



Position Paper

Access to a Basic Education for Undocumented Learners in South Africa

September 2019

1. INTRODUCTION AND PURPOSE

All children, regardless of nationality, social origin, or documented status have a fundamental and undeniable right to a basic education. Although South Africa's policy requirements outline certain documentation to be submitted as a condition of enrolment in school, the reality for many children is that this documentation does not exist, or may be difficult to obtain. Documentation may consist of many things, but for the purpose of admission to schools, it primarily relates to identity documents and residency permits.

Gaps in the Births and Deaths Registration Act,¹ low levels of birth registration in the Region, a lack of clarity around the process for addressing issues of statelessness, challenges in the asylum seeker process, the complexity of international migration, as well as geographical and cost barriers have all contributed towards the lack of documentation for many people. This, together with a lack of clarity around the legal framework governing access to a basic education has led a concerning trend whereby undocumented learners are denied access to public schools, or are later removed from school as a result of a lack of documentation. In addition, undocumented learners are frequently unable to write or to obtain formal accreditation for Matric examinations.

While the Commission has noted various attempts of State departments to work together in the spirit of co-operative governance to address some of the challenges, the Commission remains concerned

¹ 51 of 1992.

that current policies and practices are inadequate to protect and promote the realisation of rights for undocumented learners. While it is appreciative of the various streams underway, the Commission has determined the need to develop a Position Paper which aims to provide legal clarity and bring policies surrounding undocumented learners in line with the Bill of Rights and international law.

During the process of finalising this Paper, the Commission has engaged extensively with the relevant government departments (including the Department of Basic Education, Department of Home Affairs and Department of Social Development), civil society organisations, legal practitioners, independent experts, and affected individuals.

2. UNDERSTANDING THE TERM “UNDOCUMENTED”

While the term “undocumented” is used as an umbrella concept, the phenomenon in South Africa is complex, driven by multiple distinct factors and affects South African, migrant, and stateless persons simultaneously.

For the purpose of this Paper, the term “undocumented learner” shall refer to an individual of school-going age, or any person who is or who desires to be enrolled at a school, and who is not in possession of official documentation required for proof of identity or legal residency.² Although it is possible to identify a number of categories of undocumented persons, it must be noted that these categories, too, are often of a temporary nature and may change throughout the life of the learner. Undocumented learners may include persons falling into the following categories:

- i. South African children whose birth has not been, or is unable to be, registered in terms of the Births and Deaths Registration Act in South Africa
- ii. stateless persons³
- iii. migrants in an irregular situation

Children falling in any of these categories may also be unaccompanied or separated minors. Although the lack of documentation may affect persons from all nationalities, racial, and gender groups, as well

² This documentation includes, but is not necessarily limited to an official birth certificate, identity document, refugee or asylum seeker permit, temporary or permanent residence permit, or study permit for the learner or his/her parent or caregiver where relevant. In addition to this, documents not related to identification or immigration, such as proof of residence and immunisation, can also be hard to obtain and act as a barrier for admission.

³ In terms of Article 1(1) of the Convention relating to the Status of Stateless Persons of 1954, “stateless person” means “a person who is not considered as a national by any State under the operation of its law.” Although the South African Citizenship Act 51 of 1992 provides for citizenship to be granted to stateless persons, there are no clear guidelines around the process, creating significant obstacles in practice.

as those from all geographic areas, the vast majority of learners adversely impacted by a lack of documentation are poor black learners from predominantly rural areas.

Globally, around one fourth of children under five (5) have not had their births registered, and in Sub-Saharan Africa only 43% of births are registered. In Eastern and Southern Africa, birth registration stands at only 38%, and ranges widely across countries, the lowest being Somalia with only 3% of children being registered at birth. South Africa has the highest rate of birth registration on the continent, but it is still estimated that 5% of South African children do not have birth certificates.⁴

Undocumented persons are incredibly vulnerable, and face multiple barriers in accessing rights and basic services, including education, healthcare, and social welfare, amongst other things. In addition to this, they are usually restricted to informal and precarious employment opportunities, and may be more readily exposed to risks such as human trafficking. Ensuring that every person has documentation is, therefore, essential to the protection and promotion of the rights for every person.

In terms of birth registration, South African children may face many difficulties as a result of gaps in the current legal framework, as well as barriers such as far distances to travel and costs associated with registration. Due to these factors, obtaining an official birth certificate may be a lengthy and costly process. But birth registration for children born outside of South Africa is even more difficult, and although parents or caregivers can approach the embassy of the country of birth for assistance, sometimes with the assistance of the State,⁵ they, too, face multiple difficulties. Refugee and asylum seeker children, on the other hand, having fled from fear or threat of persecution are unable to seek assistance from the country of birth, meaning that it may be impossible for them to obtain an official birth certificate or identity document for the child. Even for those children who may have had official documentation, it is often lost during the migratory journey.

These are the realities under which the crisis facing undocumented learners must be understood.

3. LEGAL AND POLICY FRAMEWORK

A number of regional and international human rights instruments affirm the right to education, to human dignity, and that the best interest of the child is of paramount importance. Underlying this affirmation is the principle of equality and a prohibition of discrimination, including on grounds of nationality, social origin and other status. Despite this guarantee, there is often a misconception around the extent to which certain categories of persons are entitled to the enjoyment of rights,

⁴ https://www.unicef.org/esaro/5480_birth_registration.html

⁵ Including through the International Social Services branch of the Department of Social Development.

particularly for migrants in an irregular situation, stateless persons, and those without official documentation for the purpose of identification. At times, this misperception leads to the development of policies or practices that may unlawfully restrict or interfere with the enjoyment of fundamental rights. The section below seeks to provide a brief overview of the content and scope of the right to education within the context of undocumented learners.

3.1. Content and scope of the right to education for undocumented learners

The right to a basic education is recognised as being compulsory, universal and immediately realisable, meaning that it cannot be restricted on the basis of limited resources.⁶ In line with international legal frameworks, section 29(1)(a) of the **Constitution of South Africa** also provides that “everyone” has the right to a basic education, including undocumented persons.⁷ International bodies, including the Committee on Economic, Social and Cultural Rights (CESCR),⁸ Committee on the Rights of the Child,⁹ and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families¹⁰ have upheld the interpretation that the right of access to a basic education extends to all

⁶ As confirmed by the Constitutional Court in the case of *Juma Masjid* at para 37

⁷ This interpretation has further been reaffirmed by several supranational bodies, including the Committee on Economic, Social and Cultural Rights (CESCR) (General Comment No.13 (1999) at para 34); the Committee on the Rights of the Child (General Comment No. 6 (2005) at para 41); the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Comment No.1 at Para 57) as well as the United Nations Children’s Fund (UNICEF).

⁸ **General Comment No.13 (1999), the Committee on Economic, Social and Cultural Rights (CESCR)** confirmed that the principle of non-discrimination “*extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status*” (at para 24). The Committee further noted, in its General Comment No. 20, that “*all children within a State, including those with an undocumented status, have a right to receive education*” (at para 30). [own emphasis]

⁹ The **Committee on the Rights of the Child**, in its General Comment No. 6 (2005) outlined that all children, including unaccompanied and separated children, must be guaranteed access to education at all times, **irrespective of status** (para 41). [own emphasis]. General Comment No.23 further reiterates that “Children who have not been registered should be ensured equal access to health care, protection, education and other social services” (at para 22); “All children in the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education... This obligation implies that States should ensure equal access to quality and inclusive education for all migrant children, irrespective of their migration status” (para 59). “The Committees strongly urge States to expeditiously reform regulations and practices that prevent migrant children, in particular undocumented children, from registering at schools and educational institutions. States should also develop effective firewalls between educational institutions and immigration authorities and prohibit the sharing of students’ data as well as immigration enforcement operations on or near school premises, as these practices limit or deprive migrant children or children of migrant workers in an irregular situation of their right to education.” (Para 60).

¹⁰ Although South Africa is not yet a signatory, the Convention on the Protection of All Migrant Workers and Members of Their Families (at para 30) states that “*Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment*”.” Further, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families has stated that “*States parties shall ensure that all migrant children, independently of their migration status, have access to free and compulsory primary education as well as to secondary education on the basis of equality of treatment with nationals of the State concerned ...*” (General Comment No.1) (para 57). [own emphasis]

Moreover, General Comment No.3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and General Comment No. 22 (2017) of the Committee on the Rights of the Child was released jointly, and reiterates the above-mentioned position, while calling for a firewall to be implemented to prevent against the

persons, irrespective of their legal or documented status. In addition to this, the right to a basic education is read in line with the right of non-discrimination¹¹ and that the best interest of the child is of paramount importance in all matters concerning the child.¹²

The right to education is not an end in itself – education is the primary tool through which individuals can uplift themselves out of poverty. It is thus fundamental for the eradication of poverty, the attainment of substantive equality, and for the development of individuals and the empowerment of society at large. It serves as an essential mechanism for social integration, and for combatting social ills such as violence and discrimination. In addition to this, schools are an essential, and potentially the only comprehensive mechanism available for addressing the so-called crisis of invisibility. Undocumented learners, who would otherwise remain invisible, can be identified and receive assistance in obtaining documentation. The right to education is therefore described as being an empowerment right because of its ability to facilitate the realisation of other rights. Any analysis of the right must, therefore, be viewed within the context of its fundamental value.

The Constitutional Court has recognised that while the right to a basic education is universal, it is not absolute and may be limited in terms of section 36 of the Constitution.¹³ The limitation of the right not only hinders the development of the child at what is likely to be a crucial time in their life, but essentially creates a pattern of exclusion, deprivation and vulnerability that will extend beyond the immediate period, limiting opportunities later in life.¹⁴ Given the far reaching impact of education on personal development, dignity and psycho-social well-being of the individual, and its broader role in national development, the limitation of the right would need to meet a high threshold in order to pass the test of being reasonable and justifiable.

sharing of information collected for other purposes (such as protection or access to services) for the purpose of immigration control (at para 17).

¹¹ Section 9 of the Constitution. Moreover, the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child (CRC); the African Charter on Human and Peoples' Rights; and the African Charter on the Rights and Welfare of the Child require States to promote the realisation of rights without discrimination of any kind, including on the basis of national, ethnic or social origin, or other status. Article 2 of the CRC further obliges the state to protect children against all forms of discrimination or punishment "on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." [emphasis added].

¹² Section 28(2) Constitution.

¹³ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 37.

¹⁴ The broader impact of exclusion was succinctly expounded by the US Supreme Court in the case of *Plyler v Doe*, (1982), where it ruled that the exclusion of irregular migrant learners from free and compulsory education was unconstitutional. The Court explained that: "In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation." (457 U.S. 202).

In addition to this, in its concluding observations on South Africa released at the end of 2018, the Committee on Economic, Social and Cultural Rights explicitly outlined its concern around the number of undocumented migrant, refugee and asylum-seeking children that are not enrolled in formal education. To this end, the Committee recommended that the State “ensure that all migrant, refugee and asylum-seeking children have access to education regardless of their immigration status”.¹⁵

3.2. Admission of learners to Public Schools

Section 3 of the **South African Schools Act¹⁶ (SASA)** outlines that basic education is compulsory for every child from the age of seven (7), until the learner reaches the age of fifteen (15) or ninth grade, whichever comes first (hereinafter “learners subjected to compulsory attendance”), and section 4 enables the Head of Department (HoD) to exempt a learner from compulsory attendance if it is in the **best interest of the learner**. These provisions relating to compulsory attendance are not limited to learners with documentation. Section 3(5) and (6) of SASA impose criminal sanctions on parents or any other persons who prevent a learner who is subject to compulsory attendance from attending school.

It is, however, necessary to emphasise that even for learners who do not fall within the category of compulsory attendance, access to basic education is still legally and constitutionally guaranteed. The only distinction, therefore, lies in the ability of the State to impose criminal sanctions on persons preventing learners within a particular category from attending school. Documentation is therefore *not* a prerequisite for access to a basic education.

Both SASA¹⁷ and the **National Admission Policy for Ordinary Schools¹⁸** (National Admissions Policy) require schools to admit learners without unfairly discriminating and require the following documentation to be submitted to the school when applying for the admission of a learner:

- i. an official birth certificate,¹⁹ and
- ii. proof of immunisation of communicable diseases, and (in the case of migrant learners)

¹⁵ United Nations Committee on Economic, Social and Cultural Rights (CESCR) *Concluding observations on the initial report of South Africa as approved by the Committee at its 58th meeting, held on 12 October 2018* : Committee on Economic, Social and Cultural Rights, 29 November 2018, E/C.12/ZAF/CO/1, at para 73.

¹⁶ Act 84 of 1996.

¹⁷ Section 5

¹⁸ Section 15 of the National Admission Policy for Ordinary Schools of 1998.

¹⁹ Section 15 of National Admission Policy.

- iii. a copy of the permit for temporary or permanent residence,²⁰ or
- iv. a study permit,²¹ or
- v. evidence that an application has been made to the Department of Home Affairs (DHA) for learners and/or parents to legalise their stay in the country.²²

The lack of specific reference to other forms of documentation, including a refugee or asylum seeker permit, as well as a protection order issued by a Children’s Court has created some confusion at the level of admission to school. Both of these documents **must** be accepted by schools during the admission process.

Moreover, section 15 of National Admissions Policy states that, in the absence of the above-mentioned documentation, the learner “*may*” be conditionally admitted, and requires the parents of the learner to “*ensure that the admission of the learner is finalised within three months of conditional admission.*”

Despite explicit provisions for the conditional admission of learners without documentation, including undocumented migrant learners, section 39 of the **Immigration Act**²³ prohibits learning institutions from knowingly providing training and instruction to “illegal foreigners”, or a foreigner whose “*status does not authorise him or her to receive such training or instruction*”. Moreover, section 42(1) makes it an offence for any person to “*aid, abet, assist, enable or in any manner help*” an “illegal foreigner” or a foreigner “*in a manner that violates their status, including by providing instruction or training to him or her, or allowing him or her to receive instruction or training*”. Contravention of these provisions constitutes an offence, and any person found guilty is liable on conviction to a fine or to imprisonment. This provision, however, is contradictory to section 3(5) and (6) of SASA, as referred to above, which outlines compulsory attendance of all learners within the category outlined above.

Adding to this, section 44 of the Immigration Act also explicitly states that undocumented persons, or any persons whose status or citizenship could not be ascertained, **cannot be prevented from receiving services or performance “to which illegal foreigners and foreigners are entitled under the Constitution or any law”** [own emphasis].

Recently, the Department of Basic Education, in cooperation with other stakeholders, has undertaken a review of the existing National Admissions Policy. The process of amending the policy was still

²⁰ Section 19 of National Admission Policy.

²¹ Section 20 of National Admission Policy.

²² Section 21 of National Admission Policy.

²³ 13 of 2002.

underway at the time of writing this Paper, however, the Commission notes that the DBE released Circular No.1 of 2019 with a view of addressing a number of uncertainties in the interim. The Commission welcomes the directive that the stipulated period of three months should not be applied rigidly. However, it notes that, in terms of the circular, the reasonable period for the finalisation of the admission should not exceed six months, and that the matter should thereafter be referred to the relevant Head of Department. After considering the reasons for the delay in obtaining documentation, the circular indicates that the period within which the admission must be finalized may be extended to not more than 12 months from the date of the initial conditional admission.

While the Commission is supportive of this process, it remains concerned that, to date, a number of issues have not been adequately addressed. These concerns will be addressed below.

3.3. Reporting of undocumented persons and the sharing of information between state authorities

Section 44 of the Immigration Act requires organs of state (including public schools) to endeavor to ascertain the status or citizenship of persons, and to report any “illegal foreigner” or person whose status or citizenship cannot be ascertained.

4. ISSUES ARISING IN ACCESS TO BASIC EDUCATION FOR UNDOCUMENTED LEARNERS IN SOUTH AFRICA

Undocumented learners face significant challenges in accessing basic education as a result of multiple barriers, including a lack of clarity in the legal and policy framework, legal gaps, administrative and socio-economic barriers, funding models for schools, the lack of awareness of applicable laws and policies, and the lack of separation between the provision of basic services and immigration control.

4.1. Lack of clarity of existing legal and policy framework

A number of discrepancies and a lack of clarity in the existing legal and policy framework have been identified, namely-

- i. whether the wording of section 15 of the National Admission Policy, providing that schools “may” conditionally admit undocumented learners creates a discretionary right of admission;
- ii. whether the wording of section 15 of the National Admissions Policy, requiring the parent or guardian of the learner to ensure that the admission of the learner is finalised within

three (3) months (as amended by Circular 1 of 2019), gives rise to an automatic right to exclude the learner from access to school in the event that documentation has not been submitted after the lapse of the stipulated period;

- iii. whether the provisions of the Immigration Act prohibit schools from admitting undocumented learners deemed to be “illegal foreigners” in terms of the Act, and expose school authorities to criminal sanction; and
- iv. whether the National Admission Policy is in line with sections 9, 10, 28(2) and 29 of the Constitution.

4.1.1 Interpretation of National Admission Policy

The National Admission Policy provides that schools “may” conditionally admit learners without documentation and goes further by requiring the parent or guardian of the learner to ensure that the admission of the learner is finalised within the stipulated period. The Policy is not clear, however, on the implications where the admission process, through the submission of all required documents, is not finalised within this period. In practice, this has led to discretionary practices by individual schools - whereas some schools allow the learners to continue with their schooling, others have interpreted the provision as requiring the automatic exclusion of the learner from the school. This results in an arbitrary and inconsistent approach to the limitation of rights in practice. The current wording of Circular 1 of 2019 contains a similar lack of clarity, with no guidance provided to schools on the situation once the newly defined stipulated period has lapsed.

Both the domestic and international legal frameworks are clear in defining the right to education as universal, compulsory and immediately realisable for all persons, including those of an undocumented status. This is reaffirmed by section 3 of SASA, which provides for the compulsory attendance of learners falling within the category outlined earlier.

The Commission notes that the requirement for the provision of documentation serves an important and necessary role in, *inter alia*, verifying identity, monitoring the universal enrolment of all learners in school, as well as the prevention of fraud and other dangers such as human trafficking. However, requiring documentation as a *prerequisite* for access to school – and thus to the enjoyment of the right to a basic education – would be unconstitutional. On this basis, notwithstanding the terms “may” and “conditional admission” in section 15 of the National Admissions Policy, the admission of learners is mandatory and in no way discretionary.

Unless the exclusion of learners has been undertaken in line with section 36 of the Constitution, it would constitute a violation of the right to dignity, non-discrimination, access to a basic education, and the rights of the child. In the event that an undocumented learner excluded from a school falls within the category of compulsory school attendance, the exclusion simultaneously constitutes an offence in terms of section 3(5) and (6) of SASA. The Commission is therefore of the view that any automatic exclusion following the lapse of a rigid timeframe would give rise to a violation of a number of rights.

4.1.2 Interpretation of Immigration Act

The National Admission Policy, under sections 15 and 21, enables schools to provisionally admit undocumented migrant learners, but requires parents or guardians to submit proof of their application to regularise their stay to the DHA. Section 39 of the Immigration Act, on the other hand, makes it an offence to knowingly provide training or instruction to persons deemed to be “illegal foreigners”. Adding to this complexity, section 44 explicitly states that organs of state are *not prevented* from providing basic services to “illegal foreigners” to which they are entitled under the Constitution and the law. The current construction of the legal framework has therefore given rise to a significant amount of confusion around whether or not schools are legally permitted to admit undocumented migrant learners deemed to be “illegal foreigners” under the Immigration Act, and if they do, whether they are exposed to sanctions.

The Commission has noted, through its engagement with state entities, of the prevalence of the view that persons deemed to be “illegal foreigners” are not entitled to the right to a basic education, and on this basis, the exclusion of such persons from school does not constitute a violation of rights.

The Commission recalls that all persons, including migrants in an irregular situation, have the same human rights by virtue of the fact that they are human - this includes socio-economic rights. As outlined earlier, the international legal framework explicitly recognises the right of access to a basic education for all learners, regardless of their documented or migratory status, or the status of their parents or guardians. International bodies have further been consistent in their approach, reiterating the view that children in the context of migration are first and foremost children, and therefore require additional protection.

The Commission further recalls the fact that all laws and policies are subject to the Constitution and to the Bill of Rights. Section 39(1)(b) and (c) of the Constitution further requires the state to consider international law when interpreting the Bill of Rights, whereas section 233 requires a court, when

interpreting legislation, to “prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

In reading section 44 of the Immigration Act together with the provisions of SASA, sections 9, 28(2) and 29(1) of the Constitution, and international law, the Commission finds that “*services or performance to which illegal foreigners and foreigners are entitled under the Constitution or any law*” includes access to a basic education. The Commission is therefore of the view that the prohibition outlined in section 39, interpreted in line with the Constitution, is not applicable to schools, and the failure and/or refusal to provide undocumented migrant learners with access to basic education constitutes a direct violation of the rights contained in the Bill of Rights.

The Commission, however, recognises the legitimate purpose of immigration control, and the State’s right to conduct immigration enforcement activities within its borders. Immigration policy and practice must, however, be conducted in a manner that does not disproportionately and unlawfully interfere with the protection and enjoyment of fundamental rights. The State must, in fulfilling both obligations simultaneously, find an appropriate balance.

4.2. Legislative gaps, administrative complexities and socio-economic barriers

As mentioned previously, despite the fact that the National Admission Policy outlines certain documentation to be submitted, this documentation is not always available, and there are multiple barriers precluding access to such documentation.

Briefly, while the South African Citizenship Act²⁴ provides for citizenship to be granted to stateless persons, there are no clear guidelines around the process, creating significant obstacles and delays,²⁵ whereas the Immigration Act is silent on the process to be followed for unaccompanied and separated minors. These unaccompanied and separated minors require a Children’s Court order, as well as assistance from a social worker to apply for asylum seeker status.²⁶ There is further a lack of clarity on the process of joining persons as dependents on an existing refugee or asylum seeker permit, leading to lengthy delays, and the low rates of birth registration in many countries, as well as the reality that

²⁴ 88 of 1995.

²⁵ In its concluding recommendations to South Africa, the Committee on the Rights of the Child expressed concern around the phenomenon of stateless children in the Country, and recommended a review of national laws and policies to urgently address the situation. Despite this, countless individuals faced ongoing challenges in obtaining documentation.

²⁶ The Commission acknowledges that the Department of Social Development (DSD) hosted a two-day Colloquium on unaccompanied and separated minors in October 2017, attended by various government departments and civil society organisations. The Colloquium resulted in the signing of a formal resolution outlining a number of activities which included the establishment of interdepartmental committees, Standard Operating Procedures (SOPs) and Protocols, as well as a number of policy changes aimed at addressing a number of these issues.

official documents may be lost during migration, mean that documents are simply not always available.

Serious challenges exist in registering children born in South Africa in line with the Births and Deaths Registration Act, particularly where the parents are deceased or cannot be located, or where the mother is undocumented. The law requires that certain documentation be submitted during the late registration of a child, which includes proof of birth, a certified copy of the identity document of the parents, where applicable, the death certificate of a deceased parent, as well as payment of a late registration fee. These documents are not always available or easily attainable.

Additionally, single fathers struggle to register the birth of a child without the consent and documentation of the mother, and are required to pay high fees for the conducting of paternity tests. The cost associated with these tests alone constitute an absolute barrier to many. With regard to the asylum seeker process in particular, the Commission remains concerned over widespread allegations of administrative inefficiencies, corruption, and abuse, which may create significant time delays and insecurity for persons seeking to regularise their stay.

Where applicants are forced to travel far distances or pay application fees, those from poor socio-economic backgrounds may be unable to apply. Ultimately, the delay or inability to obtain documentation is therefore often beyond the control of the applicant, and should never result in a preclusion of access to fundamental rights.

4.3. Impact of funding models

In March 2016, the Eastern Cape Department of Education announced its decision to amend its policy on the allocation of funding to schools. The post provisioning allocation and National School Nutrition Programme (NSNP) for quintile 1, 2 and 3 schools is now based on the number of learners where valid identity, passport and permit numbers have been captured on the South African Schools Administration & Management System (SASAMS). The system therefore currently excludes funding for undocumented learners, which is a substantial deviation from the previous position, whereby funding was based on the number of actual learners enrolled.

The decision was motivated by a number of factors, but most specifically, the need to ensure compliance with the National Admission Policy, as well as to combat the so-called “ghost learner” phenomenon, where schools allegedly inflated the number of learners actually enrolled to obtain additional funding. While the Commission recognises the legitimate objectives of the funding model, it has noted that serious unintended consequences may arise.

The phenomenon of undocumented persons is more prominent in rural or underdeveloped areas, with large portions of persons from poor socio-economic backgrounds. Where the provision of funding is limited on the basis of documentation, many schools are placed in a difficult position where the allocated funding is not sufficient to meet the needs of all learners. At times, insufficient amounts of learning materials are purchased, meaning that learners must share, or the portion and nutritional value of food provided to learners is reduced. Alternatively, undocumented learners are excluded from accessing these vital resources. The post provisioning of educators may be insufficient, meaning that the learner-to-teacher ratio may be disproportionate to national standards, leading to overcrowding and therefore impacting on the overall quality of education provided - not only in relation to undocumented learner, but also in relation to documented learners. The impact leads to substantially differential treatment of particular groups of learners in a similar situation, and is further likely to contribute towards the stigmatisation of undocumented learners who are caught in a position beyond their control.

Ultimately, insufficient funding impacts on the resources and quality of education provided to all learners in a school, potentially giving rise to a violation of the right to dignity, equality, equitable access to quality basic education, and the rights of the child. This policy may also lead to direct discrimination through the unwillingness of schools to admit learners without documentation due to the far reaching implications.

While the Commission is supportive of the need to implement mechanisms to promote the effective utilisation of public funds, to improve accountability and prevent fraud and corruption, the Commission is extremely concerned about the serious implications of the funding model on the realisation of rights, with a significantly disproportionate impact on children located in poor socio-economic areas.

In view of the fact that children are a vulnerable group in need of special care and protection, the fact that the best interest of the child is of paramount importance in all matters concerning the child, and the reality that children are not in control of their documented status, the Commission is of the view that the funding model negatively affects children (both undocumented learners as well as all learners enrolled at a school affected) in a manner that is not proportionate to the aim of the policy, which aim could be achieved through less restrictive means.

4.4. Inter-departmental collaboration

In recognising that, beyond education, schools may serve as crucial platforms to facilitate access to basic services, the DBE has entered into agreements with various other departments, including the

Departments of Health, Social Development, and Home Affairs. Through schools, children are able to receive basic healthcare services and access to food and nutrition, as crucial interventions in combatting poverty. In addition to this, schools can assist the State in identifying undocumented learners, and potentially facilitate access to documentation. The DBE has therefore concluded Intergovernmental Protocol Agreements with the South African Social Security Agency (SASSA) and the Departments of Social Development and Home Affairs, which provides for the sharing of personal information.

The Commission therefore recognises the positive benefits that can be obtained through an effective system of collaboration amongst and between departments. Whereas departments are constitutionally obliged to act in the spirit of cooperative governance, this requirement cannot be interpreted to mean that departments must *always* act interdependently, as it is clear that a separation of powers must be drawn in some instances.

It is therefore crucial to highlight the fact that some forms of collaboration, without effective safeguards, may simultaneously negate the State's ability to effectively protect and uphold the fundamental rights of persons. The conducting of immigration enforcement activities, for example, may simultaneously negate the ability of undocumented learners, and migrant learners in particular, to fully access their rights. Immigration enforcement may be conducted through direct, as well as indirect means.

Direct practices include the conducting of identification and permit checks. While this is a common and legitimate practice employed globally, the Commission is concerned about the potential utilisation of this mechanism at or outside of institutions providing public services, such as schools and hospitals.²⁷

The implication is that, due to fear of detection, arrest and deportation, undocumented migrants are discouraged from accessing such services, which may have serious longer-term implications, including declining health, entrenched poverty and reduced opportunities, as well as creating a culture of fear and social isolation. This creates a disproportionate disadvantage for persons in an irregular situation and effectively translates into a denial of fundamental rights.

²⁷ The Special Rapporteur on the Right to Education, Vernor Muñoz, has explicitly expressed concern over the practice of detection and arrest of learners outside of or on their way to school (Human Rights Council: Report of the Special Rapporteur on the right to education, Vernor Muñoz on the right to education of migrants, refugees and asylum seekers, A/HRC/14/25 (2010), at para. 61).

Indirect practices, such as reporting obligations or the sharing of personal information are also potentially problematic for the protection of persons in accessing fundamental rights.

Section 44 of the Immigration Act provides for institutions to endeavor to ascertain the status or citizenship of persons, and to report any “illegal foreigner” or person whose status or citizenship cannot be ascertained. Moreover, where the collection, utilisation and sharing of personal information is able to be used for the purposes of immigration control, migrants in an irregular situation may be deterred from accessing their rights. In quoting the European Union Agency for Fundamental Rights, immigration detection practices that involve public service institutions (including schools) “*create a general atmosphere of fear among migrants in an irregular situation, deterring them from accessing such institutions and thus disproportionately interfering with their fundamental rights*”.²⁸

This sentiment has further been expressed by the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, which bodies have effectively called for the prohibition of mandatory reporting obligations by institutions providing basic services, the prohibition of immigration enforcement operations on or near school premises, as well as the establishment of firewalls between educational institutions and immigration authorities for the sharing of personal information for the use of immigration enforcement.²⁹

While immigration control and cooperative governance are both legitimate state functions, their exercise cannot and does not override the fundamental guarantee of rights and freedoms as contained in the Bill of Rights, together with a myriad of international obligations. The State must therefore adopt a human rights-based and child-centred approach to immigration control, which policies must emphasise and give effect to the primacy of the rights of the child and non-discrimination.

Therefore, while cooperation under certain circumstances is supported, a clear separation between the provision of basic services, as fundamental rights, and immigration control must be maintained. While both legitimate state functions, they serve different objectives and their implementation must achieve an appropriate balance in line with the Bill of Rights and international obligations. On this basis, there must be clear rules and procedures in place governing the collection, utilisation, retention and sharing of data between and amongst state departments, which procedure must be clear in excluding the ability to use such data for the purpose of immigration control.

²⁸ European Union Agency for Fundamental Rights: Apprehension of migrants in an irregular situation – fundamental rights considerations, at para (e).

²⁹ See fn 8 and 9 above.

5. CONCLUSION AND KEY FINDINGS

Undocumented children are, first and foremost, children, and are therefore in need of special protection. Although children are rights holders on their own, they are often reliant on parents or caregivers to take steps to enforce their rights. Moreover, the multiple challenges identified throughout this paper should not result in an interference in access to basic rights. As children are ultimately linked to the status of their parents or caregivers, and are reliant on them, the child must not be prejudiced or subjected to rights violations for a situation over which they have no control.

The Commission has noted the views of some state entities – including the Department of Home Affairs and the Department of Basic Education – that all persons are duty-bound to comply with the laws of the State. Further, the Commission notes the position of the State that undocumented migrants are not afforded the right to a basic education as a result of their undocumented or “unlawful” status within the Republic. On this basis, the essential position of the State has been formulated that such persons who have not complied with the relevant legal and policy requirements may be excluded from accessing their right to a basic education, both by being excluded from school as well as from having their formal accreditation withheld.

These contentions must fail on several counts:

- Firstly, the SASA encompasses the basic principle that the child should not be punished for the actions of the parents or caregivers in that learners may not face any form of sanction or disadvantage in instances where the applicable school fees have not been paid. This principle recognises the vulnerability and non-accountability of children, the fact that the situation is outside the control of the child, the paramountcy of the best interest of the child, and the essential nature of the right to a basic education;
- Secondly, the DBE, DHA, and DSD have all conceded that essential gaps and challenges do exist in the legal and policy framework, often resulting in significant delays and, at times, absolute barriers to compliance with the legal framework. The denial of access to a basic education due to non-compliance results on punishment being inflicted on children for the very failures of the State;
- Thirdly, the contention that the right to a basic education is not afforded to persons who are not legally present in the Republic is rejected in the strongest terms, and is in conflict with international law principles; and

- Finally, many undocumented children are South African or stateless persons – which persons the DBE, DHA, and DSD have all agreed have an undeniable and immediately realisable right to a basic education.

It is correct that all persons have an obligation to comply with the laws of the Republic. However, it cannot be permissible for fundamental rights to be withheld as a mechanism to enforce such laws, noting the supremacy of the Constitution and the Bill of Rights, including the requirement of section 36 that the limitation be the least restrictive means available.

The right to basic education, as a core obligation, is in no way conditional on legal status or documentation for the purpose of identification. Notwithstanding provisions allowing for the conditional admission, the practice of requiring documentation as a condition for enrolment and access to basic education runs contrary to the spirit and values espoused in the Constitution, and directly violates the obligations of the State in terms of international and domestic human rights standards.

Ensuring access for all children creates an essential mechanism for protection and the promotion of rights. Undocumented learners, who would otherwise be virtually invisible, are able to access a myriad of basic services outside of basic education, and receive assistance or information to enable them to access documentation where possible. For those who are unable to obtain documentation, schools provide a platform for development, empowerment, and social inclusion. The DHA, in its submission to the Commission, identifies the need to reverse what it calls the “scandal of invisibility” by ensuring the strengthening of national child protection systems. Granting all children access to schools is not only in line with the objective of reducing the exposure to risks arising from invisibility, but it provides the State with essential data required for effective planning and budgeting, which data would not be otherwise available.

The reality is that, even where policies are designed to protect children, they may have unintended but very real consequences on the realisation of rights, and where the public education system excludes learners from accessing the most fundamental tool for empowerment, we risk perpetuating the cycle of poverty and exclusion. All persons, regardless of individual circumstances, are entitled to access basic education as a crucial tool for development.

The State has positive obligations to ensure that rights are realised, which includes the need to provide for legal certainty and implement measures to address practical barriers to the realisation of rights. In light of the analysis outlined in this Paper, the Commission makes the following findings:

- 5.1. The right to basic education is **guaranteed to all persons**, irrespective of documented or legal status.
- 5.2. Notwithstanding the inclusion of the words “may be admitted conditionally” in section 15 of the National Admissions Policy, when read in line with the provisions of the South African Schools Act and the Constitution, the **admission of undocumented learners** (including undocumented migrant learners) **to public schools is mandatory**.
- 5.3. Notwithstanding the stipulated period for the finalization of admission as contained in section 15 of the National Admissions Policy as well as Circular 1 of 2019, **no learner may be excluded from school in the event that the admission is not finalised within three (3) months** or any period thereafter.
- 5.4. Unless the exclusion of a learner from school is undertaken under a law of general application and in line with section 36 of the Constitution, the failure and/or refusal to admit undocumented learners to school constitutes a **violation of the right to dignity, non-discrimination, education, and the rights of the child**. In addition, where the learner is of compulsory school-going age, the exclusion of a learner constitutes an **offence in terms of section 3(6) of the South African Schools Act**.
- 5.5. In reading section 44 of the Immigration Act together with the provisions of SASA and sections 9, 28(2) and 29(1) of the Constitution, the Commission finds that reference to “*services or performance to which illegal foreigners and foreigners are entitled under the Constitution or any law*” includes access to basic education. The provisions outlined in **sections 39 and 42 of the Immigration Act** prohibiting learning institutions from providing training or instruction to persons deemed to be “illegal foreigners” should be interpreted as being **not applicable to schools**.
- 5.6. The exclusion of undocumented learners from schools amplifies their vulnerability, and is likely to **perpetuate a cycle of inequality, deprivation and exclusion** in the long term.
- 5.7. Funding models which exclude undocumented learners have far reaching implications on the fundamental rights of all learners, including the right to dignity, equality, equitable access to quality basic education, and the rights of the child. Moreover, the consequential **negative impact on the realisation of rights is not proportionate to the aim of the policy**, which aim could be achieved through less restrictive means.

5.8. Immigration enforcement mechanisms conducted through, in conjunction with, or near public service institutions (including schools) create a climate of fear amongst migrants in an irregular situation, deterring them from accessing their right to a basic education, and therefore disproportionately interfering with the enjoyment of fundamental rights.

5.9. Inter-governmental coordination in the form of sharing personal information may deter persons from accessing their right to a basic education, and therefore disproportionately interfere with the enjoyment of fundamental rights, particularly **where insufficient safeguards exist** around the collection, utilisation, retention, and sharing of such information.

6. RECOMMENDATIONS

In terms of section 13(1)(b)(v) of the South African Human Rights Commission Act, 40 Of 2013, the Commission makes the following recommendations:

6.1. The Department of Basic Education must issue a directive to all District Offices and public schools outlining the obligation of schools in relation to undocumented learners, in line with the findings outlined in this Paper. The Directive must specify *inter alia* -

- i. that no learner may be denied admission or access to a school as a result of a lack of documentation;
- ii. that no learner, parent, or caregiver may be threatened with removal from school as a result of a lack of documentation;
- iii. that no learner may be excluded from school after the lapse of the stipulated period for the finalisation of admission;
- iv. that any Circulars issued by Provincial and/or District Departments restricting access to school for undocumented or migrant learners in any way must be immediately recalled.

A copy of this communication must be provided to the Commission.

6.2. The Department of Basic Education must ensure that, in revising the National Admission Policy, the following aspects are specifically addressed:

- i. Clarification of standard documentation required for each category of learner.

- ii. Provision for the acceptance of alternative forms of identification where a birth certificate is not available (including, for example, permits, passports, Children’s Court placement orders, or an affidavit).
- iii. Clarification of procedure to be undertaken in the event that there is an inability to provide documentation.
- iv. Explicit exclusion of legal residency status as a requirement for admission.
- v. Clarification that no learner may be denied access to school.
- vi. Guidelines containing all relevant and applicable factors to be taken into consideration for the limitation of the right to a basic education in line with section 36 of the Constitution.

6.3. The Department of Basic Education must ensure that all online registration systems implemented by Provincial Departments allow for alternative forms of documentation to be submitted during the application and registration periods, and that the procedure is adequately communicated to all District Offices and communities.

6.4. The Department of Basic Education, working with relevant stakeholders, must ensure that policies and processes are in place to enable undocumented learners in Grade 12 to write their Matric Examinations, and that all District Offices and schools are made aware of such processes. Moreover, the Department must take steps to ensure that undocumented learners are able to access the results of their Matric examinations, as well as to receive a formal accreditation thereof.

6.5. The Department of Basic Education must ensure that funding models adopted by Provincial Departments in line with the Norms and Standards for School Funding does not exclude, unfairly discriminate, or disproportionately impact on undocumented learners or any learner whatsoever, and that such models are not based, partially or at all, on the number of documented learners in schools.

6.6. The Department of Basic Education, working together with other relevant Departments, must review the terms of the Intergovernmental Protocol Agreement to establish clear rules and procedures governing the collection, utilisation, retention and sharing of data between and amongst state departments, which procedure must explicitly exclude the ability to use such data for the purpose of immigration control, in line with international standards. A copy of the reviewed Agreement must be provided to the Commission.

- 6.7. The Department of Home Affairs must issue an immediate directive to all relevant officials requiring them to desist from any and all immigration enforcement mechanisms conducted at, around, or in conjunction with schools for the purpose of immigration enforcement or deportation. All documents and procedures relating to immigration enforcement must explicitly prohibit the aforementioned activities.
- 6.8. The Department of Home Affairs must ensure that information received through the Intergovernmental Protocol Agreement is prohibited from being utilised for the purpose of immigration control or deportation, and may only be utilised for the purpose of facilitating access to documentation.
- 6.9. The Department of Home Affairs must conduct a review of the relevant laws, policies and procedures outlined in this paper, and report to the Commission on the mechanisms it intends to take to ensure that barriers of access, or potential rights violations are addressed. This includes, but is not limited to, the requirement of paternity tests as well as the cost associated thereof in the registration of the birth of a child.
- 6.10. The Department of Basic Education must develop educational material that outlines the relevant laws and policies, processes, as well as rights and responsibilities for admission to school, including in particular for undocumented learners.
- 6.11. The Departments are required to provide comprehensive reports to the Commission within **three months** from the release of this Paper outlining the measures taken to implement the above-mentioned recommendations.

SIGNED ON THIS 12th DAY OF September 2019.



Advocate André Gaum
Commissioner
South African Human Rights Commission