SOUTH AFRICA’S 2015 IMMIGRATION REGULATIONS AND THE CONTROVERSY CONCERNING THE RIGHTS OF THE CHILD TRAVELLER

Prepared by

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Abstract

Over the years, human trafficking has become one of the fastest growing crimes in the world. According to a report of the United Nations Office on Drugs and Crime, Women and Children account for 75 percent of trafficked victims. Between 2007 and 2010, children accounted for 20 percent of the trafficked victims which is approximately 1343 children per year. Sadly, these statistics continue to rise annually. It is from this premise that no one can doubt the rationale behind the 2015 Immigration Regulations that affect children travelling in and out of South Africa. However, in terms of section 28 (2) of the Constitution of the Republic of South Africa, it is a prerequisite that in any matter affecting a child, the best interest of the child be of paramount importance. This mini dissertation seeks to establish whether these Immigration Regulations which initially came into effect in May 2014, are in the best interest of child travellers. This has been done by looking at the old system which regulated the movement of children; its loopholes and shortcomings, thereby establishing whether Regulation 6 (12) is a panacea or in fact the hallmark of a series of problems that have a detrimental effect on the well-being as well as the rights of the child.

The research methodology is mainly based on a study of existing literature. This largely includes internet sources, national legislation, regional and international instruments as well as case law. The South African Immigration Act 2002 is the primary reference with regards to regulatory information. However, lessons are drawn from legislation from other jurisdictions, notably Zimbabwean Immigration laws as well as those of Namibia. This is because South Africa shares a border with Zimbabwe and it also has a historical connection with Namibia and has good relations with both States. The mini dissertation analyses the impact of the 2015 Immigration Regulations not only on children but on other sectors as well. Lastly, the latter makes recommendations on how to improve these Regulations without affecting the best interest of child travellers.

Key words:
Declaration

I, Roseline Rumbidzai Muvhevhi (201104296) hereby declare that this mini dissertation which is hereby submitted for the award of Master of Philosophy in Human Rights (MPhil), Faculty of Law, at the University of Fort Hare, is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that it has not been previously submitted for the award of a degree at this or any other tertiary institution and that this dissertation represents the state of the law as at 16 September 2016.

Signed....................................

Date............................................
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The task of completing this mini dissertation would not have been successful without the inspiration and assistance from the following people:

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### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACRW</td>
<td>African Charter on the Rights of Women and Children 1990</td>
</tr>
<tr>
<td>ATC</td>
<td>Accredited Tourism Company</td>
</tr>
<tr>
<td>BCEA</td>
<td>Basic Conditions of Employment Act 1997</td>
</tr>
<tr>
<td>BDRA</td>
<td>Birth and Death Registration Act 1992</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women and Children 1979</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child 1989</td>
</tr>
<tr>
<td>DA</td>
<td>District Administrator</td>
</tr>
<tr>
<td>GA</td>
<td>General Assembly of the United Nations</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights 1966</td>
</tr>
<tr>
<td>ID</td>
<td>Identity Document</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
</tr>
<tr>
<td>IMC</td>
<td>Inter-Ministerial Committee</td>
</tr>
<tr>
<td>IOM</td>
<td>International Organisation for Migration</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Government Organisation</td>
</tr>
<tr>
<td>OSCE</td>
<td>Organisation for Security and Co-operation in Europe</td>
</tr>
<tr>
<td>RG</td>
<td>Registrar-General</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern Africa Development Community</td>
</tr>
<tr>
<td>TBSCA</td>
<td>Tourism Business Council of South Africa</td>
</tr>
<tr>
<td>UAE</td>
<td>United Arab Emirates</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights 1948</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<tr>
<td>VFC</td>
<td>Visa Facilitation Centres</td>
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Aliens Control Act 1 of 1937
AU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969
Convention on the Elimination of All Forms of Discrimination against Women 1979
Convention on the Rights of the Child 1989
European Convention of Human Rights and Fundamental Freedoms 1950
International Convention on Civil and Political Rights 1966
International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999
Optional Protocol on the Involvement of Children in Armed Conflict 2000
Optional protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000
Palermo Protocol 2000
Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children of 2003
UN General Assembly Declaration on the Rights of the Child 1959
Universal Declaration of Human Rights 1948

National legislation

Birth and Deaths Registration Act 51 of 1992
Births, Marriages and Deaths Registration Act 81 of 1963
Child Care Amendment Act 86 of 1991
Child Care Act 74 of 1983 as amended by Child Care Amendment Act 13 of 1999
Children Status Act 6 of 2006
Children’s Act 38 of 2005
Immigration Act 13 of 2002
Maintenance Act 99 of 1998
South Africa Passports and Travel Documents Act 4 of 1994
The Constitution of Namibia 1990
The Constitution of the Republic of South Africa 1996
The Constitution of Zimbabwe 2014
Trafficking in Persons Act 4 of 2014
Uganda Children Act 59 1997
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B v S 1995 3 SA 571 A 582.
Bannatyne v Bannatyne 2003 2 SA 363 CC.
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Centre for Child Law v Minister of Justice and Constitutional Development 2009 11 BCLR 1105.
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Dawood v Minister of Home Affairs 2000 1 SA 997 C.
Dhanabakium v Subramanian and Another 1943 AD 160.
Douglas v Meyers 1991 (2) ZLR HC.
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Favard v Favard 1951 SR 95.
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Fraser v Naude 1997 2 SA 82 W.
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McCall v McCall 1994 3 201 K.
Minister of Health and Others v TAC and Others 2002 (5) SA 721 (CC).
Petersen v Maintenance Officer 2004 2 SA 56 C.
S v Grootboom 2001 1 SA 46 CC.
S v M 2008 3 SA 232 CC.
S v Makwanyane 1995 3 SA 391 CC.
S v Williams ZACC 6, 1995 (3) SA 632.
Tiwandire v Chipanda HB – 12 -04.
Townsend Turner v Morrow 2004 5 SA 599 T.
V v V 1998 4 SA 169 C.
Zimbabwe Exile forum and others v Minister of Home Affairs HC 2008.
Zimelka v Zimelka 1990 4 SA 3.
CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Human trafficking has grown to be one of the most common crimes over the years.¹ According to a report by the United Nations Office on Drugs and Crime, women and children account for 75 percent of trafficking victims.² Between 2007 and 2010 children accounted for 20 percent of the trafficking victims which is approximately 1343 children per year.³ Sadly, these statistics continue to rise annually. The illicit transportation of children by government armed forces and non-state armed groups across borders during armed conflict constitutes one of the worst forms of child trafficking.⁴ The United Nations Convention against Transnational Organised Crimes and the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children of 2003, expressly forbids all forms of human trafficking. This includes forced recruitment, prostitution and sexual slavery.⁵

Globally, children have been dubbed the most vulnerable of the human species.⁶ They are constantly subjected to all forms of abuse and degrading treatment. Such abuse includes excessive work and labour, prostitution, sexual abuse, slavery, starvation and

¹ Lane Anderson Human trafficking is the fastest growing crime despite awareness (11 January 2015) http://national.deseretnews.com/article/3223/human-trafficking-is-the-fastest-growing-crime-in-the-world-despite-awareness.html (Accessed 14/11/15);
² Ibid.
⁵ The abduction of children as part of a pattern of disappearances, for participation in hostilities, for enslavement and for other forms of exploitation is prohibited under international law, including the Optional Protocol on Trafficking and Exploitation and other international instruments outlawing human trafficking and slavery.
⁶ Ibid page 1.
malnutrition, among other things. This has also been the case in the South African context. Progressively, these transgressions against children have transformed and have taken a different face. They have re-emerged in the guise of trafficking. As a result, this has increased the need to have legislation that protects children’s rights.

In South Africa, the protection of children’s rights was previously regulated by the Child Care Act 74 of 1983 which was then repealed by the Children’s Act of 2005. The Child Care Act was described as heavily interventionist and largely modelled on first world approaches which are not necessarily appropriate for a developing country. Consequently, the Act has been amended a number of times to suit the needs of children in an African setting. Since then, South Africa has seen the development of law that aims towards protecting children, the most important being the Constitution of South Africa of 1996 (hereinafter the Constitution).

The Constitution has become the yardstick for every legislation that came into effect after its enactment. Section 28 (2) of the Constitution provides that a child’s best interests are of paramount importance in every matter concerning the child. This provision has been the backdrop of any legislation that has been put in place for the purposes of protecting the rights of the child or any other legislation that affects children.

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9 Emser page 6.
11 Child Care Act 74 of 1983 provides for the establishment of children’s courts and the appointment of commissioners of child welfare; for the protection and welfare of certain children; for the adoption of children; for the establishment of certain institutions for the reception of children and for the treatment of children after such reception; and for contribution by certain persons towards the maintenance of certain children; and to provide for incidental matters.
13 The Immigration Act was amended in 2001 and 2011 respectively.
in any way, particularly the Children’s Act.\textsuperscript{16} The purpose of the Act is to give effect to certain rights of children as contained in the Constitution, to set out principles relating to the care and protection of children and to prohibit child abduction among other things.\textsuperscript{17}

The Convention on the Rights of the Child (CRC) defines a ‘child’ as a person below the age of 18, unless the laws of a particular country set a lower age for adulthood.\textsuperscript{18} In terms of the South African Children’s Act, a child is any person under the age of 18.\textsuperscript{19} Despite this age restriction, it must be noted that the rate at which children mature has evolved over the years due to many factors which range from environmental to culture. Previously, age was the only limiting factor to the enjoyment of rights such as the right to vote and the right to work. However, due to early maturity, some children even though by law are termed children, have the ability to reason in matters that significantly affect them.

This research seeks to establish whether the 2015 South African Immigration Regulations are in the best interests of the child.\textsuperscript{20} This has been done by looking at the protection of children’s rights on a global and regional level. Furthermore, an inquiry has been made into laws that protect the rights of the child. The study looks into the history of immigration laws and establishes whether child travellers are taken into consideration. Additionally, a nexus will be established between the old immigration system, its loopholes and shortcomings and the dawn of the new Regulations that affect children. Lastly, the research will establish whether the Regulations are a panacea or the hallmark of a series of problems that have a detrimental effect on the well-being of the child.

\textsuperscript{16} Child Care Act, Sexual Offences and Related Matters Amendment Act 32 of 2007.
\textsuperscript{17} Children’s Act 38 of 2005.
\textsuperscript{18} Article 1 of the CRC 1989.
\textsuperscript{19} Section 1 of the Children’s Act 38 of 2005.
\textsuperscript{20} Child welfare Information Gateway, “Determining the best Interests of the child”2013, 5.
1.2 HISTORICAL OVERVIEW OF THE DEVELOPMENT OF CHILDREN’S RIGHTS

In the past, children’s rights were not given any special recognition since children were merely considered to be of little significance and viewed as objects with no rights. In essence they were regarded as property which can be owned. Consequently, children had the duty to be obedient, respectful and perform various services for their owners, who could be their guardians or masters. Being a child during that era of total disregard for children’s worth meant constant subjection of the former to insurmountable forms of abuse. Consequent to the lack of legal protection, children were susceptible to callous treatment that is beyond imagination.

Recognition of children’s rights only started to emerge in the middle of the 19th century. However, these rights were mainly labour related. Children’s rights protection started with the League of Nations (now the UN) when it created a committee for child protection. In 1924, it adopted the Geneva Declaration, the first international instrument concerning children’s rights, which at the same time, introduced parental responsibilities.

As a result of the Second World War, many children were left in a dire situation of vulnerability and this led to the creation of the UN Fund for Urgency for Children in 1947, which later became known as the United Nations Children’s Fund (UNICEF). In 1948, the Universal Declaration of Human Rights (UDHR) was adopted and it recognised that children and their parents are entitled to special care and assistance.

Some international scholars are of the view that the UDHR has the status of customary

24 Ibid page 2.
26 Article 25(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same special protection.
international law. On the other hand some acknowledge that parts of the UDHR have
the status of customary international law not in its entirety. Customary international
law refers to international obligations arising from established state practice, as
opposed obligations arising from formal written international treaties. It is considered
to be one of the sources of international law.

In 1959, the General Assembly of the UN (GA) adopted the Declaration on the Rights of
the Child, which enumerated the most fundamental rights of the child in international
law. Subsequently, the UN wanted to introduce a Charter of Human Rights which
would be enforceable and also command compulsion and respect from all States.
Accordingly, a Commission on Human Rights was set up to this effect. In 1989, the
GA unanimously adopted the CRC, which gave children civil, political, economic, social
and cultural rights.

It can be noted that progressively children’s rights have become broader than initially
conceived. They have developed from being merely labour-oriented to all-
embracing rights, catering for all previously mentioned categories of rights. In
essence, the best interest of the child has become of paramount importance in all
matters affecting children. Regional laws such as the African Charter on the Rights
and Welfare of the Child (African Charter), policy documents and recommendations;

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28 Article 3, Article 4, Article 5, and Articles 9 to 11.
30 Section 38 of the ICJ statute
31 It States that the child is recognised universally, as a human being who must be able to develop
physically, mentally, socially, morally and spiritually, with freedom and dignity.
32 (No author), International protection of Human Rights in armed conflict, United Nations Human Rights
Commission 2011 page 5.
33 Ibid.
34 It has two optional protocols namely the Optional Protocol on the involvement of children in armed
Pornography 2000.
35 Children now have social, economic, political and cultural rights.
36 For example, the UK Children Act, 1989 and the Uganda Children Act, 1996. Also see Julia Sloth-
Stellenbosch LR 261.
37 Came into effect in 1990, like the CRC which also came into effect during the same year.
as well as case law have played a pivotal role in determining and shaping many domestic legislations, including those of South Africa.\textsuperscript{38}

1.3 HISTORY OF IMMIGRATION LAWS IN SOUTH AFRICA

The main reason that led to the development of immigration laws in South Africa was the shared anti-trader sentiments that existed among the white settlers.\textsuperscript{39} It can be noted that just like in the international sphere of that time, South African laws paid little regard to children. As such, its immigration laws were not really children oriented. In 1894, the Natal Legislative Assembly introduced the Indian Immigration Law Amendment Bill.\textsuperscript{40} In essence, the Bill sought to control the number of Indian immigrants that entered the country. The Aliens Control Act of 1937 which had the same objective.\textsuperscript{41} However, most of these stringent requirements were lifted after apartheid.

Given that most people that came into South Africa were refugees and asylum seekers, there was great need to put in place legislation that specifically deals with that particular group of people, hence the Refugees Act of 1998 came into effect.\textsuperscript{42} The latter was enacted to give effect to relevant international legal instruments, principles and standards relating to refugees and their reception into South Africa as well as the rights and obligations that flow from the granting of refugee status.\textsuperscript{43} However, there was evidence of abuse of the Refugees Act, with over 90 percent of applicants only seeking economic opportunities.\textsuperscript{44} Loopholes in the legislation made it possible for some to undermine immigration laws, thus preventing orderly migration, with a potential to fuel extortion, abuse and exploitation of migrants, especially those with fraudulent or no

\textsuperscript{40} It sought to amend the 1891 Immigration Act.
\textsuperscript{41} Section 4 (1) of the Aliens control act stated that a person could only migrant in South Africa if that person’s habits of life were suited to the requirements of South Africa.
\textsuperscript{42} Refugees Act 130 of 1998. See also Section 3 States that the term refugee applies to any person who...owing to well-founded fear of being persecuted for reasons of race, religion,, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence of such events , is unable or, owing to such fear, is unwilling to return to it.
\textsuperscript{43} Zimbabwe Exile forum and others v Minister of Home Affairs HC 2008.
\textsuperscript{44} (No author) Human Rights watch, ‘Living on the Margins: inadequate protection of refugees in Johannesburg’ 16 November 2005.
documents at all. Several cases were reported of girls, some as young as six, who were smuggled into South Africa some in car boots who ended up in the hands of syndicates, rapists and human traffickers.\textsuperscript{45}

Consequently, in 2002, the Immigration Act became the main piece of legislation that deals with immigration matters in the country. It was enacted in terms of the Constitution to provide for the regulation of admission of persons to reside in, and their departure from, the Republic.\textsuperscript{46}

Regardless of the vast number of Immigration Regulations that have been put in place to date, none of them had specific provisions that strictly protected children travelling in and out of the Republic. According to News 24 Anti-trafficking campaigners, 30 000 children are trafficked into South Africa annually as part of the sex trade, but the situation may be far more chronic and severe than is actually known.\textsuperscript{47} It can be established that the old regime of laws was not doing enough to monitor the grounds under which children left and entered the Republic. From this premise, no one can doubt the rationale behind the 2015 Immigration Regulations affecting children travelling in and out of South Africa.

1.4 THE BEST INTEREST OF THE CHILD

Article 3(1) of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration. This provision resonates with Article 4(1) of the African Charter, section 28(2) of the Constitution, and Articles 16(1) (d) and (f) of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The best interest of the child principle has been extensively used by the courts, but mainly in divorce

\textsuperscript{45} An overview of the new immigration laws and regulations and their implications, by Home Affairs Director-General Mkuseli Apleni, at the information session for Members of Parliament: Parliament, 23 April 2015 paragraph 8.

\textsuperscript{46} Section 44.

\textsuperscript{47} News 24 16 July 2015.
matters. However, the concept has not been clearly defined. Although there is no standard definition of what constitutes the ‘best interests of the child,’ the term generally refers to the deliberations that courts undertake when deciding what type of services, actions and orders will best serve a child as well as making a decision on who is best suited to take care of such a child.

Section 7 of the Children’s Act gives an outline of what the court takes into consideration when faced with a matter that concerns a child. It looks at factors like age, sex of the child, relationship with the parents, the child’s health and mental status among other things. These in turn assist in determining what is in the best interest of the child. The rights contained in the Act supplement the rights that the child has in terms of the Constitution. Section 9 echoes section 28 of the Constitution in upholding the best interest of the child in all matters.

1.5 THE IMMIGRATION REGULATIONS 2014

The Regulations to the South African Immigration Act 2010 made by the Minister of Home Affairs in terms of section 7 of the Immigration Act, 2002 after consultation with the Immigration Advisory Board, were approved and came into effect on the 26th of May 2014. Their main objective being to ensure that the entrance and exit of people through all ports of entry is facilitated in a manner that promotes a culture of human rights. In an effort to curb child trafficking, Regulation 6(12) (a) States that, “where

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48 Nielson ‘The principles underpinning the new children’s statute, the best interests of children-standard, and the rights and responsibilities of children’ 72.
49 However, it has been argued that the ‘best interests’ standard is problematic in that, inter alia, (i) it is ‘indeterminate’; (ii) the different professionals involved with matters relating to children have different perspectives on the concept; (iii) the way in which the criteria is interpreted and applied by different States (and indeed, by different courts and other decision-makers within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker. Another factor which needs to be borne in mind in evaluating the best interests test is the importance of parental acceptance of the decision of the court. Heaton ‘Some general remarks on the concept “Best interests of the child”’ 1990 95; Helen Reece ‘The paramountcy principle: Consensus or construct?’ 1996.
51 Children’s Act Section 7 (1) a-n.
52 Ibid Section 8 (1).
53 See annexure 1.
54 The Minister of Home Affairs follows the legislative process in terms of chapter 4 of the Constitution.
parents travel with a minor child abroad, such parents must produce an unabridged birth certificate of that child reflecting the particulars of the parents of the child to the immigration officer.” Furthermore, Regulation 6(12) (b) provides that, “In the case of one parent travelling with a minor child abroad, he or she must produce an unabridged birth certificate and, in addition-

I. Consent, in the form of an affidavit from the other parent, authorising him or her to enter or depart from the Republic of South Africa with the child; or

II. a court order granting full parental rights and responsibilities or legal guardianship in respect of the child; or

III. the death certificate of the other parent registered as a parent of the child on the unabridged birth certificate.”

Moreover, in the event that both parents of the child are deceased, the person with whom the child is travelling will be required to obtain permission from the Director-General to do so.

An abridged birth certificate is a document that is issued by the department of Home Affairs. It contains details about the birth of a person such as his or her identity number, full names and country of origin. On the other hand, an unabridged birth certificate contains additional details about parents of an individual such as their identity numbers, places of birth as well as details of their citizenship at the time of the birth of the individual.

It is a constitutional requirement that all children born in South Africa be registered. This registration must be within 30 days of their birth, and it is done by the parents, guardian or any other person legally responsible for the child. This requirement is in

57 Definition of parent as defined in section 1 of the Child Care Act of 1991.
59 Section 28 (1) (a) of the Constitution.
60 Births and Deaths Registration Act 1992.
These requirements pose a number of challenges on parents as well as legal guardians of children. Legal guardians face an even bigger problem in that they are obliged to either present a court order awarding them guardianship of the child in question or, if both parents are deceased, to obtain permission to travel with the child from the Director-General of Home Affairs. However, the relevant procedures to obtain such permission are long and tedious. A legal guardian is a person lawfully vested with the power, and charged with the obligation, of taking care of and managing the property and rights of a person who, because of age, understanding, or self-control, is considered incapable of administering his or her own affairs.

It is therefore apparent that it will not be sufficient for a person to merely present a will or a document awarding him or her with legal guardianship of a child. That person has to apply to the relevant High Court for an order in this regard, since it is only the High Court that can confer guardianship: Children’s Courts and Magistrates Courts are not empowered to make such an award.

1.6 RESEARCH PROBLEM

It is difficult for any country to be able to curb the problem of child trafficking without enacting legislation to this effect. However, legislation alone without the support of enforcement measures and mechanisms is counterproductive. In South Africa, the Immigration Regulations affecting child immigrants which came into effect on the 1st of June 2015 are meant to assist in reducing the number of children who are illegally trafficked in and out of South Africa. However, in as much as these regulations seek to regulate the illegal movement of children in and out of the country, it must be noted that

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61 Every child shall have the right from his or her birth, to a name and shall be registered immediately after birth and every child has the right to acquire nationality.

62 The same is true when trying to have guardianship conferred. An application to the High Court of this nature will generally be time consuming and expensive and further, the Family Advocate’s Office will be required to confirm that such order will be in the child’s best interests, as required in any matter regarding a minor child.

63 Legal dictionary.law.com

64 Preamble of the Act
a lot of child trafficking does not take place through the formal ports. Thus, the documentation required might not really curb the issue of child trafficking. According to the Human Trafficking Index report of 2014, South Africa is the main port of entry of most of the trafficking crimes in the region. South Africa ranks among the 10 States in Africa where human trafficking is worst, with 100 000 people reportedly being trafficked in the country annually.\textsuperscript{65} This is not only based on the figures of those children that have been trafficked already but it is also inclusive of those at risk.\textsuperscript{66} Those children that are said to be at risk are those that have no access to awareness information related to trafficking thus they fall prey to the trafficking syndicates.

Consequently, section 28(2) of the Constitution makes it a prerequisite that in any matter affecting a child, the best interest of the child be of paramount importance. No doubt that the drafters of the 2015 Immigration Regulations had this provision in mind when they were drafting the regulations. However, regardless of the commitments made to ensure the protection of children’s rights in any matter that affects them, a lot is left to be desired particularly with the 2015 Immigration Regulations. It can be submitted that in enacting these regulations, it was seen to be best for children if there are rules that sufficiently protect them from the constant danger of trafficking that beset them.

The Regulations are intended to make the illegal movement of children in and outside South Africa difficult. However, their practical implications are far reaching and, as a result, it is no longer going to be a simple exercise to travel in and out of South Africa with minor children.

The new requirements are more hectic on legal guardians of children whose parents have either abandoned the minor child or who have died.\textsuperscript{67} They have to apply to the relevant High Court for Guardianship Orders so as not to limit their own freedom of

\textsuperscript{67} Immigration leaflet ‘Travelling abroad with children’ www.dha.gov.za/files...immigrationleaflet. 3 (Accessed 20/05/15).
movement by being unable to travel with the minor child out of or into the country.\textsuperscript{68} The implications of the Act affects single parents as well. Unmarried mothers have to deal with disinterested and absent fathers since they have to decide whether they should include their details on the birth certificate of the child. Similarly, unmarried fathers will also have to be more insistent that they are included on the birth certificates of their children at the time of the birth of the child. This is to avoid a situation where the mother is able to simply remove the minor child from the country without the consent of the biological father.\textsuperscript{69}

It goes without saying that in all this, the child’s physical, moral, emotional and spiritual welfare is at stake.\textsuperscript{70} Children travel for many reasons including but not limited to, tourism, medical reasons, parental visits or to acquire education. These reasons, no matter how important they may seem, may not be possible if the requirements set out in the new regulations are not met. As a result, if adequate care is not taken in implementing these regulations, a child’s right to education,\textsuperscript{71} family environment,\textsuperscript{72} freedom of movement,\textsuperscript{73} and the right to be heard in every matter concerning the child\textsuperscript{74} may be infringed. This then has a direct effect on a child’s physical, social and spiritual wellbeing.

Therefore, the research problem to be addressed is whether the 2015 Immigration Regulations facilitate the attainment of the best interest and protection of children’s rights or not. The research thus looks at the nature of the 2015 Immigration Regulations and the position prior to its enactment. Hence, the study evaluates the shortcomings of the previous legislation against the new Regulations as well as the impact that they might have on the interests and welfare of the child. This notion is based on a number of reasons that are discussed in this mini dissertation.

\textsuperscript{68} Section 14 Child Care Act.
\textsuperscript{69} Ibid page 5.
\textsuperscript{70}  
\textsuperscript{71} McCall v McCall 1994 (3) SA 201.
\textsuperscript{72} Section 27 of the Constitution.
\textsuperscript{73} Ibid Section 28 (1) (b).
\textsuperscript{74} Ibid Section 21.
\textsuperscript{74} Article 12 of the UN Convention on the Rights of the Child 1989.
1.7 RESEARCH QUESTIONS
The mini dissertation will address the following research questions:

1. Are the 2015 Immigration Regulations consistent with the paramount interest of the child, especially the child traveller?
2. Are there any shortcomings in the Regulations and how can they be overcome?
3. How can the implementation of these Regulations ensure the effective protection of the rights and interests of the child and relevant stakeholders?

1.8 HYPOTHESIS
The research postulates that while the immigration laws affecting the movement of children in and out of South Africa may be necessary they may also impact on the welfare of the child in ways not contemplated. It hypothesizes that, the regulations make it difficult for a parent or guardian to travel with their children for whatever reasons. The result, in some instances, is detrimental to the child. Furthermore, the research conjectures that if not well implemented, the regulations could be the key to Pandora’s Box under which lies countless ways violating a number of rights that affect children may. Lastly, the research finds that perhaps because the old regime of laws did not make enough effort to monitor the movement of children in and out of the Republic, therefore the 2015 Regulations are necessary and desirable.

1.9 LITERATURE REVIEW
Not much has been written about the 2015 Immigration Regulations. However, a considerable amount of literature has been written on the rights of the child particularly with respect to the best interest of the child. The literature also highlights the problems that arise in trying to create an equilibrium between law enforcement and the protection of children’s rights.

The research focuses greatly on enacted legislation, regionally as well as internationally. The latter includes the Constitution, treaties, conventions, declarations, case law as well as recommendations flowing from treaty bodies.

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76 Tharinger et al 300.
The UDHR provides the basis of all human rights protection. According to section 38 (1) (b) of the ICJ Statute international custom is one of the sources of international customary. As mentioned earlier, there is a debate over whether the UDHR forms part of international custom.\(^77\) It is not a treaty therefore it does not directly create legal obligations for States. However, it is an expression of the fundamental values which are shared by all members of the international community.\(^78\) It gives everyone the right to be respected as a human being and to have all the subsequent rights respected and protected.\(^79\) Article 1 recognises that everyone is born free and equal in dignity and in rights.\(^80\) Articles 12 to 15 deal with the rights to privacy, freedom of movement and nationality.\(^81\) Fundamentally, it also caters for children’s rights particularly in Article 25 and 26 which talk about the right to adequate standard of living and education respectively.

In 1976, ICCPR was adopted. Although it is not wholly an instrument that deals with children’s rights, it caters for a broad spectrum of human rights, and as such, some of the some rights also affect children. It gives children the right to adequate protection, family association, name and nationality.\(^82\) With respect to freedom of movement, the ICCPR goes further than the UDHR.\(^83\) It provides for freedom for everyone to leave and return to any country including their own country.\(^84\)

The African Charter was adopted during the same period as the CRC.\(^85\) It sought to tackle challenges faced by children in an African setting. These children’s circumstances remain unique and critical due to social, economic and cultural differences as well as hardships such as poverty, hunger, natural disasters, conflicts

\(^77\) Paragraph 1.2.
\(^79\) Preamble of the UDHR.
\(^80\) Article 2, right to equality.
\(^81\) Article 12 prohibition of interference with privacy, family, home or correspondence; Article 13 right to freedom of movement; Article 14 right to seek asylum; Article 15 right to nationality.
\(^82\) Article 17 right to privacy, family association, Article 23 definition of a family, Article 24 right to protection, birth nationality etc.
\(^83\) Article 12 of ICCPR.
\(^84\) Rehman International Human Rights law 2ed (2010) 78; Article 12 Banjul Charter.
and exploitation among, other factors.\textsuperscript{86} The recognition of the family as the natural unit and basis of society is also emphasised in Article 18 (1) of the African Charter.\textsuperscript{87}

The CRC is the international epitome of children’s rights. As such, every matter that concerns the rights and welfare of the child is contained herein. However, this mini dissertation will only focus on those provisions that are relevant to this research. Article 3 of the CRC contains the best interest of the child provision, while Article 7 gives children the right to be registered at birth, the right to a name, nationality and care. It states that every child has the right to a legally registered name and nationality, as well as the right to know and, as far as possible, to be cared for by their parents. Article 9 states that governments must respect and protect a child’s identity and prevent their name, nationality or family relationships from being changed unlawfully. If a child has been illegally denied part of his or her identity, the government must act quickly to protect and assist the child to re-establish his or her identity. Article 10 deals with family reunification and Article 11 covers issues relating to kidnapping and trafficking. It urges governments to take steps to prevent children from being taken out of their own country illegally or being prevented from returning to the country. This provision very much resonates with the objectives of the 2015 Immigration Regulations,

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 supplements the CRC by providing States with detailed requirements to end the sexual exploitation and abuse of children. It also protects children from being sold for the purposes of forced labour, illegal adoption and organ donation.\textsuperscript{88} In addition, it also prohibits the sale and exploitation of children for sexual purposes. It strongly prohibits child pornography and any other related acts.

The Protocol defines offences of sale of children, child prostitution and child pornography.\textsuperscript{89} It also creates obligations on governments to criminalise and punish activities related to these offences. It requires punishment not only for those offering or

\textsuperscript{86} Preamble of the Charter.  
\textsuperscript{87} Both instruments entered into force in 1990.  
\textsuperscript{88} Article 34 and 35 of CRC.  
\textsuperscript{89} Article 2.
delivering children for the purposes of sexual exploitation, transfer of organs or children for profit or forced labour, but also for anyone accepting the child for these activities.

The Protocol also protects the rights and interests of child victims. It urges governments to provide legal and other support services to child victims.\textsuperscript{90} This obligation includes considering the best interests of the child during any interactions with the criminal justice system.\textsuperscript{91} Further, the Protocol provides that children must also be supported with necessary medical, psychological, logistical and financial support to aid the rehabilitation and reintegration of children. As a complement to the CRC, interpretation of the Optional Protocol’s text is always guided by the principles of non-discrimination, best interests of the child and child participation.\textsuperscript{92}

There is also the International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999, which came into force on 19 November 2000.\textsuperscript{93} It recognises the importance of basic education and to protect children from abuse. It provides for the need for social rehabilitation and integration while addressing the needs of their families.\textsuperscript{94}

South Africa recognises the importance of International Law. As stated in the Constitution, when interpreting the Bill of Rights, a court or tribunal must consider international law and may also consider foreign law.\textsuperscript{95} Furthermore in terms of sections 231; 232 and 233 South Africa recognises international law as well as international customary law unless if it is inconsistent with the Constitution or an Act of Parliament.\textsuperscript{96} In addition to the basic rights that affect everyone, children also have the right to housing;\textsuperscript{97} health care; food; water, social security;\textsuperscript{98} and education.\textsuperscript{99} The main embodiment of these rights is section 28 of the Constitution.

\textsuperscript{90} Preamble of the Protocol.
\textsuperscript{91} \textit{Ibid}.
\textsuperscript{92} \url{http://www.unicef.org/crc/index_30204.html} (Accessed 14/11/15).
\textsuperscript{93} Worst Forms of Child Labour Convention (No. 182) 1999.
\textsuperscript{94} \textit{Ibid} preamble.
\textsuperscript{95} Section 39 (1).
\textsuperscript{96} \textit{Ibid} section 232.
\textsuperscript{97} Government of RSA and Others v Grootboom and Others (CCT11/00) [2000] ZACC paragraph 19.
\textsuperscript{98} Minister of Health and Others v TAC and Others 2002 (5) SA 721 (CC) paragraph 7.
Besides the Constitution there are other legislations that also protect the rights and interests of children. Before it was repealed, the Child Care Act criminalised the failure of a parent to provide child support.\textsuperscript{100} The Children’s Act of 2005 gives a breakdown of the factors that the court considers when dealing with matters that affect children. Sections 7, 9 and 10 particularly deal with the best interest of the child. Section 18 to 22 focuses on parental responsibility and chapter 18 deals with tracking in children.

The Basic Conditions of Employment Act of 1997 (BCEA) makes it illegal to employ a child under the age of 15; the Domestic Violence Act of 1998 further defines different forms of domestic violence and explains how a child can get protection order against the abuser; and the Films and Publications Act of 1996, protects children from exploitation in child pornography. In addition, the Natural Fathers of Children Born out of Wedlock Act of 1997 gives natural unmarried fathers, including those whose marriages are not recognised by the state (for example Muslim and Hindu marriages) the statutory right to go to court to ask for access, custody or guardianship of their children. This legislation was passed after a constitutional court ruling in the case of \textit{Fraser v Children’s Court Pretoria North and Others}.\textsuperscript{101} The Court held that, in certain circumstances, the consent of the father is required before a child born out of wedlock may be adopted.\textsuperscript{102} Further, the provisions of the Child Care Act, 1983, which required only the mother’s consent, were declared unconstitutional. Consequent to this decision, the interests of children are important in deciding on custody or access to children.\textsuperscript{103}

\textbf{1.10 METHODOLOGY}

The research methodology is mainly based on a study of existing literature, and as such it is a desktop research. This largely includes library research, internet sources and case law. The South African Immigration Act 2002 is the primary reference point with regards to regulatory information. However, legislation from other jurisdictions has been used, for instance, the Zimbabwean immigration laws as well as those of Namibia. This

\textsuperscript{99} \textit{Christian Education South Africa v Minister of Education} (CCT13/98) [1998] ZACC paragraph 16.
\textsuperscript{100} Chapter 7.
\textsuperscript{101} CCT 31/96.
\textsuperscript{102} \textit{Ibid}.
is because South Africa shares a lot with these States and as such can learn from their Immigration Regulations and implementation policies. Furthermore, international as well as regional instruments such as the CRC, the African Charter, the Children’s Act, CEDAW, ICCPR, the Optional Protocol on the involvement of Children in Armed Conflict 2000 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography 2000 and CRC, have been referred to.

The research also utilises data from research papers written by renowned authors in the area of immigration and children’s rights. Furthermore, input from Lexis Nexis reports and other law journals and articles have been used. Information has also been drawn from textbooks relevant to the research topic.

1.11 LIMITATIONS OF THE RESEARCH

The major limitation of this study is that its primary focus is on Regulation 6 (12) which came into effect on the first of June 2015. Given the serious uproar that it caused, there is a possibility of the withdrawal of some of the provisions that are contentious. Such withdrawal may only take place if the provisions remain unenforceable or cannot be amended. Furthermore, not many writers have touched on the matter before since it is a fairly new terrain.

In order to overcome these possible hiccups, legislation from other jurisdictions have been used to make comparisons and draw conclusions that shed light on the South African context. Furthermore, the research is structured in such a way that even if some provisions of the regulations are withdrawn, the research still remains significant and relevant. However, the Department of Home Affairs has announced the unlikelihood of such a withdrawal. Home Affairs Minister Malusi Gigaba stated that those opposing the Regulations are the ones that have done disservice to themselves and the country since the country cannot sacrifice children in an effort to chase tourists. In his words,

“The argument on how many children have been victims of trafficking versus how many tourists we can get was unfortunate, brutal and uncaring.”\textsuperscript{105}

1.12 DELIMITATIONS
The research focuses on the Immigration Regulations of 2014 that affect children. It mainly focuses on whether these Regulations are in the best interests of the child since they affect children in several ways. Its main focus is on parents and legal guardians travelling with children in and out of South Africa and the implications that the new Regulations have on children.

1.13 ETHICAL CONSIDERATIONS
This research is based on already existing material and legislation. No surveys will be conducted. The only consideration to be made pertains to the issue of plagiarism. Plagiarism, in an academic or university context, may be defined as taking and using the ideas, writings, works or inventions of another, from any textual or internet-based source, as if they were one’s own.\textsuperscript{106} The University of Fort Hare has a non-tolerance policy on the issue of plagiarism, and as such, all sources used have been referenced and acknowledged. In accordance with the University’s research policy, there will be no falsification or fabrication of data, misuse of research funds or any other form of dishonesty which undermines the integrity of the research and which may bring the university into disrepute.

1.14 CHAPTER BREAKDOWN
This research is divided into five chapters: Chapter One is introductory; it provides the background of the study; the research problem that has prompted the researcher to undertake this study; the aims and objectives as well as the assumptions underlying the research. Furthermore, it looks at some of the loopholes that paved way for the adoption of the South African Immigration Act of 2002.

Chapter Two discusses the 2015 Immigration Regulations as well as their limitations. It looks at parental responsibility in relation to the best interest of the child. In a nutshell,

\textsuperscript{105} Travel companies ‘harming SA’ with visa row-Gigaba Sunday Times 2 August 2015 page 2 column 2.
\textsuperscript{106} University of Fort Hare policy statement (2009) 1.
this chapter seeks to determine whether the provisions of the new Regulations are in the best interest of the child.

Chapter Three evaluates how other States with similar requirements manage to maintain the principle of the best interests of the child as well as the protection of the right to freedom of movement.

In Chapter Four particular attention is paid to the amendments that have been made to cater for the challenges faced by the tourism sector due to the implementation of the 2015 Immigration Regulations.

Lastly, Chapter Five provides a conclusion and looks at policy and legal options that will assist in curbing child trafficking without affecting the rights of child travellers.
CHAPTER TWO: THE 2015 IMMIGRATION REGULATIONS AND ‘THE BEST INTEREST OF THE CHILD’

2.1 INTRODUCTION

In any society, children are the most vulnerable. Consequently, it is trite to always act in a manner that is beneficial to them. As previously mentioned, lack of a solid definition of the phrase ‘best interest of the child’ allows it to be loosely interpreted and applied in a broad context. The CRC merely mentions that the interest of the child be prioritised. However, nothing more is said to this effect, which leaves room for different interpretations and scenarios to which the principle may be applied.\(^\text{107}\) The courts have shown reluctance to have a standard rule of thumb for the application of this principle but rather prefer to look at the circumstances of each case.\(^\text{108}\)

This lacuna in the clarity of this principle has been subject to many criticisms.\(^\text{109}\) It has been argued that deciding what is best for a child poses a lot of questions,\(^\text{110}\) for example, whether a judge should primarily be concerned with the child’s happiness only or consider other factors as well.\(^\text{111}\) Another criticism is that the concept is too indeterminate to serve as a useful tool.\(^\text{112}\) It creates conflict and processes that in turn entrench the rights of parents rather than those of children.\(^\text{113}\) In addition, in the case of Centre for Child Law v Minister of Justice and Constitutional Development,\(^\text{114}\) the court did not expressly make reference to this concept and this raised a lot of questions such as whether it is still the best interest of the child principle or not.\(^\text{115}\) For as long as there

\(^{107}\) Article 3(1) of the CRC; Article 4(1) of the African Charter.

\(^{108}\) Barratt page 368.


\(^{112}\) B v M 2006 3 All SA 109 W.


\(^{114}\) 2009 11 BCLR 1105.

\(^{115}\) Ibid.
are unanswered questions in relation to this principle in matters affecting children, it is as if there are no rules regulating its function at all.\textsuperscript{116}

This Chapter seeks to dissect the best interest of the child principle in relation to other rights. It also looks at the concept of parental responsibility and how that affects the rights of a child. Furthermore, it seeks to establish whether the Regulations contained in the Immigration Act are indeed in the best interest of the child.

2.2 PARENTAL RESPONSIBILITY

2.2.1 The definition of parental responsibility

Parental responsibility is a legal concept that refers to all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to a child.\textsuperscript{117} The term emphasises parents’ duties towards their children and not necessarily the rights of the former over the children.\textsuperscript{118} The court in the case of \textit{V v V} observed that over the years the emphasis in thinking with regards to questions of the relationships between parents and their children has shifted from the concept of parental power to parental responsibility.\textsuperscript{119} Parents are expected to take care of their children,\textsuperscript{120} maintain contact with them,\textsuperscript{121} act as guardians, and provide financial support as well as basic needs where applicable.\textsuperscript{122} This also includes the payment of maintenance.\textsuperscript{123} The Children’s Act does not define what maintenance is and the term has been used to refer to the provision of food, clothing, accommodation and the like.\textsuperscript{124} Additionally, maintenance is ancillary to the duty to support.\textsuperscript{125} In the case of \textit{Bannatyne v Bannatyne}, the court

\begin{itemize}
\item \textsuperscript{116} Rayner “Protection and promotion of the best interests of the child” (1997) 9.
\item \textsuperscript{117} Section 3 of the Children’s Act of 1989.
\item \textsuperscript{119} 1998 4 SA 169 C.
\item \textsuperscript{120} The concept of care is define in section 1 (1) of the Children’s Act.
\item \textsuperscript{121} Ibid section 1.
\item \textsuperscript{122} The Department of Justice and Constitutional Development “Protecting the best interest of children” 2015.
\item \textsuperscript{123} Section 18(2) (d) of the Children’s Act.
\item \textsuperscript{124} Heaton 178.
\item \textsuperscript{125} Zimelka v Zimelka 1990 4 SA 303 W.
\end{itemize}
established that parents are responsible for supporting their children and making available their needs. 126

While mothers and married fathers have automatic parental responsibility, unmarried fathers, step mothers, stepfathers and grandparents do not have automatic parental responsibility. 127 In other words, they have to apply for it to be granted. 128 The case of Fraser v Naude has been described as the locus classicus for the rights of unmarried fathers. 129 In this case, Fraser had a relationship with a woman to whom he was not married. After the relationship ended the woman found out that she was pregnant with his child. She later gave the child up for adoption. Fraser became aware of the adoption and made an application to court for the adoption to be set aside. The Court decided that it would not be in the best interest of the child to be removed and placed with his biological father. 130 In making this decision the Court considered the provisions of section 28 of the Constitution. 131

With regards to grandparents, the court in Petersen v Maintenance Officer considered the common law rule that allowed an extra-marital child to claim maintenance from maternal grandparents, but not from the paternal grandparents. 132 Accordingly, the court developed the common law to allow the extra-marital child’s claim for maintenance against the paternal grandparents. 133 In Townsend-Turner v Morrow the maternal grandparents sought to have contact with their grandson. Their application was denied on the basis that placing the child with the grandparents would place the child in the middle of the confusion and it was not in his best interest. 134

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126 2003 2 BCLR 11 CC.
128 In Kleingeld v Heunis 2007 5 SA 559 T, maternal grandparents had to apply for contact with their grandchildren but the parents of the children opposed the application because they viewed them as autocratic and temperamental. The court would not interfere with the parents’ decision and it would only do so if it could be proven that it would be in the best interest of the child.
129 1997 2 SA 82 W.
130 Skelton 245.
131 Paragraph 10.
132 2004 2 SA 56 C, 2004 2 BCLR 205 C, 2004 All SA 117 C.
133 Skelton 254.
134 2004 5 SA 559 T.
The concept of parental responsibility is there to ensure that a child’s basic needs and rights are protected.\textsuperscript{135} Providing a home for the child; protecting and caring for the child; consenting to the child’s medical treatment and at times consenting to the child’s emigration are some of the duties that a caregiver has.\textsuperscript{136} The person with such responsibilities has to make decisions that are in the best interest of the child at all times.\textsuperscript{137} In the case of \textit{S v Grootbroom}, the Constitutional Court held that the primary responsibility of fulfilling these needs falls on parents.\textsuperscript{138} However, such power and duty ceases when the child reaches the age of majority, which is currently set at 18 years.\textsuperscript{139}

It must be noted that there is a difference between maintenance and parental responsibility.\textsuperscript{140} Whether a parent has parental responsibility or not does not exempt him or her from maintaining a child.\textsuperscript{141} In \textit{Martins v Martins}, the court decided that a parent has to keep any form of employment that he or she has so as to earn income to support his family.\textsuperscript{142} Additionally, in the case of \textit{Fish Hoek Primary School v Welcome} the school argued that the unmarried father was liable to pay fees because he had parental responsibilities.\textsuperscript{143} The court held that where a parent qualifies for rights and responsibilities then the obligation stands.\textsuperscript{144}

\textbf{2.2.2 Parental responsibility in relation to the new Regulations}

As mentioned above, parents, guardians and caregivers have a responsibility to consent to a child’s emigration.\textsuperscript{145} Regulation 6 makes it mandatory for consent to be sought from either parent or from any person responsible for the child. Where both parents are deceased the person travelling with the child must seek permission from the Director-General in order for him or her to be able to travel with the child.\textsuperscript{146}

\begin{footnotes}
\textsuperscript{135} Section 15 (3) (a) (i) and (ii) of the Maintenance Act 99 of 1998.
\textsuperscript{137} Article 18 of CRC.
\textsuperscript{138} 2001 1 SA 46 CC paragraph 76.
\textsuperscript{139} \textit{Bursey v Bursey} 1999 3 SA 33 SCA.
\textsuperscript{140} Barrat et al Law of Persons and Family (2012) 189.
\textsuperscript{141} Gheera “Parental Responsibility” (2014) 4.
\textsuperscript{142} 1959 2 PH B19 O.
\textsuperscript{143} 2009 3 SA C.
\textsuperscript{144} Skelton 249.
\textsuperscript{145} \textit{Ibid} page 2.
\textsuperscript{146} (No author) Sawubona “Under 18s Travelling to and from SA” October (2015) 176.
\end{footnotes}
The stringent nature of the new Regulations speaks volumes on the need to curb child abuse perpetrated through trafficking.\textsuperscript{147} However, it makes it difficult for caregivers to make decisions that they consider to be in the best interest of the child. The processes involved are tedious, and to a certain extent limit the right of the child as well as parental control over the child. Notably, in as much as the new Regulations seek to reduce the volume of child trafficking, it can only do so to a limited extent. An estimated 20.9 million men, women and children are trafficked for commercial sex or forced labour around the world today.\textsuperscript{148} Although this figure is not made up of children alone, it still proves that trafficking is a major problem.\textsuperscript{149} In South Africa, a significant number of child trafficking cases are not done via the legal ports of entry. Children just disappear and traffickers are less likely to use airports or border posts. This is because the official exit and entry points provide a high likelihood for the smugglers to be caught.

\textbf{2.2.3 Relocation of parents}

It is an unfortunate reality that in the event of marital breakdown, the spouses must, due to various reasons, go their separate ways and reconstruct their lives in a manner that each chooses alone.\textsuperscript{150} Consequently, this means that children have to be moved from one place to the other, and by no means for their liking or convenience. However, any movement must be in the best interest of the child.\textsuperscript{151} The problem arises when the other parent does not consent to the relocation of the children involved.

Section 45 of the Children’s Act deals with the removal or abduction of children from the Republic and grants the High Court jurisdiction to preside over such matters.\textsuperscript{152} It is considered to be in the best interest of the child if the child resides with the primary care giver.\textsuperscript{153} However, there is a possibility that a parent may just decide to relocate to another place without the knowledge or consent of the other parent. Section 35 of the

\begin{flushleft}
\textsuperscript{147} Section 1 of the Children’s Act.
\textsuperscript{149} \textit{ibid} paragraph 4.
\textsuperscript{150} \textit{F v F} 2006 3 SA 42 SCA paragraph 10.
\textsuperscript{151} Skelton 264.
\textsuperscript{152} Section 45 (3) (d) of the Children’s Act.
\textsuperscript{153} \textit{J v J} paragraph 30.
\end{flushleft}
Children’s Act was put in place to prevent parents from doing so, especially when this is done to frustrate the rights and responsibilities of the other parent. In a way, by making it mandatory for one parent travelling with minor children to submit proof of consent from the other parent, Regulation 6 helps in curbing unlawful abductions and trafficking.\textsuperscript{154}

Furthermore, the Hague Convention on the Civil Aspects of International Child Abduction (The Convention) operates where the unilateral action of one of the parents has interfered with the exercise of parental responsibilities and rights of the other parent.\textsuperscript{155} Essentially, it protects children from wrongful removal.\textsuperscript{156} International child abduction occurs when a parent takes a child from the country where he or she usually lives to another country without the consent of the other parent.\textsuperscript{157} The Convention only applies to children under the age of 16 because it is presumed that a child above that age can hardly be abducted against his or her will.\textsuperscript{158}

While the new Regulations are strict on these requirements, their primary concern is not the impact of the relocation or purpose of the travel on the child. They merely focus on the unauthorised entry or exist of children in and out of the country. Where the purpose of travelling is permanent relocation, it is also important that before outrightly denying permission to do so, the officials look at the benefits to the child that would accrue from such a relocation. The proposed relocation must be compatible with the child’s welfare.\textsuperscript{159} In deciding whether or not relocation would be in the child’s best interest, it has to be evaluated and weighed on a balance of competing factors, including the child’s wishes.\textsuperscript{160}

2.3 THE BEST INTEREST OF THE CHILD PRINCIPLE

In every action involving a child, thought must be given to how the action will impact on the child, or groups of children, in order to ensure that their best interests are met. The phrase ‘best interest of the child’ has been described as an aspirational statement,

\textsuperscript{154} Regulation 6 (12) of the Immigration Act.
\textsuperscript{155} Skelton 269.
\textsuperscript{156} Section 27 of the Children’s Act.
\textsuperscript{157} Skelton 273.
\textsuperscript{158} Article 4 of the Convention.
\textsuperscript{159} Skelton 265.
\textsuperscript{160} F v F paragraph 10; Skelton 265.
which mostly in custody matters refers to the hope held by society, namely that the outcome will essentially be the most appropriate for the child.\textsuperscript{161} It is used to ensure that the wellbeing of the child is protected.\textsuperscript{162} For the court to decide what is good for a child it has to take into account a number of factors.

The Court considers the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers. A child has the right to family association which is considered to be a very fundamental component for a child to develop into a wholesome individual.\textsuperscript{163} The concept of a family refers to all people who are blood related or those who become related through adoption, marriage, civil union or a marriage-like relationship.\textsuperscript{164}

In addition, the court also considers the capacity of the parents to provide a safe home and adequate food, clothing, and medical care together with the mental and physical health needs of the child.\textsuperscript{165} The mental and physical health of the parent and the presence or absence of domestic violence in the home are also important factors to be considered.\textsuperscript{166} The court would not want a child to stay with a mentally unstable person because that person cannot make sound decisions on behalf of the child.\textsuperscript{167} In addition, the court would also not allow a child to be kept in a home that has domestic violence as this will negatively affect the child’s mental health, academic performance and social life.

The concept of the best interest of the child has been part of the South African law since the 1948 case of \textit{Fletcher v Fletcher}.\textsuperscript{168} Since then, the concept has been developed in terms of section 7 of the Children’s Act.\textsuperscript{169} The Court in the case of \textit{McCall v McCall}\textsuperscript{1994 3 201 K.}\textsuperscript{167} 

\begin{footnotes}
\item[163] Article 18 of the African Charter.
\item[165] Section 28 of the Constitution.
\item[167] \textit{McCall v McCall} 1994 3 201 K.
\item[168] Skelton 239.
\item[169] Section 7 (a-n) gives an outline of the factors that are taken into account when determining the best interest of the child
\end{footnotes}
used the same guidelines in determining the best interest of the child.\footnote{170} In this case, it was held that in determining what is in the best interests of the child, the Court must decide which of the parents is better placed and able to promote and ensure the child’s physical, moral, emotional and spiritual welfare.\footnote{171}

The implementation of the best interest principle is entirely based on judicial precedence since there are no legislative guidelines to assist decision-makers in its application.\footnote{172} However, legislation that affects children now also focuses on the inclusion of central principles involved in decision making in matters regarding children in domestic legislation.\footnote{173} Guiding principles are crucial in the understanding and implementation of any legislation. For example, the guiding principles in the CRC are found in Articles 2, 3, 6 and 12. These principles relate to non-discrimination; best interest of the child; survival and development; and the need for the child’s opinion to be expressed and heard respectively.\footnote{174} Since South African children’s law is greatly influenced by international law, and therefore these international principles are also applicable in domestic matters by the force of section 39 and chapter 14 of the Constitution.\footnote{175}

Where possible, the key principles of the best interest of the child;\footnote{176} non-intervention and de-institutionalisation;\footnote{177} and the child’s right to participate in decision-making about his or her life must be followed.\footnote{178} This does not mean that by taking into account what the child has to say concerning a matter, the court has to disregard its duty or the parents’ duty to act on behalf of the child. Essentially, it creates an awareness that in

\footnote{170}1994 3 SA 201 K, 1995 58 THRHR 472.  
\footnote{171}The Court in the case of Martens v Martens 1991 4 SA 287 T also agreed with the same criteria.  
\footnote{172}Child Care Act 1991.  
\footnote{175}The African Charter; Policy documents (such as the IMC’s Interim Recommendations for the Transformation of the Child and Youth Care System) and South African common law and case law.  
\footnote{176}Section 28 (2) of the Constitution.  
\footnote{177}Non-intervention and de-institutionalisation, based on the premise that except where it is in the best interests of the child, the child should not be separated from his or her parents and family, and that institutionalisation of children should be restricted to a step of last resort, and where possible, children should be returned to a family environment as soon as this is possible.  
\footnote{178}Article 12 of CRC.
any issue affecting children, it must not be forgotten that children are also humans and should be actively involved.

Consequently, John Rawls propounds that children participate in the formation of the initial social contract to the extent that they are capable.\(^\text{179}\) This goes back to the issue of the reasoning capacity of a child.\(^\text{180}\) Children can only be allowed to take part in decision-making where it can be reasonably presumed that they have a better understanding of the state of affairs. Even so, adults still have to interpret whatever information that they receive from children and use it in the children’s best interest. However, according to Worfold, whenever adults act on behalf of a child, they doing for the child what they would wish to be done for themselves if they were in the child’s place. In this regard, they do so without any mechanism available for children to question their judgement and dispute the correctness of their decisions.\(^\text{181}\) This presupposes that for the principle to be holistic, children should be consulted about their wishes and preferences.

2.4 THE BEST ‘INTEREST’ TEST

When looking at the best interest of a child, the age, physical and mental condition of the child must be considered. It is important for decision makers to give due consideration to the child’s changing developmental needs. As a child grows, his or her needs changes. Children need a lot of attention; some need space, while others do not know how to deal with the physical changes that take place around their bodies. This can be attributed to the differences in the levels of maturity for each child as well as other factors that affect a child’s mental well-being.\(^\text{182}\)

A child is not the only focal point the age and physical and mental condition of each parent also plays a significant role. Before a decision is made, it should be investigated whether the parent or guardian making such a decision on behalf of the child is in his or

\(^{179}\) John Rawls was an American moral and political philosopher. His theory of justice as fairness envisions a society of free citizens holding equal basic rights cooperating within an egalitarian society.

\(^{180}\) Joel Olasunkamianwo “A comparative analysis of the Rights of the child with particular reference to child soldiers” Doctoral Thesis University of Fort Hare page 45.

\(^{181}\) Ibid page 50.

\(^{182}\) It has been pointed out that children are not little adults, they react to situations differently and therefore the things that would not upset an adult tremendously affects them.
her proper state of mind. In situations where consent to travel with a child is not granted because the person who denied the consent was irrational, then such refusal must be reviewed.

Furthermore, in order to adequately make a decision that is good for a child, the existing relationship between each parent and his or her child is vital. Consideration must be given to the parent’s positive involvement with the child’s life. It should be established whether the parent is able to accurately assess and meet the emotional, intellectual and physical needs of the child. These needs are also affected by other relationships of the child, including but not limited to his or her relationships with siblings, peers, and extended family members.

The role that each parent plays in the upbringing and caring of a child is very important. In cases where parents are separated, each parent has to actively support the child’s contact and relationship with the other parent.\(^\text{183}\) Contact simply means maintaining a relationship with the child.\(^\text{184}\) If the child lives with someone else, communication is to be maintained with the child on a regular basis by visiting or being visited by the child.\(^\text{185}\) It is unacceptable for a parent to unreasonably deny the other parent visitation or access to the child.\(^\text{186}\)

The idea of family contact is important in a child’s life and it was in existence even before the Children’s Act came into effect.\(^\text{187}\) It is from this premise that it can be established that at times children travel so that they can meet with their families and relatives. In the case of \textit{Heystek v Heystek}, the court argued that the right to family or parental care is not confined to natural parents only; it also extends to step parents and other relatives.\(^\text{188}\)

\(^{183}\) \textit{Haskins v Wildgoose} 1996 3 All SA 446 T.

\(^{184}\) Section 1 of the Children’s Act.

\(^{185}\) Skelton 243.


\(^{187}\) \textit{B v S} 1995 3 SA 571 A 582.

\(^{188}\) 2002 2 SA 754 T paragraph 757C.
2.5 THE NEW REGULATION VERSUS CHILDREN’S RIGHTS

At every stage of a child’s contact with the justice system, as well as during the formulation of legislation and policy, thought must be given to the situation of the child involved. It must be ensured that all children have their rights upheld and are offered appropriate services without discrimination. Each situation must be handled with sensitivity and an understanding of the issues that a child, or group of children, may face.\textsuperscript{189}

Section 28 of the Constitution provides a framework for the fundamental rights of children. This section is reproduced at length below as the rights contained therein are important.\textsuperscript{190} The section provides:

“1) Every child has the right –

a) to a name and nationality from birth;

b) to family care and parental care, or to appropriate alternative care when removed from the family environment;

c) to basic nutrition, shelter, basic health care services and social services;

d) to be protected from maltreatment, neglect, abuse, or degradation;

e) to be protected from exploitative labour practices;

f) not to be required or permitted to perform work or provide services that-

i) are appropriate for a person of that child’s age; or

ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;

g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-

i) kept separately from detained persons over the age of 18 years; and

ii) treated in a manner, and kept in conditions, that take account of the child’s age;

\textsuperscript{189} Ibid paragraph 4.
\textsuperscript{190} Section 28 of the Constitution.
h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
   i) not to be used directly in armed conflict and to be protected in terms of armed conflict.

2) A child’s best interests are of paramount importance in every matter concerning the child.

3) In this section “child” means a person under the age of 18 years.”

Regulation 6(12) (a) requires parents travelling with a minor child to produce an unabridged birth certificate of that child reflecting the particulars of the parents and of the child. The birth and death Registration Act requires every child to be registered within 30 days of birth. A notice of birth must be given by birth parents within 7 days of the child’s birth. However, this is not the case for illegitimate children. Notice of birth of an illegitimate child is given under the surname of the mother or any other person present at the birth of the child. This is where the problem starts for illegitimate children or children in alternate care who want to travel. The requirements of an unabridged birth certificate disadvantages these children in that parents may chose not to register their children in an effort not to involve disinterested fathers in the lives of their children. Even when the omission of the father’s name is not mala fide and the father simply cannot be found, it is a long process to try and get consent from that father or any other person, or to get proof that the father is indeed missing.

Furthermore, there are situations of fathers whose names are on the birth certificates of their children but they are estranged. The situation is even worse when that particular father dies. Regulation 6 (12) (b) requires the production of a death certificate of the

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191 Section 28 of the Constitution.
192 Section 9(1) of the Birth and Deaths Registration Act 1992.
193 Ibid section 10 (1) (a) and (b).
194 A child in alternate care shall, before departing from the Republic, produce a certified copy of an authorization letter from the Provincial Head of the Department of Social Development where the child resides as contemplated in section 169 of the Children’s Act.
195 Regulation 6 (12) (b).
other parent registered as a parent of the child on the unabridged birth certificate.\textsuperscript{196} The person seeking to travel with the child may not know where to find the death certificate and trying to get it may be a wild goose chase. After a careful consideration of all these contributory circumstances, a child is entirely left at the mercy of the parents to make decisions that will not later on have detrimental repercussions especially in future events that may require registration details.

Since a child has the right to be registered at birth, a limitation of that right does not affect the child alone. The limitation may also impute on a parent’s parental responsibilities and rights.\textsuperscript{197} Nowadays, things are run in such a way that what is written on paper is presumably the gospel truth. If a parent’s name is written or omitted, that act or omission has far reaching effects that will possibly affect a child as well as the omitted parent. Fixing such issues is an arduous process which takes time. The process may involve court applications that take long and when it comes to travelling, it is impossible to do everything and still make it for the pre-planned trip. People are not aware of these processes and many other requirements that need to be fulfilled.

It is almost obvious that during these processes and applications, because the child is a minor, his or her decision may not be taken into consideration. However, every child has the right to be heard.\textsuperscript{198} This right is relevant in all aspects of a child’s life. Under Article 12 of CRC, every child has the right to express his or her views on all matters affecting him or her. Nonetheless, these views may not be given due weight if the child is very young. Article 12 does not provide for all children to have the final and decisive say, but only requires that their views be given due weight in accordance with their age and maturity.\textsuperscript{199} Age in relation to the right to be heard,\textsuperscript{200} the right to vote and the right to work,\textsuperscript{201} has historically been the only accepted basis for withholding these rights from children.

\textsuperscript{196} Section 15 of the Birth and Deaths Registration Act 51 of 1992.\textsuperscript{197} Article 18 of CRC.\textsuperscript{198} Article 12 of CRC.\textsuperscript{199} CRC Committee General Comment 12 The right to be heard page 17.\textsuperscript{200} Ibid Article 12.\textsuperscript{201} Article 15 of the African Charter.
Children participation may go a long way in deciding what is in the best interest of the child, especially where there is non-compliance with the Regulations. Participation can be described as securing the opportunity for children to express their views and influence decision-making. The major reason for the implementation of these Regulations was to curb child trafficking. Surely, if a child is given an opportunity to speak, it can be established whether the purpose of the visit is in any way prejudicial to the child. In turn, this avoids the danger of unnecessarily limiting the rights of the child.

The right to be heard ensures that every child who is capable of forming a view is able to express himself or herself freely and fully in any matter that may affect him or her. However, this right is often limited because in most instances parents do not like to involve their children in matters that they primarily believe they can handle on their own. This is probably due to the protective nature of parents and the instinctive urge to protect their children from any potential harm.

Parents may not necessarily be keen to involve their children but decision makers should. According to the UN Committee on the Rights of the Child, young children are acutely sensitive to their surroundings and very rapidly acquire understanding of the people, places and routines in their lives, along with awareness of their own unique identity. They make choices and communicate their feelings, ideas and wishes in numerous ways, long before they are able to communicate verbally or in writing. This can be of great assistance in trying to understand what a child wants or wishes to be done.

In _HG v CG_, the court examined section 31 of the Children’s Act which deals with major decisions concerning children. Although the children in this case were involved and had a chance to voice out their feelings, the recommendations that were later given by

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203 Article 11 of CRC.
204 Article 12 of CRC.
206 UN Committee on the Rights of the Child, 2005.
experts went against their wishes. In the court’s view, this was against the children’s right to participate in matters affecting them. It then decided that the children were of age and were mature enough to make their own decisions.

The major hindrance to the full exercise of rights is lack of information. With particular reference to the new Regulations, not much detail has been given on the length of the other processes involved. Apart from a section describing the new Regulations, nothing more is given. The right to be heard discussed above is intertwined with the right of access to information. A child must receive adequate information about the process, the choices they have and possible consequences of their choices. However, it is common that children are not informed of what will be taking place. This is because it is presumed that since they are children they do not have the required understanding of what will be happening.

Having regard to a child’s age, maturity and stage of development, the child must be informed of any action or decision in any matter which significantly affects him or her. However, age alone cannot determine the significance of a child’s view. Information, experience, environment, social and cultural expectations, and levels of support from parents all contribute in one way or the other to the development of a child’s capacity to form a view.

These factors that contribute to a child’s view of affairs are mainly based on a child’s life experience. Life experience is made up of various factors ranging from what a child has been exposed to and places that a child has been. Subsequently, a child also has the right to freedom of movement. A child should be able to travel from one place to another at will and with approval from a guardian or parents. Sadly, this is not as easy anymore when such movement involves crossing borders and leaving one’s country of

207 2010 3 SA 352 ECP.  
208 Skelton 266.  
209 Ibid page 266.  
210 (No author) Sawubona “Under 18s Travelling to and from SA” October (2015) 176.  
211 Section 32 of the Constitution.  
212 Section (6) (5) of the Children’s Act.  
213 The Committee on the Rights of the Child General Comment No.12 (2009).  
214 Section 21 (1) of the Constitution.
birth. It can thus be concluded that this right is, to a certain extent, limited by the stringent requirements of Regulation 6 (12).

Consequently, the limitation of the right to freedom of movement of a child also limits the parents’ right to the same since at times it will be impossible for them to travel without the child.\textsuperscript{215} Furthermore, the right to leisure is also limited since most of the trips abroad are for leisure purposes.\textsuperscript{216} Not only has this limitation affected children leaving South Africa, it has also made it difficult for children to travel into South Africa for recreational purposes.\textsuperscript{217} This is evidenced by the rapid percentage decrease in the number of tourists recently.\textsuperscript{218} From May to December 2014, South Africa lost 66 000 foreign tourists due to changes in the Immigration Regulations.\textsuperscript{219} Approximately 43 percent of these tourists would have been from Asian States; 16 percent from European States and 15 percent from Africa.\textsuperscript{220} It is also stated that no other country requires children to travel with an unabridged birth certificate in addition to their passport when travelling with both parents. Furthermore, it is difficult to comply with the requirements since there is no international standard for birth certificates. Each country has the right to develop their own document that proves the birth or existence of a person and this makes it difficult for them to be internationally accepted.

Apart from this, it can be suggested that the Regulations unjustly disadvantage children born of unmarried parents and those who come from disadvantaged communities. This is in direct contravention of the principle of non-discrimination. The principle of non-discrimination means that no distinction, restriction, exclusion or preferential treatment should be given to any child based on race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.\textsuperscript{221} States are required to ensure that all children are not discriminated against.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid} Section 21 (2) and (3).
\item Article 31 of CRC.
\item Article 12 of the African Charter.
\item Adam Wakefield; News 24 Visa Regulation hurting tourism Industry Report. 2015-06-23 19:00.
\item \textit{Ibid} paragraph 5.
\item \textit{Ibid} paragraph 6.
\item Section 9 (3) of the Constitution.
\end{enumerate}
\end{footnotesize}
Furthermore, they should put in place active measures to ensure that children have equal opportunities so that no child is unjustly disadvantaged.

Moreover, there are children who live far from the areas where these documents are to be processed and that also puts them at a great disadvantage. They have to apply at a nearest Home Affairs office where biometric information will be verified. However, it can take up to 8 weeks to acquire an Unabridged Birth Certificate from the date of application and this could be a problem.²²²

All these rights are relevant in determining what is in the best interests of a child, or group of children, are. While a child’s best interests are of primary consideration, they must also be considered and balanced with any other conflicting human rights and policies.²²³ Rights contained in the Bill of Rights may be limited only in terms of a 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.²²⁴ Therefore, the rights discussed above may be limited where there are no less restrictive means to achieve the same purpose.²²⁵ The Constitutional Court judgement in *S v M (Centre for Child Law as Amicus Curie)*,²²⁶ confirmed that the best interest of the child along with other rights can be limited and cannot assume dominance over other constitutional rights.²²⁷

**2.6 CONCLUSION**

*Prima facie*, the 2015 Immigration Regulations were put in place so that they can protect children from being unlawfully removed from the country. However, in the process of protecting children from this, a number of rights are being limited and this erodes the principle of the best interest of the child. Children travel for various reasons, for instance, to seek medical assistance, educational purposes, recreational purposes

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²²⁴ Section 36 of the Constitution.
²²⁵ *Ibid* Section 36 (1) (e).
²²⁶ 2008 3 SA 232 CC paragraph 22-36.
²²⁷ Skelton 241.
or visit family and friends. Not much has been done to ensure that some of these fundamental rights of the child are not unnecessarily limited. It is clear that, in all these, children in alternate care or living with one of the parents suffer the most. This can be attributed to the fact that such children are the ones who in most cases cannot fulfil the requirements stipulated in Regulation 6(12). Furthermore, not only are the rights of these children limited, those of their care givers are also vicariously limited. In a nutshell, it is unclear if the Regulations are really achieving the best interest of the child or not. Furthermore, there is no evidence to confirm that the Regulations clearly assist in decreasing child trafficking. However, it is evident that the only sector that has been affected thus far is the tourism sector.
CHAPTER THREE: THE RIGHT TO FREEDOM OF MOVEMENT

3.1 INTRODUCTION

Freedom of movement is an indispensable condition for the free development of a person. It has been described as a pre-condition for the enjoyment of many other rights. Limitations on freedom of movement can have serious consequences for the life, health and well-being of individuals and communities. Consequently, ensuring freedom of movement forms an important part of any human rights protection strategy. The right to freedom of movement interacts with several other rights enshrined in various human rights instruments. In some instances, this right has been linked to the right to family association, dignity and equality. The infringement of this right, as well as other ancillary rights, takes place where there is a bona fide limitation or a limitation that is not permitted by law. Just like there are rights that are linked to the right to freedom of movement, there are also problems that arise if this right is abused. One such problem is the issue of human trafficking.

Human trafficking is not a problem that is uniquely South African. It is prevalent in many States and it remains a problem that needs to be dealt with urgently. Due to the fact that the world has become a global village, trafficking is perpetrated though many different States and this makes it difficult to completely eradicate trafficking syndicates. In the Southern African region, many trafficking victims are from Zimbabwe. This is because the government of Zimbabwe does not fully comply with the minimum standards set up by the International Labour Organisation (ILO) for the elimination of trafficking. Apart from the Trafficking in Persons Act which was enacted in 2014, the government has

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230 United Nations Human Rights Committee General comment 27.
231 Elliot v Commissioner of Police 1997 5 BCLR 670 ZS.
232 Article 12 (3) of ICCPR.
233 Unfettered freedom of movement can result in illegal immigrants, rise in human trafficking and overpopulation in some States among other problems.
234 Trafficking in Persons Report 2015 page 1 paragraph 1.
235 Ibid page 1.
failed to ensure that the prohibitions under the law are consistent with international norms and standards.\textsuperscript{236}

On the other hand, South Africa is also a destination for trafficked victims. It is arguably, the country with the largest numbers of human trafficking in Africa.\textsuperscript{237} Anti-trafficking campaigners and NGOs claim that 23,000 children are trafficked into the country annually as part of the sex trade.\textsuperscript{238} The same figure has been used by the Department of Home Affairs to justify the recently introduced visa regulations aimed at combating child trafficking.\textsuperscript{239}

This is why South Africa is trying hard to eliminate this prevalent catastrophe. However, it is unfortunate that the enforcement of the Immigration Regulations has resulted in the limitation of the right to freedom of movement and residence, among other rights. The right to freedom of movement is enshrined in major international instruments and the limitation of that right affects South African citizens and non-nationals alike.\textsuperscript{240} This chapter seeks to evaluate children’s rights and related laws in other States, specifically Zimbabwe and Namibia. It then looks at how the law in these respective States has affected fundamental children’s rights, with special reference to the freedom of movement. Specific reference is made to these States because South Africa and Namibia have a historical connection that was cemented during the fight against colonialism and apartheid.\textsuperscript{241} Since then the relationship between these two States has been characterised with interaction at all levels.\textsuperscript{242} The same applies to the relationship that South Africa has with Zimbabwe which goes beyond just sharing a border. Lastly, it also investigates if these laws mitigate the problem of child trafficking without limiting the best interest of the child principle.

\textsuperscript{236} Van de Watt ‘Human trafficking in South Africa: an elusive statistical nightmare’ 2015 page 6 paragraph 2.
\textsuperscript{237} Ibid.
\textsuperscript{238} Ibid.
\textsuperscript{239} Regulation 6 (12) of the Immigration Act of 2002.
\textsuperscript{240} Article 13 of UDHR, Article 12 of ICCPR.
\textsuperscript{241} (No author) Relations with Namibia www.dirco.gov.za.
\textsuperscript{242} Ibid.
3.2 FREEDOM OF MOVEMENT AND RESIDENCE

3.2.1 International recognition of freedom of movement

Since its adoption, the UDHR has been hailed as a common standard for the achievement and protection of human rights.\(^{243}\) Its impact on the development of human rights has been immense. It inspired the adoption of the ICCPR, ICESCR and several other regional human rights conventions.\(^{244}\) Consequently, the right to freedom of movement is enshrined in each of these instruments. Accordingly, Article 13 of the UDHR is echoed in Article 12 of ICCPR among other instruments that guarantee freedom of movement.\(^{245}\) Article 13 of UDHR States:

Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.\(^ {246}\)

Article 13 does not belittle national legislation when it comes to the acceptance of non-nationals. It still stands that no one has the absolute right to enter a country to which one is not a national.\(^ {247}\) The right to move freely relates to the whole territory of a country. According to Article 12 (1) of ICCPR, everyone is entitled to move from one place to another and to choose a place to live. Since this is not an absolute right, the only permissible limitations must not nullify the purpose and necessity of freedom of movement.\(^ {248}\)

States have the duty to ensure that people have the full enjoyment of this right. This obligation is imposed both on the State of residence and on the State of nationality. Since international travel usually requires appropriate documents, in particular a

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\(^{243}\) Preamble of the UDHR.


\(^{245}\) Article 12 of ICCPR States that; everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant. No one shall be arbitrarily deprived of the right to enter his own country.

\(^{246}\) Article 13 (1) and (2).


\(^{248}\) General comment 27.
passport, the right to leave a country concurrently includes the right to obtain the necessary travel and identity documents. The issuing of passports and other travel documents is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validation for a national residing abroad may deprive such person of the right to leave the country of residence and to travel elsewhere. Such delays can be in the form of unnecessary requirements and unending procedures. All these hindrances in turn restrict the freedom of those who wish to travel to do so freely and at will.

Due to the principle of sovereignty, States still maintain the right to make laws whichever way they prefer and for whatever purpose that they deem necessary for the promotion of peace, development and national security. However, with respect to restriction and limitation of the right to freedom of movement, any limitations must be in line with Article 12 (3) of ICCPR. In other words, it has to be consistent with other rights guaranteed in the Covenant and with the fundamental principle of equality and non-discrimination. The right to freedom of movement may only be limited by restrictions that are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others. Therefore, it is clearly a violation of the Covenant if the restrictions imposed on the right are based on distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

It is common practice that certain laws that limit this right by imposing a lot of requirements before one can travel. This is mainly common when it comes to women in male dominant States. In examining reports made by States, it has been found on several occasions that measures preventing women from moving freely or travelling

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250 South Africa Passports and Travel Documents Act, 1994.
251 Article 12 (3) of ICCPR.
252 Article 12 (1) and (2).
253 This is common in States that strictly observe Shari’ah law such as Islamic dominated States like Saudi Arabia among others. See Amnesty International "Saudi Arabia unfulfilled Promises" https://www.amnesty.nl/sites/default/files/public/mde230182013en.pdf.
without the consent or in the company of a male person is a violation of Article 12 of ICCPR.\textsuperscript{254} Similarly, it can be submitted that the strict requirements that a child traveller needs consent from either parent or affidavits to prove the same, constitutes a limitation on the exercise of his or her right to freedom of movement. The situation can possibly be worse for travellers from non-English speaking States where the affidavits will have to be interpreted. These requirements infringe on the right of both the child and anyone who wishes to travel with such a child. It therefore becomes insignificant that \textit{prima facae} these requirements are in the best interest of the child.

3.2.2 \textit{Regional recognition of freedom of movement vis a vis the trafficking}

A number of national constitutions reflect this provision of international law by providing its citizens with the right to freedom of movement.\textsuperscript{255} The recognition of the right to freedom of movement is not only prevalent in Africa alone; it is respected in European States as well.\textsuperscript{256} The Organisation for Security and Co-operation in Europe (OSCE) made a number of commitments to freedom of movement. For example, the participating States declared in the Helsinki Conference in 1975 their intention to simplify and administer flexible procedures for exit and entry and to ease regulations concerning the movement of citizens from other participating States in their territory.\textsuperscript{257} In 1989, in Vienna, further commitments to respect fully and not to arbitrarily limit this right were made.\textsuperscript{258} Furthermore, the States vowed not to take any action that is contrary to the UDHR or the ICCPR.\textsuperscript{259}

In 1991, in Moscow, the OSCE States committed themselves to remove legal and other restrictions on travel within their territories for their own nationals and foreigners.\textsuperscript{260} The OSCE maintains these commitments through a number of means. These include

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{255} Section 21 of the Constitution of South Africa.
\item \textsuperscript{256} Article 2 of Protocol 4 to the European Convention of Human Rights and Fundamental Freedoms.
\item \textsuperscript{258} Article 13 UDHR.
\item \textsuperscript{259} \textit{Ibid} Article 13.
\item \textsuperscript{260} Anisa Niaz, \textit{Immigration and Human Rights} (LLM Public Law), United Kingdom 4.
\end{enumerate}
\end{footnotesize}
sharing information and responding quickly to requests for information by other participating States. They also hold bilateral meetings to examine particular questions or issues which may be brought to the attention of the participating States through diplomatic and other channels.\textsuperscript{261}

Such commitment is necessary and can be implemented in African States as well. Notably, there are more human rights violations in Africa than anywhere else in the world.\textsuperscript{262} Furthermore, there is the issue of refugees and the freedom of movement. The Africa Charter regulates the right to freedom of movement and only limits this right in terms of law or for national security, law and order.\textsuperscript{263} The AU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 recognises the need for an essentially humanitarian approach towards solving the problem of refugees since it is responsible for some of the tension and conflict between States.\textsuperscript{264} It is also important that when dealing with specific rights, States draw lessons from other States. With regards to the right to freedom of movement, there is no harm in imitating policies that are used by the OSCE States. These policies will assist in realising the right to freedom of movement while at the same time strengthening interstate relationships.

\textbf{3.2.3 Freedom of movement: a South African perspective}

From a South African perspective, the right to freedom of movement entails the liberty to move freely within South Africa as well as to reside, leave and return to the Republic. Previously, apartheid legislation imposed restrictions on this right by the use of pass laws and Group Areas legislation.\textsuperscript{265} The post democratic government outlawed these laws. Section 21 of the Constitution confers the right upon citizens to enter the Republic. Section 21 States:

1) Everyone has the right to freedom of movement.

\begin{flushright}
\textsuperscript{261} Ibid. \\
\textsuperscript{263} Article 12 (2) of the African Charter. \\
\textsuperscript{264} Preamble. \\
\textsuperscript{265} Currie 370.
\end{flushright}
2) Everyone has the right to leave the Republic.

3) Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.

4) Every citizen has the right to a passport.

International law requires a state to accept its own nationals when they are deported from other States. Similarly, the state has the primary duty to ensure that the right to freedom of movement is not unnecessarily limited. The right to move freely and to choose one’s place of residence within the borders of a country and the right to leave one’s country are the main components of freedom of movement. Any stringent requirements in the Immigration Regulations limit this freedom and this poses a number of problems.

In terms of the new Regulations, a child may not travel without the required unabridged birth certificate, the consent from parents, affidavits or proof of guardianship. As previously discussed in paragraph 1.5 above, failure to submit the required documents may arise due to on a number of factors but either way, it results in the limitation of the freedom of movement of a child and that of the guardian or parents alike. Although the decision to prevent a person who does not meet the requirements from travelling is substantially supported by law, however harmless it may seem and for whatever purpose, such prohibition interferes with the exercise of the right to freedom of movement.

The South African Constitution requires that international law must be considered when dealing with issues affecting human rights, and this includes binding and non-binding law. It is from this premise that the South African legislative body endeavours to promote human rights that are contained major international instruments especially the

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266 Constitution of the Republic of South Africa 1996.
267 Currie 453.
268 Ibid page 370.
269 Annexure 1.
270 Elliot v Commissioner of police 1997 5 BCLR 670 ZS.
271 S v Makwanyane 1995 3 SA 391 CC.
ones that it is party to. In this instance, South Africa ratified the ICCPR in 1998 which means that it is bound by the provisions of this Covenant. Invariably, South Africa has the duty to protect and promote the right to freedom of movement and residence. It is in this light that one is reluctant to accept that the purpose of the 2015 Immigration Regulations is to limit this right. As has been stated above, the Regulations were put in place to protect children from the major problem of trafficking and not to arbitrarily deprive them of their right to free movement.

The right to freedom of movement is not only recognised by South Africa alone, but by many other States in the region. Zimbabwe also recognises this right.\(^{272}\) However, it can be submitted that lack of close monitoring mechanisms in States in the African region has promoted the crime of human trafficking. In some States it is difficult to establish the seriousness of this crime due to lack of resources to carry out the necessary investigations and prosecutions. It can be noted that the prevalence of trafficking in States like Zimbabwe has not been empirically verified due to the absence of enabling legislation and limited funding to undertake research at a national level.\(^{273}\) This means that there are no reliable statistics that actually point to the manifestations, severity or causes of this problem in Zimbabwe.

In Zimbabwe, the authorities have currently used the Immigration Act to arrest those travelling without proper documents.\(^{274}\) The government also adopted the Trafficking in Persons Act.\(^{275}\) The latter seeks to domesticate the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children - the Parlemo Protocol of 2002- which supplements the United Nations Convention against Transnational Organized Crime 2000. It seeks to prevent, suppress and punish trafficking in persons, especially women and children.\(^{276}\) It also provides for the establishment of an inter-

\(^{272}\) Section 66 of the Zimbabwean Constitution.
\(^{274}\) \textit{Ibid} Section 14.
\(^{275}\) Act 4 of 2014.
\(^{276}\) Zimbabwe is a signatory to the United Nations Convention and Protocol to prevent, suppress and punish trafficking in persons.
ministerial Committee with the mandate to formulate and implement a national plan of action against trafficking in persons.\textsuperscript{277}

### 3.3 COMPARATIVE APPROACH TO IMMIGRATION LAWS AFFECTING CHILDREN

#### 3.3.1 Zimbabwean laws affecting children

##### 3.3.1.1 Birth registration

There are no special immigration laws that only affect children when it comes to Zimbabwean legislation. Immigration is mainly regulated by the Immigration Act.\textsuperscript{278} Section 13 (1) (b) states that if the person wishing to enter the country is a child below the age of 16, then that child must be in possession of valid travel documents or if the child is travelling with an adult, that adult must also have valid travel documents and show these at the port of entry.\textsuperscript{279}

Similarly, the same requirements are stipulated in section 26 and apply to people under the age of 16 exiting the country.\textsuperscript{280} However, such production of documents is not as easy when one is not in possession of all the documents, particularly a passport. In order for a minor or anyone else to be able to apply for a passport, a birth certificate is required, among other documents: this is where the problem begins.

Zimbabwe ratified the CRC in 1992 and ratified in 1995 the ACRWC, both provide for the right of children to be registered at birth. However, Zimbabwe started the journey earlier on through the Births and Deaths Registration Act of 1986 (BDRA). The Act puts the responsibility for the notification of birth or stillbirth on either parent and if they cannot, the occupier of the house in which the birth occurred, health worker, headman, witness to the birth provided the person has attained 18 years of age, or any other person having responsibility for the child.

Consequently, every child has the right to be registered at birth, which means that it is presumed that every child has a birth certificate from birth. In terms of the Act, births should be registered within 42 days of a child’s birth and at the latest, before the expiry

\textsuperscript{277} Ibid Section 9.  
\textsuperscript{278} Ibid Section 9.  
\textsuperscript{279} Section 13 1 (a) (i) and (ii) and (b) (i) and (ii).  
\textsuperscript{280} Section 26 (1) (a) and (b).
of 12 months.\textsuperscript{281} Thereafter, a written authority from the Registrar-General (RG) is required. These birth certificates are already unabridged which means that they already contain the details of both parents.\textsuperscript{282} This subsequently makes it easier for the child to get and apply for other ancillary documents like an Identity Document (ID) or a passport.\textsuperscript{283} According to section 35 of the Zimbabwean Constitution, all Zimbabwean citizens are entitled to the rights and privileges of citizenship and this includes attainment of travel documents.\textsuperscript{284}

However, despite the existence of this provision in the law, birth registration in Zimbabwe is far from being comprehensive.\textsuperscript{285} Not every child that is born alive is registered and this makes it difficult later in life for the child to exercise some fundamental rights like education which require birth certificates for registration.\textsuperscript{286} Furthermore, this makes the attainment of section 35 rights difficult, hence when the child needs to travel, it becomes almost impossible if the official channels have to be followed.

Most children do not get registered because the RG’s office has a lot of strict and rigid requirements.\textsuperscript{287} In the event of the death of both parents, the registering relatives must produce the death certificates and bring forth witnesses.\textsuperscript{288} Invariably, orphans do not get registered because of reluctant and disinterested relatives especially in those cases where there are disputes between the late father’s and the late mother’s families.\textsuperscript{289}

Apart from this, the long investment in time through travelling and queuing to attain the documents is also a major discouraging element to birth registration for many rural people. It was reported by the RGs office that generally some people do not understand

\begin{footnotesize}
\begin{enumerate}
\item Chapter 5:02 of the Birth and Deaths Registration Act 1963.
\item \textit{T v Registrar General of Births and Deaths} 135/07 2008 ZWSC 26.
\item Section 35 (3) (b) and (c) of the Zimbabwean Constitution.
\item \textit{Ibid} section 35.
\item \textit{Ibid} Section 20 (d).
\item Birth Registration Report page 40.
\item Birth and Death Registration Act 1963.
\item Birth Registration Report page 42.
\end{enumerate}
\end{footnotesize}
the significance of birth certificates.\textsuperscript{290} However, when there is an urgent need for it, such as school examinations and important international trips that is when parents desperately and earnestly seek birth registration.\textsuperscript{291}

Social issues also significantly affect birth registration of children whose parents separated and remarried. After a remarriage or at the birth of a child born out of wedlock, a father sometimes denies paternity or responsibility of his child and becomes reluctant to play his role in the registration process.\textsuperscript{292} In cases of remarriage, the new husband may make it difficult for his new wife to get in contact with her former husband for the purpose of registering her children. Similarly, a wife may make it very difficult for the husband to communicate with his former wife for the purpose of obtaining birth certificates for his children.\textsuperscript{293}

3.3.1.2 Case Law

Generally, there are no specific reported cases which deal with issues relating to birth registration in Zimbabwe. However, the cases discussed below are a reflection of the problems that arise due to lack of birth registration and the impact that it had on the rights of a child in terms of national legislation as well as international conventions.\textsuperscript{294}

In the case of \textit{Douglas v Meyers}, the applicant was the natural father of an illegitimate child born of the Respondent.\textsuperscript{295} He sought an order declaring that he was entitled to reasonable access to the child. The mother opposed the relief on the ground that she was the natural guardian of the child, and that the father had no inherent right of access.

The Court held that the natural father of an illegitimate minor does not have an inherent right to access to the child. The Court will grant such access if the father establishes that such access is in the best interest of the child. In other words, the Court will only

\begin{flushleft}
\textsuperscript{290} \textit{Ibid} page 41. \\
\textsuperscript{291} \textit{Ibid} page 42. \\
\textsuperscript{292} \textit{Favard v Favard; Douglas v Meyers}. \\
\textsuperscript{293} \textit{Ibid} report Page 37. \\
\textsuperscript{294} CRC. \\
\textsuperscript{295} 1991 (2) ZLR HC.
\end{flushleft}
grant such an order if there is some very strong ground compelling it to do so. For instance if the mother is not a fit parent.\textsuperscript{296}

This case made it impossible for the father of an illegitimate child to take part in the welfare of the child. It means that even when it comes to acquiring the child’s birth certificate, he would be unable to do so if there is a dispute with the child’s mother. Invariably, this is one of the reasons why some children end up growing without having a birth certificate or ID, let alone a passport. To deny a child access to these rights on the basis that his or her father was not married is a breach of constitutional rights.\textsuperscript{297}

In \textit{Tiwandire v Chipanda},\textsuperscript{298} the mother of a child born out of wedlock sought an order directing that the child’s natural father surrender the child to her after he had abducted the child from her custody. The court upheld the judgment in \textit{Cruth v Manual},\textsuperscript{299} that the father of a child born out of wedlock has no rights at all in the child. It was stated that to hold that the father of a child born out of wedlock has rights in respect of the child would be to elevate the legal status of the father of such a child to that of a spouse in a divorce and allow unwarranted interference in the mother’s rights over the child. It was further held that it would be worthwhile for the legislature to look into the issue of rights of fathers of children born out of wedlock.\textsuperscript{300} The Court in this matter referred to the need for reform of the law governing guardianship and custody of such children.\textsuperscript{301}

In matters of residence, the court in the case of \textit{Favard v Favard} ruled that a child takes domicile of his or her guardian. In this case, it was argued that the guardian was the father and consequently, the child’s domicile was the country where the father was domiciled at the time of the child’s birth. However, according to Zimbabwean law, a child born out of wedlock takes the domicile of its mother by virtue of the fact that the mother is the legal guardian of that child.\textsuperscript{302}

\begin{footnotes}
\footnote{296} Ibid.
\footnote{297} Section 81 (d) of the Zimbabwean Constitution.
\footnote{298} HB – 12 -04.
\footnote{299} 1999 (1) ZLR 7 (5).
\footnote{300} \textit{Ibid} Report page 27.
\footnote{301} \textit{Favard v Favard} 1951 SR 95.
\footnote{302} \textit{Ibid} report page 27.
\end{footnotes}
3.3.2 Immigration laws in Zimbabwe

Immigration laws in Zimbabwe are not significantly different from those in South Africa, both States consider a person below the age of 18 to be a child.³⁰³ Both States require travelling documents and proof of consent where the child in question is a minor. However, the state has the primary duty to ensure that the child’s rights are not unnecessarily infringed upon. These rights include the right to family care, shelter and basic health and nutrition.³⁰⁴ Where parents are separated this also means the right for both parents and the child to move freely.³⁰⁵

Although foreign nationals have no right to enter and reside in a foreign country, the right to respect family life that stems from the right to equality and dignity has an impact on immigration laws.³⁰⁶ In a way, Zimbabwean immigration laws do not make it entirely difficult for people to travel in and out of the country. Failure to travel in any case is not due to the strict laws but can be attributed to the lack of required documents mainly caused by ignorance and reluctance to acquire them beforehand.

3.3.3 Namibian children’s laws and rights

Namibia has ratified a number of international instruments which call on signatories to observe, protect and uphold children’s rights, the most notable being the CRC,³⁰⁷ CEDAW,³⁰⁸ and the ACRWC.³⁰⁹ Due to the fact that South Africa and Namibia share a long and similar history, it is not surprising to discover a lot of similarities in both States’ legislation. South Africa occupied South-West Africa, (modern day Namibia), during the First World War and administered its mandate until the end of the Second World War.³¹⁰ Both States have a mixed system of Roman-Dutch law; English common law and customary law.³¹¹ For the purpose of this study, focus will be given to Namibian laws affecting children, especially the rights of child travellers. Like any country, the Namibian

³⁰⁴ Section 20 (a), (b) and (d).
³⁰⁵ Section 66.
³⁰⁶ Dawood v Minister of Home Affairs 2000 1 SA 997 C.
³¹⁰ CIA fact book www.indexmundi.com>compare>southafrica>Namibia>.
³¹¹ Ibid.
The legislature has enacted laws in terms of section 44 of its Constitution that aim towards the protection of children,\textsuperscript{312} for example, the Children Status Act.\textsuperscript{313}

The Children Status Act aims to provide for children born outside marriage to be treated equally and fairly and to provide for matters which are in the best interest of all children.\textsuperscript{314} Children born out of wedlock are the most vulnerable because in matters requiring parental consent, it is always difficult for them because, in most cases there is a disinterested parent. It is from this premise that the Act seeks to promote and protect the best interests of such children and to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents.\textsuperscript{315}

Invariably every matter that has anything to do with a child resonates with the concept of parental responsibility and authority. The concept of parental authority in matters affecting children in Namibia is similar to the one in South African as previously discussed.\textsuperscript{316} As such, the primary responsibility to ensure that a child acquires all the necessary documents to enable him or her attain and enjoy the rights awarded by law, rests on the parents.\textsuperscript{317}

Article 15(1) of the Namibian Constitution provides that children shall have the right from birth, to a name, the right to acquire a nationality and, subject to legislation enacted in the best interest of children, as far as possible the right to know and be cared for by their parents. It is in the best interest of the child that he or she maintains contact with the parents especially when they are separated. This is when the right to freedom of movement comes into play. This is why it is vital for parents to understand their parental duties and execute them. In turn, the government also makes it possible for the enjoyment of this and other rights without imposing unnecessary limitation, while at the same time ensuring the protection and safety of the children.

\textsuperscript{312} The legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this Constitution subject, where applicable, to the powers and functions of the National Council as set out in this Constitution.

\textsuperscript{313} Children Status Act of 2008.

\textsuperscript{314} The case of Frans v Paschke and Others (1548/2005) 2012 NAHC 159 ruled out the categorisation of children.

\textsuperscript{315} Felicity Goagoes children’s rights in Namibia “Custody and guardianship of children” 178.

\textsuperscript{316} Chief Family Advocate and Another v G, 2003 2 SA 599 W 601 paragraph 1.

\textsuperscript{317} Births, Marriages and Deaths Registration Act 81 of 1963.
3.3.4 Case law

In the appeal case of *IJT v AIE*, the Supreme Court of Namibia set aside the High Court judgement in that the judges had erred in not hearing oral evidence on issues relating to the best interest of the child. Furthermore, it was held that the genesis of any substantive legal discussion should be the Constitution in this case Article 15(1) and that Article 14(1) of the Namibia Constitution should be the starting point in the consideration of the right of the child. The Article provides that:

“The family is the natural and fundamental group unit of society and is entitled to protection by the State.”

The case of *M v M*, involved the custody of a minor child after the parents’ divorce. The court held that it does not look at the perfect parent but at the best interest of the child. The court’s quest is to find a parent who is better suited to safeguard the minor’s growth, development and welfare. The court’s judgement was based on the finding in the *McCall v McCall* case. It was held that:

“In determining what is in the best interest of the child, the court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare."

In the case of *P v P*, with similar facts the court held that it looks past the enmity between parents and focuses on the parent that is more likely to make decisions that will be more favourable for the child.

3.4 CONCLUSION

In a nutshell, it can be noted that the right to freedom of movement and residence plays a significant role in the formulation of immigration laws and regulations of any country. The conflict between national security and some fundamental human rights is not a

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319 *Ibid* paragraph 17.
321 1994 (3) SA 2001 at 2041.
322 2007 (5) SA 94 (SCA).
323 *Ibid* paragraph 12.
problem that is unique to South Africa. It is also prevalent and even worse in States like Zimbabwe and Namibia. As such, it is a delicate matter that requires States to tread carefully in trying to maintain a balance between the two. It is important to realise that the primary goal for limiting the right to freedom of movement is not a deliberate move to unjustifiably infringe upon people’s rights, but in most instances, it is a necessary evil.

The right to freedom of movement greatly affects children’s rights in instances where the parents are separated. In such cases, there are always battles over consent, custody and access to the child or children. However, although it is in the best interest of children to have undisturbed family association, it is also important to ensure their safety and protection from trafficking. This leads to the adoption of strict regulations which, at face value, may seem unfair to both the child and the parents.

The issue of consent often arises when it comes to acquiring documents such as an ID, birth certificate and a passport which are constitutional rights for every child. Consequently, these documents are vital in many matters affecting children. This is even more so now that the 2015 Immigration Regulations of South Africa are strict on the production of such documents and parental consent in certain instances.
CHAPTER FOUR: AMENDMENTS TO REGULATION 6(12)

4.1 INTRODUCTION

Due to the ever rising numbers of immigrants, there is need to regulate and ensure that legislation is in place and up to date so as to maintain national security and prevent illegal immigration. The Immigration Regulations which came into operation on 26 May 2014 repealed the Regulations of in 2005. As it has been shown above, this was meant to manage immigration in a way that balances South Africa’s openness to travellers as well as meet developmental and security imperatives.

However, the Regulations seemingly caused more harm than the initially intended good. They gave rise to a lot of unexpected consequences particularly in the tourism sector. During the 2013-2014 financial year, it is reported that South Africa received 13.5 million foreign nationals who came as visitors. The Department of Home Affairs issues about 600,000 passports annually to citizens who want to travel. These figures have been drastically decreasing due to the changes in these laws. The stakeholders in the tourism sector warned that as a result of the strict immigration requirements, South Africa might lose a lot of money as well as face possible increase in unemployment.

The Minister of Tourism, Mr Derek Hanekom, stated that tourism contributes 1.5 million direct and indirect jobs. This is considerably more than the mining sector and therefore a decrease in tourists could be detrimental to the country’s economy.

This unfortunate impact of the new Regulations on the economy consequently led to the amendment of the Regulations so as to cater for the concerns that were raised. This

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324 Annexure 1.
327 From May to December 2014, South Africa has lost 66 000 foreign tourists due to changes in the Immigration Regulations. News24 (23/06/2015) 19:00.
328 Regulation 6 (12).
chapter looks at Regulation 6 (12) and how it has been amended. Furthermore, it evaluates how these changes have affected the initial purpose of the Regulations.

4.2 THE IMPACT OF THE REGULATIONS

4.2.1 Definition of a tourist

A tourist can be described as a person who is traveling, especially for pleasure.\textsuperscript{330} Similarly, a tourist can be defined as a visitor who stays for at least one night at a visited place.\textsuperscript{331} There is no significant difference between tourists and travellers, therefore both terms can be used interchangeably to refer to non-nationals. Another word that can also be used is ‘visitor’. A visitor is any person visiting a country other than that in which he or she usually resides, for any reason other than following an occupation remunerated from within the country visited.\textsuperscript{332}

Invariably, tourism becomes the temporary movement of people to destinations outside their normal places of work and residence, the activities undertaken during their stay in those destinations, and the facilities created to cater to their needs.\textsuperscript{333} According to Macintosh and Goeldner, tourism is; "the sum of the phenomena and relationships arising from the interaction of tourists, business suppliers, host governments and host communities in the process of attracting and hosting these tourists and other visitors."\textsuperscript{334}

The tourism industry is made up of a collection of activities, services and industries that delivers a travel experience, including transportation, accommodations, eating and drinking establishments, retail shops, entertainment businesses and other hospitality services provided for individuals or groups traveling away from home.\textsuperscript{335} This is why in South Africa it is said that the tourism sector generates more income than the mining industry. Any reduction in the number of tourists impacts negatively on the overall national economy.

\textsuperscript{331} TBCSA Second Impact Assessment Report 11.
\textsuperscript{333} Mathieson and Wall (1982).
\textsuperscript{335} Ibid.
4.2.2 The impact of the 2015 Immigration Regulations on the tourism sector

Statistics show that for the first eight months of 2014, and prior to the coming into effect of the new Regulations, overseas arrivals grew by 5.6 percent. The biggest percentage of South African tourists is made up of people from overseas.\textsuperscript{336} A comparative analysis of statistics between 2013 and 2014 indicates a decrease in tourists form overseas. Tourists from China and Russia fell with an estimated 37 percent and 46 percent respectively towards the end of 2014.\textsuperscript{337} Unfortunately, this decrease was made worse by the enforcement of the Regulations. In 2015, overseas arrivals had reportedly gone down by nearly 10.7 percent for the first four months of the year, with China at 45.5 percent decrease.\textsuperscript{338}

Regionally, 74 percent of South Africa’s tourists are residents of SADC States. Zimbabwe, with just more than 2 million visitors, provided the highest number of tourists from the SADC region, followed by Lesotho at 1.5 million; Mozambique 1.3 million; Swaziland 919 000; Botswana with 556 000 tourists; 211 000 Namibians; 177 000 Zambians; 167 000 Malawians; 54 000 Angolans and 30 000 tourists from the Democratic Republic of Congo.\textsuperscript{339} These figures have since started to decrease.

As a result of this gradual decline, the industry has lost direct spending of up to R886 million, which has been attributed to the changed Immigration Regulations.\textsuperscript{340} Given the rate at which the number of foreign tourists is decreasing, the industry anticipates a loss of up to 100 000 more tourists, with an estimated direct tourism spending of R1.4 billion.\textsuperscript{341}

\textsuperscript{336} Among the 10 leading States for overseas tourists were the UK 402 000, the US 309 000, Germany 275 000 France 132 000, Netherlands 131 000, Australia 111 000, India 86 000; China 83 000, Canada 60 500 and 58 600 Italians.
\textsuperscript{337} Statistics SA.
\textsuperscript{338} \textit{Ibid} page 1.
4.3 THE AMENDMENTS

After a lot of concerns were raised about the dire consequences of the 2015 Immigration Regulations, an Inter-Ministerial Committee (IMC) was set up to deliberate on that issue. New amendments to South African visa requirements were announced on 23 October 2015, to ensure that the processes of travelling into and out of South Africa will become more streamlined and efficient.

In respect to South African children, the IMC accepted the implementation of the current child-travel requirements, including the parental consent affidavits as these seek to protect children.\(^{(342)}\) In terms of the Regulations, parents travelling with a child were required to produce an unabridged birth certificate of the child reflecting the particulars of the parents of the child.\(^{(343)}\) To mitigate the serious inconveniences caused by this regulation, it was recommended that the details of the parents be included in the child’s passport: therefore, the child will not have to produce an unabridged birth certificate. However, for inbound travellers the unabridged birth certificate requirements are still applicable during the visa application processes. For visa applications, the applicant will no longer be required to apply in person which means that applications made by post will be accepted.

Regulation 6 (12) (b) (i) States that consent in the form of an affidavit is required from the other parent registered as a parent on the birth certificate of the child authorising him or her to enter into or depart from the Republic with the child that he or she is travelling with. Furthermore, a court order granting full parental responsibilities and rights or legal guardianship in respect of the child, if he or she is the parent or legal guardian of the child is a requirement.\(^{(344)}\) This requirement affects children especially those on educational tours. In order to ensure that the best interest of the child is protected, the IMC agreed that in the next three months school principals will issue

\(^{(342)}\) Annexure 1 Regulation 6 (12) (a) and (b).
\(^{(343)}\) Ibid Annexure 1.
\(^{(344)}\) Ibid Annexure 1.
letters confirming permission for children to travel for school tours.\textsuperscript{345} This authority will also be extended to include registered sports bodies as well.

The Regulations were a reflection of the government’s commitment to deal with the issue of child trafficking.\textsuperscript{346} This includes reducing the number of children who enter the country against their will or without the knowledge of their parents or guardians. The IMC agreed that travellers who are from visa exempted States traveling with children will be strongly advised to bring along proof of the relation and consent from the absentee parent or guardian. This means that travellers will not be turned away and that care and caution will be exercised where such proof is not available. This is to ensure that while the requirements are being flexible, the main mandate of curbing trafficking is observed.

To cater for the time constraints posed by the Regulations, the Department of Home Affairs will implement the biometrics, including fingerprints and photos, at the pilot sites which will be at OR Tambo Airport, King Shaka, and Cape Town International Airports. The department will also introduce an Accredited Tourism Company (ATC) Programme for China, India and Russia with possible extension to other visa requiring States.\textsuperscript{347} Additionally, within three months to a year the department will also increase Visa Facilitation Centres (VFC) in selected States. These include China, India, United Kingdom, Nigeria Democratic Republic of Congo, Angola, Ghana, Kenya and Uganda. Lastly, the Department will fast-track the opening of VFC in Zimbabwe, United Arab Emirates (UAE) and Botswana. Measures which will be implemented beyond one year include the installation of systems for pre-flight checks at international airports.\textsuperscript{348}

\textbf{4.4 CONCLUSION}

In a nutshell, the amendments to 2015 Immigration Regulations can be described as being therapeutic as they only ease the unforeseen consequences which have affected the tourism sector. However, it is not yet clear whether these amendments will not

\textsuperscript{345} Section 28 of the Constitution.
\textsuperscript{346} Annexure 1.
\textsuperscript{348} Ibid.
defeat the initial purpose of the Regulations which is to curb the prevalence of child trafficking. Furthermore, it is also unclear whether these negative effects on the tourism sector are only a genesis of the same on many other departments and sectors that are directly or indirectly linked to children and their movement from one place to the other.

However, although these amendments are what was required to resurrect the shrinking tourism sector, a lot remains to be desired in terms of whether these amendments are still in the best interest of the child and whether or not they aid in the protection of children’s rights. To reiterate what was said by the Minister of Home Affairs, Malusi Gigaba, the country cannot sacrifice children in an effort to chase tourists. “The argument on how many children have been victims of trafficking versus how many tourists we can get was unfortunate, brutal and uncaring.”

349 Travel Companies “Harming South Africa with visa row-Gigaba” Sunday Times 2 August 2015 page 2 column 2.
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION
From the previous discussion, it can be noted that the child’s best interests are paramount in all matters concerning the child. The child’s best interest requires South Africa to enact legislation which is amicable to the right to freedom of movement for the child. However, the new South African immigration regime, in particular Regulation 6 (12) of the Immigration Act has failed to safeguard the best interest of the child by unnecessarily curtailing the right to freedom of movement of the child. Furthermore, the requirements provided under the same Regulation are inflexible, stringent and to a larger extent impractical as shown in previous chapters. This chapter, therefore, posit recommendations predicated on the recognition of the best interest of the child and the need to ensure that children enjoy their right to freedom of movement.

5.2 SUMMARY OF CHAPTERS
Chapter two showed that prima facie, the 2015 Immigration Regulations were enacted to protect children from being unlawfully removed from the country. However, in the course of protecting children, a number of rights are infringed and this violates the principle of the best interest of the child. The law must recognise that children travel for numerous reasons, for instance, to seek medical assistance, educational purposes, recreational purposes or visit family and friends. However, not much has been done to ensure that some of these fundamental rights of the child are not unnecessarily infringed. It is clear that, in all these instances, children in alternate care or living with one of the parents suffer the most. This can be attributed to the fact that such children are the ones who in most cases cannot fulfil the requirements stipulated in Regulation 6(12).

An analysis of chapter three shows that the right to freedom of movement and residence plays a pivotal role in the formulation of immigration laws and regulations of any country. In this interplay of many factors, the conflict between national security and some fundamental human rights is apparent. Such a conflict is also prevalent in
Zimbabwe and Namibia. As such, it is a complex matter that requires States to maintain a balance between the two. It is important to realise that the main goal for limiting the right to freedom of movement should not be a deliberate move to unjustifiably infringe upon people’s rights. Further, chapter three reveals that the issue of consent often arises when it comes to acquiring documents such as an ID, birth certificate and a passport which are constitutional rights for every child. Consequently, these documents are vital in many matters affecting children. This is even more so now that the 2015 Immigration Regulations of South Africa are strict on the production of such documents and parental consent in certain instances.

In Chapter four, the study has demonstrated that the 2015 Immigration Regulations have an unintended negative impact on the tourism sector. Such regulatory consequences have led to the defeat of the purpose of the Regulations which is to curb the prevalence of child trafficking, among others and at the same time promoting freedom of movement. Further, it is also unclear whether these negative effects on the tourism sector are only the beginning of the same on many other departments and sectors that are directly or indirectly linked to children and their movement from one place to the other. In sum, chapter four reveals the need to strike a balance between the best interest of the child and curbing child trafficking.

5.3 IMPORTANT FINDINGS OF THE STUDY
On the question relating to whether the 2015 Immigration Regulations are in line with the best interest of the child, especially the child traveller, the study concludes that the 2015 South Africa Regulations are inconsistent with this principle. This means that the South African government is obliged to ensure that the Regulations are in harmony with the best interests of the child. The Regulations are not amicable to the right to freedom of movement which constitutes an essential element of what the law calls “the best interest of the child.” Further, on the question relating whether there any shortcomings in the Regulations, the study concludes that they are loopholes in the new Regulations. For instance, the Regulations merely outline the requirements without necessarily disclosing the strenuous procedures involved.
5.4 RECOMMENDATIONS

5.4.1 Amending or repealing the “controversial” Regulations

The previous discussion has indicated that the 2015 Regulations are not entirely in the best interest of the child. As stated before, the process of amending Regulation 6 (12) has already begun with the relaxation of the requirement of the unabridged birth certificates. However, such relaxation is not enough to protect the best interest of the child. The Regulation 6 (12) is still haunted with loopholes in that the required documents cannot be easily acquired overnight. The bureaucratic procedures associated with red tape in government department makes it impossible for individuals to meet the requirements. This study therefore, suggests that the government should not take a piece meal approach to the problem but rather repeal or amend the legislation in its entirety.

5.4.2 Domestication of international standards and norms

Safeguarding the rights of the children starts at the national level can be done by ratification and effective implementation of relevant international and regional conventions. Consequently, this requires harmonisation of national legislation with international norms or standards. Although South Africa ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children in 2004, it has not taken any concrete steps to domesticate the provisions of the Protocol. Therefore, this study suggests that South Africa should domesticate international laws to ensure that its laws, including immigration laws comply with international norms and standards. Any legislation enacted in this regard has to give the government the mandate to ensure the prevention, protection, recovery and reintegration, as well as to criminalise child trafficking. Further, such national

\[\text{Article 144 (1) (f).}\]
\[\text{Article 284 (1) Any child who is the victim of trafficking and who is found under circumstances which indicate that he or she is a child contemplated in section 150 (c) Must be informed on relevant court and administrative procedures; and (d) Must be assisted to enable her/his views and concerns to be presented and considered at appropriate stages.}\]
\[\text{Article 284 (1) (a).}\]
legislation must not only be aimed at curbing child trafficking at international level, but rather also deal with local offenders. For instance, a number of children have been trafficked from Kwa-Zulu-Natal and the Eastern Cape to the metropolitan areas of Gauteng and the Western Cape.\textsuperscript{354}

5.4.3 Regulatory Prudence

Lessons should be drawn from the unrest that was caused by the regulations affecting child travellers. Perhaps the legislature needs to be vigilant when amending or making any legislation. The constant revision and amendment of Regulation 6(12) may suggest that its provisions were not thoroughly investigated and enough was not done to ensure that its provisions were not detrimental to the same people intended to be assisted. Furthermore, thought should be given to alternative measures that are less restrictive and not double edged.

5.4.4 Regulatory awareness measures

When the new Regulations came into force, the public was not conscientised enough on the impending impact of the regulation. This study, suggests that in future the government of South Africa should embark on awareness activities and communication strategies. There is need for the government to discuss with all the affected stakeholders and launch awareness campaigns and try to alert the travellers about the requirement of the 2015 Immigration Regulations. This can be done by utilising social media platforms or televised programmes and adverts that promote awareness on the matter. Further, the government can also make use of platforms such as the radio in order to convey its message effectively.

5.5 Recommendations related to child trafficking

5.5.1 International and Regional cooperation

As previously highlighted, child trafficking is not a problem unique to South Africa. It is an inter-country issue that requires both regional and bilateral agreement and coordinated action. It can be recommended that an inter-country institutional symmetry as the basis for coherent and comprehensive strategies be created. Furthermore,

\textsuperscript{354} Molo Songololo "The Trafficking of Children for the Purpose of Sexual Exploitation"2000.
States can adopt a regionally shared and comprehensive definition of child trafficking, guided by the definition set out in the Palermo Protocol. In turn, this will possibly satisfy the need to recognise child trafficking as a complex protection issue which includes the removal, transportation, illegal reception or sale, and placement of the child into an exploitative context. Lastly, as a region, States can conduct research on child trafficking and harmonise strategies to curb this practice. As previously stated, the issue of trafficking in Zimbabwe is crippled by lack of research and awareness of its existence may help its prevention.

5.5.2 Educating the Public

Education is a key preventive measure against child trafficking. Child trafficking can be reduced by improving awareness activities and communication strategies. As it stands, most people are only aware of the isolated incidents of trafficking and have no idea of its intensity. This can be achieved by establishing inter-ministerial bodies as the main coordination mechanisms working together with organisations like UNICEF, International Organisation for Migration (IOM) and ILO. The CRC, together with other relevant international instruments, constitute the normative framework for UNICEF efforts against child trafficking.

With regards to trafficking, it is the goal of UNICEF to increase protection of children from violence, abuse, exploitation and discrimination. UNICEF has effectively promoted this in many States in West and Central Africa since 1998. More can be done in this regard in that these international instruments should not only be used as normative framework, interpretation and awareness of children’s rights can play a significant role in ensuring the best interest of the child in any matter. It is difficult for people to promote what they do not know or what they have little understanding of.

Child trafficking also falls under the mandate of two IOM and ILO. These organisations work in close and active collaboration with UNICEF. The latter also cooperates closely with the Office of the High Commissioner for Human Rights, as well as the main human

\footnote{Ibid page 4.}
\footnote{Ibid.}
rights mechanisms engaged in the prevention of child trafficking, particularly the Committee on the Rights of the Child and the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography.\textsuperscript{357}

5.6 CONCLUSION

From the previous discussion, it can be maintained that Regulation 6 (12) has failed to curb the phenomena of child trafficking that is fast spreading throughout the country, into the region and worldwide. Instead, the Regulations have had negative impact on the best interests of the child and the tourism sector. Initially, the Regulations were met with a lot of criticism mainly relating to the tourism sector which eventually led to the amendment of the Regulations to cater for these concerns. Even so, the amendments did not adequately address the primary issue of child trafficking.

The discussion also revealed that the best interest of the child is still at stake and it is unclear whether the controversy concerning the rights of child travellers has been addressed. The interrelated nature of rights practically makes it impossible to address each right in isolation. As a result, the Regulations tend to have a limiting effect on most of these rights. In an effort to protect these rights, the purpose of the Regulations may possibly be diluted and that is the major bone of contention.

ANNEXURE 1

Immigration Regulation 6 (12)

(12)(a) Where parents are travelling with a child, such parents must produce an unabridged birth certificate of the child reflecting the particulars of the parents of the child.

(b) In the case of one parent travelling with a child, he or she must produce an unabridged birth certificate and –

(i) Consent in the form of an affidavit from the other parent registered as a parent on the birth certificate of the child authorising him or her to enter into or depart from the Republic with the child he or she is travelling with;

(ii) A court order granting full parental responsibilities and rights or legal guardianship in respect of the child, if he or she is the parent or legal guardian of the child; or

(iii) Where applicable, a death certificate of the other parent registered as a parent of the child on the birth certificate;

Provided that the Director-General may, where the parents of the child are both deceased and the child is travelling with a relative or another person related to him or her or his or her parents, approve such a person to enter into or depart from the Republic with such a child.

(c) Where a person is travelling with a child who is not his or her biological child, he or she must produce:

(i) A copy of the unabridged birth certificate of the child;

(ii) An affidavit from the parents or legal guardian of the child confirming that he or she has permission to travel with the child;

(iii) Copies of the identity documents or passports of the parents or legal guardian of the child; and
(iv) The contact details of the parents or legal guardian of the child,

Provided that the Director-General may, where the parents of the child are both deceased and the child is travelling with a relative or another person related to him or her or his or her parents, approve such a person to enter into or depart from the Republic with such a child.

(d) Any unaccompanied minor shall produce to the immigration officer-

(i) Proof of consent from one of or both his or her parents or legal guardian, as the case may be, in the form of a letter or affidavit for the child to travel into or depart from the Republic:

Provided that in the case where one parent provides proof of consent, that parent must also provide a copy of a court order issued to him or her in terms of which he or she has been granted full parental responsibilities and rights in respect of the child;

(ii) A letter from the person who is to receive the child in the Republic, containing his or her residential address and contact details in the Republic where the child will be residing;

(iii) A copy of the identity document or valid passport and visa or permanent residence permit of the person who is to receive the child in the Republic; and

(iv) The contact details of the parents or legal guardian of the child.
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