

Separation of children from parents in situations of migrancy: Avoidable trauma

Ann Skelton¹

Mrs L and her seven year old daughter arrived in San Diego, United States of America (U.S.) in November 2017, where she told border officials that they had fled the Congo in fear of their lives. For no apparent reason, and without any opportunity to argue against the decision, the officials took the crying child away from her mother, and placed her thousands of miles away in a facility in Chicago. It took a court application by the American Civil Liberties Union (ACLU) to get her back, four months after her removal. The court case grew into a class action to assist others, like Mirian G, a mother from Honduras who came to the U.S. with her 18 month old son in February 2018. Despite her showing the authorities several documents that proved he was her child, the authorities removed him and it took her two months to have him safely returned (Cheng, 2018). These cases were early examples of what was soon to become an avalanche of removals.

Approximately 2300 children were separated from their parents between 5 May and 9 June 2018. This added up to more children being separated from their parents by border officials in one month, than had been removed during the entire previous year. The thinking behind this apparent shift was made clear in early May when Attorney General Jeff Sessions announced a new 'zero-tolerance' policy: 'If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law'. The ACLU insists that there was no law requiring the separation of children – hence the historic moment when President Donald Trump was offered a pen – just sign, he was told, and you can reunite these families (Cheng,2018).

Colleen Kraft, President of The American Academy of Pediatrics (AAP), issued a statement in May 2018 on behalf of the AAP, saying that she was appalled by the policy forcibly separating children from their parents: 'Separating children from their parents contradicts everything we stand for as paediatricians – protecting and promoting children's health. In fact, highly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short or long-term health. This type of prolonged exposure to serious stress – known as toxic stress – can carry lifelong consequences for children' (Kraft, 2018).

The American Psychiatric Association President (APA), Altha Stewart, weighed in on 30 May 2018 with a similar statement: 'Children depend on their parents for safety and support. Any forced separation is highly stressful for children and can cause lifelong trauma, as well as an increased risk of other mental illnesses, such as depression, anxiety, and posttraumatic stress disorder (PTSD). The evidence is clear that this level of trauma also results in serious medical and health consequences for these children and their caregivers' (Stewart, 2018). She pointed out that many of these children were already traumatised by war and violence in their home countries, and that they needed to be

¹ Faculty of Law, University of Pretoria, South Africa

Corresponding author:

Ann Skelton, Centre for Child Law, Faculty of Law, University of Pretoria, Lynwood Rd Campus, Pretoria, South Africa

Email: ann.skelton@up.ac.za

protected and be permitted to remain with their families during the asylum procedures. The APA called for an immediate halt to the separations.

Indeed, it did just take the flourish of a pen to end the practice of separations, when President Trump signed an executive order on 20 June 2018 – but then the government dragged its heels over reuniting the children and parents. On 26 June 2018, a federal judge issued a national court order in the ACLU's case, directing government to reunite all children under five with their parents by 10 July, and all remaining children by 26 July 2018. A progress report filed on 13 July 2018 infuriated the judge – he upbraided the officials for employing laborious processes and DNA tests as a prerequisite for reunification. While these processes are the norm for unaccompanied migrant children (who cross the border alone or become separated after arrival, and then need to be placed with families), the judge insisted that a more streamlined process was required for children who were forcibly removed from their parents by the state, and that DNA test were only needed if there was a genuine reason to doubt parentage (Sullivan 2018).

International law is clear that separation of children from their parents is to be avoided. The UN Convention on the Rights of the Child (CRC) states that 'State parties shall ensure that a child shall not be separated from his or her parents against their will' and this can only be done by competent authorities, subject to judicial review, where it is shown to be in the child's interests (CRC, 1989, Art 9), and the African Charter on the Rights and Welfare of the Child contains a similar provision (ACRWC, 2000, Art 19). In a General Comment elucidating its position in the context of migrancy, the Committee on the Rights of the Child has said 'States should comply with their international legal obligations in terms of maintaining family unity, including siblings, and preventing separation, which should be a primary focus', and it goes on to say that States should not only desist from separating children from families, but take active measures to avoid it (UN Committee for Migrant Workers and CRC, 2017, para 27). Ironically, the United States is the only country in the world that has not ratified the CRC. UN experts did not mince words in a joint statement issued on 22 June 2018, entitled 'Release migrant children and stop using them to deter irregular migration'. The statement of the experts went on to say that '[d]etention of children is punitive, severely hampers their development, and in some cases may amount to torture'. The experts were equally concerned that the plan, following reunification of families, was to hold them all in detention (Human Rights Council Report, 2018). This despite the fact that, according to the ACLU, there is a 99.6 % attendance rate of asylum seekers at immigration court hearings, among migrants who are enrolled in a Family Case Management Programme instead of being detained (Cheng, 2018).

South Africa has ratified the CRC. Our Constitution views the best interests of the child as a paramount consideration. The Constitutional Court has pronounced on the importance of avoiding separation of children from their parents, even in the context of child protection services, stating that '[S]eparation may rupture the family unit and hamper the development of a child. It is imperative, therefore, that the statutory framework for the removal of children provides for an appropriate degree of judicial oversight of the removals' (*C v Department of Health and Social Development, Gauteng*, 2012). The Constitutional Court has also said that foundational to the enjoyment of childhood is 'the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma'. The Court went on to say that the State has a duty to create positive conditions 'and to diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril' (*S v M*, 2007). However, despite this, two cases occurred in South Africa in 2018, in which Zimbabwean children were separated from their parents, and the authorities sang to the same hymn sheet as the US authorities.

In November 2017, the SA police service (SAPS) intercepted eight Zimbabwean children between the ages of two and 14 years who were smuggled into the country in a truck. The driver said he was taking the children to visit parents who were in Cape Town. The children were removed and placed in temporary safe care in a centre administered by the Department of Social Development (DSD). They stayed there for four months, over Christmas and New Year. They were meant to return to school in Zimbabwe in January, but were still at the centre.

In February 2018, eight adults who claimed to be the parents of the children applied for a court interdict at the North Gauteng High Court in Pretoria. They asked the court to release the children into their care. But DSD refused to release the children, citing trafficking concerns since the parents could not prove their parentage. They expected the parents to foot the bill for DNA tests. The children were not legally represented, and the parents' lawyer, despite valiant efforts, failed to convince the judge, who ordered that the children be repatriated to Zimbabwe in March 2018. The Department of Social Development triumphantly 'tweeted' the plane journey complete with pictures (children's faces obscured), with the children dressed identically in new clothes with caps and back-packs. It was reminiscent of the US Department of Home Security Secretary, Kirstjen Nielsen, who told a press briefing in June that separating children from their parents did not breach their rights: 'We give them medical care. There's videos; There's TV' (Cheng, 2018).

In another case, on 29 March 2018, at the Bakwena Plaza tollgate on the N1, another group of eight Zimbabwean children travelling in a mini-bus taxi from Zimbabwe were intercepted by SAPS together with officials from the Department of Home Affairs (DHA). The taxi driver (who had the permission of the parents and guardians to travel with the children) was arrested thereafter on suspicion of child trafficking. Subsequently, the children were taken to the Hammanskraal police station and later to a temporary safe care facility in Hammanskraal. The parents and guardians of the children were immediately alerted regarding this development. On that same day the children's fathers went to the Hammanskraal Police Station. They met with a DHA official who informed them that they could not see the children as it was late and that the children were going to be taken to a place of safety. The official advised the fathers to return on the 3 April 2018 to fetch the children but to bring the mothers of the children with them. When the mothers showed up DHA officials refused to re-unite them with the children. They found assistance through the Centre for Child Law, who brought an urgent court application on behalf of the parents in the (Moretele Children's Court, case 14/1/14/ (118/18)).

On 24 April 2018, the Children's Court in the matter granted an order reuniting the children with their parents. So, legal intervention resulted in the reduction of the period of separation down to just under a month. Of course, it could have been avoided altogether. It should be mentioned that although government officials claimed in both cases that there was a risk of trafficking – this is inaccurate. Trafficking involves the illegal conveyance of children for the purpose of exploiting them. The children were being smuggled (illegally brought across the border) but not with the intention of exploitation. Although smuggling is against the law (and obviously exposes children to risk) the solution does not lie in keeping the children separate from their parents. Furthermore, if all of them have an irregular migration status it would be lawful, and acceptable, to repatriate them *together*, as families, in a humane manner. This is what eventually happened to the second set of families that were reunited by the Moretele Children's Court.

Despite the fact that the media publicised these two cases, there was not much of an outcry. No statements were issued by associations of paediatricians or psychologists. Now that the US debacle has made us all so much more aware, let us hope that the South African authorities do not in the future separate children from their caregivers as they did in these two cases. But if they do, let us galvanize across our professional roles and stand against separation of children from their parents in situations of migration.

References

Cheng, A. (2018) Fact-Checking Family Separation. American Civil Liberties Union (19 June 2018)

Human Rights Council Report. (2018) 'UN Experts to US: "Release Migrant Children from Detention and Stop Using them to Deter Irregular Migration"' (22 June 2018). Retrieved from <https://reliefweb.int/report/united-states-america/un-experts-us-release-migrant-children-detention-and-stop-using-them>

Kraft, C. (2018) AAP Statement Opposing Separation of Children and Parents at the Border (8 June 2018). Retrieved from <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPStatementOpposingBorderSecurityandImmigrationReformAct.aspx>

Stewart, A. (2018) APA Statement Opposing Separation of Children and Parents at the Border. (30 June 2018). Retrieved from <https://www.psychiatry.org/newsroom/news-releases/apa-statement-opposing-separation-of-children-from-parents-at-the-border>

Sullivan, S. (2018) Inside the Family Separation Legal Drama. American Civil Liberties Union (16 July 2018)

International instruments

Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), available <http://www.refworld.org/docid/3ae6b38c18.html> [accessed 18 July 2018]

UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <http://www.refworld.org/docid/5a12942a2b.html> [accessed 18 July 2018]

UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 18 July 2018]

Case law

C and Others v Department of Health and Social Development, Gauteng and Others (CCT 55/11) [2012] ZACC 1

S v M (Centre for Child Law as Amicus Curiae) (CCT 53/06) [2007] ZACC 18