements can be balanced in order to undertake a fully effective best-interests assessment, the CRC provided

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Charter on the Rights and Welfare of the Child art. 4(1), OAU Doc. CAB/LEG/24.9/49 (1999) [hereinafter African Child Charter].

171. According to Article 4(1) of the African Child Charter, "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." African Child Charter, *supra* note 170, art. 4(1).

172. *See* THOKO KAIME, THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD: A SOCIO-LEGAL PERSPECTIVE 113 (2009).

173. *Id.* at 112–113.

174. *Id.* at 110.

175. *See* UNCRC, *supra* note 58, art. 3(1).

176. CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, ¶ 46, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

177. *See id.* ¶¶ 52–79.

procedural safeguards to guarantee the implementation of the child's best interests.[178]

Most African countries are States Parties to the UNCRC and the African Child Charter, which drew its inspiration from the UNCRC.[179] There is no reason why States Parties to the African Child Charter cannot draw inspiration from General Comment No. 14 as they seek to determine the best interests of children in general, and refugee and asylum-seeking children, in particular.[180]

Some human rights advocates have argued, however, that the application of the best interests of the child principle, especially with respect to the assessment of the rights of refugee and asylum-seeking children, has been problematic.[181] The argument is that a poorly-undertaken assessment of the best interests of a refugee child for the purpose of re-uniting the child with his or her biological parents can force the child to return to a community in which his or her rights are routinely violated.[182] This is especially evident in the case where the child is fleeing from cultural practices, such as child, early, or forced marriage, and female genital mutilation/cutting ("FGM/C").[183] However, these problems can be avoided by integrating the CRC elements into the assessment of the child's best interests.[184] Hence, a best-interests of the child assessment that takes into consideration, for example, the child's right to health, will conclude that it would not be

178. *See id.* ¶¶ 85–99.

179. Most of the articles in the African Child Charter are very similar to those in the UNCRC. In the Preamble to the African Child Charter, the African Member States of the Organization of African Unity, Parties to the present Charter, reaffirm "adherence to the principles of the rights and welfare of the child contained in declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child." *See* African Child Charter, *supra* note 170, pmbl. All 54 African countries have ratified the UNCR. *See* Convention on the Rights of the Child: Status of Treaties (as of Dec. 4, 2024), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en [https://perma.cc/BTQ2-C7RT] (Dec. 4, 2024).

180. *See generally* UNCRC, *supra* note 58, art. 3(1); African Child Charter, *supra* note 170, art. 4(1).

181. *See* d'Orsi, *supra* note 170, at 301.

182. *See id.*

183. *See id.*

184. *See General Comments No. 14*, *supra* note 176, ¶¶ 52–79.

in the best interests of a child fleeing FGM/C practices to return that child home to a culture that is intent on violating her rights to health.[185]

There are other principles, besides the best interests of the child, that inform and impact the obligations of States Parties to the African Child Charter to protect all children, including refugee and asylum-seeking children. These include the principle of "non-discrimination"[186] and the right to life, survival, and development.[187] Thus, when national authorities consider, for example, an asylum-seeking child's application, they must take into consideration the principle of "non-refoulement," which is enshrined in the 1951 Refugee Convention, and in doing so, they can minimize the chances that the child would be returned to a situation that can threaten his or her right to life.[188] The introductory note to the 1951 Refugee Convention states that "[t]he principle of non-refoulement is so fundamental that no reservations or derogations may be made to it."[189] Refugees and asylum-seeking children are first and foremost children, and therefore, they are "entitled to the enjoyment of the rights and freedoms recognized and guaranteed in [the African Child Charter]."[190] The non-discrimination principle, then, must be applied, for example, when government operatives determine the extent to which refugee and asylum-seeking children can realize their economic, social, and cultural rights within the countries in which they are presently located.[191] These children must be allowed to exercise their rights to education and healthcare and must not be discriminated against simply because they are refugees or asylum-seeking children.[192]

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185. *See* African Child Charter, *supra* note 170, art. 14(1); UNCRC, *supra* note 58, art. 24(1).

186. African Child Charter, *supra* note 170, art. 3. Article 3 states as follows: "Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status." *See id*.

187. *See id.*, art. 5.

188. U.N. High Commissioner for Refugees, Convention and Protocol Relating to the Status of Refugees, U.N. General Assembly Resolution 2198 (XXI), at 3 (Dec. 16, 1966) https://www.unhcr.org/us/media/convention-and-protocol-relating-status-refugees [https://perma.cc/PFZ7-XN2J].

189. *Id.*

190. African Child Charter, *supra* note 170, art. 3 (emphasizing the application of the non-discrimination principle).

191. d'Orsi, *supra* note 170, at 302–03.

192. African Child Charter, *supra* note 170, art. 11.

Article 23 of the African Child Charter enshrines additional rights applicable specifically to refugee children.[193] First, in its dealings with a refugee or asylum-seeking child, the State Party must act according to applicable international and domestic laws; there must not be any distinction between unaccompanied and accompanied children. Moreover, the child in question must be allowed to enjoy not only the rights enshrined in the African Child Charter, but also those guaranteed by other international and regional human rights and humanitarian instruments to which the States in question are Parties.[194] Second, States Parties are obligated to cooperate "with existing international organizations (e.g., the UN Refugee Agency) which protect and assist refugees in their efforts to help such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family."[195]

Third, in the case where "no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason."[196] Finally, the provisions of Article 23 "apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order, or howsoever caused."[197]

Refugee and asylum-seeking children must be protected against "all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development."[198] In addition, the African Child Charter imposes an obligation on States Parties to "undertake to protect the child from all forms of sexual exploitation and sexual abuse."[199] According to the UN Refugee Agency, "[r]efugee

193. *Id.* art. 23(1) (e.g., the Charter imposes an obligation on States Parties to "take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.")

194. *Id.*

195. *Id.* art. 23(2).

196. *Id.* art. 2(3).

197. *Id.* art. 2(4).

198. *Id.* art. 15(1).

199. *Id.* art. 27(1) (applies to both refugee and asylum-seeking children).

and displaced children and adolescents may be at increased risk of abuse and exploitation for a variety of reasons," which may include "separation from their families, lack of access to education, and the need to take on adult responsibilities such as caring for siblings."[200]

In each State Party, it may be necessary to complement the domestic or national legal framework for evaluating the status of refugee and asylum-seeking students with international and regional human rights instruments.[201] For example, "in cases of detention of unaccompanied migrant children," certain types of international legal instruments are likely to play an important role in enhancing the protection of refugee and asylum-seeking children and these include those dealing with "consular relations and with human rights in the context of the administration of justice."[202] In addition, "in cases of the interception and rescue of migrant children at sea," maritime law is quite relevant.[203] With respect to children who have been "orphaned or separated from their families as a result of international armed conflicts," international humanitarian law should be considered.[204]

The rights of refugee and asylum-seeking children in Africa are enshrined in international and regional instruments, as well as in the laws of many countries in the continent. The Organization of African Unity ("OAU") Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Refugee Convention") is one such instrument.[205] Although the OAU Refugee Convention does not specifically mention "child" or "children," its definition of "refugee" is inclusive and therefore applies equally to children.[206]

Scholars have praised the OAU Refugee Convention's expanded definition of "refugee" for "its broad scope, its humanitarian aspirations and for inspiring the liberalization of refugee protection

200. U.N. Refugee Agency, Action for the Rights of Children (ARC): Critical Issues - Abuse and Exploitation, UNHCR, https://www.unhcr.org/media/action-rights-children-arc-critical-issues-abuse-and-exploitation [https://perma.cc/QMW8-SBLB].

201. *Id.* ¶ 37.

202. Human Rights Council, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, ¶ 37, U.N. Doc. A/HRC/11/7 (May 14, 2009).

203. *Id.*

204. *Id.*

205. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

206. *Id.* art. 1 (uses the inclusive term "person" to define "refugee").

elsewhere."[207] While such an expanded definition is likely to provide more protections for refugees in Africa, it is up to national courts to use their adjudicative powers to determine the nature of these expanded protections. They can do so by "giving meaning to the terms in the definition [of the word "refugee"] and interpreting the law within the context of African realities."[208] In this article, the term "refugee children" includes children who are born in a country to parents who are refugees or asylum seekers, but who have not been granted or are not eligible to be granted citizenship by birth.

In the Section that follows, this Article will examine the role of Africa's domestic courts in promoting and protecting the rights of refugee children in Africa.

B. African Courts and the Rights of Refugee Children

Courts, especially in democratic countries, play a very important role in "safeguarding, promoting, and protecting human rights," including especially those of vulnerable groups, such as refugee and asylum-seeking children.[209] Courts are empowered by their national constitutions to interpret and apply the law.[210] For example, the Constitution of the Republic of South Africa, 1996, states that "[t]he judicial authority of the Republic is vested in the courts" and that "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."[211] In South Africa, the Constitutional Court ("ZACC") is the highest court in the country and it is tasked with deciding constitutional matters and "any other matter, if the [ZACC] grants leave to appeal on the grounds that the matter raises an arguable point of law of general importance which ought to be considered by that Court, and makes the final decision whether a matter is within its jurisdiction."[212]

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207. Tamara Wood, *Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's expanded refugee definition*, 26 INT'L J. REFUGEE L. 555, 555 (2014).

208. Isaac Lenaola, *The Role of African Courts in Promoting Refugee Rights*, 31 INT'L J. REFUGEE L. 343, 344 (2019).

209. *Id.* at 343.

210. *Id.*

211. S. AFR. CONST., 1996 § 165(1), (2).

212. *Id.* § 167(3).

Similarly, the Constitution of the Republic of Kenya, 2010, grants courts the jurisdiction to "hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."[213] Kenyan courts are empowered by the Constitution to "grant appropriate relief, including—*(a)* a declaration of rights; *(b)* an injunction; *(c)* a conservatory order; *(d)* a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; *(e)* an order for compensation; and *(f)* an order of judicial review."[214]

When courts adjudicate cases before them, they can "strengthen the refugee protection regime and develop the law to advance refugee rights" and those of asylum-seeking children.[215] Refugee and asylum-seeking children are entitled to the protections of the rights enshrined in most international and regional rights instruments just like other human beings. In addition, these children are extremely vulnerable, especially given the fact that they usually find themselves living in communities that are far away from home, and which are likely to be socially, economically, and culturally different from the environments that they left behind—usually outside their countries of origin.[216]

Kenya is one African country that has been flooded with refugees and asylum seekers since it gained independence in 1963.[217] A review of a case from Kenya provides an example of how courts in Africa are promoting and protecting the rights of refugee and asylum-seeking children.

1. Refugee Consortium of Kenya and Another v. The Attorney General and Others

This petition was brought by the Refugee Consortium of Kenya ("RCK") as the First Petitioner, with the objective of promoting and

213. CONSTITUTION art. 23 (2010) (Kenya).

214. *Id.* art. 23(3).

215. Lenaola, *supra* note 208, at 343.

216. *See id.*

217. Fred Nyongesa Ikanda, *East Africa's Economic Powerhouse and Refugee Haven, Kenya Struggles with Security Concerns*, MIGRATION POLICY INSTITUTE (July 2, 2024), https://www.migrationpolicy.org/article/kenya-migration-refugee-profile#:~:text=Today%2C%20most%20of%20Kenya's%20770%2C000,Sudan%20(see%20Figure%204) [https://perma.cc/S2ZF-7NEL].

protecting "the rights and dignity of refugees, asylum seekers, internally displaced persons and other forced migrants in Kenya and the wider East African region."[218] The Second Petitioner, N T, is "a Congolese National and a registered refugee who was residing within the Kasarani area in Nairobi County before she was forcefully relocated to Dadaab Refugee Camp."[219] She was the biological mother of six children, all of whom were under the age of fifteen years and she had brought the petition before the High Court of Kenya at Nairobi on behalf of these children and forty-seven other affected children.[220]

The First Respondent is the Attorney General of Kenya and the Second Respondent is the Cabinet Secretary of the Ministry of Interior and National Coordination, which is in charge of refugee affairs.[221] The Commissioner of Refugee Affairs, an office that was created by Kenya's Refugees Act, is the Third Respondent.[222] In addition, the High Court admitted Cradle—Children Foundation, an NGO, which works to promote and protect children's rights, as well as, "litigate[] in constitutional matters affecting children, as an interested Party."[223] With respect to the Petitioners' case, Justice Lenaola, writing for the High Court, summarized the facts as follows: N T was arrested on May 4, 2014, along with the parents of several other children, and subsequently detained at the Kasarani Police Station.[224] After three days at the police station, they were "forcefully taken to Daadab Refugee Camp."[225]

Based on the "refugee status documents" that N T had produced at the Police Station, Justice Lenaola revealed that she was the mother of "minor dependants" who had been left at home.[226] However, N T

218. *Refugee Consortium of Kenya and Another v. The Attorney General and Ors*, ¶ 2 (Petition No. 382 of 2014) [2015].

219. *Id.* ¶ 3. The Dadaab Refugee Complex is one of Kenya's largest refugee settlements. It consists of three camps—Hagadera, Dagahaley, and Ifo. Dadaab hosts more than 240,000 refugees and asylum-seekers between the three camps. *See Inside the world's five largest refugee camps*, THE UN REFUGEE AGENCY (July 19, 2023), https://www.unrefugees.org/news/inside-the-worlds-five-largest-refugee-camps/ [https://perma.cc/6N54-QEZ5].

220. *Refugee Consortium of Kenya and Another*, ¶ 3.

221. *Id.* ¶ 4.

222. *Id.*

223. *Id.* ¶ 5.

224. *Id.* ¶ 12.

225. *Id.*

226. *Id.*

stated that she had not been given the opportunity to register a formal complaint to the Respondents before she was forcefully removed to the camp.[227] She indicated that she had left her children, including one, a daughter named D L who was still breastfeeding at home.[228] D L, noted Justice Lenaola, was "taken in by a friend," however, her efforts to reunify the child with her mother were not successful and, eventually, "the child developed health problems associated with pre-mature interruption and breastfeeding."[229]

On July 11, 2014, the First Petitioner wrote to the Commissioner for Refugee Affairs seeking information about "the refugee children who had been separated as a result of the Directive issued on March 15[,] 2014 and the subsequent security operation, but no response to this was ever received."[230] The First Petitioner's letter also indicated that the Refugee Consortium of Kenya ("RCK") had made several home visits to "ascertain the welfare of the minors" and had "compiled a report that details how the children, except for the children of the Second Petitioner, had been suffering since their parents were taken away from them by the Respondents."[231]

The Petitioners, explained Justice Lenaola, had submitted to the Court that the Respondents had "failed to apply the 'best interests of the child' standard in terms of Article 53(2) of the Constitution in the implementation of the Directive and press statement."[232] In addition, noted Justice Lenaola, this standard is repeated in Section [8(1)] of the Children Act.[233] The Petitioners submitted further that the Respondents had infringed:

> upon the Constitutional rights of the minor refugees cited in the Petition, in particular the refugee children's rights to fair administrative action (Article 47(1)), freedom and security of the person which includes the rights not to be subjected to physical or

227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* ¶ 13.
231. *Id.* ¶ 14.
232. *Id.* ¶15.
233. *Id.*; *see also* The Children Act (Cap. 141): Laws of Kenya (2022), § 8(1).

> psychological torture or to be treated or punished in a cruel, inhuman or degrading manner.[234]

In addition, the Petitioners had submitted that Article 29(d) and (f) of the Constitution of Kenya, 2010 guarantees the child's right to be protected against "abuse, neglect and inhuman treatment,"[235] as well as Article 53(1)(d), which states that "[e]very child has the right—(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour."[236] Finally, noted Justice Lenaola, the Petitioners also based their claims on their "inherent dignity and the prohibition against unfair discrimination" pursuant to Articles 27 and 28 of the Constitution.[237]

The Petitioners had also submitted that the implementation of the "Directive and press statement had breached the Children Act, 2010," particularly Section 6(1), which provides that "a child shall have a right to live with and to be cared for by his parents," as well as, "Section 7 which provides for every child's right to education which shall be the responsibility of the Government and the parents."[238] Section 13(1) of the Children Act, which "provides for the protection of every child from physical and psychological abuse, neglect and any other form of exploitation," as well as, Section 18 of the Children Act, which "provides that no child shall be subjected to torture, cruel treatment or punishment or unlawful arrest," were also cited by the Petitioners.[239]

The Petitioners also relied on various international treaties.[240] The Petitioners alleged that the "Directive and press statement in issue" were unconstitutional because "during the police operations, minors were separated from their parents and that the effect of the forceful relocation of the parents of the minors herein was that the minors were stripped of the parental care they are entitled to under the law and which

234. *Refugee Consortium of Kenya and Another*, ¶ 16.

235. *Id.*; *see also* CONSTITUTION, art. 29(d) & (f) (2010) (Kenya).

236. *See* CONSTITUTION, art. 53(1)(d) (2010) (Kenya).

237. *Id.* arts. 27 & 28.

238. *See Refugee Consortium of Kenya and Another*, ¶ 17.

239. *Id.*

240. These included the UNCRC, the African Child Charter, the UDHR, the ICCPR, the Banjul Charter, the 1951 Refugee Convention, the 1967 Protocol Relating to the Status of Refugees, and the OAU Refugee Convention. *See id*. ¶ 18.

they enjoyed prior to the security operation."[241] In addition, alleged the Petitioners, the actions of the Respondents had disrupted the "integration, education and well-being of refugees, especially minors, who were already enjoying the social amenities available in urban centres" and that "[t]he actions of Respondents therefore exposed them to psychological and mental torture and unnecessary distress."[242]

With respect to the relocation of the urban-based refugees to the Dadaab Refugee Camp, the Petitioners submitted that this was undertaken "without proper planning towards ensuring that the rights and interests of the refugees are catered for and more so those of the minor children" and that the Respondents implemented the directives "hurriedly without due regard to the rule of law and the right to fair administrative action."[243] The Petitioners also submitted that they had hoped and believed that the Respondents would "adhere to due process before separating and/or removing the guardians of the minors from their homes."[244]

After thoroughly examining the submissions of the Petitioners and those of the Respondents, Justice Lenaola explained that the "main point for determination is whether the Respondents' acts and/or omissions in executing the [Government] Directive infringed upon the rights of minor refugees and violated the provisions of the Constitution and other legal instruments to which Kenya is bound."[245] Justice Lenaola noted further that "[i]f it is found that the implementation of the Directive infringes upon the rights of the Petitioners, it would subsequently have to be determined whether this limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom."[246]

In deciding the issues before the High Court, Justice Lenaola explained, it was critical to "consider the vulnerable position of refugee children."[247] This is due to the ruling in *Kituo cha Sheria & Ors v.*

241. *Id*. ¶ 19.

242. *Id.*

243. *Id.* ¶ 20.

244. *Id.* The Petitioners supported their arguments by citing a report by the Independent Policing Oversight Authority, whose conclusion was that "the operation was not conducted in compliance with the law, respect for the rule of law, democracy, human rights and fundamental freedoms as envisaged under Article 238 of the Constitution." *Id*.

245. *Id.* ¶ 43.

246. *Id.*

247. *Id.* ¶ 45.

Attorney General, where the High Court had ruled that "refugees fall within the category of vulnerable persons recognized by Article 20(3) of the Constitution since they have been forced to flee their homes as a result of persecution, human rights violations and conflict."[248] The *Kituo cha Sheria* Court also held that "refugees or those close to them have been victims of violence on the basis of very personal attributes such as ethnicity or religion and that they are 'vulnerable due to lack of means, support system of family and friends and by the very fact of being in a foreign land where hostility is never very far.'"[249]

While individuals may already face many vulnerabilities by virtue of the fact that they are refugees, Justice Lenaola explained, these vulnerabilities are exacerbated in the case of refugee children.[250] Justice Lenaola cited a report in which the UN High Commissioner for Refugees ("UNHCR") stated that "(r)efugee children are children, first and foremost, and as children, they need special attention."[251] The UNHCR's guidelines, Justice Lenaola noted, "further recognize that children are susceptible to disease, malnutrition and physical injury" and that they are "dependent on adults for their physical, psychological and social wellbeing and that their development should not be interrupted."[252] Justice Lenaola then explained that taking the UNHCR's guidelines into consideration, several international and regional human rights instruments, as well as legislative enactments and constitutional provisions in many countries protect the rights of refugees generally and refugee children in particular.[253] It is for this reason, concluded Justice Lenaola, that Kenya is a signatory to several international and regional human rights instruments, which enshrine protections for children's rights.[254]

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248. *See Refugee Consortium of Kenya and Another*, ¶ 45; *see also Kituo cha Sheria and Others v. Attorney General* (Petition No. 19 & 115 of 2013) [2013] eKLR.

249. *See Refugee Consortium of Kenya and Another*, ¶ 45; *see also Kituo cha Sheria and Ors*, ¶ 40.

250. *See Refugee Consortium of Kenya and Another*, ¶ 46.

251. *Id*.; *see also* U.N. Refugee Agency, *Refugee Children: Guidelines on Protection and Care* (1994), https://www.unhcr.org/us/media/refugee-children-guidelines-protection-and-care [https://perma.cc/ZX6Z-QMB3].

252. *See Refugee Consortium of Kenya and Another*, ¶ 46.

253. *See Refugee Consortium of Kenya and Another*, ¶ 47.

254. *See id*. These include, inter alia, the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, the 1969 Organization of African Unity Convention Governing the Specific aspects of Refugee Problems in Africa, the U.N. Convention on the Rights of the Child, and the African Charter on the Rights and Welfare

In addition, Kenya has enacted The Refugees Act, 2006, which is designed to provide "for the recognition, protection and management of refugees."[255] All recognized refugees are also subject to "all the laws in force in Kenya."[256] Refugees in Kenya, noted Justice Lenaola, are also entitled to the protections of the Constitution of Kenya, including its Bill of Rights.[257] In 2010, Kenya also enacted the Children Act in order to domesticate the UNCRC and the African Child Charter.[258]

Justice Lenaola cited Article 3(1) of the UNCRC, which enshrines the best interests of the child principle.[259] The learned justice explained that the best interests of the child is "a universal standard which has its origins in family law and is a guiding principle in decisions to be made about children."[260] This standard for making decisions concerning children and their rights has been entrenched in both the Constitution of Kenya at Article 53(2) and Kenya's Children Act § [8(1)]. Justice Lenaola then concluded that he will apply these principles in determining the Petition before the High Court.[261] The first issue that Justice Lenaola examined was whether the Respondents had violated the Petitioners' rights in terms of the Constitution of Kenya, the Children Act, and various international and regional human rights instruments to which Kenya is a State Party.[262] The Petitioners, Justice Lenaola explained, had prayed the Court to hold that the Respondents had contravened Article 29(d) and (f) and Articles 53(1)(d) and 53(2) of the Constitution of Kenya.[263] In addition, the Petitioners also based

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of the Child. How international law is applicable in Kenya is clarified by Article 2(5) and (6) of the Constitution, which state as follows: "(5) The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." CONSTIUTION, art. 2(5) and (6) (2010) (Kenya).

255. The Refugees Act, 2006 (Kenya), An Act of Parliament to make provision for the recognition, protection and management of refugees and for connected purposes [Act No. 13 of 2006, L.N. 64 of 2007, Act No. 19 of 2014, Act No. 11 of 2017]. According to Article 16, every single refugee who is recognized as such by the law is entitled "to the rights and be subject to the obligations contained in the international conventions to which Kenya is a party." *Id.* art. 16.

256. *Id.*

257. *See Refugee Consortium of Kenya and Another*, ¶ 48.

258. *See id*; *see also* The Children Act (Cap. 141): Laws of Kenya.

259. *See* UNCRC, *supra* note 58, art. 3(1).

260. *Refugee Consortium of Kenya and Another*, ¶ 49.

261. *See id.* ¶ 50.

262. *See id.*

263. *Id.* ¶ 50. These articles, respectively, "*protect the right to freedom and security of the person which includes the right not to be subjected to torture in any manner or treated or punished in a cruel, inhuman or degrading manner, and the rights of every child to be protected*

their Petition on Article 27 of the Constitution, which guarantees everyone "equality and freedom from discrimination;"[264] Article 28 of the Constitution, which protects the right of everyone to dignity;[265] Article 47(1) of the Constitution, which protects the right to fair administrative action;[266] numerous provisions of the Children Act, 2010, which the Petitioners argued had been violated by the Respondents; and finally, the Petitioners had alleged that the Respondents had forcefully separated the refugee children from their parents in contravention of rights enshrined in international and regional human rights instruments.[267]

Justice Lenaola then examined and decided on each of the rights and freedoms that the Petitioners alleged had been infringed or violated.[268] The first was the prohibition against unfair discrimination. Justice Lenaola noted that in the Supplementary Affidavit that had been sworn on behalf of the Petitioner by Leila Muriithia-Simiyu, it had been "deponed that the directive in issue was discriminatory because it only targeted refugees living outside the refugee camps."[269] Justice Lenaola then explained that in his view, "discrimination is differentiation on illegitimate grounds."[270] In addition, "[u]nfair discrimination . . . means that people are treated differently in a way which impairs their fundamental dignity as human beings."[271] Article 27(4) of the Constitution of Kenya, Justice Lenaola explained, prohibits discrimination, "directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, language or birth."[272]

However, the Petitioners had not submitted that the relocation of refugees to special camps was unfair discrimination because refugees

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from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour and provides that a child's best interests is of paramount importance in every matter concerning the child." *See id.* ¶ 51.

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *See id.* ¶¶ 53–67.
269. *Id.*
270. *Id.*
271. *Id.*
272. CONSTITUTION, art. 27(4) (2010) (Kenya).

in Kenya are treated differently from other people within the jurisdiction of Kenya.[273] Instead, the Respondents had "differentiated between refugees living in refugee camps and those living in urban areas by issuing [the] impugned directive."[274] In addition, Justice Lenaola explained, the action taken by the Respondents was "to ensure that all refugees are eventually detained in camps and thus subjected to the same conditions."[275] He concluded that it was not evident that the Respondents' Directive imposed any unfair treatment on refugees living outside the camps and that the Petitioners "had not made a compelling case in this regard."[276] Therefore, it would be very difficult to find in favor of the Petitioners "on this aspect of the Petition."[277]

Justice Lenaola then examined the second issue, which is the right to freedom and security of the person.[278] With respect to this issue, the Petitioners had prayed the Court to declare that the Respondents were in contravention of Article 29(d) and (f) of the Constitution of Kenya, which provides that "[e]very person has the right to freedom and security of the person, which includes the right not to be '[s]ubjected to torture in any manner, whether physical or psychological' or '[t]reated or punished in a cruel, inhuman or degrading manner.'"[279] Justice Lenaola explained that he was unable to fully address this issue because the Petitioners had not properly argued this point, nor had they provided any submissions to support their case. Hence, Justice Lenaola concluded that he was unable to rule in favor of the Petitioners on this issue.[280]

Next, Justice Lenaola examined the issue of the right to dignity.[281] He cited Article 28 of Kenya's Constitution and concluded that since the Petitioners had not presented "an argument in either their written submissions or in any of their Supporting Affidavits to show how the Directive, press statement and subsequent act and/or omissions by the Respondents [had] violated the Petitioners' right to dignity," there was

273. *See Refugee Consortium of Kenya and Another*, ¶ 54.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *See id.* ¶ 55.
279. CONSTITUTION art. 29(d), (f) (2010) (Kenya).
280. *See Refugee Consortium of Kenya and Another*, ¶ 55.
281. *See id.* ¶ 56.

no need to rule on the issue.[282] Justice Lenaola then next examined the right to fair administrative action.[283] He cited Article 47 of the Constitution, which enjoins the State "to take administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair."[284]

The Petitioners had submitted that the Respondents had not developed and adopted "a lawful, reasonable and procedurally fair policy . . . to cater for the welfare of refugee children and their parents before the Directive was issued and swiftly implemented."[285] The Petitioners also submitted that they had "legitimate expectation that the Respondents would adhere to due process before separating and/or removing the guardians of the minors from their homes but that the Directive was implemented hurriedly without due regard to the rule of law."[286]

After considering the facts that were adduced before the Court by the parties, Justice Lenaola agreed with the Petitioners that they had been denied the right to fair administrative action.[287] He recalled that in *Kituo cha Sheria*, the Court had held that "a policy that does not make provision for the examination of individual circumstances and anticipated exceptions is unreasonable and a breach of Article 47(1) of the Constitution."[288] With respect to the case at bar, Justice Lenaola explained that it was similarly "unreasonable of the Respondents to indiscriminately relocate all the arrested refugees without considering their individual circumstances first."[289] The fact that several months after the Respondents' actions, some of the refugees who had been affected by the impugned actions were granted exemptions is "an admission [by the Respondents] that the initial decision was hurried and not procedurally fair."[290] In addition, "this [also] shows that the rights to fair administrative action and the best interests of the child

282. *Id.*
283. *See id.* ¶ 57.
284. *Id.*
285. *Id.*
286. *Id.*
287. *See id.*
288. *Id.* ¶ 58.
289. *Id.*
290. *Id.*

were breached as the individual cases for consideration ought to have been dealt with before the relocation."[291]

In addition, Justice Lenaola explained that the parents in this case were arrested while they were attending church and subsequently relocated to the Refugee Camps, without granting them the opportunity "to make arrangements for the care of their minor children."[292] Justice Lenaola held that this was "a clear breach of the expectations of fair administrative action" and therefore "a breach of Article 47 of the Constitution."[293]

Next, Justice Lenaola examined the issue of the rights of the refugee children.[294] The Petitioners had submitted that during the implementation of the Directive, the Respondents had failed to take into account the best interests of the child principle.[295] As a consequence, adduced the Petitioners, the fundamental rights of many of the children mentioned in the Petition had been violated.[296] Justice Lenaola recalled that the Petitioners had cited various provisions of the Children Act, the Constitution of Kenya, and the UNCRC, which they claim the Respondents had violated.[297] Justice Lenaola then declared that once the submissions of all the parties to the case at bar are taken into consideration, "it is not in dispute that the children cited in this Petition have been separated from their parents."[298]

With respect to Article 9 of the UNCRC, separating children from their parents is only justified if such action is "necessary for the best interests of the child."[299] However, Justice Lenaola concluded that this

291. *Id*.
292. *Id*.
293. *Id*.
294. *Id*. ¶ 59.
295. *Id*.
296. *Id*.
297. *Id*. These provisions included Section 6(1) of the Children Act, which provides that a child has the right to live with and be cared by his or her parents; Section 7 of the Children Act, which imposes an obligation on the government to provide for the child's education; Section 13(1) of the Children Act, which mirrors Article 53(1)(d) of the Constitution of Kenya—both provide for the protection of every child from physical and psychological abuse, neglect and any other form of exploitation; and Article 9 of the UNCRC, which imposes an obligation on States Parties to ensure that a child shall not be separated from his or her parents against their will, except in accordance with applicable law and procedures. *See* The Children Act (2022) Cap. 141: §§ 6, 7, 13(1) (Kenya); CONST. art. 53(1) (2010)(Kenya); UNCRC, *supra* note 58, art. 9.
298. *Refugee Consortium of Kenya and Another*, ¶ 60.
299. UNCRC, *supra* note 58, art. 9.

was "clearly not the case" in the matter before the Court.[300] According to some of the evidence presented before the Court by the Petitioners, many parents who were attending church services when they were removed by the authorities believed that they would be able to return to collect their children, but that never happened.[301] Justice Lenaola ruled that the Respondents had taken "retrogressive measures," which had caused the refugee children to lose parental care which they had before the Directive was implemented.[302] He also noted that the suggestion by the Respondents that the refugee children should be reunited with their parents in the camps "is not a viable option" because that option would interfere with the children's "educational and social integration."[303] It also failed to consider and take into account "the individual circumstances of the children and their parents."[304]

Justice Lenaola concluded that "the determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs."[305] Thus, properly determining the best interests of a child requires an "individualized examination of the precise real-life situation of the child" and this, unfortunately, was not carried out in the case at bar.[306] After citing cases from the Constitutional Court of South Africa, Justice Lenaola ruled that the Petitioners had succeeded in "showing that the implementation of the Respondents' Directive and press statement infringed upon the children's rights to parental care, education and to be protected from neglect."[307] Justice Lenaola also ruled that the Respondents had not only failed to make the best interests of the child of "paramount importance" in their actions concerning the refugee children, but had not considered them at all.[308]

300. *Refugee Consortium of Kenya and Another*, ¶ 60.
301. *See id.*
302. *Id*. ¶ 62.
303. *Id.* ¶ 63.
304. *Id*.
305. *Id*.
306. *Id*.
307. *Id*. ¶ 67.
308. *Id*.

Justice Lenaola then considered whether the Directive can be justified under Article 24 of the Constitution of Kenya.[309] He had already concluded that "the implementation of the Directive violates the fundamental rights and freedoms of the children."[310] As such, stated Justice Lenaola, the next level of inquiry "is whether the violation is justified under Article 24 of the Constitution of Kenya, which states that "[a] right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."[311]

Justice Lenaola cited *Kituo cha Sheria*, where the High Court held that "the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be."[312] Justice Lenaola noted that the Third Respondent—the Commissioner of Refugee Affairs—had attempted to justify the limitation of the rights of the refugee children and their parents by stating that the Directive and the press statement "ordering the encampment of all refugees was [for the purpose of streamlining] refugee management and [addressing] emerging security challenges."[313] However, Justice Lenaola stated that just as the Court of Appeal held in *Kituo cha Sheria*, "any limitation based on national security considerations cannot be excluded from consideration under Article 24."[314]

309. *See id*. ¶ 68.

310. *Id*.

311. *Id*. ¶ 69; *see also* CONSTITUTION (2010) (KENYA).

312. *Refugee Consortium of Kenya and Another*, ¶ 70.

313. *Id*. ¶ 71.

314. *Id*. Justice Lenaola had cited *Kituo*, where the Court of Appeal had held as follows

> [w]here national security is cited as a reason for imposing any restrictive measures on the enjoyment of fundamental rights, it is incumbent upon the State to demonstrate that in the circumstances, such as the present case, a specific person's presence or activity in the urban area is causing danger to the country and that his or her encampment would alleviate the menace. It is not enough to say, that the operation is inevitable due to recent grenade attacks in the urban areas and targeting a group of persons known as refugees with a broad brush of criminality as a basis of a policy is inconsistent with the values that underlie an open and democratic society based on human dignity, equality and freedom. A real connection must be established between the affected persons and the danger to national security posed and how the indiscriminate removal of all the urban refugees would alleviate the insecurity threats in those areas. Another factor, connected to the first one is the element of

After agreeing with the judgment in *Kituo cha Sheria*, Justice Lenaola then added that "the State has not provided any evidence whatsoever to show that the relocation of urban refugees, who are lawfully registered by itself, will address the current security challenges."[315] He then held that the limitation of the Petitioners' rights was not justified under Article 24 since "no rational connection between the purpose of the Directive and the infringement of rights have been established."[316] Justice Lenaola then ordered the Respondents to reunite the Second Petitioner and the other refugee children with their parents.[317]

This case is very important because it reinforces the rights of families, including those of refugees, to live together as one unit. Writing for the High Court, Justice Lenaola nullified the government's directive. The Court took into consideration "the fact that the affected parents were arrested impromptu without being given an opportunity to make arrangements for the care of their minor children."[318] With respect to the question as to whether the directive and the action taken by the government were in the best interests of the child, the High Court held that they were not.[319] The decision in this case adds to the growing African jurisprudence on the rights of refugee and asylum-seeking children.

The African Child Charter enshrines the right to education to all children, regardless of whether they are citizens, refugees, asylum-seekers, or unaccompanied. Article 11 states that "[e]very child shall

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proportionality. The danger and suffering bound to be suffered by the individuals and the intended results ought to be squared.

Quoted in Refugee Consortium of Kenya and Another; *see also Kituo cha Sheria and Others v. Attorney General* (Petition No. 19 & 115 of 2013) [2013] eKLR.

315. *Refugee Consortium of Kenya and Another*, ¶ 72.

316. *Id.* ¶ 73.

317. *See id.* ¶ 85. Specifically, Justice Lenaola held as follows: "(a) an order of mandamus compelling the Respondents, "jointly and severally to re-unite the 2nd Petitioner and other affected refugee[s] with 48 children on whose behalf the present Petition was brought"; (b) an order nullifying the Directive dated March 26, 2014 to relocate the 2nd Petitioner and other affected refugees (i.e., the parents of the 48 refugee children) to the Dadaab Refugee Camp in Kenya; (c) a declaration that the Respondents acted in contravention of Articles 53(1)(d) and 53(2) of the Constitution of Kenya in respect of the 48 refugee children who had been affected by the Respondents' Directive; and an award of KShs. 50,000 to be paid by the Respondents to each of the 48 refugee children affected by the Directive." *Id*.

318. Lenaola, *supra* note 208, at 346.

319. *See Refugee Consortium of Kenya and Another*, ¶ 60.

have the right to [an] education."[320] If Articles 1, 2, and 22 of the UNCRC are read together, it becomes clear that refugee and asylum-seeking children are to enjoy the rights enshrined in the UNCRC just like any other children.[321] Therefore, laws that are designed to protect the rights of children, such as the right to education, but do not specifically mention "refugee and asylum-seeking children" also apply to the latter.[322] In the Section that follows, this Article will examine a case from the High Court of South Africa that deals with the child's right to education and whether that right extends to "undocumented children."[323]

2. Centre for Child Law and Others v. Minister of Basic Education and Others (High Court of South Africa)

Writing for the High Court of South Africa, Judge Mbenenge explained that the main issues to be determined in the case *Centre for Child Law and Others v. Minister of Basic Education and Others*, is "the right to basic education enshrined, without any qualification, in section 29 of the Constitution" of South Africa.[324] The case is about children who had been "precluded from unconditionally continuing to attend public schools unless they or their parents/guardians identify themselves by means of, inter alia, passports, identity documents, birth certificates or permits."[325] The Department of Basic Education ("DOBE") explained that this policy had been put in place to improve administrative processes within the Department and to more effectively and efficiently manage and control immigration in South Africa.[326]

Judge Mbenenge explained that "learners lacking the requisite documents have become known and are referred to as "undocumented

320. African Child Charter, *supra* note 170, art. 11(1).

321. UNCRC, *supra* note 58, arts. 1, 2, 22.

322. *Id*.

323. These are: (i) children in South Africa who, for a variety of reasons, do not have birth certificates; and (ii) children who are not nationals of South Africa and who do not have the necessary permits for them to reside permanently in the country and most of whom do not have birth certificates—many of these children are refugees and/or asylum seekers. *Centre for Child Law and Others v. Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (Dec. 12, 2019) [hereinafter *Centre for Child Law and Others* (2840/2017)].

324. *Id*. ¶ 1; *see also* S. AFR. CONST. 1996, § 29.

325. *Centre for Child Law and Others* (2840/2017), para. 1.

326. *Id*.

children."[327] Before examining the facts of the case, Judge Mbenenge provided an overview of the right to education generally and in South Africa, in particular.[328] He began by citing *Juma Musjid* in which the Constitutional Court of South Africa ("ZACC") had recognized the importance of the right to basic education.[329]

South Africa is a country in transition, where basic education is expected to serve a "transformative and empowerment" role and help the country to "redress the entrenched inequalities caused by apartheid."[330] Judge Mbenenge then cited *Brown v. Board of Education of Topeka*,[331] a case in which the US Supreme Court held that "[s]eparate educational facilities are inherently unequal" and that "the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[332]

As part of the factual background to the case, Judge Mbenenge explained that before 2016, the Eastern Cape Provincial Government's

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327. *Id*.

328. *Id*., para. 2.

329. *Id*. para. 3. Specifically, the ZACC had held as follows: "Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school—an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution—is a necessary condition for the achievement of this right." *Governing Body of the Juma Musjid Primary School & Others v. Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (April 11, 20111), para. 43.

330. *Centre for Child Law and Others* (2840/2017), para. 4.

331. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

332. *Centre for Child Law and Others* (2840/2017), para. 4. Specifically, the U.S. Supreme Court held that

> [t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, 347 U.S. at 493.

Department of Education had "provided teaching staff and funding to all learners at schools in the Eastern Cape regardless of whether the learners possessed identification documents."[333] The Provincial Government provided funding to schools based solely on the "actual number of learners in the school, and not on the number of learners whose identification document particulars were entered into the South African Schools Administration and Management System."[334] Through this system, all learners in the Province, including those who did not have identification documents, were guaranteed access to basic education, as well as the necessary nutrition that was provided by the National School Nutrition Program.[335]

However, on March 17, 2016, then-Acting Superintendent-General of the Provincial Department of Education issued a Circular instructing schools to update the South African Schools Administration & Management System ("SASAMS") to require that only learners with valid "ID and passports"[336] would be able to participate in school programs, including access to nutrition.[337] In addition, funding to schools, which included nutrition transfers, would henceforth, "be based only on the learner numbers where valid ID passport numbers have been captured on the SASAMS system."[338]

On June 6, 2016, the Acting Superintendent-General issued another circular advising schools that "funding for learners with no identity numbers or with invalid numbers would be withheld until corrected, failing which, by June 17, 2016, the affected learners would be regarded as no longer in existence and thereupon removed from enrolment at the affected schools."[339] The First and Second Applicants had urged the Provincial Department of Education not to give effect to Circular 06 of 2016.[340] However, they were not successful.[341] Judge Mbenenge explained that practically, "the consequences of the decision

333. *Centre for Child Law and Others* (2840/2017), para. 5.

334. *Id*.

335. *Id*.

336. "ID and passports" were defined to include identification documents, or any other permits that had been issued by the Department of Home Affairs to regularize a learner's stay in South Africa. *See id*. at fn. 11. The circular was referred to as "Circular 06 of 2016." *See id*.

337. *Centre for Child Law and Others* (2840/2017), para. 6.

338. *Id*.

339. *Id*. para. 7.

340. *Id*. para. 8.

341. *Id*.

to stop funding undocumented children resulted in their exclusion from school and the exclusion of learners from being funded if they remained at school."[342]

As explained by Judge Mbenenge, at Phakamisa High School, "a no-fee school located at Zwide Township, Port Elizabeth, on whose behalf the second applicant launched the application, there were, at the time of the launch of the application, 37 learners without valid identity numbers" and that this represented "a decrease from the 2016 academic year when there were 99 such learners."[343] The application was initially launched on May 26, 2017 by the First and Second Applicants against the First, Second, and Third Respondents seeking an order declaring Circular 06 of 2016 to be "inconsistent with the Constitution and/or the South African Schools Act."[344] After receiving an unfavorable reply, the First and Second Applicants "approached the court, by way of urgency under case number 3317/18,[345] seeking, mainly, an order that named learners of the Phakamisa High School, 37 in number, be admitted into a public school pending the final determination of this application."[346]

Noting that there was no case to be made, the Court (per Mtshabe AJ) denied the interim relief that the Applicants had prayed for. After this ruling, the thirty-seven children on December 13, 2018, "sought leave to intervene in this application."[347] Judge Mbenenge explained that the majority of the thirty-seven children were born to South African parents but that for a variety of reasons, were not able to obtain birth certificates.[348] The rest of the children were "foreign children residing in South Africa without the necessary documentation allowing them to reside or study in South Africa."[349] However, on February 15, 2019, the ZACC set aside the order made by Mtshabe AJ and which was dated on December 10, 2018.[350]

342. *Id*.
343. *Id*.
344. *Id*. para. 9.
345. *Centre for Child Law and Others v. Minister of Basic Education and Others* (3317/2018) (ECG) unreported (Dec. 10, 2018) (*Centre for Child Law and Others* (3317/2018), cited in *Centre for Child Law and Others* (2840/2017), para. 11.
346. *Id*. para. 11.
347. *Id*.
348. *Id*. para. 12.
349. *Id*.
350. *Id*. para. 13.

The ZACC directed the Respondents to "admit and [enroll] the learners listed in annexure 'A' to this order into appropriate adult basic education and training centres (ABET centres), pending the final determination of the litigation instituted in the High Court under case number: 2480/17."[351] The Respondents were also directed to "admit and [enroll] the learners listed in annexure 'B' to this order into ordinary public schools, pending the final determination of the litigation instituted in the High Court under case number: 2480/17."[352] The ZACC also noted that the admission and enrollment of the learners mentioned in its order would not be "conditional upon the learners complying with the admission criteria set out in sections 15, 20 or 21 of the Admissions Policy for Ordinary Public School."[353]

Through its order of March 19, 2019, the ZACC also granted the thirty-seven children leave to intervene "as further applicants (third to thirty-ninth applicants)."[354] Judge Mbenenge also noted that "the Minister of Home Affairs and the Superintendent-General of the Department of Home Affairs were joined as the fourth and fifth respondents, respectively."[355] The thirty-seven children then "embarked on a challenge to clauses 15 and 21 of the Admission Policy, and sections 39 and 42 of the Immigration Act 13 of 2002, relied on by the first to the third respondents in opposition to this application."[356] On June 21, 2019, the Fourth and Fifth Respondents delivered their opposing affidavit and on July 2, 2019, the South African Human Rights Commission ("SAHRC") was admitted as *amicus curiae* in order to make "proper interpretation of the Immigration Act."[357]

Also, on July 16, 2019, Section 27 was also admitted as *amicus curiae* "to assist the court on the access component of the right to basic education including its protection under international human rights law instruments and its interpretation in regional fora and comparative

351. *Id*.

352. *Id*.

353. *Id*.; *see also Centre for Child Law & 37 Children v. Minister of Basic Education & 2 Others* (Case CCT 19/19): Order Dated 15 Feb. 2019, paras. 4, 5, 6 (S. Afr.).

354. *Centre for Child Law and Others* (2840/2017), para. 14.

355. *Id.*

356. *Id*.

357. *Id*. paras. 15, 16.

jurisdictions."[358] In addition, Section 27, noted Judge Mbenenge , "relies on the constitutional and legislative provisions that empower and oblige organs of State to co-operate and co-ordinate their efforts to advance the realisation of constitutional rights."[359] On July 17, 2019, the First and Third Respondents "delivered their supplementary opposing affidavit" to the Court and in it they referenced Circular 1 of 2019—the latter "accommodates undocumented children at schools, whilst their parents or care-givers take steps to secure the requisite documents."[360]

Next, Judge Mbenenge examined the "bases of the respective parties' cases."[361] As part of that examination, he quoted from the opposing affidavit of the Fourth and Fifth Respondents, which was used to "justify the impugned provisions of the Immigration Act and make out a case for the limitation brought about by these provisions in terms of section 36 of the Constitution, regardless of the outcome of the application on the Admission Policy."[362]

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358. *Id*. para. 17. Section 27 is a public interest law center and human rights organization that seeks "to achieve substantive equality and social justice in South Africa." *See* Section 27, *About Us*, (Aug. 4, 2024) https://section27.org.za/about-us/ [https://perma.cc/Z4CB-UKXK].

359. *Centre for Child Law and Others* (2840/2017), para. 17.

360. *Id*. paras. 18, 19.

361. *Id*. para. 21. The First and Second Applicants, noted Justice of the Peace Mbenenge, based their case on "contentions that (a) the right enshrined in section 29(1)(a) read with section 28(2)(a) of the Constitution accords '*everyone*' a basic right to education, and not a right subjected to a condition that they provide identification documents; (b) the impugned decision infringes section 28(2) of the Constitution which provides that '[a] *child's best interests are of paramount importance in every matter concerning the child*'; (c) the decision is also discriminatory within the meaning and contemplation of the equality clause and section 5 of the South African Schools Act 84 of 1996 which states that '*a public school must admit learners and serve their educational requirements without unfairly discriminating in any way*'; and (d) the right to dignity under section 10 of the Constitution [of South Africa]." *See* S. AFR. CONST., 1996 §§ 28(2), 29(1); South African Schools Act 84 of 1996 § 5.

362. *Centre for Child Law and Others* (2840/2017), para. 28. The salient part reads as follows:

> . . . there is no reason why illegal foreigners ought to receive free education by establishing as of right, children of this status to attend '*no fee*' schools, which are entirely subsidized by taxpayers. This is likely to lead to increased illegal immigration, as well as potential child abandonment or child-headed households, especially from neighbouring countries, once it is ordered that all children in South Africa must obtain a free education. I understand that the same privilege is not afforded by all our neighbouring countries, and certainly not all of them in Africa, from where many of the illegal immigrants to this country originate.

Id.

The Fourth and Fifth Respondents, noted Judge Mbenenge, also submitted that measures designed to prohibit free access to public education, as well as those enshrined in the Immigration Act, have been put in place "to prevent or at the very least dissuade, persons who are not citizens or otherwise legally entitled to free government services from burdening the country's constrained financial resources."[363] In supporting their argument, the Fourth and Fifth Respondents contended that "undocumented children ought to claim whatever rights they may have regarding basic education from their country of citizenship, lest South Africa becomes a destination for persons requiring or desiring free education."[364]

Next, Judge Mbenenge examined the submission of Section 27, which was admitted as *amicus curiae* to provide assistance to the Court on the access component of the right to education, particularly with respect to this right's protection under international law.[365] Another *amici curiae*, the SAHRC, was also admitted to provide the Court with a proper definition of the Immigration Act.[366] Judge Mbenenge explained that the SAHRC had sought to "demonstrate that a declaration of invalidity of sections 39(1) and 42 is not the appropriate relief because, upon a proper interpretation, the Immigration Act does not prohibit the provision of basic education to children who are illegally present in the country" and that this position is supported by the thirty-seven children as well, except that "they persist in a declaration of unconstitutionality in the event of the court not being persuaded that the SAHRC's interpretation is correct."[367]

In defining the issues to be determined by the High Court, Judge Mbenenge noted that at the beginning of the hearing, Ms. Sephton, who

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363. *Id.* para. 29.

364. *Id*.

365. *Id*. para. 30. The position of Section 27 on the right to education in South Africa, noted Mbenenge JP, is that

> (a) when interpreted in line with international law and with reference to comparative law, the right to education enshrined in section 29(1)(a) is afforded to all children within South Africa, regardless of their migration or documentation status; (b) (i) Clauses 15 and 21 of the Admission Policy; and (ii) Sections 39(1) and 42 of the Immigration Act, are unconstitutional; and (c) the respondents have not justified the limitations imposed by the provisions referred to in paragraphs (b) above in terms of section 36 of the Constitution.

Id.

366. *See id*. para. 16.

367. *Id*. para. 31.

was representing the First and Second Applicants, had informed the Court that Circular 06 of 2016 had been withdrawn and replaced by Circular 01 of 2019, and that as a result of this development, "all learners, including the undocumented ones, are being funded at schools in terms of Circular 01 of 2019."[368] Judge Mbenenge then explained that in Ms. Sephton's view, the relief that the First and Second Applicants had sought was now moot.[369] After sifting through the submissions of all the parties, including those of the *amici curiae*, Judge Mbenenge summarized the issues to be determined by the Court.[370]

After concluding that the application launched by the First and Second Applicants was "beset by unreasonable delay," Judge Mbenenge then proceeded to determine whether the deal could be condoned.[371] He explained that the mandated period of 180 days, however, may be extended by a court upon an application by the individual concerned.[372] However, before deciding on whether to grant an extension to a delay that is greater than 180 days, the court must investigate to determine whether such an extension is justified in the interests of justice.[373] He then explained that the phrase "interests of justice" is quite prominent in "condonation applications" and that in

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368. *Id*. para. 32.

369. *See id*.

370. *Centre for Child Law and Others* (2840/2017), para. 35 These are

> (a) whether there was an unreasonable delay in launching the application and, if so, whether such should be condoned in terms of section 9 of PAJA; (b) whether the issue on the constitutionality of the Admission Policy embodied in Circular 06 of 2016 has become moot; (c) the constitutionality of clauses 15 and 21 of the Admission Policy; (d) whether sections 39(1) and 42 of the Immigration Act should be interpreted as prohibiting the provision of basic education *children whose presence in the country is illegal*; and (e) what order the court should grant.

Id. (emphasis added).

371. *Id.* para. 41. Section 7(1)(b) of PAJA states that

> [a]ny proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—*(b)* where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

Promotion of Administrative Justice Act 3 of 2000 § 7(1)(b) (S. Afr.).

372. *Centre for Child Law and Others* (2840/2017), para. 43 (S. Afr.). *See also* Promotion of Administrative Justice Act 3 of 2000 § 9(1) (S. Afr.) [hereinafter PAJA].

373. *See Centre for Child Law and Others* (2840/2017), para. 43 (S. Afr.). *See also* PAJA, § 9(2).

Brummer,[374] the ZACC had explained the standard for granting both "condonation and leave."[375]

Judge Mbenenge also cited other South African cases that deal with the interests of justice in the context of Section 9 of the PAJA.[376] After examining several authorities from both the ZACC and the ZASCA, he concluded that although the application before the Court was launched beyond the 180 days period that is stipulated in PAJA, "the explanation tendered for the delay passes muster" and that there is no doubt that the case at bar raises "a novel constitutional issue" that is of "national importance"[377] and that because the case involves constitutional rights, "especially [those] of children would, in [his] view, on its own warrant the grant of condonation of the unreasonable delay and adjudication of the merits of the matter."[378] He concluded that "a good case has been made out for condoning the delay occasioned in launching this application."[379]

Next, Judge Mbenenge examined whether the relief sought by the applicants had become moot as submitted by the First to Third Respondents.[380] He explained that "[i]t is trite law that a case is moot and therefore not justiciable if it no longer presents an existing or live

374. *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others*, 2000 (3) SA (CC); 2000 (5) BCLR 465; 2000 (2) SA 837 (CC), para. 3 (S. Afr.).

375. In *Brummer*, noted Mbenege, the ZACC held as follows: "The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect which the condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect." *Brummer* 2000 (3) SA (CC); 2000 (5) BCLR 465; 2000 (2) SA 837 (CC), paras. 3–4; *see also Centre for Child Law and Others* 2019 (126) ZAECGHC; 2020 (1) All SA 711 (ECG); 2020 (3) SA 141 (ECG), at 16 para. 44 (S. Afr.).

376. For example, in *Camps Bay Ratepayers' and Residents' Ass'n. and Another v. Harrison and Another*, the South African Supreme Court of Appeal ("ZASCA") held, in the context of Article 9(2) of PAJA that "the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success." *Camps Bay Ratepayers' and Residents' Ass'n and Another v. Harrison and Another* 2010 (19) SA (CC); 2011 (2) BCLR 121 (CC), 2011 (4) SA 42 (CC) at 37 para. 54 (S. Afr.).

377. Centre for Child Law and Others (2840/2017), paras. 51, 52.

378. *Id*. para. 52.

379. *Id*. para. 54.

380. *Id*. para. 55.

controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law"[381] and that as "long as the person mounting the legal challenge confronts continuing harm, collateral harmful consequences that continue to endure, or a significant prospect of future harm, the case cannot be deemed moot."[382] Judge Mbenenge then explained that the starting point for examining the issue of mootness is "consideration of the relief that the applicants are seeking."[383] The legal challenge in the case at bar "[was] mounted mainly on clauses 15 and 21 of Circular 06 of 2016, and not on Circular 01 of 2019."[384] Of particular importance "is the quest, inter alia, for a mandamus directing that no learner may be excluded from a public school on the basis that he or she does not have an identity number, permit or passport."[385]

The effect of the disputed Clause 15 of Circular 06 of 2016, as explained by Judge Mbenenge, is to deny access to basic education to children on the basis that they do not have identification documents.[386] On the other hand, Clause 21 provides that learners who are classified by South Africa's Immigration Act as illegal foreigners must demonstrate that they have applied to the appropriate authorities to legalize their stay in South Africa as part of their application for admission to a public school.[387] The two impugned clauses, it was argued by the applicants, limit the right of the children mentioned in the application to education, even though the Constitution guarantees the right of access to basic education to all.[388]

While Circular 01 of 2019 provides for the "funding of and accommodates even undocumented children, it effectively extends the period within which the requisite documentation should be secured

381. *Id*. para. 58.

382. *Id*.; *see also Afriforum NPC and Others v. Eskom Holdings SOC Limited and Others* 2017 (199) ZAGPPHC; 2017 (3) All SA 663 (GP) at 35 para. 110.

383. *Centre for Child Law and Others* 2019 (126) ZAECGHC; 2020 (1) All SA 711 (ECG); 2020 (3) SA 141 (ECG), at 20 para. 60.

384. *Id*. para. 61.

385. *Id*.

386. *Id*. para. 62.

387. *Id*.

388. *Id*. Education in South Africa is considered a fundamental right, which is enshrined in the Bill of Rights. According to § 29(1)(a), "[e]veryone has the right—(a) to basic education, including adult basic education." S. AFR. CONST., 1996 § 29(1)(a). This provision of the Bill of Rights does not distinguish between citizens and non-citizens in respect of access to education. *See id*.

from 3 months to 12 months."[389] However, after twelve months, if the learner has not yet secured the required documentation, such a learner must leave until he or she can acquire the appropriate documentation. This, argued the thirty-seven children, "is unfair" and that children should never be expelled from school simply on the basis that they do not have "identification documents."[390] Given that the Respondents did not agree with this assessment, the High Court concluded that there was indeed a "controversy between the parties."[391]

Judge Mbenenge also noted that "due to the personal circumstances of some of the children's care-givers and parents," it was unlikely that some of the children that do not currently have the requisite identification documents would be able to secure them anytime soon.[392] He noted that there have been narratives of "parlous experiences of how impossible it has been to obtain the necessary documents."[393] Some of these, Judge Mbenenge continued, involve parents who have abandoned their children, and that efforts to obtain identification documents for these children without the presence of their biological parents have proven "futile."[394] These children not only face the danger of becoming stateless, they are also "beset by two [other] problems": abandonment by their parents and being denied the right to access basic education because they do not have identification documents, which they are not in a position to acquire.[395] Most importantly, noted Judge Mbenenge, the application was brought to the Court, not just on behalf of the thirty-seven children, but on behalf of a class of children and in the public interest, "in terms of section 38 of the Constitution."[396]

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389. *Centre for Child Law and Others (2840/2017)*, para. 64.

390. *Id*.

391. *Id*.

392. *Id.* para. 65.

393. *Id*.

394. *Id*.

395. *Id*.

396. *Id*. Section 38 states as follows: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members." S. AFR. CONST., 1996 § 38.

After distinguishing the facts contained in the cases relied on by the First to Third Respondents from those in the case at bar, Judge Mbenenge concluded that "the relief sought [by the applicants] is not hit by the mootness principle, with the result that the merits of the application ought to be considered."[397] Judge Mbenenge then examined the issue of whether Clauses 15 and 21 of the Admission Policy are unconstitutional. He then cited Section 29(1)(a) of the Constitution, which enshrines the right to basic education for everyone and which, explained Judge Mbenenge, is "unqualified, unconditional and applies to everyone" and "not even '*everyone upon the production of a birth certificate*' or '*provided they are in the country legally*.'"[398]

Given that the two impugned clauses apply to "different situations," Judge Mbenenge decided to examine them, one after the other.[399] He began by examining Clause 15, which he explained "constitutes a severe limitation to other rights enshrined in the Constitution for the protection of children namely, the right of children to have their best interests considered paramount; the right to dignity; and the right to equality."[400] He then noted that these three rights deserve to be examined separately and proceeded to do so. With respect to the best interests of the child,[401] he explained that Section 28 of the Constitution of South Africa does not allow for a "restrictive interpretation" of this right and that a "wider interpretation" must be afforded to this right in order to "encompass '*every child*,' and not only children who are South African citizens, children who are lawfully present in the country, or children in possession of birth certificates."[402] South African courts have held that "even children who have been detained for purposes of deportation as illegal foreigners are bearers of the right enshrined in section 28 [of the Constitution]."[403] Most importantly, Judge Mbenenge explained that Section 28(2) not only creates a "stand-alone right," but it "strengthens the right to basic education as well."[404] Section 28(2) seeks to uphold the best interests

397. *Centre for Child Law and Others (2840/2017)*, para. 70.

398. *Id*. para. 71 (emphasis in original); *see also* S. AFR. CONST., 1996 § 29(1)(a).

399. *Centre for Child Law and Others*, (2048/2017), para. 72.

400. *Id*. para. 75.

401. The best interests of the child principle is enshrined in §28 (2) of South Africa's Constitution. *See* S. AFR. CONST., 1996 § 28(2).

402. *Centre for Child Law and Others*, (2048/2017), para. 76.

403. *Id*.

404. *Id*. para. 77.

of the child in "every matter" and by doing so, it actually "serves to augment" and strengthen "the right to education."[405]

Judge Mbenenge then examined South Africa's obligations under various international and regional human rights instruments.[406] By ratifying the UNCRC and the African Child Charter, South Africa agreed to "give primary consideration inter alia to children's interests at all times" given that the two treaties "recognise the importance of holding paramount the best interests of the child in all matters concerning them."[407]

Judge Mbenenge next examined the right to dignity. He acknowledged that children are individuals with "distinctive personalities not dependent on or assessed in the light of the actions of their parents" and that they have their own dignity.[408] He then cited *S v. M*, where the ZACC held that "[e]very child has his or her own dignity."[409] Judge Mbenenge explained that according to some of the affidavits submitted to the Court by some of the affected children, being denied access to basic education has "devastating consequences" for these children and that some of them have "expressed feelings of shame and embarrassment at being unable to perform tasks that other children of their age can perform."[410] Further, these children expressed being "depressed, or finding themselves in dangerous situations resulting from being out of school."[411] Prevented from attending school or exercising their right to basic education, these children are likely to remain trapped in extreme poverty indefinitely.[412] In addition, they are less likely to be able to participate in a meaningful way in the affairs of

405. *Id*. *See also* S. AFR. CONST., 1996 § 28(2).

406. *See* UNCRC, *supra* note 58; African Child Charter, *supra* note 170.

407. *Centre for Child Law and Others (2840/2017)*, para. 78.

408. *Id*. para. 79.

409. Specifically, the ZACC had held that

> [e]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

S v. M 2007 (3) SA 232 (CC), para. 18.

410. *Centre for Child Law and Others* (2048/2017), para. 80.

411. *Id.*

412. *Id.* para. 81.

their communities and, in addition to being "denuded of their self-esteem and self-worth," they are likely to fail to achieve self-actualization or become productive and contributing members of their communities.[413]

In examining the right to equality, Judge Mbenenge cited Section 9(3) of the Constitution, which prohibits unfair discrimination and Section 5(1) of the Schools Act, which "makes it incumbent on a public school to admit learners and serve their educational requirements without unfairly discriminating in any way."[414] Judge Mbenenge then concluded that Clause 15 of the Admission Policy "effectively denies children access to education on the basis of their documentation status, which constitutes unfair discrimination."[415] Although Section 9(3) of the Constitution does not include "the documentation required for enrolment in public schools" as one of the grounds for discrimination, Judge Mbenenge held that "the differentiation will amount to discrimination where it is on a ground analogous to those listed in [Section 9(3)]."[416]

Judge Mbenenge explained that in order "[t]o be considered an analogous ground of differentiation to those listed in Section 9(3), the classification must have an adverse effect on the dignity of the individual, or some other comparable effect."[417] According to the thirty-seven children's submissions, "documentation status is a ground analogous to those listed in Section 9(3)" and that "differentiating the children on their documentation status impairs their fundamental right to dignity, thus placing such differentiation on *par* with the expressly listed ones."[418] Children who are affected by the impugned Circular, Judge Mbenenge noted, "are disadvantaged by their lack of documentation and emanate from the vulnerable, poor black community" and that if one takes into consideration "the fact that this differentiation is based on attributes that have the potential to impair human dignity, the inescapable conclusion is that clause 15 limits the right to equality as discriminating between children on the basis of their

413. *Id.*
414. *Id.* para. 82.
415. *Id.* para. 83.
416. *Id.* para. 84.
417. *Id.*
418. *Id.* para. 85.

documentation status, as well."[419] In concluding that Clause 15 of the Admission Policy is unfair, Judge Mbenenge recalled that South Africa is a State Party to the UNCRC, whose provisions are "applicable to each child within a [State Party's] jurisdiction without discrimination of any kind, irrespective of inter alia the child's or his or her parent's or legal guardian's national ethnic, social origin, birth or other status."[420]

Next, Judge Mbenenge examined Clause 21 of the Admission Policy, which mandates that all learners that are classified as "illegal aliens," must prove that they have "applied to legalise their stay before they can be admitted to public schools."[421] However, Judge Mbenenge stated that it "is well-nigh impossible, if one has regard to the fact that the children were brought into South Africa illegally and, therefore, cannot meet the requirements of a residence or study permit."[422] He concluded that these children were not in a position to legalize their stay.[423]

With respect to the right to education, Judge Mbenenge noted that this right is extended to *everyone* within the jurisdiction of South Africa and that the "nationality or immigration status" of the individual is "immaterial."[424] He cited *Lawyers for Human Rights*[425] where the ZACC held that denying constitutional rights to persons who are in South Africa illegally "would constitute a negation of the values underlying our Constitution."[426] The *Lawyers for Human Rights* Court

419. *Id.* para. 86.

420. *Id*. para. 87.

421. *Id*. paras. 88, 89. Clause 21 states as follows: "Persons classified as illegal aliens must, when they apply for admission for their children or themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991." *Id.*

422. *Centre for Child Law and Others* (2840/2017), para. 89.

423. *See id.*

424. *Id.* paras. 89, 90.

425. *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another* 2004 (7) BCLR 775 (CC); 2004 (4) SA 125 (CC) (Mar. 9, 2004).

426. *Centre for Child Law and Others* (2840/2017), para. 90. Specifically, the ZACC held that "[t]he only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation

also held that all persons within the territorial boundaries of South Africa have the protections of the country's courts.[427]

Judge Mbenenge noted that the ZACC was "indebted" to the thirty-seven applicants for having "benevolently made reference to a wealth of material in international law which makes it plain that children, including those with irregular status, are bearers of the right to education."[428] After concluding that Clause 21 also constitutes a severe limitation "to other rights which protect children," Judge Mbenenge held that "clauses 15 and 21 of the Admission Policy are unconstitutional."[429] He then considered whether the limitation imposed by Clauses 15 and 21 of the Admission Policy was justified under section 36 of the Constitution, which deals with the limitation of rights.[430] Judge Mbenenge noted that Section 29 of the Constitution of South Africa, which protects the right to education, "is an immediately realisable right that stands on a higher pedestal."[431] He then cited *Juma Musjid*,[432] where the ZACC held that the right to education "is immediately realizable" and that "[t]here is no internal limitation requiring that the right be '*progressively realised*' within '*available resources*' subject to '*reasonable legislative measures*.'"[433]

He then concluded that the right to education "may only be limited in accordance with law of general application in accordance with section 36 of the Constitution."[434] In the case at bar, he explained, the

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of the values underlying our Constitution." *Lawyers for Human Rights*, 2004 (7) BCLR 775 (CC), para 26.

427. *Lawyers for Human Rights*, 2004 (7) BCLR 775 (CC), para 27. Specifically, the ZACC held that

> [o]nce it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why 'everyone' in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2). It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country.

Id.

428. *Centre for Child Law and Others* (2840/2017), at 91.

429. *Id.* paras. 92, 93.

430. *See* S. AFR. CONST., 1996 § 36.

431. *Centre for Child Law and Others* (2840/2017), para. 94.

432. *Governing Body of the Juma Musjid Primary School and Others v. Essay N.O. and Others (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (April 11, 2011).

433. *Id.* at 37 (emphasis in original).

434. *Centre for Child Law and Others* (2840/2017), para. 95.

onus to establish that the limitation is justified is on the First to Third Respondents.[435] Section 36(1) of the Constitution states that "[t]he rights in the Bill of Rights *may be limited only in terms of law of general application* to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."[436] However, both Clauses 15 and 21 are not a law of general application but are "merely a policy which is incapable of authorising the limitation of a right in the Bill of Rights."[437] Judge Mbenenge then concluded that Clauses 15 and 21 of the Admission Policy "unjustifiably limit the rights under sections 9(1), 10, 28(2) and 29(1)(a) of the Constitution and fall to be declared unconstitutional."[438] In addition, Mbengenge JP noted, "[t]he impugned Admission Policy (Circular 06 of 2016, as amended by Circular 01 of 2019) does not save clauses 15 and 21 from unconstitutionality."[439]

Judge Mbenenge recalled that Section 3(1) of the Schools Act makes it mandatory for "all children to attend school from the age of 7 until 15, or on reaching grade 9, or whichever comes sooner."[440] Clauses 15 and 21 of the Admission Policy, however, impose additional requirements "on children who seek admission to public schools." According to Judge Mbenenge, these additional requirements are not "contemplated by the Schools Act."[441] Also, the National Education Policy Act 27 of 1996 ("NEPA") does not contain any provision that either "expressly or impliedly" authorizes "the imposition of the requirement of providing a birth certificate or identification document as a necessary precondition for admission to a public school."[442] Thus, concluded Judge Mbenenge, Clauses 15 and 21 of the Admission Policy "are also liable to be set aside on the basis that they are *ultra vires* the Schools Act and NEPA."[443]

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435. *Id*.

436. S. AFR. CONST., 1996 § 36(1) (emphasis added by Mbenenge JP); *see also Centre for Child Law and Others* (2840/2017), para. 96.

437. *Centre for Child Law and Others* (2840/2017), para. 97.

438. *Id*. para. 101.

439. *Id*.

440. *Id*. para. 104.

441. *Id*.

442. *Id*. para. 105; *see also* National Education Policy Act 27 of 1996 (S. Afr.).

443. *Centre for Child Law and Others* (2840/2017), para. 106.

Next, Judge Mbenenge examined the proper interpretation of Sections 39 and 42 of the Immigration Act.[444] Section 42(1) of the Immigration Act 13 of 2002 makes it an offense for any person (except for "humanitarian assistance") to "aid, albet, assist, enable or in any manner help—(a) an *illegal foreigner*; or (b) a *foreigner* in respect of an matter, conduct or transaction which violates such *foreigner's* status, when applicable, including but not limited to—(i) providing instruction or training to him or her, or allowing him or her to receive instruction or training."[445] According to Section 49(6) of the Immigration Act 2011, any individual who fails to "comply with one of the duties or obligations set out under sections 38 to 46 shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding five years."[446]

With respect to the interpretation of Sections 39 and 42 of the Immigration Act, Judge Mbenenge took into consideration the submission of the SAHRC and then suggested that those sections "ought to be interpreted so as not to be in conflict with section 29(1)(a) of the Constitution."[447] He concluded that for that reason and contrary to the position taken by the human rights NGO, Section 27, he will choose "an interpretation that saves the impugned sections from

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444. *Id*. para. 108. Section 39 of the Constitution of Kenya provides as follows:

> (1) No learning institution shall knowingly provide training of instruction to—(a) an *illegal foreigner*; (b) a *foreigner* whose *status* does not authorise him or her to receive such training or instruction by such person; or (c) a *foreigner* on terms or conditions or in a capacity different from those contemplated in such *foreigner's* status. (2) If *an illegal foreigner* is found on any *premises* where instruction or training is provided, it shall be presumed that such *foreigner* was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such *premises*, unless *prima facie* evidence to the contrary is adduced.

Immigration Act No. 13 (2002) (S. Afr.) § 39 (emphasis in original).

445. *See, e.g*., Immigration Act No. 13 (2002) § 42(1) (S. Afr.).

446. Immigration Act No. 13 (2011) § 49(6) (S. Afr.).

447. *Centre for Child Law and Others* (2840/2017), para. 113. The SAHRC had "appositely" Mbenenge JP's view,

> argued that the interpretation hinges on an invocation—(a) the requirement in section 39(2) of the Constitution which requires that all legislation be interpreted to promote the spirit, purport and objects of the Bill; (b) the principle enunciated in section 233 of the Constitution requiring that legislation be interpreted in conformity with international law; and (c) the presumption that legislation does not intend to change the law more than is necessary, and that Parliament knows the existing law when it legislates.

Id. para. 111.

constitutional invalidity."[448] Judge Mbenenge supported this approach by citing *Rahube*,[449] a case of the ZACC in which Goliath AJ held that "[w]hen faced with a challenge to the constitutional validity of a provision in an Act, the Court examining the challenge should ascertain whether it is reasonably possible to interpret the section in a manner that conforms with the Constitution."[450]

Judge Mbenenge recalled that Section 39(2) of the Constitution mandates that "[w]hen interpreting any legislation," all courts in South Africa "must promote the spirit, purport and objects of the Bill of Rights."[451] Judge Mbenenge also cited *Hyundai Motor Distributors*[452] which held that "all statutes must be interpreted through the prism of the Bill of Rights."[453] He then noted that the rights enshrined in the Bill of Rights that "are of relevance" when interpreting Sections 39 and 42 of the Immigration Act are "the right to basic education, the right that seeks to uphold the best interests of the child, the right to equality, and the right to dignity."[454] Recalling that he had already examined these rights as part of the discussion of Clauses 15 and 21 of the Admission Policy, Judge Mbenenge then reiterated that "children, including those who are undocumented and whose presence in the country may be illegal, are entitled to the right under section 29(1) of the Constitution."[455]

Based on Section 39(1)(c) of the Constitution, which states that courts in South Africa "may consider foreign law" when interpreting a provision of the Bill of Rights,[456] Judge Mbenenge noted, as argued by the SAHRC, "that the interpretation of section 29(1) of the Constitution

448. *Id*. para. 112.

449. *Rahube v. Rahube and Others* [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (Oct. 30, 2018).

450. *Id*. para. 34.

451. *Centre for Child Law and Others* (2840/2017), para. 113; *see also* S. AFR. CONST., 1996 § 39(2).

452. *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit N.O. and Others* (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (Aug. 25, 2000).

453. *Centre for Child Law and Others* (2840/2017), para. 113; *see also Hyundai Motor Distributors*, para. 21.

454. *Centre for Child Law and Others* (2840/2017), para. 114.

455. *Id*.

456. S. AFR. CONST., 1996 § 39(1)(c).

accords well with foreign law."[457] Judge Mbenenge cited *Plyler v. Doe*,[458] a case in which the US Supreme Court had the opportunity to determine whether it was constitutional for the State of Texas to withhold public funds "from local schools for the education of children who were not 'legally admitted' into the United States."[459] Writing for the US Supreme Court, Justice Brennan held that in order for the State of Texas to deny the children of parents who had entered the State illegally free public education that it offered to other children, "that denial must be justified by a showing that it furthers some substantial state interest."[460]

With respect to conformity of the Schools Act with international law, Judge Mbenenge explained that Section 233 of the Constitution of South Africa "enjoins courts when interpreting legislation to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is not."[461] After noting that he had already made reference to international human rights instruments that have been signed and ratified by South Africa and which the country's courts are bound to give effect to, he then explained that the ZACC has, "on previous occasions," drawn inspiration from these conventions while interpreting provisions of the Bill of Rights.[462]

Judge Mbenenge noted that there is a "longstanding presumption that the legislature does not intend to alter the existing law more than is necessary" and that "[t]he legislature is also presumed to know the existing laws."[463] The Schools Act, which was promulgated before the enactment of the Immigration Act, defines "learners" as "*any person receiving an education or obliged to receive education in terms of the Act*."[464] Judge Mbenenge drew attention to the fact that the definition of learners does not distinguish between "learners that are legally present in the country and those that are not."[465]

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457. *Centre for Child Law and Others* (2840/2017), para. 115.

458. Plyler v. Doe, 457 U.S. 202 (1982).

459. *Centre for Child Law and Others* (2840/2017), para. 116; *see also Plyler*, 457 U.S. at 457.

460. *Plyler*, 457 U.S. at 220.

461. *Centre for Child Law and Others* (2840/2017), para. 121; *see also* S. AFR. CONST., 1996 § 233.

462. *Centre for Child Law and Others* (2840/2017), paras. 122, 123.

463. *Id*. para. 124.

464. *Id*. (emphasis in original).

465. *Id*.

Judge Mbenenge then concluded that taking into consideration the definition of learners provided in the Schools Act and that "in the absence of an express indication that the Immigration Act intended to repeal or amend the Schools Act, the Immigration Act must be interpreted not to detract from the right recognized under the Schools Act for all learners to receive education."[466] He noted that the Immigration Act does not make any reference to "*school*," "*education*," or "*basic education*" and that the significance of this is that the Immigration Act was enacted when the Constitution "already referred to a right to '*basic education*' in section 29" and "that the international law that bound South Africa referred to the right of the child to '*education*'" and finally, "the Schools Act referred to '*school*', and '*education*' when it conferred rights on learners."[467] Thus, concluded Judge Mbenenge, "in light of these provisions, it is appropriate to interpret the Immigration Act's reference to '*learning institution*' and '*training or instructions*' as not referring to the basic education that schools provide to children."[468]

Judge Mbenenge then held that had Parliament intended for the expressions "learning institution" and "training or instructions" in the Immigration Act to apply to the "basic education that schools provide to children," it would have "had to be explicit in using these terms" when it drafted and enacted the Immigration Act.[469] Parliament, instead, referred to "*learning institutions*" and to "*training and instruction*."[470] He opined that "learning institutions" and "training and instruction" ought to be interpreted "to refer not to the rights of the children who receive basic education, but adults attending '*learning institutions*' to obtain something over and above '*basic education'* and are thereby trained or instructed in furtherance of their pursuits."[471]

Judge Mbenenge then held that Sections 39 and 42 of the Immigration Act "fall to be interpreted in a way that does not prohibit children from receiving basic education from schools"[472] and that such an interpretation "is consistent with the right to basic education as

466. *Id*. para. 125.
467. *Id.* para. 126 (emphasis in original).
468. *Id*. (emphasis in original).
469. *Id*.
470. *Id*. (emphasis in original).
471. *Id*. (emphasis in original).
472. *Id*. para. 127.

enshrined in section 29 [of the Constitution]; every child's rights under section 28(2) [of the Constitution] to have their best interests taken into account in matters concerning them; international conventions' emphasis on providing education to all children irrespective of their status and the existing obligation in the Schools Act placed on parents; and Schools to ensure that all learners receive basic education."[473]

Therefore, concluded Judge Mbenenge, "the [Department of Basic Education] and the Provincial Department are acting unconstitutionally in not permitting children to continue receiving education in public schools purely by reason of the fact that they lack identification documents."[474] After noting that the assistance provided to the Court by the amici curiae was "invaluable" and that it went "a long way in assisting the court to arrive at the conclusion it did," Judge Mbenenge then spelled out the Court's order.[475]

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473. *Id*.

474. *Id*. para. 131.

475. *Id*. para. 135. The Court ordered as follows:

> 1. The unreasonable delay in the launch of this application is condoned in terms of section 9(1) of the Promotion of Administrative Justice Act 3 of 2000. 2. Clauses 15 and 21 of the Admission Policy for Ordinary Public Schools published in Government Gazette 19377 (19 October 1998) under Government Notice 2432 *are declared to be inconsistent with the Constitution and, therefore, invalid*. 3. Circular 06 of 2016, dated 17 March 2016, the contents of which were communicated to School Governing Bodies and Principals of public schools that any Norms and Standards, Post Provisioning allocation and National School Nutrition Program transfers to schools in the Eastern Cape Province will be based only on the learner numbers where valid identity, permit or passport numbers have been captured in the South African Schools Administration and Management System *is declared inconsistent with the South African Schools Act 84 of 1996 and the Constitution and, therefore, invalid, and is set aside*. 4. The first to third respondents are directed to admit all children not in possession of an official birth certificate into public schools in the Eastern Cape Province (the schools), and where a learner cannot provide a birth certificate, the Principal of the relevant school is directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified. 5. Sections 39 and 42 of the Immigration Act 13 of 2002 *do not prohibit the admission of illegal foreign children into schools and do not prohibit the provision of basic education to illegal foreign children*. 6. *The first, second and third respondents are interdicted and restrained from, in any manner whatsoever, removing or excluding from schools, children, including illegal foreign children, already admitted purely by reason of the fact that the children have no identity document number, permit or passport, or have not produced any identification document*s. 7. The first to fifth respondents shall pay the costs of the application, including the costs consequent upon the employment of two counsel where utilised, jointly and severally, the one paying the other to be absolved.

Id. (emphasis added).

The case *Centre for Child Law and Others v. Minister of Basic Education and Others* is very important, not just because its judgment affirms the right of *all* children in South Africa to receive basic education, but also because it contributes significantly to the protection of the rights of refugee and asylum-seeking children. The High Court's decision in *Centre for Child Law* should inform policy on access to education for all children, including refugee and asylum-seeking children in South Africa, as well as in other countries in Africa.

Many African countries have laws that allow children who are born within their jurisdictions to acquire citizenship by birth.[476] In the Section that follows, this Article will examine a case from the High Court of Namibia, which deals with the right of a child born in Namibia to refugee parents to acquire citizenship by birth.

3. Kwizera v. Minister of Home Affairs, Immigration, Safety and Security (High Court of Namibia)

The applicant in *Kwizera*[477] was born in Otjiwarongo, Namibia, on March 27, 2002, to parents of Burundian nationality.[478] Writing for the High Court of Namibia, Justice Usiku noted that the matter before the Court concerns the question whether "a child born in Namibia of parents who are not Namibian citizens, who entered Namibia as asylum seekers, and who at the time of the child's birth had not yet obtained refugee status, is entitled to Namibian citizenship by birth in terms of art. 4(1)*(d)* of the Namibian Constitution."[479]

Justice Usiku stated that the applicant, Russel Kwizera, had sought an order from the Court:

476. For example, Namibia's constitution provides that citizenship can be acquired by birth. Of special interest to this method of acquiring citizenship are children who are born to immigrants to Namibia. According to Article 4(1)(d), the following category of persons can acquire citizenship by birth: "those born in Namibia after the date of Independence who do not qualify for citizenship under Sub-Article (c) hereof, and whose fathers or mothers are *ordinarily resident* in Namibia at the time of the birth of such persons." CONSTITUTION OF NAMIBIA 1990 (rev. 2014), art. 4(1)*(d)* (emphasis added). This provision does not cover children born to diplomats (i.e., individuals enjoying diplomatic privileges), career representatives of another country, illegal immigrants, and individuals who are members of any police, military or security unit seconded for service within Namibia by the government of another country. *See id.*

477. *Kwizera v. Minister of Home Affairs, Immigration, Safety & Security*, Case No. HC-MD-CIV-MOT-GEN-2021/00357, [2023] NAHCMD 311 (June 8, 2023).

478. *Id*. paras. 5, 7.

479. *Id*. para. 1.

> (a) declaring him to be a Namibian citizen by birth as envisaged by art 4(1)*(d)* of the Constitution;
>
> (b) directing the respondent to, within 30 days from the date of this order, issue him with a Namibian passport, and,
>
> (c) costs of suit.[480]

The respondent, the Minister of Home Affairs, Immigration, Safety and Security ("MHA"), however, had opposed the application and filed a counter application.[481] The applicant, noted Justice Usiku, opposed the MHA's counter application.[482] Justice Usiku began the examination of the case by noting that the parents of the applicants were nationals of Burundi, fled the country in 1996 as a result of "an internal inter-ethnic conflict," and arrived Namibia on October 11, 2000.[483] Subsequently, the applicant's parents applied for refugee status on October 16, 2000 "in accordance with the provisions of the Namibia Refugees (Recognition and Control) Act 2 of 1999."[484] On March 27, 2002, the applicant, through his parents, was issued "a Namibian 'confirmation of birth.'"[485] Justice Usiku notes, however, that on the confirmation-of-birth document, the applicant's father was initially referred to as "Namibian" but that later, someone had crossed out "Namibian" and replaced it with "Burundian."[486] Subsequently, on May 28, 2002, "the applicant was issued with a full birth certificate, which records that his father's place of birth is Bugenyizi, but the country is indicated as Namibia."[487]

On September 4, 2006, the application of the applicant's father for refugee status in Namibia was approved by the Namibia Refugees

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480. *Id*. para. 2.

481. Justice Usiku noted that as part of the opposition to the applicant's prayer, the MHA launched a counter application in which he [sought] an order: (a) declaring that an asylum seeker is not an ordinarily resident of Namibia and a child born in Namibia to an asylum seeker shall not be a Namibian citizen by birth as envisaged in art 4(1)(*d*) of the Constitution, (b) declaring that a decision to issue the applicant a full birth certificate on 28 May 2002 is reviewed and set aside and the full birth certificate and the national identification card issued pursuant thereto are revoked, and, (c) costs of suit.

Id. para. 3.

482. *Kwizera* [2023] NAHCMD 31, para. 4.

483. *Id*. para. 5.

484. *Id*. para. 6.

485. *Id*. para. 7.

486. *Id*.

487. *Id*. para. 8.

Committee.[488] He was subsequently asked to report to the Camp Administrator at the Osire Camp so he could apply for a refugee identity card.[489] In 2018, the applicant reached 16 years of age and applied for a Namibian identity card, which was subsequently issued on October 24, 2018.[490] In 2021, the applicant was informed that the school that he attended had "organized a school trip to South Africa, which he intended to attend."[491] In preparation for the trip to South Africa, the applicant applied for a Namibian passport on April 15, 2021.[492] However, the passport authorities at the Ministry of Home Affairs ("MHA") rejected his application, stating that he was not a Namibian citizen since he was born in Namibia to parents who were refugees in the country.[493]

Not satisfied with the response that he had received from the MHA, the applicant sought the services of legal counsel and instructed his new attorneys to "re-apply for a Namibian passport on his behalf."[494] On May 3, 2021, the attorneys for the applicant were informed by the Executive Director of the MHA that the applicant was not entitled to a Namibian passport because he was not a Namibian citizen.[495] On May 12, 2021, the MHA's attorneys sent a letter to the applicant's legal counsel "expressing readiness to issue the applicant an emergency travel document that is valid for 12 months and recording that the applicant's attorneys were informed at the meeting of 3 May 2021 that the [MHA] was investigating how the applicant obtained Namibian citizenship."[496]

In a letter dated May 17, 2021, the applicant's legal counsel notified the attorneys for the MHA that the applicant was a Namibian citizen by birth and that he was willing to accept the proposed Namibian travel document that was valid for twelve months but that he would not accept a refugee passport.[497] Since there was no agreement between the parties regarding whether the applicant was a citizen of

488. *Id*. para. 10.
489. *Id*.
490. *Id*. para. 11.
491. *Id*. para. 12.
492. *Id*.
493. *Id*.
494. *Id*. para. 13.
495. *Id*.
496. *Id*. para. 14.
497. *Id*. para. 15.

Namibia by birth, by virtue of the provisions of Art. 4(1)*(d)* of the Constitution, the applicant filed, on September 9, 2021, the application that is currently before the High Court for determination.[498] In his application, the applicant argued that "he is a Namibian citizen by birth, by virtue of provisions of art 4(1)*(d)* of the Constitution in that: (a) at the time of his birth, his parents were ordinarily resident in Namibia, and that, (b) his parents are not persons falling within the categories of person mentioned in the proviso to art 4(1)*(d)*."[499]

In his confirmatory affidavit, the father of the applicant acknowledged that he was the biological father of the applicant, that the applicant was born in Namibia on March 27, 2002, at the time the applicant was born, he and his wife were lawfully living and residing in Namibia, that he had read the "founding affidavit of the applicant," and that he was confirming "as true and correct all the references therein."[500] Justice Usiku then noted that the applicant was seeking the relief prayed for in the "Notice of Motion."[501] The respondent challenged the applicant's claim and disputed his assertion that he was a citizen of Namibia by birth.[502] In addition, averred the respondent, the birth certificate that had been given to the applicant, as well as, the identification card, "were issued on wrong information and misstatement of facts and were therefore, issued erroneously and are liable to be revoked."[503]

In response to the applicant's argument that he would become stateless if the High Court found that he is not a Namibian citizen by birth, the respondent stated that the applicant would not be rendered stateless because he could acquire Namibian citizenship by "registration or naturalisation as contemplated in art 4(3) and (5) of the Constitution."[504] Finally, the respondent argued that given that the

498. *Id*. para. 16.

499. *Id*. para. 17. The applicant also advanced other reasons to support his contention that he had acquired Namibian citizenship by birth. These are that: "(a) he was issued with a Namibian full birth certificate and a Namibian national identity card reflecting that he is a Namibian citizen, (b) from the time of his birth he only had one status for his presence in Namibia, namely as a citizen, (c) he has lived his entire life in Namibia and regards Namibia his only home, and that, (d) taking away his citizenship by birth will render him a stateless person, as he is not willing to apply for citizenship by descent." *Id*.

500. *Kwizera*, [2023] NAHCMD 311] para. 19.

501. *Id*. para. 20.

502. *Id*. para. 21.

503. *Id*. para. 23.

504. *Id*. para. 25.

applicant was born of Burundian parents, "he is a citizen of Burundi"[505] and that the decision to "reject applicant's passport application was reasonable in the circumstances and that the applicant's application be dismissed."[506]

Justice Usiku noted that the respondent had asserted in the counter-application that the relief prayed for by the applicant raises the question "whether a child born in Namibia to asylum seekers acquires citizenship at birth."[507] The respondent argued further that if the relief sought by the applicant is granted, then "every child born of an asylum seeker [would] automatically [acquire] Namibian citizenship by birth"[508] and that this does not conform with the provisions of Article 4(1)*(d)* of the Constitution.[509] Regarding the identification documents that had been issued to the applicant by the State of Namibia, the respondent had submitted that they should be revoked because they were issued in error.[510]

With respect to the applicant's position, Justice Usiku explained that he had contended that he was entitled to Namibian citizenship because he was born in Namibia to parents who were "ordinarily resident in Namibia" and that "children born of parents who are asylum seekers do not form part of the list of persons excluded from acquiring Namibian citizenship by birth under art 4(1)*(d)*."[511] Regarding the identification documents that had been issued to him by the government of Namibia, the applicant averred that there is no evidence that these documents were issued based on wrong information and therefore the identification documents were valid and should not be revoked.[512]

Having provided an overview of the submissions of both the applicant and the respondent, Justice Usiku then proceeded to analyze the case.[513] He noted that the principal issue before the Court for determination is "whether or not the applicant is entitled, in terms of art 4(1)*(d)* to Namibian citizenship by birth" and that "[i]f he is so

505. *Id*.
506. *Id*. para. 26.
507. *Id*. para. 27.
508. *Id*.
509. *Id*.
510. *Id*. para. 28.
511. *Id*. para. 29.
512. *Id.* para. 30.
513. *Id*. para. 31.

entitled, then it follows that he is entitled to be issued with Namibian identification documents."[514] However, if he is not entitled to Namibian citizenship by birth, Justice Usiku explained, then he cannot claim Namibian identification documents.[515]

Justice Usiku stated the relevant provisions of Article 4(1)*(d)* of the Constitution of Namibia and noted that "[t]he main question arising from the provisions of art[.] 4(1)*(d)* is whether the applicants' parents were 'ordinarily resident in Namibia' at the time of [the applicant's] birth."[516] An important question arising from examining Article 4(1)*(d)* of the Constitution that must be answered by the Court, then, is whether the applicant's parents were "ordinarily resident in Namibia" at the time of his birth.[517] Justice Usiku cited *MW v. Minister of Foreign Affairs* in which the Supreme Court of Namibia interpreted the term "ordinarily resident."[518] Justice Usiku stated that based on the facts adduced in Court, he was of the opinion that the main reason for the applicant's parents being in Namibia at the time of his birth was to "wait for the outcome of their application for refugee status."[519] He noted further that at that time, "the outcome could result either in the approval or rejection of the application for refugee status."[520] Also, Justice Usiku explained that "being in Namibia awaiting the outcome of an application for refugee status bestows only a right to remain temporarily in the country" and that if "such application is refused, the applicant loses the protection granted by that temporary right and he or she shall be subject to the laws governing deportation of unlawful entrants."[521]

Justice Usiku then explained that the term "ordinarily resident" in Article 4(1)*(d)* of the Constitution "is used in the context of parents who enjoy full legal protection to remain in Namibia" and that parents who are only granted the right to remain in Namibia while they wait on the outcome of their application for refugee status are not covered by this constitutional provision.[522] Thus, concluded Justice Usiku, the

514. *Id*.
515. *Id*.
516. *Id*. para. 32.
517. *Id*. para. 33.
518. *De Wilde (MW) v. Minister of Foreign Affairs*, 2016 (3) NR 707 (SC), para. 70.
519. *Kwizera*, [2023] NAHCMD 311 para. 36.
520. *Id*.
521. *Id*. para. 37.
522. *Id*. para. 38.

right of a refugee-seeking individual to "full legal protection to remain in [Namibia] arises only when the application is successful."[523] The parents of the applicant, held Justice Usiku, cannot be considered to have been "ordinarily resident" in Namibia at the time of the applicant's birth and consequently, the applicant "never acquired Namibian citizenship at birth, as contemplated in art 4(1)*(d)*."[524]

Justice Usiku then explained that since he had determined that the applicant is not a Namibian citizen by birth, it follows that the applicant is "not entitled to the Namibian identification documents and that those which were issued to him should therefore, be revoked."[525] He then examined the issue of whether the Court's decision that the applicant had not acquired Namibian citizenship by birth would render him stateless.[526] He stated that in addition to the fact that the applicant "retains his Burundian citizenship by descent," he was entitled to apply for Namibian citizenship if he desired to do so.[527]

Justice Usiku noted that in his counter application, the respondent had prayed the Court to declare that "an Asylum seeker is not an ordinary resident of Namibia and a child born in Namibia to an asylum seeker shall not be a Namibian citizen by birth as envisaged in Article 4(1)*(d)* of the Namibian Constitution."[528] After conducting the required "two-fold enquiry," Justice Usiku concluded that the appropriate declaratory relief "should be phrased to the effect that: parents who are in Namibia awaiting the outcome of their application for refugee status and who, at the time of birth of their child, have not obtained refugee status, are not 'ordinarily resident' in Namibia, for the purposes of art 4(1)*(d)* of the Constitution."[529] Justice Usiku then dismissed the applicant's application and granted the respondent's counter application.[530]

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523. *Id*.
524. *Id*. para. 39.
525. *Id*. para. 40.
526. *Id*. para. 41.
527. *Id*.
528. *Id*. para. 42.
529. *Id*.
530. Specifically, the Court issued the following order:
1. The applicant's application is dismissed. 2. It is declared that parents who are in Namibia awaiting the outcome of their application for refugee status and who, at the time of the birth of their child have not obtained refugee status, are not 'ordinarily resident' in Namibia for the purposes of art 4(1) (*d*) of the Constitution. 3. The decision to issue the applicant a full birth certificate on 28 May 2002 is hereby

The Court's ruling created a significant dilemma for the applicant. Given the fact that he was born in Namibia, had lived there all his life, and had never left the country, the only cultural and linguistic ties that he had were with Namibia and not Burundi. Although his parents fled Burundi in 1996 because of inter-ethnic conflict, by 2023, when the case was being decided, the security situation in Burundi had not improved significantly.[531]

Thus, it is unlikely that the applicant would wish to return to the chaos that his parents had fled from when they left Burundi in 1996 in search of more peaceful surroundings in Namibia. That left the applicant with the second alternative: acquisition of Namibian citizenship by "registration or naturalization as contemplated in art 4(3) and (5) of the Constitution" of Namibia.[532] However, the applicant would have to prove that he had been *ordinarily resident* in Namibia. The High Court in *De Wilde v. Minister of Home Affairs* had held that to be ordinarily resident in Namibia, one had to be in possession of a permanent residency permit.[533] The Court in *Kwizera* had already revoked the applicant's identification documents based on its interpretation of Article 4(1)*(d)* of the Constitution.[534] It was likely to be extremely challenging for the applicant to acquire the permanent residency permit required for him to prove that he had been ordinarily

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reviewed and set aside and the full birth certificate and the national identification card issued pursuant thereto are hereby revoked. 4. The applicant is ordered to pay the costs of the respondent occasioned by the application and the counter application, such costs to include costs of one instructing and two instructed counsel. 5. The matter is removed from the roll and is regarded finalized.

Id. para. 49.

531. Human Rights Watch, *Burundi: Events of 2023*, https://www.hrw.org/world-report/2024/country-chapters/burundi?gad_source=1&gclid=Cj0KCQjwn9y1BhC2ARIsAG5IY-4Vt8oLEZhoobNpQKu8kj1fJxtXScYzgVaAqURelREWGXQoIBpAgPoaAhKhEALw_wcB [https://perma.cc/35ZN-WTXH] (noting the deteriorating security situation in Burundi).

532. According to Article 4(3) of the Constitution, the applicant can acquire Namibian citizenship by marriage—this provision will necessarily interfere with the applicant's right to marry someone of his choice since he must marry a citizen of Namibia in order to remain in the country as a citizen. CONSTITUTION OF NAMIBIA 1990 (rev. 2014), art. 4(3). Article 4(5) states that he can acquire Namibian citizenship by naturalization if he is a person who is "ordinarily resident in Namibia at the time when the application for naturalisation is made; and b. have been so resident in Namibia for a continuous period of no less than ten (10) years; and c. satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law." CONSTITUTION OF NAMIBIA 1990 (rev. 2014), art. 4(5).

533. *De Wilde v. Minister of Home Affairs* [2016] NASC 12 (June 13, 2016), para. 25.

534. *Kwizera*, [2023] NAHCMD 311, para. 40.

resident in Namibia so that he could apply for Namibian citizenship through the "registration or naturalization" channel as provided in Article 4(5) of the Constitution of Namibia.[535]

In *De Wilde*, Deputy Chief Justice Damaseb explained that "[i]n determining whether or not a person is ordinarily resident as contemplated by Art 4(1)*(d)*, each case must be considered on its facts"[536] and that "[k]ey considerations will include whether the person concerned normally lives in Namibia, and is therefore not merely visiting Namibia, and whether the person has no immediate intention of permanent departure."[537]

Russel Kwizera was born in Namibia and has lived continuously in Namibia; he cannot be considered one who is merely visiting the country; and he has not indicated any intention to permanently leave the country. If he were to apply for registration and naturalization in Namibia, would he qualify under Article 4(5)*(a)* as an individual who is "ordinarily resident in Namibia" if this provision is read with the Supreme Court's decision in *De Wilde*?[538] Some observers have noted that the Supreme Court's decision in *De Wilde* will open "the door for parents who are not permanent residents of Namibia and who do not otherwise fall under any of the other categories under article 4 of the Constitution to apply for a certificate of Namibian citizenship by birth for their child, if that child was born in Namibia and one of the parents was ordinarily resident in Namibia at the time of the birth," with courts guided by the Supreme Court's new definition of "ordinarily resident."[539]

An important lesson from *Kwizera* is that it exposed the fragile nature of the rights of children born to refugees, especially their right to citizenship. If children, regardless of the immigration or citizenship status of their parents, do not have clear access to a nationality, their rights, including their right to life, can be at risk. For example, they may not be able to have access to education and healthcare in the

535. CONSTITUTION OF NAMIBIA 1990 (rev. 2014), art. 4(5).

536. *De Wilde*, [2016] NASC 12, para. 70.

537. *Id.*

538. CONSTITUTION OF NAMIBIA 1990 (rev. 2014), art. 4(5)(a).

539. Stephen Vileghe, *The Supreme Court confirms minor child's right to citizenship—Namibia*, LEX AFRICA (July, 2016), https://lexafrica.com/2016/07/the-supreme-court-confirms-minor-childs-right-to-citizenship-namibia/#:~:text=It%20opens%20up%20the%20door,one%20of%20the%20parents%20was [https://perma.cc/QD5C-L5RL].

countries in which they were born. In addition, such a child is not likely to be able to obtain travel documents to legally cross borders and return safely to the countries in which they were born. This can force them to take dangerous and extremely unsafe journeys in order to secure safety in other countries. In addition, such stateless refugee children are likely to be forced into extreme poverty and into situations where they are highly susceptible to various forms of exploitation, including child labor, child marriage, and sexual slavery.[540]

The protection of the rights of children born to refugees can be improved significantly if African governments ensure that the "best interests of the child" principle is made the foundation for all legislation affecting children or for interpreting legislation that implicates children's rights, including children born to refugee and asylum-seeking parents. Perhaps African countries should start seriously considering amending their constitutions to create "birthright citizenship" under which all children born in a country automatically acquire citizenship in that country regardless of their parents' nationality or immigration status.[541]

This should be followed by legislation that enhances the ability of all parents, including those who are refugees, to register the births of their children. Authorities should not unnecessarily impede the registration of children born to refugee and asylum-seeking parents because they do not have, for example, a permanent residence within the country, or because they do not speak the country's official language, or because they do not trace their ancestry to one or more of the country's existing ethnolinguistic groups. The emphasis should be on the best interests of the child, regardless of whether the child is born to parents who are citizens or nationals of the country or are refugees or asylum seekers.

With respect to Article 4(1)*(d)* of the Constitution of Namibia, for example, if the best interests of the child are taken into consideration, the expression "ordinarily resident" can be changed to "resident" and the provision changed to: "A person is a citizen of Namibia by birth: *(d)* if he or she was born in Namibia after independence to a father or mother who was *resident* in Namibia at the time of the birth and did not fall into one of these exceptions, as long as the application of the

540. *See Child trafficking is a crime—and represents the tragic end of children*, SAVE THE CHILDREN, https://www.savethechildren.org/us/charity-stories/child-trafficking-awareness [https://perma.cc/49UY-4U4G].

541. *See, e.g.*, U.S. CONST. amend. XIV.

exception would not result in statelessness." Then, the category of "illegal immigrants" is deleted from the list of exceptions. This modification would significantly improve the rights of children born to refugee or asylum-seeking parents and minimize the chances that they would be rendered stateless. Such a template can then be used by African countries to reform their constitutions or immigration statutes on the acquisition of citizenship by birth.

Children born to refugee parents as well as refugee and asylum-seeking children usually find themselves in a range of challenging and difficult situations that "expose them to particular risk of rights violations and which, accordingly, demand additional forms of protection."[542] Children born to refugee parents are already in a much more precarious situation compared to other children whose parents are citizens and that should call for special protection regimes for refugee children. The Committee on the Protection of All Migrant Workers and Members of their Families and the Committee on the Rights of the Child issued a joint general comment in 2017 in which they stated that "the best interests of the child should be ensured explicitly through individual procedures as *an integral part of any administrative or judicial decision* concerning the entry, *residence* or return *of a child*, placement or care of a child, or the detention or expulsion of a parent associated with his or her own migration status."[543]

In the case of a child born in a country to refugee and/or asylum-seeking parents, denying him or her the right to acquire citizenship by birth simply because of the immigration status of his or her parents is certainly not in the child's best interests. Therefore, it is important that African countries engage in necessary institutional reforms to significantly enhance the ability of children born to refugee and asylum-seeking parents to acquire citizenship by birth.

IV.SUMMARY AND CONCLUSION

In Africa, people migrate internally or externally for economic and political reasons. They may voluntarily leave their homes in search

542. *Part VIII Protection Measures for Children in Vulnerable Situations Introduction*, *in* 25 MONITORING STATE COMPLIANCE WITH THE UN CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF ATTRIBUTES 355, 355 (Ziba Vaghri, Jean Zermatten, Gerison Lansdown & Roberta Ruggiero eds., 2022).

543. CMW and CRC, *Joint general comment No. 3 (2017) on the general principles regarding the human rights of children in the context of international migration*, at 7, U.N. Doc. CMW/C/GC3-CRC/C/GC/22 (Nov. 16, 2024) (emphasis added).

of better opportunities to acquire skills that can enhance their ability to obtain higher-paying jobs or engage in entrepreneurial activities to create wealth for themselves. However, individuals may be forced by armed conflict and gross violation of human rights to flee their homes, with their children, and seek refuge in other countries. Through this process, they become refugees and/or asylum seekers in other lands. In addition, they may have children while in transit. In 2023, the African Center for Strategic Studies determined that "the number of Africans who are forcibly displaced, largely due to conflict, has risen over the past year and now totals over 40 million people" and these include "internally displaced persons, refugees, and asylum seekers."[544]

The UNHCR has reported that over eighty-three percent of the people who have been forced to flee their homes in South Sudan are women and children.[545] Many of these people are often forced to live in inhospitable and overcrowded camps with little access to welfare-enhancing and life-saving services, such as education, job-training opportunities, safe drinking water, sanitation, and healthcare. The children who are born to refugee and asylum-seeking parents become refugees themselves and are extremely susceptible to becoming stateless.[546]

Refugee children are recognized as bearers of rights enshrined in the UNCRC.[547] Human rights defenders have noted that what it means to be a "refugee child" has a significant impact on how the rights of such children are protected by immigration and other authorities within a country.[548] Refugee children, then, can be considered as children who are forced to flee their homes, often but not always with their parents, to escape persecution, war or violence.[549] In this Article, children who are born to refugee parents are also considered refugees and asylum seekers, unless the laws of the countries in which they are born allow

544. *African Conflicts Displace Over 40 Million People*, AFR. CTR. FOR STRATEGIC STUDIES 1–2 (Aug. 22, 2023), https://africacenter.org/wp-content/uploads/2023/10/African-Conflicts-Displace-Over-40-Million-People.pdf [https://perma.cc/355J-HYG6].

545. UNHCR, *South Sudan Refugee Crisis Explained*, *supra* note 16.

546. *See* Bronwen Manby, *Who Belongs? Statelessness and Nationality in West Africa*, MIGRATION POL'Y INST. (Apr. 7, 2016), https://www.migrationpolicy.org/article/who-belongs-statelessness-and-nationality-west-africa [https://perma.cc/B5RD-BW6N] (noting the extent of statelessness in West Africa and its consequences).

547. *See* UNCRC, *supra* note 58, art. 22.

548. *See* Lawrence et al., *supra* note 57, at 20.

549. *See* UNCRC, *supra* note 58; *see also Who is an 'asylum-seeker'?*, *supra* note 45.

them to automatically acquire citizenship by birth. In that case, the only action that the parents of such a child have to take in order for the child to acquire citizenship by birth is to ensure that the child's birth is officially registered.

The child, no matter the citizenship or immigration status of his or her parents, has a right to a name, identity, and a nationality, and this right must be protected by all States Parties to the UNCRC.[550] The CRC and CMW encourage States Parties to the UNCRC and the Migrant Workers Convention to take all necessary measures to ensure that all children within their jurisdictions "are immediately registered at birth and issued birth certificates, irrespective of their migration status or that of their parents."[551] The right to a nationality and safeguards against statelessness are very important for the well-being of children, especially for children who are either refugees or asylum seekers. This, of course, includes children who are born to parents who are refugees or asylum seekers.[552] In addition, States Parties are advised to "strengthen measures to grant nationality to children born in their territory in situations where they would otherwise be stateless."[553]

Many human rights scholars and advocates have argued that efforts to protect the rights of refugee children in Africa should be "viewed from the perspective of the 'best interests' of the child" principle.[554] This principle applies to all children, including those who are refugees or asylum seekers.[555] The UNHCR has actually developed guidelines on how to determine the best interests of the child as part of the international legal framework to protect refugee children.[556] Thus, in all actions regarding refugee and asylum-seeking children, including measures on the children's right to citizenship, the best interests of the child should be the guiding principle.[557] However, a failure to

550. *See* UNCRC, *supra* note 58, arts. 7, 8; *see also* UNCRC, *supra* note 58, art. 29.

551. CRC and CMW, *supra* note 80, para. 21.

552. *See* UNCRC, *supra* note 58, art. 7 (emphasizing the need for States Parties to guard against statelessness).

553. CRC and CMW, *supra* note 80, para. 26.

554. d'Orsi, *supra* note 170, at 300.

555. *See* KAIME, *supra* note 172, at 113.

556. *Id.*

557. *See id.*

undertake a holistic assessment of the best interests of the child can force the child into a situation of uncertainty or worse, statelessness.[558]

Courts, especially those in democratic societies, play a very important role in safeguarding, promoting, and protecting human rights, including those of refugee children.[559] When courts adjudicate the cases brought before them, they can strengthen people's rights, including those of refugee children, and develop the law to advance the protection of refugees in general and refugee children in particular. As human beings, refugee children are entitled to the protections of the rights enshrined in international and regional human rights instruments, including the UNCRC and the African Child Charter.[560]

One way to determine the extent to which the rights of refugee children are recognized and protected in African countries is to examine case law that directly addresses different aspects of the rights of refugee children and those of children born to refugee and asylum-seeking children. This Article has examined three court cases from the High Court of Kenya, the High Court of South Africa, and the High Court of Namibia. In the first case, *Refugee Consortium of Kenya and*

558. This is what happened in *Kwizera* when the High Court of Namibia on the question of the applicant's application for Namibian citizenship by birth. The applicant, Russel Kwizera, was born in Namibia to parents who were refugees from Burundi. The Court held that since the applicant's parents were not "ordinarily resident" in Namibia at the time of the applicant's birth," the "applicant never acquired Namibian citizenship by birth." In addition, the Court held that since the applicant was not entitled to Namibian citizenship by birth, the decision by the government to issue him a full birth certificate on May 28, 2002 was set aside and the full birth certificate and the national identification card issued pursuant to the full birth certificate were subsequently revoked. *Kwizera*, para. 49. Kwizera was left with two difficult and complicated options—to acquire citizenship by descent in Burundi, a country he did not know and had never visited, or face another daunting task and apply for Namibian citizenship by naturalization. CONSTITUTION OF NAMIBIA 1990 (rev. 2014), art. 4(5); *see also* HIAS, *What are the impacts of being stateless?*, https://hias.org/statelessness/ [https://perma.cc/F3JX-SSTE] (noting that children born to "refugee or asylum seeker parents" can fall into statelessness).

559. In this Article, "refugee children" include children, who, as defined in Article 1 of the OAU Refugee Convention, were forced to leave their homes or home country because of fear of being persecuted or killed, as well as children were born to parents who are refugees and/or asylum seekers. *See* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1, *adopted* Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974) [hereinafter OAU Refugee Convention].

560. U.N. Refugee Agency, *Protecting Refugee Children: Background Guide Challenge Topic #2*, UNHCR (2023), https://www.unhcr.org/media/protecting-refugee-children-background-guide-challenge-2-0 [https://perma.cc/4KF6-AHN6] (noting that refugee children require special care because of their vulnerable situation).

Another v. The Attorney General and Others,[561] the High Court held that the government of Kenya cannot use national security as a justification to violate the fundamental rights of people under its jurisdiction in general and those of refugees in particular. In this case, urban-based refugee children had been separated from their families, pursuant to a government directive. Writing for the High Court, Justice Lenaola nullified the government's directive and held that the government's actions were not in the best interests of the refugee children and that the government had failed to establish a real connection between the presence of the refugee parents in the urban areas, instead of the refugee camps, and danger to national security.[562]

The African Child Charter and the UNCRC enshrine the right to education for all children regardless of whether they are citizens, refugees, asylum seekers and whether they were born to refugee parents. States Parties to these international and regional human rights instruments are required to ensure that the rights enshrined in these instruments are respected and realized by each child within their jurisdictions without discrimination of any kind.[563]

In *Centre for Child Law and Others v. Minister of Basic Education and Others*, the High Court of South Africa was called upon to decide on the right of "undocumented children," who included refugee children, to basic education.[564] These children had been "precluded from unconditionally continuing to attend public schools unless they or their parents/guardians identify themselves by means of, inter alia, passports, identity documents, birth certificates or permits."[565] Of the thirty-seven children who were the subject matter of this case, the majority were born in South Africa to South African parents but were unable to obtain birth certificates. The rest were "foreign children residing in South Africa without necessary documentation allowing them to reside or study in South Africa."[566]

561. *Refugee Consortium of Kenya & Another v. The Attorney General and Ors* (2015) eKR. at 15–18 (Kenya).

562. *Id*. at 15.

563. UNCRC, *supra* note 58, art. 2; *see also* the African Child Charter, *supra* note 170, art. 11.

564. *Centre for Child Law and Others v. Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (Dec. 12, 2019).

565. *Id*. para. 1.

566. *Id*. para. 12.

The Court affirmed the right of all children residing in South Africa, regardless of their ability to produce a birth certificate or the proper form of identification, to receive basic education in South Africa.[567] This ruling represented an important contribution to jurisprudence on the protection of the rights of refugee children—the Court held that excluding undocumented learners, many of whom were refugee children, from attending public schools, violated the right to basic education guaranteed everyone in South Africa in Section 29(1)(a) of the Constitution.[568]

Some African countries have laws that allow children who are born within their jurisdiction to acquire citizenship by birth. However, children born to certain categories of individuals are excluded from acquiring citizenship through birth. In *Kwizera*, Russel Kwizera, who had been born in Namibia of Burundian parents who were refugees in the country, and had lived in Namibia all his life, prayed the High Court to declare him a citizen by birth pursuant to Article 4(1)*(d)* of the Constitution and order the respondent, the Minister of Home Affairs, to issue the applicant a Namibian passport.[569]

After conducting what he referred to as a "two-fold enquiry," Justice Usiku of the High Court of Namibia concluded that the appropriate declaratory relief must be phrased as follows: "parents who are in Namibia awaiting the outcome of their application for refugee status and who, at the time of birth of their child, have not obtained refugee status, are not 'ordinarily resident' in Namibia, for the purposes of art 4(1)*(d)* of the Constitution."[570] Justice Usiku then dismissed the applicant's application and granted the respondent's counter application.[571] Subsequently, he declared "that parents who are in Namibia awaiting the outcome of their application for refugee status and who, at the time of the birth of their child have not obtained refugee status, are not 'ordinarily resident' in Namibia for the purposes of art 4(1)(*d*) of the Constitution," which meant that the applicant did not meet an important condition for acquiring Namibian citizenship by

567. *Id*. para. 135.

568. *Center for Child Law* (2840/217), para. 114 (reiterating "that children, including those who undocumented and whose presence in the country may be illegal, are entitled to the right under section 29(1) of the Constitution").

569. *Kwizera* [2023] NAHCMD 311, paras. 1, 2.

570. *Id*. para. 45.

571. *Id*. para. 47.

birth.[572] In addition, held Justice Usiku, "[t]he decision to issue the applicant a full birth certificate on 28 May 2002 is hereby reviewed and set aside and the full birth certificate and the national identification card issued pursuant thereto are hereby revoked."[573]

The High Court's ruling created a dilemma for the applicant. First, given the fact that he had been born in Namibia and had lived there all his life, had never left the country, the only cultural and linguistic ties that he had were with Namibia and not Burundi, the land of his parents. It was not likely that the applicant would want to return to the chaos that his parents had fled from when they left Burundi in 1996—the Court had suggested that its decision would not leave the applicant stateless because he could seek Burundian citizenship by descent.[574] The Court also held that the applicant could acquire Namibian citizenship by registration or naturalization pursuant to Article 4(3) and 4(5) of the Constitution of Namibia. In addition to the fact that the provision in Article 4(3) will interfere with the applicant's right to marry a person of his choice—he must marry a citizen of Namibia in order to avail himself of this provision—the provision in Article 4(5) requires that he prove that he has been "ordinarily resident" in Namibia at the time when the application for naturalization is filed.[575] This could prove very difficult for the applicant, especially given the fact that his residency documents had been revoked by the High Court.[576]

In this Article the expression "refugee children" was defined to include children who accompany their families when they flee their homelands, regardless of the reasons for such flight, as well as children who are born to refugee parents. While all these three cases add to Africa's growing jurisprudence on the rights of refugee children, they also reveal that more work needs to be done in order to significantly improve the protection of the rights of these children. African countries must create legal and institutional environments within which refugee children are treated like any other children and allowed to enjoy the rights that are guaranteed to other children, for example, the right to basic education, healthcare, and family life. In addition, African States must reform their constitutions and citizenship statutes to make it easier for children born to refugee parents to acquire citizenship by birth.

572. *Id*. para. 49.
573. *Id*.
574. *Id*. para. 41.
575. CONSTITUTION OF NAMIBIA 1990 (rev. 2014), arts. 4(3), 4(5).
576. *Kwizera* [2023] NAHCMD 311, para. 49.