



Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the review of the Information received from South Africa on follow-up to the concluding observations on its initial report, 14 May 2021

Submitted by

SECTION27

Centre for Child Law

Children's Institute

Legal Resources Centre

Equal Education Law Centre

Lawyers for Human Rights

1. SECTION27 is a public interest law organisation that uses research, advocacy, and litigation to further the realisation of the constitutional rights to health and basic education.
2. The Legal Resources Centre ("LRC") is a public interest law clinic that works to ensure the realisation of the constitutional right to education for poor and marginalised communities.
3. The Children's Institute is a research unit in the Health Sciences Faculty at the University of Cape Town, which works to advance children's rights through multidisciplinary research, advocacy, education and technical support.

4. The Centre for Child Law (“CCL”) is a public interest litigation organisation registered with the Legal Practice Counsel. The CCL contributes towards the establishment and promotion of the best interests of children in South African law, policy and practice through litigation, advocacy, research and education.
5. Lawyers for Human Rights established the Refugee and Migrant Rights Programme followed by a Statelessness Unit which is composed of a walk-in law clinic that provide legal advice and representation, to ensure due process for asylum seekers, refugees and those deprived of their right to nationality.
6. Equal Education Law Centre (“EELC”) is a public interest organisation registered with the legal practice council and operating a daily specialised education walk-in clinic serving learners across the country. The EELC’s overriding goal is to ensure the realisation of every learner’s right to an equitable, safe and adequate basic education.
7. The purpose of this submission is to comment on South Africa’s State Party report on Follow-up to Concluding Observations, submitted on 14 May 2021, specifically regarding South Africa’s submission on the access to education of undocumented migrant, refugee and asylum-seeking children. In particular we seek to bring to the attention of the Committee the ongoing issues regarding the admission of undocumented learners into school, in spite of the judgment in [Centre for Child Law v Minister of Basic Education](#) 2020 (3) SA 141 (ECG) (“*Phakamisa judgment*”), which our organisations continue to encounter.
8. We argue that while the *Phakamisa judgment* was an important judgment that confirmed that the right to basic education in South Africa’s Constitution extends to all children, regardless of lack of identification documentation, statelessness, or immigration status, the implementation of the judgment has been inadequate to enable access to basic education for undocumented migrant, refugee, and asylum-seeking children.

9. Circular 1 of 2020, in terms of which the Department of Basic Education withdrew Clauses 15 and 21 of the School Admission Policy for Ordinary Schools and *advised* that schools follow the High Court's ruling in the *Phakamisa judgment*, is insufficiently certain regarding schools' *obligation* to admit learners regardless of immigration or documentation status.

10. In this submission we note that it is often difficult to formally differentiate between undocumented non-national and undocumented national children. The experiences of both groups of learners are often very similar as exclusion is often premised on lack of documentation. Undocumented learners, including learners who are South Africans, migrant learners, and asylum-seeking, stateless and refugee learners still face a number of barriers to access basic education in South Africa. We believe that these barriers have been either inadequately, or not addressed at all by South Africa. Significantly, we have found that schools across South Africa are not well-informed of either the *Phakamisa judgment* or Circular 1 of 2020 or such schools do not believe the Circular or *Phakamisa judgment* applies to them.

Phakamisa judgment

11. The CCL was the applicant in the matter that resulted in the *Phakamisa judgment*, in which the High Court (Eastern Cape Division) stated that a lack of documentation cannot be used as a barrier to learners' access to the right to basic education. Any requirements for the submission of identification documentation for learners as a precondition to access basic education at public schools was declared to be unconstitutional.

12. There were two exclusionary measures put in place by South Africa that were challenged in the case. The reason for describing these measures in this submission is that it is apparent that many public schools in South Africa are still enforcing similar measures despite the *Phakamisa judgment*.

13. The first measure was that the provincial education department in the Eastern Cape had issued Circular 06 of 2016, which stated that the provision of funds to schools would be calculated based on the numbers of learners with a valid identity document as captured on the South African Schools Administration and Management Systems (SASAMS - a digital platform designed to collate data from schools regarding learner and parent/caregiver information). While not explicitly excluding learners without documentation or valid documentation from schools, the Circular had the effect of doing so by refusing to fund them. Schools would either exclude them or be faced with inadequate budget for the real number of children in the school. The second measure was the Admission Policy for Ordinary Public Schools, published by the national Department of Basic Education ('DBE'), which stated that while an undocumented child could be admitted to a public school, it was necessary for their documentation to be presented to the school within three months of admission. If this was not done, the child would be excluded from school. Further, if a child was an "illegal alien" (terminology employed by the Admission Policy), in order to be admitted to a public school, it would be necessary for a child to produce evidence that they had applied to legalise their presence in South Africa.

14. The High Court held that denying children access to basic education in public schools on the basis of lack of documentation was unconstitutional. The relevant exclusionary clauses in the Eastern Cape Circular and the national Admissions Policy were declared invalid. Further, the High Court ordered the DBE and the provincial department of education to ensure all undocumented learners in the Eastern Cape were not excluded from public schools. The High Court stated that where a learner was undocumented, the Principal of a school was to accept "...alternative proof of identity." This could be, for example, in the form of an affidavit or sworn statement given by the parent or caregiver.

Steps taken by South Africa to facilitate access to education for undocumented national, migrant, asylum-seeking, and refugee learners after the Phakamisa judgment

15. In early 2020, the DBE issued Circular 1 of 2020. The Circular explains the *Phakamisa judgment* and states that while the judgment related to a matter in the Eastern Cape, it “...sets the tone of the appetite of Courts on the learners’ right to basic education throughout the country.” Thereafter, the Circular states that the Admissions Policy for Ordinary Schools will be amended in due course and *advises* schools across the country to follow the precedent set out in the judgment.
16. On 11 February 2021, the DBE published a new draft Admissions Policy for Ordinary Public Schools for public comments. Public comments closed on 12 March 2021 and it is unclear as to when the draft Policy will become operable. The draft Policy states that schools may not prevent the admission of learners from schools or exclude them from any aspect of the right to basic education on the basis of lack of documentation. This may help further push provincial education departments and individual schools to remove barriers to accessing basic education for undocumented children.
17. However, clause 23 of the draft Policy states that “[a]ll schools are advised to admit learners and serve their educational needs irrespective of whether the learner or the parent of the learner does not produce the documents listed in paragraph 15, 17 to 20 of the policy”. The word “advised” does not properly reflect the findings in the *Phakamisa* judgment, which “directs” the admission of undocumented learners. The wording in the draft policy is not mandatory, which leaves it open for schools to deny admission of undocumented learners.
18. Furthermore, various parts of the draft Policy introduce the requirement that a long list of documents must be submitted by parents/guardians when applying for enrolment of learners who are non-nationals. Many of these documents are not required by the current admissions policy. To now include a list of documentary requirements in various clauses creates confusion over whether learners can be admitted if their parents/caregivers cannot provide these documents. In addition, the amended policy says that when parents/guardians cannot provide certain documents or where certain information cannot

be verified, that the school must report it to the Department of Home Affairs (DHA) or even the Department of Justice and Correctional Services (DJCS).

19. The draft Policy also says that the Head of Department (HOD) must hold parents accountable for obtaining the identification or immigration documents from Home Affairs but does not provide guidelines on how the HOD should do this without violating learner's rights to equality, dignity, and basic education. We have observed schools using intimidation and threats of expulsion or the withholding of reports as a way of holding parents' and learners' accountable. This creates a hostile environment for the learner and parent concerned and can impact negatively on the learner's right to basic education.

20. The majority of the learners and their parents/caregivers that we have assisted are attempting to obtain their documents from Home Affairs but have not yet been able to obtain assistance from Home Affairs or are dependent on other government departments for supporting documents required for the application process such as the Department of Social Development (for example caregivers of orphans need to first obtain a court order before they can apply for the registration of the child's birth). It would therefore have been preferable for the admission policy to place an onus on Home Affairs to prioritise the processing of identity and immigration documentation for undocumented children.

Remaining obstacles to access to basic education for undocumented, migrant, asylum-seeking, and refugee learners

21. Despite the above measures taken by South Africa, our organisations are still encountering numerous cases of undocumented national, migrant, stateless, asylum-seeking, and refugee learners being denied access to basic education.

22. Schools across the country remain ill-informed regarding the rights of migrant and undocumented children to access basic education. Often, we have found that schools are not aware of Circular 1 of 2020 or the *Phakamisa judgment*.

23. We have also observed that, at times, even when schools are aware of the *Phakamisa judgment* or Circular 1 of 2020, schools have argued that the Circular is only advisory, and that the judgment only applies to schools in the Eastern Cape province. This notion will be further strengthened if the draft Policy were to be introduced in its current form. Schools are requiring the submission of additional documentation beyond a sworn statement or affidavit from the parent/caregiver regarding the identity of a child. We have encountered schools requiring documents such as letters from social workers, legal letters, and documentation proving that the parents, caregivers or learners have applied to Home Affairs to obtain their documentation. This was the case even during the level 4 and 5 lockdowns due to the COVID-19 pandemic when Refugee Reception Offices were closed, and Home Affairs was operating with limited capacity and not allowing late registration of birth or identity document applications.

24. The practice, which was declared unconstitutional in the *Phakamisa judgment*, of allowing children with a lack of documentation to be admitted to schools for three months pending them obtaining documentation, failing which they would be excluded from schools, is also still being practised by schools. This practice is unlawful as it takes Home Affairs and Refugee Reception Offices significantly longer to process applications and issue birth certificates, identity documents and permits. When parents/caregivers or learners are unable to fulfil the requirement, learners are threatened with expulsion or reports are withheld as leverage. In some instances, schools have threatened to call the police. The practice therefore results in a large number of learners being excluded from schools three months after their admission. In addition we have noted that schools withdraw fee exemptions from parents whose asylum and refugee permits expired during the nationwide lockdown. This impacts indigent parents who were previously exempted from paying school fees in full.

25. We have also noted that school administrators responsible for admissions and clerks for SA-SAMS often refuse to enter information regarding undocumented children. This results in

the school not being fully funded for important programmes such as the school feeding scheme (some funding for learners is allocated to schools based on numbers of learners), which dilutes the quality of learning and food for all the children in the school. Further, without being registered on the SA-SAMS system some schools are saying that they cannot issue reports for undocumented learners.

26. Additionally, we have noted that the online portal to apply for admission at a public school in the Gauteng, Western Cape and Mpumalanga provinces requires learners and parents/caregivers to submit identity documentation. There is no option to by-pass this requirement on the portal when a learner or parent/caregiver does not have the identity documentation and the provincial government has not given any information on the portal as to what to do if a learner or parent/caregiver does not have the additional documentation.

27. Lawyers for Human Rights, in partnership with the Consortium for Refugees and Migrants in South Africa (“Cormsa”), conducted a training with school administrators and social workers in Mpumalanga on 23-25 of August 2021. The school administrators responsible for the online registration of learners expressed that they had neither received or heard of the judgment nor corresponding circular. They also confirmed that the DBE had not placed measures on the online platform that would allow for the registration of undocumented learners. They mentioned that this would in turn frustrate their efforts to implement the circular.

28. This creates the perception amongst parents/caregivers that children without the necessary identification documents are not allowed to attend school. Those who persist will physically approach the school and attempt to hand in the alternative documents such as affidavits. However, they face barriers on many levels starting with COVID-19 related social distancing protocols which prohibit parents/caregivers from entering school grounds.

29. While the online admission system is currently only occurring in the Gauteng, Western Cape and Mpumalanga provinces, many provinces are planning to move the application process for admissions online and we fear similar problems will occur.
30. On 5 August 2021, CCL sent a letter to the DBE highlighting these concerns based on the observations of CCL, the Children’s Institute, Equal Education Law Centre, and the LRC. All organisations have continued to encounter numerous instances of children being excluded from school on the basis of lack of documentation. The concerns listed above were included in the letter.
31. In the letter, CCL requested that Circular 1 of 2020 be reissued by the national Department of Basic Education to all Provincial and District basic education departments, all schools and SA-SAMS clerks. Further, it was requested that the Circular be accompanied by a covering letter making it clear that there is an *obligation* for schools to admit undocumented learners and that requiring the submission of extra documentation after three months as a condition to remain in school is unlawful. CCL requested that the national Department of Basic Education then report back to CCL on how the Circular and covering letter were distributed to ensure the above practices cease. Unfortunately to date, CCL has received no response from the government to this letter, despite having requested a response by 13 August 2021.
32. SECTION27 alone processed 75 cases of learners excluded from schools due to being undocumented and/or being non-nationals in 2020. We have noted that often such exclusion is due to institutionalised xenophobia on the part of school administrative staff. Some of the migrant learners we have assisted were excluded from schools because of their country of origin, even when they had documentation proving that they were in the country lawfully. Many of the learners we assisted were unaccompanied migrant, abandoned or orphaned children.

33. Generally, our organisations are able to get the excluded children admitted to schools through the use of legal letters on a case-by-case basis. However, the issue of exclusion is widespread and systemic. Given the high number of undocumented children in South Africa (national and migrant), a case-by-case approach is not sustainable will not reach the majority of children at risk of exclusion.
34. A further issue that our organisations have observed is the denial of access for undocumented learners to write the final examinations necessary to obtain a National Senior Certificate (“NSC”) or the refusal to release the results of such examinations to undocumented learners after the examinations have been written. School administrators outside Gauteng Province have explained during capacity building training that frequently learners without documentation are unable to write their NSC examinations because of their lack of registration. The NSC is a benchmark certificate necessary to prove that one has completed one’s basic education. Obtaining the NSC is necessary to apply for many jobs and to apply and be admitted to higher education institutions. Therefore, not allowing undocumented students to write the NSC or obtain their results is a denial of an aspect of the right to basic education and creates significant barriers for future employment and study opportunities. At the time of writing, LHR had reached out to the DBE concerning this issue and were awaiting their response
35. In 2019 the government reported that there were 1 million undocumented learners in public schools and that the majority (over 80%) were South African citizens. In 2020 the government reported that this number was 660 000, excluding data from the Eastern Cape province. It is unclear why there has been such a dramatic reduction. Because Home Affairs and Refugee Reception Centres have not been operating at full capacity for the past 18 months, it is not possible that this many undocumented children have suddenly been issued with the required identity documentation by Home Affairs. We are therefore concerned that this reduction could indicate that undocumented children are not being admitted to public school or are not entered onto the SA-SAMs data system.

Conclusion and recommendations

36. The Committee, in its Concluding Observations on the initial report of South Africa, called upon South Africa to “Ensure that all migrant, refugee and asylum-seeking children have access to education regardless of their immigration status.” We believe that the measures taken by South Africa to facilitate access to basic education for undocumented national, migrant, refugee and asylum-seeking learners are inadequate. Our organisations still receive numerous complaints from parents, caregivers, advice offices and social workers regarding children being excluded from schools on the basis of lack of identifying documentation or immigration status. South Africa needs to unequivocally inform provincial governments and all public schools that there is an obligation to unconditionally provide a basic education to undocumented learners and put in place and/or implement stringent oversight measures that ensure access to basic education for undocumented learners. Merely purporting to remove formal barriers to access to basic education is inadequate when considering the large scale of the problem and continued practices of schools and provincial governments to exclude learners from basic education due to lack of documentation.