

The Adverse Effect of Immigration Laws on a Migrant Child's Right to Family Life: A Reminder of the South African *Nandutu* Case

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Abstract

A child's right to grow up with its parents is presented in articles 9 and 25 of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of a Child, respectively. South Africa has ratified both treaties, and thus has a duty under international children's law to protect children's rights in domestic South African law. At the national level, section 28 of the Constitution of the Republic of South Africa, 1996, contains a variety of rights of children. Particularly, section 28(1)(b), akin to international children's law, protects a child's right to family or parental care. Using a child-rights-based approach, guided by the rationality of the principle of best interests of the child and a child's right to life, this article seeks to appraise the 2019 judgment of the South African Constitutional Court in *Nandutu v the Minister of Home Affairs*, in which the Court declared reg 9(9)(a) of South Africa's Immigration Regulation of 2014 inconsistent with the Constitution. In analysing this decision, legislation, and case law, this article further aims to highlight the significance of *Nandutu*, through the lens of a migrant child's right to family life.

Keywords: Migrant child; children's right to family life; *Nandutu*; immigration; expulsion; children's best interests; children's right to life; survival, and development

1. Introduction

South Africa acceded to the United Nations Convention on the Rights of the Child (CRC) in June 1995,¹ and to the African Charter on the Rights and Welfare of the Child (African Children's Charter) in January 2000.² The state has demonstrated its commitment to these treaties by enacting various South African domestic laws relating to and protecting children in the country.³ These domestic laws highlight a strong commitment by the state to realise its duty, under international children's law, to respect, protect, promote, and fulfil the rights of every child in South Africa. The leading legislation is the 1996 Constitution of the Republic of South Africa.⁴

Akin to international children's law, particularly article 2 of the African Children's Charter,⁵ the Constitution, under section 28, unequivocally, recognises a child as a person below the age of 18. The Constitution also recognises and protects a child's right to '... family care or parental care, or to appropriate alternative care when removed from the family environment'.⁶ In addition to the Constitution, children in South Africa enjoy the protection of their rights in, for example, the Children's Act 38 of 2005 (as amended),⁷ the Sexual Offences and related matters Amendment Act 32 of 2007, and the Child Justice Act 75 of 2008. The development and adoption of these acts of parliament in South Africa to protect and secure the rights of

children constitute a show of the state's bold intention to ensure the well-being of all children in the country. In particular, the inclusion of section 28 in the Bill of Rights of the Constitution is an important development for current South African children, given that previous generations of children – especially within previously segregated communities – had been deprived of their basic rights during apartheid.⁸ Some had been detained without trial, tortured, and assaulted; many faced discrimination in healthcare, education, and other areas.⁹ It is common knowledge that children need special legal, social, and psychological protection due to their vulnerability in society.¹⁰ Generally they are dependent on others, such as their parents and families or the state, for care, protection, well-being, and to develop properly.¹¹

The focus of this article is the impact of the Constitutional Court decision in *Nandutu*,¹² on the right of a migrant child to family life in South Africa. Through the lens of the decision in *Nandutu*, I assess the constitutionality of reg 9(9)(a) of the 2014 South African Immigration Regulation.¹³ This provision, as interpreted by the Constitutional Court in *Nandutu* and discussed broadly here, contains provisions that adversely affect the family life and well-being of children who have a foreign parent married to a South African citizen or permanent resident in South Africa. To put it succinctly, ‘... the judgment grapples with the intertwined relationship between human dignity and familial rights and how they function alongside notions of state security and legislative regimes that seek to protect persons within the borders of the Republic’.¹⁴ Taking a child's-rights-based approach, the discussion in this article accentuates a migrant child's right to family life, the best interests of the child, and the child's right to life, survival, and development.

As a point of departure, it is imperative to note that *Nandutu* was not the first, and will not be the last, landmark decision of the Constitutional Court relating to and generating new avenues for protecting children's rights in South Africa.¹⁵ Over the years, the Constitutional Court has established itself as a progressive authority on several aspects of children's rights that have improved both the interpretation¹⁶ and application¹⁷ of those rights in domestic South African law. In one of its latest judgment on children, the Constitutional Court in the *Centre for Child Law v Director-General: Department of Home Affairs* handed down a judgment declaring section 10 of the Births and Deaths Registration Act 51 of 1992 invalid and inconsistent with the Constitution,¹⁸ ‘... to the extent that it prohibits an unmarried father from giving notice of the birth of his child under his surname, in the absence of the child's mother or without her consent’.¹⁹ In the same spirit, *Nandutu* challenges the constitutionality of reg 9(9)(a) of South Africa's Immigration Regulation of 2014 by stating that it undermines a migrant child's right to family life. Broadly, as discussed further in section 2 below, the decision in *Nandutu* indirectly upholds the state's obligation,²⁰ under the CRC and the African Children's Charter, to protect the rights of children with a foreign parent married to a citizen or a permanent resident in South Africa.²¹

Against this background, I approach the interpretation of a migrant child's right to family life through the lens of *Nandutu* and fortified by the provision and scope contained in international children's rights instruments, the Constitution, and the Children's Act. My analysis is further inspired by the rationality of the best interests of the child principle,²² a child's right to life, survival, and development,²³ and parental and state responsibility to safeguard a child's well-being.

This article is divided into five main parts, including the introduction and the conclusion. The opening section 2 provides a succinct contextual analysis of the facts in *Nandutu*. Given that the child involved in *Nandutu* was affected by the adverse impact of reg 9(9)(a) of the

Immigration Regulation, section 3 provides a deep analysis and argument, through the lens of international children's rights law, to justify *Nandutu* as a significant gain for children's rights jurisprudence in South Africa. Drawing from the analysis presented in section 3, section 4 of this article spotlights the relevance of *Nandutu* in accentuating selected aspects of children's rights.

2. The Factual Background

The central issue in *Nandutu* involves parties challenging the constitutionality of the Immigration Regulations of 2002 and of 2014, in relation to the requirement that a foreign spouse of a South African citizen or permanent resident must leave South Africa in order to apply to change their visa status.²⁴ According to the facts, the first applicant (Robinah Sarah Nandutu, a Ugandan citizen) entered South Africa on 20 February 2015 on a 30-day visitor's visa, issued to her by the South African High Commission in Kampala, Uganda in terms of section 11(1) of the Immigration Act 13 of 2002. The condition on the visa was its use for holiday purposes only. However, because Nandutu was pregnant and had a fiancé – Tomlinson, a British citizen – resident in South Africa with a permanent residency permit at the time the visa was issued, the purpose of her visit also included spending time with the second applicant (Tomlinson), the father of her child (then, expected child).²⁵ On her visa, it was specifically indicated that her stay in the South Africa should not exceed 30 days and she was obliged to hold a return ticket.²⁶ On 21 April 2015, a few days before her stay in South Africa was to expire, she married the second applicant (Tomlinson). On 22 April 2015, acting on legal advice, Nandutu made an application to the Department of Home Affairs (DHA) for a spousal visa (temporary residence visa)²⁷ in terms of section 11(6) of the Immigration Act of 2002.²⁸ Under this visa category, she could reside with her husband in South Africa.²⁹

On 14 August 2015, while Nandutu was still expecting the outcome of her visa application, their child was born.³⁰ Unfortunately they were not able to register the birth due to Nandutu's lack of a valid temporary residence visa.³¹ On 7 October 2015, she was notified that her application for a change of visa status had been rejected on the grounds that there was '[n]o change of status or conditions attached to the temporary visa while in the Republic in terms of section 10(6) of the Immigration Act of 2002'.³² Nandutu was thus required to leave South Africa with her child, without her husband, to register the birth in Uganda and apply for a change of the condition on her visa at the South African High Commission in Kampala. If she did not do so, she would risk being in South Africa illegally and her child could be stateless and not properly registered at birth.³³ Essentially, the decision on her application for a visa extension meant that the family had to be separated and the child deprived of his right to grow up in a family environment with his parents.

Unsatisfied with the immigration laws and the looming impact on their family unity should Nandutu and the baby leave South Africa, Nandutu (the first applicant) and Tomlinson (the second applicant), approached the High Court of the Western Cape to challenge the constitutionality of reg 9(9)(a) of the Immigration Act of 2002. At the High Court, where the matter was first heard, Acting Judge (AJ) Thulare stressed the importance of the checks and balances created by the legislative framework and the need to guard against those who seek to take advantage of the South African immigration system.³⁴ Additionally, the High Court held that the legislative framework was carefully designed with the aim of mitigating administrative inconvenience and preventing marriage to a foreigner in South Africa from becoming a loophole for criminals to circumvent the immigration restrictions, a health risk, or a compromise to the welfare of the people of South Africa.³⁵ Consequently, on 18 April 2018

the High Court decided that reg 9(9)(a), as read with section 10(6)(b) of the Immigration Act, did not constitute an infringement of the right to human dignity, nor did it offend the right to equal treatment of visa applicants. Concerning the child, the High Court ordered the Director-General of the DHA to register the child's birth, failing which the DHA would appear before the Children's Court in the Western Cape to give reasons for the failure, and for the Children's Court to make an order as it deemed just and in the best interests of the child.³⁶

Unsatisfied with the decision of the High Court, particularly regarding the child involved, the applicants approached the Constitutional Court, seeking an improved constitutional reasoning around the issues raised in the matter. At the Constitutional Court the central question was whether it is constitutionally permissible to compel all foreign spouses and children of South African citizens or permanent residents holding visitors' visas to leave South Africa in order to submit applications to change their visa status.³⁷ Indeed, even though the High Court's decision on the child concerned was progressive, it was narrow and limited to the particular child in the case. This was contrary to the intention of the parties; as understood from its factual background, the case was technically tailored and composed to achieve a wider decision which, as stated above, would be beneficial to all migrant children in the same situation as the child involved in *Nandutu*. Also, it appears that the Director-General of the DHA did not comply with the High Court's order. Though compliance would not have resolved the main intention of the applicants, it would have been appreciated as a step in the right direction.

Thus, the applicants, as probably expected, appealed to the Constitutional Court of South Africa in 2019 with the same motive to challenge the constitutionality of reg 9(9)(a) of the Immigration Act. The Constitutional Court's decision, among other things, reversed the decision of the High Court and declared reg 9(9)(a) unconstitutional. The substantive parts of the Constitutional Court Order in *Nandutu* include:

- - Regulation 9(9)(a) of the 2014 Immigration Regulations is declared to be inconsistent with the Constitution and therefore invalid, to the extent that the rights accorded by means of the exceptional circumstances contemplated in s 10(6)(b) of the Immigration Act are not extended to the foreign spouse or child of a South African citizen or permanent resident.
- - During the period of suspension, the following is to be read into reg 9(9)(a) of the Immigration Regulations: '(iii) is the spouse or child of a South African citizen or permanent resident'.
- - Should the defect not be remedied within the period of suspension, the interim reading-in shall become final.
- - Ms Nandutu is granted leave to apply for a visa pursuant to s 11(6) of the Immigration Act 13 of 2002.³⁸

Particularly extraordinary here were the declaration of reg 9(9)(a) as unconstitutional, the reading of words into the provision, and the lifting of the applicability of the regulation to allow Nandutu to make an application to change her visa status without leaving South Africa.³⁹ Indeed, it further demonstrated the eagerness of the Constitutional Court to protect the family, to give it a chance to yield the necessary emotions to generate a favourable environment of the child to develop properly.

Even though *Nandutu* was not solely about the rights of children, but about the specific rights of the child involved in the case, a profound analysis of the facts reveals otherwise: namely that it was a classic child's-rights-based case and judgment, which sought to, among other

things, protect migrant children's right to an identity and to family life. It is worth noting that the involvement of the first and second applicants (Nandutu and Tomlinson) in this case and their further interactions with the DHA were strongly influenced by the impending disastrous consequences of the immigration laws on their child, their child's identity and rights, and their family life. But the Constitutional Court's judgement has a wider reach: all children might benefit from the amendment of the Immigration Act.

Drawing inspiration from selected aspects of the Constitutional Court's decision, specifically related to the application brought by Nandutu and Tomlinson to the extent that it relates to their child, the analysis in sections 3 and 4 examines the impact and relevance of *Nandutu* through the lens of the rights of children of migrants in South Africa.

3. *Nandutu* and Children's Rights

The aim of this section is to spotlight and celebrate salient characteristics of the *Nandutu* decision that enhance the right to a family life of the child of a migrant in South Africa, through the lens of selected international children's law applicable to South Africa. It is worth noting that the Constitutional Court makes no direct reference to any of the children's rights treaties ratified by the country which are contemplated in this article. Whether intended or not, however, the decision makes strong pointers to enhance children's rights jurisprudence in a country where the rights of immigrants and their children remain a highly politicised issue. As discussed further under points 3.1, 3.1.1, and 3.1.2 below, adverse immigration regulation in any country has severe repercussions on (migrant) children's rights and well-being.

To start, it is worth noting that the decision of the Constitutional Court in *Nandutu* is a bold statement to enhance and protect a migrant's child's right to, inter alia, family life. As discussed in section 2 and further elucidated below, *Nandutu* had much to do with the explicit intention of Nandutu and Tomlinson to protect their child's right to family life and inherent dignity and to give themselves (as migrant parents) a chance to exercise their natural and legal parental duties.⁴⁰ It is crucial that, as further discussed below under point 3.1, the family environment is a fundamental group of society⁴¹ upon which the state is built.⁴² Indeed, article 18 of the African Children's Charter affirms that the family is a natural unit and basis of society, worthy of special protection.

Prior to the adoption of reg 9(9)(a) of the 2014 Immigration Regulation, and specifically as of October 2014, a child born in South Africa to foreign parents, with one or both of its parents holding a permanent residence permit at the time of its birth, acquired a South African citizenship.⁴³ However, due to the 2014 amendment of the Immigration Regulation of 2002, a foreign child born in South Africa after October 2014 and prior to *Nandutu* in June 2019, whose parents held either a temporary or permanent resident permit or no permit at all, was only registered at birth and issued with an abridged and vault birth certificate.⁴⁴ Thus, the onus was placed on the parent(s) to travel to their country of origin to acquire the child's unabridged birth certificate and a visitor's or relative's visa for the child before re-entering South Africa.⁴⁵

As stated above in section 2, Nandutu's application to change the condition on her visa in South Africa was thrice rejected. According to section 9(9)(a) of the Immigration Act, she had to leave the country with her child as she was not allowed to change the condition while in South Africa. But her husband could stay in South Africa on the strength of his permanent residence status. One may wonder why Nandutu did not leave her child with her husband (Tomlinson) in South Africa, travel to Uganda to rectify her permit, then return to reunite with her family and

baby.⁴⁶ Although that might seem practical, Steinfeld, among many other scholars, warns that separating a new child from a principal caregiver should be a very last resort, as early childhood bonding with principal caregivers fortifies a child's development foundation.⁴⁷ Indeed, while bonding does not immediately yield the effects it should for every child, it is no doubt critical for a baby; if it is not established within the first few months after birth and when the child is brought home from hospital, this can affect a child's emotional and affectionate development.⁴⁸ Separating Nandutu from her baby even for a couple of weeks, but most likely months,⁴⁹ could be detrimental to the baby's sense of security and later its confidence as a toddler, adolescent, and adult. Indeed, had Nandutu opted to leave South Africa, as contemplated under section 9(6)(b) of the Immigration Act of 2022, this would have been a violation by the state, South Africa, of her family and of her child's right to family life.⁵⁰

3.1. A child's right to family life

A child's right to family life was first presented, indirectly, in articles 12, 16, and 25 of the Universal Declaration of Human Rights.⁵¹ For children, the right to family life is contained in articles 9 and 25 of the CRC and the African Children's Charter, respectively. There are, as one might expect, salient differences in the contextual phrasing of a child's right to family in the two treaties. For instance, the CRC does not encourage separation from the family unit against a child's best interest and the child's will, while the African Children's Charter permits temporary or permanent separation from an unconducive family unit.⁵² In South Africa, one of the general principles of the Children's Act as stated in section 6(2)(d) is to '... protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child'. This is an important provision because, as discussed earlier in section 3, a child's right to family life is a crucial right which also facilitates and sets the scene for a child's enjoyment of other rights, such as the right to health, education, and shelter, protected in international and domestic South African child laws.

Broadly, despite the lack of a clear definition of the concept of a family in the CRC, African Children's Charter, or domestic South Africa law, a family is a crucial platform through which the majority of children's rights, including children's proper development within their community and state, are fulfilled.⁵³ Indeed, a family environment represents the first duty-bearing unit in every society with the responsibility to provide care and protection for a child. Accordingly, the UN Committee on the Rights of the Child (UN Committee on the CRC), in its interpretation of the best interest principle of the child, holds that '[t]he family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children'.⁵⁴

Cronjé and Heaton add that a family should be understood as an '... arrangement of a group of people with blood relations, or who are related to one another through either adoption or marriage; or members of a household created by people who have entered into a marriage-like relationship'.⁵⁵ The African Committee of Experts on the Rights and Welfare of the Child (the African Children's Committee) adopts a broad understanding of the concept of family to include other members of the community or village whose actions or non-actions could influence or affect the upbringing of a child.⁵⁶ This expanded conceptualisation is also featured in South African domestic law.⁵⁷

In *Nandutu*, the Constitutional Court refers to a child's right to a family life not as a '... coincidental consequence of human dignity, but rather a core ingredient of it'.⁵⁸ One of the decisive references in Constitutional Court cases which echoes the importance of the role of

the family to support a child's well-being in South Africa is the 2008 Constitutional Court decision in *S v M*, in which Sachs J highlights the significance of the role played by parents, by stating that they

... serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs ... It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.⁵⁹

Elsewhere, in *Prince v Massachusetts*, the Supreme Court of the United States stated that '[i]t is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder'.⁶⁰ Thus, a child's right to family life should first and foremost be understood as a given that should not be limited or violated arbitrarily in any circumstance except where the best interest of the child is at risk, as stipulated in article 25 of the CRC and section 7(f) and (k) of the South African Child Act of 2005.⁶¹

Under South African domestic law, it is in the best interests of a child to grow and develop in the care of its parents and family, or, where this is not possible, to grow in an environment resembling a caring family environment as closely as possible.⁶² Furthermore, according to section 28(2) of the Constitution, the state, as the upper guardian of children, is mandated to always consider what is in the best interests of the child. In *Minister of Welfare and Population Development v Fitzpatrick*, Justice Goldstone stated that '... section 28(2) requires that a child's best interests [be of] paramount importance in every matter concerning the child'.⁶³ The only applicable legal exception which permits the state to separate a child from its family is when the best interests of the child are compromised within the family. This was not the case in *Nandutu*.

However, even when a state deems it fit to do so, '... competent authorities subject to judicial review [shall] determine, in accordance with applicable law and procedures'⁶⁴ whether it is in the best interests of a child to be separated from its parents and family.⁶⁵ It is possible that this exception was applicable to *Nandutu's* child as the separation was couched within South Africa's immigration laws and further validated in the decision of the High Court, a 'competent authority', as a security measure to prevent any loophole for criminals to circumvent immigration restrictions.⁶⁶ However, *Nandutu* and her husband were not criminals.

Based on this understanding, the presence of a 'family life' between the first and second applicants and their child in the context of *Nandutu* cannot be overstated. The CRC and the African Children's Charter count on the strength of a conducive, understanding, and loving family environment as the main source from which a child derives great benefits. For example, the Preamble of the African Children's Charter recognises the importance of the family environment for the full and harmonious development of a child's personality. In the same light, the Preamble of the CRC states that a family should provide '... an atmosphere of happiness, love and understanding'. Conversely, not all families are able to provide a child with a happy family environment and some family units might be dangerous to a child. Freeman suggests that this is generally because some parents have the habit of ill-treating their children and so do not deserve to be credited even with the relics of parental responsibility.⁶⁷ This too was not applicable to *Nandutu* and Tomlinson. Indeed, their family unit was

embryonic and needed time to mature, both in the context of their marriage and their child. By law, it is the responsibility of the state to support the family in providing their child with the necessary tools, support, and love to successfully transition from child to adulthood.⁶⁸ Thus the decision and majority position of the Constitutional Court in *Nandutu* to read into reg 9(9)(a) of the Immigration Regulation and to further grant Nandutu leave to apply for a visa pursuant to section 11(6) of the Immigration Act was progressive, especially through the lens of protecting the child's right to family life.

The following subsections present an analysis of the two crucial aspects that play out in *Nandutu* and further support the reasonableness of the Constitutional Court's decision in relation to the limitations imposed by asymmetrical and detrimental immigration laws on a migrant child's right to family life. These are a child's best interests and a child's right to survival and development.

3.1.1. A child's right to family life and the best interests principle

One of the first cases concerning the best interests of the child in immigration matters was *Rodrigues Da Silva* of 2006.⁶⁹ In this case it was held that restrictive immigration laws which could lead to separating children from their families interfere with a child's survival, development, and best interests.⁷⁰ According to the Committee on the CRC, preserving family unity is a vital element of the child protection system, applicable in domestic legal frameworks in all states parties to the CRC.⁷¹ The intrinsic link between children's best interests in relation to their right to family life is provided for in art 9(1) of the CRC, which requires '... that a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child'.

Contained in various international children's law frameworks, the best interests of the child is an established principle which provides for the well-being and development of a child broadly,⁷² and a migrant child specifically.⁷³ The Committee on the CRC avers that '[t]he concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child'.⁷⁴ Akin to international children's law, section 28(2) of the Constitution recognises the best interests of every child in South Africa as a guiding principle in all matters concerning children in the country.⁷⁵ In *Fletcher v Fletcher*, the then Transkei and Natal courts recognised the best interests of the child as superior in all matters concerning a child.⁷⁶ Since then, especially after South Africa's accession to the African Children's Charter and the CRC, as indicated earlier, in section 1, there has been a growing progressive trend in the interpretation and implementation of the principle in South African courts across varied groups of children in specific contexts, such as the girl child and vulnerable children.⁷⁷ The Children's Act, the leading comprehensive legal instrument which protects children's rights in South Africa, dives deeper to provide general measures which must guide the activities, implementation of legislation, and proceedings by organs of the state when dealing with any issues concerning children.⁷⁸ Of specific interest to the analyses presented here, the Children's Act calls on the government and other state agents working with any matter involving children to ensure that the child's best interest is the paramount consideration in all matters affecting a child.⁷⁹ In an attempt to conceptualise the best interests principle as applicable to immigration cases concerning the adverse impact of the separation of parents and families to a child's wellbeing and development, Lord Kerr in *ZH (Tanzania) (FC) v Secretary of State for the Home Department* held that:

Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases.⁸⁰

In South Africa, the immigration restrictions under reg 9(9)(a), read with section 10(6)(b) of the Immigration Act, requiring the children and spouses of citizens and permanent residence permit holders to leave the country to extend or change the conditions on their visa cannot be said to be in the best interests of a child; the Regulation, presents three main threats to the principle as contained in the CRC, the African's Children's Charter, the Constitution, and the Children's Act. The first threat is the intentional exposure of a child's vulnerability, especially in the context of children's right to grow with their parents and to enjoy the protection and welfare that ensues from the benefit of growing in an understanding family environment.⁸¹ According to Leloup, this threat can also lead to children having less developed ties with their parents.⁸²

The second threat is that, if implemented as is, reg 9(9)(a) of the Immigration Regulation of 2014 will jeopardise a migrant child's ability and psychological impetus to self-develop and to harness key and balanced decision-making skills to reasonably evaluate crucial decisions during the transition to adulthood. Research has shown that a family environment embodies essential elements, such as love, caring, and understanding, that enable a child to develop properly and to successfully make that transition.⁸³

Thirdly, from an African perspective, separating children from their family unit could affect their ability to understand their 'identity of becoming a being' and other deep African cultural values such as *ubuntu*,⁸⁴ which are generally conceived within the family.⁸⁵ This is momentous, as reflected in article 31 of the African Children's Charter, which states that an African child has a responsibility to 'preserve and strengthen African cultural values in [their] relations with other members of the society, in the spirit of tolerance, dialogue and consultation'.

3.1.2 . A migrant child's right to a family life and right to life, survival, and development

A migrant child's right to family life is a strong contributing factor to its life, survival, and development.⁸⁶ As put forward earlier under point 3.1, besides acting as a protective unit against external forces that might hurt a child, a family also plays a pivotal role in the child's development.⁸⁷ As Carlson advances, in a real world the family is not always a safe place to guarantee a child's life, survival, and development.⁸⁸ It is common knowledge that the family is not always a haven.⁸⁹ Yet the unparalleled potential of the family to protect and sustain a child's right to life, survival, and development is a given. This is because the family is generally the preferred unit and or platform to activate the bidirectional nature of parent-child relationships. It sets, heightens, and paces how a child's behaviours influence parents, and how parental attitudes shape a child's physical, social, and emotional functioning.⁹⁰ One benefit of promoting a child's right to family life that has been widely researched is parental responsivity. According to Spiker and others, parental responsivity is behaviour characterised by '... warmth, nurturance, stability, predictability, and contingent responsiveness to child initiations'⁹¹ and it is crucial for language and cognitive development. According to Elmer, the immediate basic task of the family is '... to serve human needs'.⁹² For children, the family also serves as a 'trusted' platform through which they get what they want, need, and deserve.⁹³

Thus the removal of a parent, for reasons not founded on the principle of the best interests of the child, is counterproductive and detrimental to the child's well-being. Furthermore, the guarantee of a migrant child's right to life, survival, and development within the family environment creates a fundamental bridge with other children's rights, such as to health,⁹⁴ education,⁹⁵ and an adequate standard of living.⁹⁶

In *Zakayev and Safanova*, the European Court for Human Rights established that where the expulsion of a parent is inevitable, the state should find other means (through, for example, the extended family)⁹⁷ of protecting the family, and consequently the life, survival, and development of the child.⁹⁸ In this case, the expulsion order against the father was rescinded by the court, predominantly to protect the family unit and well-being of the child. Indeed, the court ordered the affected parent to stay at home and care for the child, while his wife, the child's mother, was to continue working in order to provide for other family needs to curb the child's vulnerabilities.⁹⁹ Likewise, the Constitutional Court's reasoning and order in *Nandutu*, highlighted in section 2 above, was to ensure that the child survives and develops bidirectional relationships and key emotions with his parents.

4. The Relevance of *Nandutu*

Nandutu should be celebrated as a victory for children, particularly for migrant children and those whose parents or one parent is a foreign spouse to a South African citizen or permanent resident based in South Africa. As shown in section 3, *Nandutu* adds jurisprudential substance to South African's impressive legal platform and channels to protect the rights of every child in the country. Here, I identify and discuss three crucial related factors that justify and clarify why *Nandutu* strengthens the protection of children's rights in South Africa.

4.1. On a migrant child's right to family life

Related to the first point, *Nandutu* strengthens the debate around the universality of the family environment and the important role played by parents and family in protecting the rights of the child and nurturing the child. Broadly, the judgement emphasises the necessity of assuring that children have the possibility to develop under favourable conditions, such as access to appropriate healthcare, a balanced diet, quality education (including learning 'family values' from an early age), and a healthy environment in which to live. The actual attainability of these benefits becomes more likely when children grow with their parents or in an environment with similar sentiments and emotions to a family environment. As stated above, the family unit is also the principal vessel through which the state fulfils its legal duty to children.¹⁰⁰

4.2. On leaving no child behind

'Leaving no child behind' is considered here as an intentional or unintentional undertaking to contribute to or advance the well-being of all children, inclusively and purposefully, without any form of discrimination or prejudice.¹⁰¹ Leaving no child behind in this context means restoring and respecting the dignity¹⁰² and identity¹⁰³ of children born in South Africa to a foreign spouse of a South African citizen or permanent resident.¹⁰⁴ In *Nandutu*, the Constitutional Court reasoned that:

... given that the right to dignity is extended to include the right to family life, it is clear that the rights of children protected by section 28(1)(b) and (2) are limited, in that where a parent is required to leave the Republic in order to apply for a change of visa status,

this may result in the child's family being separated. Section 28(2) of our Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. Although the words 'paramount importance' appear in section 28(2), our jurisprudence holds that they do not automatically override other rights as every right is itself capable of being limited. In *De Reuck v Director of Public Prosecutions*, this Court made it clear that the word 'paramount' in section 28(2) does not automatically mean that a child's best interests can never be limited by other rights, and that therefore, in certain instances, section 28(2) may be subjected to limitations that are reasonable and justifiable in terms of section 36.¹⁰⁵

According to Eekelaar, '... if the best solution to the issue in question is considered to have a detrimental effect on a child's interest, it may need to be modified or abandoned ... the focus remains finding what is best for the child'¹⁰⁶ and no one else. The Committee on the CRC admits that the concept of the child's best interests is aimed at '... ensuring both the full and effective enjoyment' of all the rights recognised in the CRC and the '... holistic development of the child'.¹⁰⁷ In *Nandutu*, there was no vivid evidence that expelling the mother and consequently disenfranchising the child from its right to family life was in the child's best interest. The excerpt above highlights the causality between a child's right to a family life and its dignity, just as scholarship has shown that a child's development and identity are strengthened by physical, psychological, and edifying ties with its parents.¹⁰⁸

5. Conclusion

To conclude, *Nandutu* was meant to serve as a blueprint for all children of migrants legally resident in South Africa who could be affected adversely by the constantly reviewed immigration laws in South Africa. The positive contribution of parents, whether migrants or citizens, and the family environment is of great benefit to the child's development and to society at large, as recognised in international and South African domestic child law. According to the Children's Act, parental responsibility is a multifaceted set of rights, duties, and responsibilities which must be performed, at all times, in the best interests of the child and no one else. According to the Act, these rights and responsibilities, include, inter alia: caring for the child, maintaining contact with the child, acting as a guardian for the child, and contributing to the maintenance of the child.¹⁰⁹

According to *Nandutu*, the scope and structure of section 10(6)(b) read with reg 9(9)(a) is that a change of one's marital status – in this case, becoming a spouse to a South African citizen or permanent resident – while in the country on a visitor's visa does not qualify the person to apply for a change of visa status while in the country. One could argue, based on the facts presented in *Nandutu* jointly with the international legal recognition of the doctrine of state sovereignty,¹¹⁰ that the state has an obligation to its citizens to secure its borders and to determine through immigration laws who enters and resides in the Republic.¹¹¹ Granted. But in practice this is not tenable if reg 9(9)(a) were to be implemented as it was before *Nandutu*. This is because some South Africans, particularly those married to migrants, will be adversely affected, which would defeat another key objective of the state: to protect and ensure the well-being of its people. The marriage of a citizen and/or permanent resident and the migrant child's right to family life should not be destroyed by immigration regulations that are averse to safeguarding the family and the best interests of the child. As argued in sections 3 and 4, international children's law and South African domestic law protect every child's right to family as sacrosanct and only limited when the best interest of the child is at risk.

Notes

1 CRC (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

2 African Children's Charter (adopted 11 July 1990, entered into force 29 November 1999) (1990) CAB/LEG/24.9/49 (African Children's Charter).

3 Over the years, the state has adopted progressive children's rights legislation: see e.g. the 1996 Constitution, s 28; the Children's Act 38 of 2005 (assented into law in June 2006); Child Justice Act 75 of 2008 (assented in law in May 2009), and Regulations on the Registration of Births and Deaths of 1992 (amended in February 2014). See also, Rushiella Songca, 'Evaluation of Children's Rights in South African Law: The Dawn of An Emerging Approach to Children's Rights?' (2011) 44 Comparative and International Law Journal of Southern Africa 340.

4 See specifically s 28.

5 The African Children's Charter is preferred because it contains no exception to its definition of a child as compared to the CRC, which states '... a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

6 The 1996 Constitution, s 28(1)(b).

7 This Act is generally referred to as the primary law aimed at giving effect to children's constitutional rights.

8 Read e.g. Social Change Interviews, on 'Growing Up in South Africa During Apartheid': <<https://sites.lib.jmu.edu/sc-interviews/2020/04/10/growing-up-in-south-africa-during-the-apartheid/>> accessed 11 March 2022.

9 Sarah Wunderlich, *The Effect of Apartheid on Black Children Based on the Example Given in Sindiwe Magona's Mother to Mother. A Lesson Plan* (GRIN 2017) <www.grin.com/document/368529> accessed 13 September 2022.

10 Gayla Margolin and Elana Gordis, 'The Effects of Family and Community Violence on Children' (200) 41 Annual Review of Psychology 445. <https://www.annualreviews.org/doi/pdf/10.1146/annurev.psych.51.1.445?casa_token=X6xvVexH4xUAAAAA:RciBeU3w3Kp4oGpoa2mwChkKI-S-yu8zN3SXE2xLKOxXh9GwKCVigB6MMwffXJIC7M2OpKvt-XtOCQ> accessed 18 February 2023.

11 See generally, UN Committee on the Rights of the Child, General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), 29 May 2013, CRC /C/GC/14 <www.refworld.org/docid/51a84b5e4.html> accessed 11 March 2022.

12 *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC) (*Nandutu*).

13 A full transcript of the Immigration Regulation is available at <www.dha.gov.za/IMMIGRATION_ACT_2002_MAY2014.pdf>. It should be noted that the 2014 Immigration Regulation is an amendment of the 2002 Immigration Regulation. The conditions outlined in reg 9(9)(a) of the 2014 Regulation are similar to those in the 2002 Regulation.

14 *Nandutu v Minister of Home Affairs* (n 12) [1].

15 A list of other cases in which the Constitutional Court has handed down progressive children's rights jurisprudence <www.concourt.org.za/index.php/children-s-rights#> accessed 31 January 2023.

16 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT 5 of 2003) [2003] ZACC 19 (15 October 2003).

17 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

18 *Centre for Child Law v Director-General: Department of Home Affairs* (CCT 101/20) [2021] ZACC 31 (22 September 2021).

19 *Ibid.* para 144.

20 Indirectly, because the judgement makes no direct reference to international children's law. But the decision aligns with international children's law standards, as discussed further in this article.

21 It should be noted that the case and its decision do not extend to the stepchild or stepchildren of a South African citizen or permanent resident.

22 Constitution, s 28(2); CRC, art 3(1), and African Children's Charter, art 4(1).

23 s 28 (1)(a–f); CRC, art 6, and African Children's Charter, art 5.

24 *Nandutu* (n 12) [2].

25 *Ibid.* [8].

26 *Ibid.* [7].

27 A spousal visa in South Africa allows a foreign national to reside in the Republic with a South African citizen or permanent resident wife or husband. For more on the requirement to obtain this visa, visit <www.dha.gov.za/index.php/immigration-services/permanent-residency/10-immigration-services/969-documents-required-spouse-married-for-a-minimum-of-five-years> accessed 10 September 2022.

28 *Nandutu* (n 12) [8].

29 *Ibid.*

30 *Ibid.* [9].

31 *Ibid.* Further, her proof of application for a temporary residence visa did not suffice.

32 *Ibid.* [10].

33 For more on the consequences on being stateless, see Elvis Fokala and Lilian Chenwi, 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee' (2014) 6(2) *African Journal of Legal Studies* 357.

34 *Nandutu* (n 12) [18].

35 *Ibid.* [19].

36 *Nandutu v Minister of Home Affairs* [2018] 3 All SA 259 (WCC) (High Court decision) [66(5)].

37 *Nandutu* (n 12) [28].

38 s 11, entitled 'Visitor's Visa', provides:

'(1) A visitor's visa may be issued for any purpose other than those provided for in sections 13 to 24, and subject to subsection (2), by the Director-General in respect of a foreigner who complies with section 10A and provides the financial or other guarantees prescribed in respect of his or her departure: Provided that such visa –

(a) may not exceed three months and upon application may be renewed by the Director-General for a further period which shall not exceed three months; or

(b) may be issued by the Director-General upon application for any period which may not exceed three years to a foreigner who has satisfied the Director-General that he or she controls sufficient available financial resources, which may be prescribed, and is engaged in the Republic in –

(i) an academic sabbatical; (ii) voluntary or charitable activities; (iii) research; or (iv) any other prescribed activity.

(2) The holder of a visitor's visa may not conduct work: Provided that the holder of a visitor's visa issued in terms of subsection (1)(a) or (b)(iv) may be authorised by the Director-General in the prescribed manner and subject to the prescribed requirements and conditions to conduct work.

[...]

(5) Special financial and other guarantees may be prescribed in respect of the issuance of a visitor's visa to certain prescribed classes of foreigners.

(6) Notwithstanding the provisions of this section, a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22: Provided that – (a) such visa shall only be valid while the good faith spousal relationship exists; (b) on application, the holder of such visa may be authorised to perform any of the activities provided for in the visas contemplated in sections 13 to 22; and (c) the holder of such visa shall apply for permanent residence contemplated in section 26(b) within three months from the date upon which he or she qualifies to be issued with that visa.'

39 This is because, under the present conditions and lethargic issuance of visa and permits by the DHA, there was no guarantee that Nandutu would have been issued a visa to return to South Africa within weeks. In some cases, it can take longer and end up being rejected.

40 The Constitution, s 10 states that 'Everyone has inherent dignity and the right to have their dignity respected and protected'. The Constitution, s 28(1)(b) states that 'Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment' and s 28(2) goes on to provide that '[a] child's best interests are of paramount importance in every matter concerning the child'.

41 Several international instruments accentuate this point. See e.g. the Universal Declaration of Human Rights, arts 12 and 16(1); the Preamble and several provisions of the African Charter on the Rights and Welfare of the Child; the Preamble and several provisions of the CRC; several provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Preamble and art 23 of the International Covenant on Civil and Political Rights; the

Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, 1986, arts 1, 2, and 17; the International Covenant on Economic, Social and Cultural Rights, art 10; the African Charter on Human and Peoples' Rights, art 18; and the European Social Charter, art 16.

42 See e.g. Universal Declaration of Human Rights, art 16(3).

43 See, Immigration Act, ss 26(c) and 27(iv).

44 It is important to note that the 2014 amendment of the Immigration Regulation was the main trigger of the legal issues playing out around this matter. Notably s 10 of the Immigration Act initially allowed for temporary residence permits and to change visa status while in the Republic. In the same Act, s 26(b) allowed the DHA to issue a permanent residence permit to a foreigner who is the spouse of a citizen or resident and s 26(c) allowed the DHA to issue a permanent residence permit to a foreigner who was a child of a citizen or resident under the age of 21. For details on this process, see <www.dha.gov.za/index.php/civic-services/birth-certificates>.

45 South Africa Relatives Permit or Relatives Visa allows the immediate relatives of a South African permanent resident or citizen to move to South Africa based upon their family connections. The Relatives Visa can be only availed of by applicants within the second degree of kinship of the citizen or permanent residence holder. The exception is mentioned under s 27(g) of the Immigration Act of 2022, which states that 'Applicants applying under a minor South African child do not qualify. Applicants applying through a Permanent Residence holder who obtained status as a relative do not qualify.'

46 Without discounting the role, a father could play in bonding and assuring a child's security and confidence, motherly care is widely seen as very critical especially during the very early days and months of a child's life.

47 MB Steinfeld, 'Bonding is Essential for Normal Infant Development'. UC Davis Health <https://health.ucdavis.edu/medicalcenter/healthtips/20100114_infant-bonding.html> (accessed 12 December 2022)

48 As Ibid.

49 Considering how laborious the process of acquiring a South African permit has become for fellow Africans, the risk of Nandutu being kept away from her baby for a long time was very real.

50 The 'family' is crucial to a child's well-being and development, and should not diminish even after divorce. See e.g. Madelene de Jong, 'Suggested Safeguards and Limitations for Effective and Permissible Parenting Coordination (Facilitation or Case Management) in South Africa' (2015) 18 Potchefstroom Electronic Law Journal 150. Also, this would have been acceptable as it would fall under one of the grounds on which the African Children's Charter, for example, under art 25, validates the removal of a child from a family environment.

51 Indirectly because the Universal Declaration for Human Rights is not directly ascribed to children: art 12: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'; art 16: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'; and art 25: 'Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'

52 For more details on the dissimilarities and similarities of the two provisions, see CRC, art 9 and African Children's Charter, art 25, respectively.

53 See e.g. broadly, Chapter 3 of the Children's Act on 'Parental Responsibilities and Rights'.

54 Committee on the CRC 'General Comment 14' on the 'right of the child to have his or her best interests taken as a primary consideration' (29 May 2013) UN Doc CRC/C/CG/14 para 59.

55 DSP Cronjé and Jacqueline Heaton, *South African Family Law* (LexisNexis 2010) 3.

56 The African Committee of Experts 'General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on the Responsibilities of the Child' (2017) paras 29–30. See also, Committee on the CRC 'General Comment 14' para 59 provides, inter alia, 'The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.'

57 See Children's Act, ch 3.

58 *Nandutu* (n 12) [1].

59 *S v M (Centre for Child Law as Amicus Curiae)* (n 12) [134]. See also *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

60 *Prince v Massachusetts*, 321 US 158, (1944) para 166.

61 Several parts, and in particular, s 7(k) of the South African Children's Act emphasises '... the need for a child to be brought up within a stable family environment and, [as an alternative] where this is not possible, in an environment resembling as closely as possible a caring family environment'.

62 See e.g. Children's Act, s 7(1)(k).

63 *S v M* (n 12) [17].

64 See e.g. CRC, art 9(1).

65 Sonja Starr and Lee Brilmayer, 'Family Separation as Violation of International Law' (2003) 21 *Berkeley Journal of International Law* 213.

66 *Nandutu v Minister of Home Affairs* (n 37).

67 Michael Freeman 'Protecting children on both sides of the globe' (1994) 16 *Adelaide Law Review* 79.

68 See generally Chapter 3 of the Children's Act.

69 *Rodrigues de Silva and Hoogkamer v The Netherlands* App no 50435/99 (ECtHR, 31 January 2006).

70 *Ibid.* 44.

71 UN Committee on the Rights of the Child 'General Comment 14' (n 54) para 60.

72 The Committee of the CRC, in its 'General Comment 5' on the general measures of implementation of the Convention on the Rights of the Child' (27 November 2003) UN Doc CRC/GC/2003/5 expects

states to interpret development as a ‘holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development’ (para 12).

73 See African Children’s Charter, arts 4(1) and CRC, art 3.

74 UN Committee of the CRC ‘General Comment 14’ (n 54) para 4.

75 Bernard Bekink and Mildred Bekink, ‘Defining the Standard of the Best Interests of the Child: Modern South African Perspectives’ (2004) *De Jure* 21, 22–23.

76 *Fletcher v Fletcher* 1948 (1) SA 130 (A) 143.

77 See e.g. *Townsend-Turner v Morrow* 2004 (2) SA 32 (C) (access by grandparents); *R v H* 2005 (6) SA 535 (C) (child’s best interests and the right to be heard); and *Christian Lawyers Association v Minister of Health* 2005 (1) SA 512 (T) (child’s best interests and choice of termination of pregnancy).

78 Children’s Act, ch 2.

79 Children’s Act, s 9.

80 *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, [46].

81 For more examples, to understand this threat, see Eliahu Frack Abram, ‘The Child’s Right to Family Unity in International Immigration Law’ (1995) 17 *Law & Policy* 397.

82 Mathieu Leloup, ‘The Principle of the Best Interests of the Child in the Expulsion Case Law of the European Court of Human Rights: Procedural Rationality as a Remedy for Inconsistency’ (2019) 37 *Netherlands Quarterly of Human Rights* 50, 54–56.

83 Yani Hamdani, Bhavnita Mistry and Barbara Gibson, ‘Transitioning to Adulthood with a Progressive Condition: Best Practice Assumptions and Individual Experiences of Young Men with Duchenne Muscular Dystrophy’ (2015) 37 *Disability and Rehabilitation* 1144.

84 Ubuntu is an ancient African philosophy that draws on the fact that we are one human family. For more on the African concept of ubuntu and how a family unit is a core justification of its existence. See S Lundin and B Nelson, *Ubuntu! An Inspiring Story about an African Tradition of Teamwork and Collaboration* (2010).

85 Charles Ngwena, *What is Africanness? Contesting Nativism in Race, Culture and Sexualities* (2018) 26–30.

86 See the African Children’s Charter, art 5, and CRC, art 6. For an overview of the evolution of this right, and principle of children’s rights, see EE Sutherland ‘The Child’s Right to Life, Survival and Development: Evolution and Progress’ (2015) 26 *Stellenbosch Law Review* 272.

87 See Joseph Jackson and Lauren Fasig, ‘The Parentless Child’s Right to Permanent Family’ (2011) 46 *Wake Forest Law Review* 1.

88 Richard Carlson, ‘A Child’s Right to a Family versus a State’s Discretion to Institutionalize the Child’ (2016) 47 *Georgetown Journal of International Law* 937, 949.

89 *V v S* (CA&R14/2018) [2018] ZAECGHC 86 (7 September 2018).

90 Michael Rutter and Jim Stevenson, 'Developments in Child and Adolescent Psychiatry Over the Last 50 Years' in Michael Rutter and others (eds), *Rutter's Child and Adolescent Psychiatry* (5th edn, Blackwell 2009) 3–17.

91 Donna Spiker, Glenna Boyce and Lisa Boyce, 'Parent–Child Interactions When Young Children Have Disabilities' in Laraine Glidden (ed), *International Review of Research in Mental Retardation* (Elsevier B.V. 2002) 25, 35–70.

92 MC Elmer *The Sociology of the Family* (Ginn 1945) 9.

93 See broadly the Children's Act, s 46.

94 African Children's Charter, art 14 and CRC, art 24.

95 African Children's Charter, art 11 and CRC, art 28.

96 African Children's Charter, art 14 and CRC, art 27.

97 See also the Children's Act, s 46 which states amongst others that, 'A children's court may make the following orders: An alternative care order, which includes 'An order placing a child- (i) in the care of a person designated by the court to be the foster parent of the child; (ii) in the care of a child and youth care centre; or (iii) in temporary safe care'.

98 *Zakayev and Safanova v Russia* App no 11870/03 (ECtHR, 11 February 2010) paras 45–52. It should be noted the solution applicable in this case was not viable in *V v S* as that family environment was clearly detrimental to the child's development.

99 Ibid.

100 Elvis Fokala, 'The Impact of the Best Interests and the Respect for the Views of the Child Principles in Child Custody Cases' (2019) 88 *Nordic Journal of International Law* 614.

101 For a more detailed understanding of this drive and how it relates to children's civil rights, see M Kihuen, 'Leaving No Child Behind: A Civil Right' (2009) 17 *Journal of Gender, Social Policy & the Law* 1.

102 African Children's Charter, art 13.

103 CRC, art 8.

104 *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) para 49.

105 *Nandutu* (n 12) [60].

106 John Eekelaar, 'The Role of the Best Interest's Principle in Decisions Affecting Children and Decisions about Children' (2015) 23(1) *International Journal of Children's Rights* 5.

107 Committee on the CRC, GC No 14 (n 5) para. 4.

108 Ya'ir Ronen, 'Redefining the Child's Right to Identity' (2004) 18 *International Journal of Law, Policy and the Family* 147.

109 See generally, Chapter 3 of the Act.

110 I Osundun, 'A Doctrine of State Sovereignty Reconciled with the Protection of Human Rights: A Proposal for the Codification of a Doctrine of Humanitarian Intervention' (2014) *Bristol Law Review* 51.

111 Anton van der Linde, 'Immigration and the Right to Respect for Family Life in the European Context: A Reflection on the States' Positive Obligations and Possible Lessons for South Africa' (2015) *De Jure* 438.