

# PRO BONO & HUMAN RIGHTS ALERT

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## IN THIS ISSUE

Refugee Day 2022: The right to birth registration for migrant children

This year we commemorate Refugee Day by highlighting the importance of birth registration for migrant children.



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## Refugee Day 2022: The right to birth registration for migrant children

This year we commemorate Refugee Day by highlighting the importance of birth registration for migrant children.

*"Without legal proof of identity, children are left uncouncted and invisible." – UNICEF*

### WHY IS BIRTH REGISTRATION IMPORTANT?

Birth registration is a significant right for every human as it triggers one's ability to access other rights. Both international and South African law clearly establish the right to birth registration as a fundamental human right, quintessential to ensuring the safety and future of a child.

### THE CURRENT PROBLEM WITH BIRTH REGISTRATION

South Africa is a country centred on documentation, and the consequences of not being documented can be far-reaching and result in a child not being able to access basic services that they are entitled to under the Constitution of the Republic of South Africa,

1996 (Constitution). In South Africa, birth registration is governed by the Births and Deaths Registration Act 51 of 1992. However, the manner in which birth registrations are recorded and classified is problematic in itself as it distinguishes between the birth of a citizen and the birth of a foreign national. Further, the registration of children born to foreign nationals, who are not permanent residents or refugees, is conditional upon valid documentation. This is because the current regulatory framework governing the registration of births in South Africa requires foreign nationals to provide valid documentation. This therefore means that the legislation operates from the premise that one's status in South Africa determines whether a child's birth can be registered or not.

### INTERNATIONAL LAW

The African Charter on the Rights and Welfare of the Child (Article 6) and the United Nations (UN) Convention on the Rights of the Child (Article 7), both of which the Government of South Africa is a party to, recognise the right of every child to be registered and to acquire a nationality. As a result, the right of children to have their birth registered should not be arbitrarily or unnecessarily limited. To do so is in conflict with South Africa's international obligations and the obligations imposed by the Constitution.

Moreover, both the 1951 UN Convention on the Status of Refugees and the Organisation of African Unity's (now the African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa affirm that all human beings shall enjoy fundamental rights and

## Refugee Day 2022: The right to birth registration for migrant children

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freedoms without discrimination. This is a principle that is firmly entrenched in the Constitution, which also emphasises equality and non-discrimination in the access of rights and freedoms.

*"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the Bill of Rights."*

*– Nugent J, Minister of Home Affairs and Others v Watchenuka and Others*

The current legal framework which regulates birth registration limits the rights and freedoms of children born to non-South Africans parents. This is done because of the immigration status of the parent(s).

### BEST INTERESTS OF THE CHILD

The obligations that are entrenched in the Constitution, as well as regional and international conventions ratified by South Africa, are applicable to persons seeking asylum from persecution in South Africa. It will undoubtedly be a serious dereliction of South Africa's obligations to limit the applicability of these rights to vulnerable and marginalised persons, especially children, seeking asylum in South Africa.

Significantly, there are legal principles in relation to the rights of children that are entrenched internationally and regionally and therefore binding on South Africa. The principle of best interests of the child is one such example that is found in the Convention on the Rights of the Child (Convention) This principle is also entrenched in section 28(2) of the Constitution which states that, "A child's best interests are of paramount importance in every matter concerning the child."

It must be borne in mind that in many aspects the Constitution mirrors the African Charter on the Rights and Welfare of the Child.

### WHAT'S THE SOLUTION?

In 2016, the UN Committee on the Rights of the Child made several recommendations to South Africa regarding barriers to birth registration. It recommended that the Government review and amend all legislation and regulations relevant to birth registration and nationality to ensure their full conformity with the Convention, including through the removal of requirements that may have punitive or discriminatory impacts on certain groups of children.

It is important to stress that an overly restrictive or exclusionary birth registration system will have an adverse effect and result in the exclusion of a significant number of children, especially those children born to non-South Africans.



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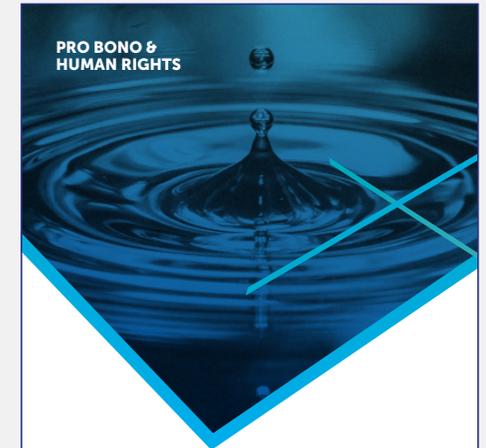
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The consequence of non-registration of birth will undoubtedly result in great hardships for many children, as access to essential services in South Africa in most instances requires a child's birth certificate.

Thus, a less restrictive birth registration system which allows for the registration of all children born in South Africa, regardless of their parent's immigration status, would

promote the principle of acting in the best interests of a child. This approach would be in line with regional and international legal principles to which South Africa is bound, and ensure the safety of all children.

**ELGENE ROOS**



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