

NEW IMMIGRATION REGULATION: “IT IS A MESS”

IMMEDIATE RELEASE: 16 July 2015

The Centre for Child Law objects to the statement by Mr M Tshwete on behalf of the Department of Home Affairs that the new immigration regulations are “as per directive of the Children’s Act”. We are at a loss to understand this statement. Surely, the immigration regulations must flow from the Immigration Act and not the Children’s Act.

Mr Tshwete conflates trafficking with international parental child abduction. Child trafficking is the illegal movement of children within the country or across the border with the purpose of exploitation, for example child labour or prostitution. If the element of exploitation is not present, then it is not trafficking.

Parental child abduction is when one parent unlawfully removes a child to or retains a child in a country other than their country of habitual residence without the consent of the other parent. In this scenario, both parents must have guardianship in respect of the child. Where this happens, the unlawful removal or retention is dealt with through the Hague Convention on the Civil Aspects of International Child Abduction. It is important to understand that this is not a criminal matter and that “abduction” in this context does not mean criminal abduction (which must have a sexual exploitation element) and is not trafficking.

It is concerning to us that the Department of Home Affairs does not distinguish between these two distinct legal concepts which are dealt with under different laws.

We understand and agree that it is important to prevent parental child abduction and that the Department of Home Affairs has an important role to play in preventing this. However, the new regulation itself, relating to parental consent to removal of the child from the country is legally incorrect and in contradiction with the Children’s Act.

There are two problems: Firstly, in some instances an unmarried father does not have guardianship of a child despite the fact that his name may be on the child’s birth certificate. The regulation assumes that all fathers whose name is on the birth certificate has guardianship and must give consent to the child’s departure from the

Republic. This is incorrect and places mothers and their children in an impossible position where they have lost contact with the father. The regulation causes considerable difficulty for children with an absent parent who want to leave the country for school, sport or cultural trips and who are prevented from doing so because they cannot obtain parental consent in the form of an affidavit.

Secondly, the single mother is forced by the regulation to approach a High Court, at enormous expense, to declare that she is the child's sole legal guardian despite the fact that this is already true in law. However, the regulation is incorrectly drafted and states that a parent must have a court order declaring that they have "full parental responsibilities and rights or legal guardianship". It omits the word "sole" and creates confusion. Frankly, the regulation is a mess.

We are encouraged by the fact that Mr Tshwete has distanced himself and the Department from the position that the purpose of the regulation is a response to the numbers of children trafficked and that the Department has 'no intention or legitimate ground to put a "spin" on immigration law and regulations'. We agree that there is no evidence regarding the number of children trafficked and that wild exaggeration is unhelpful.

In any event, we are not convinced that the new immigration regulation will assist in combating the trafficking of children. The nature of trafficking is clandestine and is generally not found in regular border crossings such as children traveling with their parents on vacation.

ENDS.

For comment:

Prof Ann Skelton 012 420 4502, 082 443 2702 ann.skelton@up.ac.za

Karabo Ozah 012 420 4502, 071 682 1761 karabo.ozah@up.ac.za

Carina du Toit 012 420 4502, 071 603 8292 carina.dutoit@up.ac.za