

YOUR RIGHT TO EDUCATION**WHY ARE CHILDREN UNDOCUMENTED? SOME REASONS INCLUDE:**

- ⇒ The Department of Home Affairs (DHA) requires mothers to provide their identity document when they register the birth of their child. However, many mothers do not have their identity document because the DHA never issued it to them. This is often the case if they were not born at a hospital or clinic and is a major reason why many South African births are unregistered.
- ⇒ The DHA does not allow fathers who are not married to the mother to register the birth of their child, even though the Department must allow it by law. Sometimes the DHA will even request paternity tests, which are often too expensive for fathers to get and is an unlawful request.
- ⇒ The DHA does not allow relatives to register the births of children when the parents are unavailable to do so – for example, if the parents have abandoned their children or are deceased.
- ⇒ Migrant children are often unable to obtain documentation. For example, the DHA often unlawfully refuses to provide documentation to migrant children who were separated from their parents during their travels to South Africa and who are being looked after by other adults.

WHAT THE LAW PREVIOUSLY SAID ABOUT UNDOCUMENTED CHILDREN AND SCHOOL



ADMISSIONS POLICY

The Admissions Policy for Ordinary Public Schools (Admissions Policy) used to say that South African children must present a birth certificate when applying for admission to school (section 15). Migrant children who were in the country without documents needed to show proof that they had applied for documents allowing them to stay in South Africa (section 21).

Children who could not produce these documents could be admitted to school on condition that they produce the documents within three months of being admitted, but the school principal did not **have** to admit them. As a result, it was up to the principal to decide whether to admit undocumented learners. In many cases, principals would not admit undocumented learners at all, or they would admit them, but remove them from school after a few months if they failed to produce the required documentation.

IMMIGRATION ACT

In addition to the Admissions Policy, the way that the Immigration Act 13 of 2002 (Immigration Act) was interpreted by schools and other officials was also a problem for undocumented children. Sections 39(1) and 42 said that a “learning institution” was not allowed to provide an “illegal foreigner” with training and that a person who did that could be charged and given a fine or imprisonment for up to five years. Many principals and school officials used to say that the DHA threatened them with imprisonment under these sections if they admitted undocumented children (regardless of whether they were South African or migrant children).

Like in the case of the Admissions Policy, schools would not admit undocumented learners, or if they were admitted, were later removed from school if they did not produce the documents within a certain amount of time.

The terms we use matter! They make a difference in how people and their rights are perceived. The term “illegal foreigner” is negative and contributes to xenophobia in South Africa.



WHAT THE LAW SAYS ABOUT UNDOCUMENTED LEARNERS NOW



⇒ CENTRE FOR CHILD LAW & OTHERS V MINISTER OF BASIC EDUCATION & OTHERS

In 2019, a group of out-of-school undocumented children joined an ongoing court case called *Centre for Child Law & Others v Minister of Basic Education*. They asked the court to declare the Admissions Policy and Immigration Act unconstitutional as it violated their right to basic education. The court held that sections 15 and 21 of the Admissions Policy were unconstitutional as they violated the right to education, the right to equality, the right to dignity, and a child's best interests.

Important things the court said

- The court said that “learning institutions” under sections 39 and 42 of the Immigration Act referred to adults attending learning institutions, and **not children receiving “basic education”**.
- Children, including those who are undocumented and whose presence in the country may be “illegal”, are entitled to the right to education under section 29(1) of the Constitution.
- The Department of Basic Education (DBE) is acting unconstitutionally by not allowing children to continue receiving education in public schools just because they do not have identification documents.
- **The right to education extends to “everyone” within the boundaries of South Africa; the nationality or immigration status does not matter.**

WHAT THE LAW SAYS ABOUT UNDOCUMENTED LEARNERS NOW

⇒ DEPARTMENTAL CIRCULAR 1 OF 2020

A Circular is a notice issued by the DBE informing stakeholders of developments that they should be aware of. After the judgment was handed down, the DBE issued a Circular to education stakeholders including heads of provincial education departments, schools and school principals. The Circular shared what the judgment said and informed stakeholders to follow it. The Circular was withdrawn, and an updated version was released in 2024.

⇒ UPDATED DEPARTMENTAL CIRCULAR

In December 2024, the DBE updated and revised the Circular after receiving complaints from civil society organisations, including the Equal Education Law Centre, that undocumented learners were being denied admission from school and that undocumented matric learners were being refused registration for their matric examinations. The [updated Circular](#) states the following:

- “This circular is issued as a reminder that undocumented learners may not be denied the right to admission to a school on account of not possessing the necessary documents such as, amongst others, a birth certificate or an identity document. This also includes the right to be registered and sit for the National Senior Certificate Examinations.”
- “The court case in the *Centre for Child Law and Others v Minister of Basic Education and Others* affirmed the principle that the lack of documents should not be used as an impediment to deny a learner a right to basic education”.
- “The court [in the *Centre for Child Law* matter] made the following order: [t]he first, second and third respondents were interdicted and restrained from, in any manner whatsoever, removing or excluding from schools, children, including foreign children, already admitted, purely by reason of the fact that the children have no identity document number, permit or passport, or have not produced any identification documents”.
- “The Basic Education Laws Amendment Act provides in section 4(b) that any learner whose parent or guardian has not provided any required documents, whether of the learner or such adult person acting on behalf of the learner, during the application for admission, shall nonetheless be allowed to attend school”.
- “Undocumented learners cannot be prevented from registering or writing the National Senior Certificate examination. Umalusi has also confirmed that an identity document is not compulsory for the issuing of a National Senior Certificate”.

RULES

1. _____
2. _____
3. _____

WHAT THE LAW SAYS ABOUT UNDOCUMENTED LEARNERS NOW

⇒ BASIC EDUCATION LAWS AMENDMENT ACT 32 OF 2024

- Section 5(1) of the South African Schools Act (SASA), as amended by the Basic Education Laws Amendment Act (BELA), states that public schools “must admit, and provide education to, learners and must serve their educational requirements for the duration of their school attendance without unfairly discriminating in any way”.
- Section 5(1A) of the (SASA), as amended by BELA, states “[a]ny learner whose parent or guardian has not provided any required documents, whether of the learner or such adult person acting on behalf of the learner, during the application for admission, shall nonetheless be allowed to attend school”.
- Section 5(1B) of the SASA, as amended by BELA, states “[t]he principal of the school must advise the parent or guardian to secure the required documents”.

⇒ UNDOCUMENTED LEARNERS: YOUR RIGHT TO EDUCATION

- If you apply for school, you cannot be refused because you do not have documents or because of your nationality.
- If you are already in school, you cannot be removed because you do not have documents or nationality.
- If you do not have documents, your school must accept a different proof of identity, such as an affidavit. Even if you do not know your exact date of birth, you can write as much as you do know in your affidavit.
- A school can advise you to secure the required documents but should not pressure you or give you the impression that without the documents you will not be admitted or will be removed from school.

⇒ UNDOCUMENTED MATRIC LEARNERS

- The DBE has said that you must be allowed to register to write matric examinations even if you do not have documents.
- Umalusi must give you your National Senior Certificate even if you do not have an ID or documents.
- Umalusi has said “Whether documented or not, all registered candidates will be certified if they fulfil the qualification requirements. In short, the ID number is not a requirement for issuing a certificate.”

EELC

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EDUCATION
LAW CENTRE**

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