

Recent Legal Developments: Reconceptualising Undocumented Children's Access to Basic Education in South Africa

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Abstract

The *Constitution of the Republic of South Africa*, 1996, guarantees the right to basic education to all children. The implementation of this right has been fraught with challenges, however, particularly for undocumented children. The aim of this article is to examine recent legal developments that have reshaped access to basic education for undocumented children in South Africa. Key legislative measures, such as amendments to the Admission Policy for Ordinary Public Schools, 1998 and provisions of the *Basic Education Laws Amendment Act 32 of 2024*, are analysed. These developments are considered against the backdrop of a recent judicial decision in *Centre for Child Law v Minister of Basic Education 2020 1 All SA 711 (ECG)* and advocacy efforts. This analysis highlights both progress and setbacks in ensuring equal access to basic education. The article further explores the implications of the delayed implementation of certain legal provisions and the ongoing need for comprehensive policy reform. While commending the steps taken so far, the article reconceptualises access to basic education in light of these changes and emphasises the urgency of addressing the legal and administrative barriers continually faced by undocumented children in South Africa.

Keywords

Basic education; admission to school; public schools; immigrants; undocumented children; South Africa.

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1 Introduction

The right to basic education is a fundamental human right guaranteed to everyone under section 29(1)(a) of the *Constitution of the Republic of South Africa*, 1996 (hereinafter *Constitution*).¹ Yet thousands of undocumented children in South Africa remain excluded from the education system.² In 2023, reports by the United Nations Committee on Economic, Social and Cultural Rights and other sources revealed a worrying trend in South Africa, where schools continue to deny basic education to undocumented children despite legal protections.³ The landmark legal ruling in *Centre for Child Law v Minister of Basic Education* (hereinafter *Centre for Child Law and 37 Children*) unequivocally affirmed the state's obligation to provide education to all children, regardless of their legal status.⁴ This ruling established a legal precedent that is supposed to reshape admission practices throughout South Africa.

In response to these challenges, the *Basic Education Laws Amendment Act 32 of 2024* (hereinafter *BELA Act*) amending some provisions of the *South African Schools Act* was signed into law on 13 September 2024, marking a significant legislative step towards dismantling the legal barriers faced by undocumented children.⁵ However, the implementation of sections 4 and 5, dealing with admission and language policies, respectively, has been delayed for further consultation, creating uncertainty around its enforcement.⁶ Additionally, amendments to the Admission Policy for Ordinary Public Schools of 1998 have been introduced to align the legal framework with constitutional mandates, ensuring that children are not denied access to education based on documentation status.⁷ This article, therefore, seeks to assess whether the government has taken sufficient

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¹ Section 29(1)(a) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

² SECTION27 *et al* 2021 <https://eelawcentre.org.za/wp-content/uploads/final-submission-s27-ccli-lrc-eelc-lhr.pdf> paras 26-31.

³ *Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its Second Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child* (2023) para 13; Mutandiro 2023 <https://groundup.org.za/article/undocumented-children-struggle-to-find-schools/>.

⁴ *Centre for Child Law v Minister of Basic Education* 2020 1 All SA 711 (ECG).

⁵ *Basic Education Laws Amendment Act 32 of 2024* (the *BELA Act*).

⁶ Presidency of the Republic of South Africa 2024 <https://youtu.be/Cl62rjYJOMM>.

⁷ Call for Comments on the Admission Policy for Ordinary Public Schools (GN 38 in GG 44139 of 10 February 2021) amending the provisions of the Admission Policy for Ordinary Public Schools (GN 2432 in GG 19377 of 19 October 1998) (the Admission Policy).

steps through these recent legal developments to effectively address the challenges undocumented children face in gaining admission to public schools. To achieve this, the paper will identify normative standards relevant to the protection of undocumented children from international and regional frameworks. These standards will serve as a benchmark for evaluating South Africa's legal developments and their impact on undocumented children's access to education. The article adopts a doctrinal research approach that involves analysing and interpreting various legal resources, such as international instruments and their general comments, the *Constitution*, legislation, case law, policies, circulars and regulations.⁸ To understand the scope of protection provided for these children it is crucial first to define what is meant by undocumented children and to clarify the concept of basic education, both of which terms are discussed below.

2 Decontextualising the term "undocumented"

In this context, undocumented children are children born to South African parents who have, for a variety of reasons, been unable to obtain birth certificates or any other form of identity documents in terms of the *Births and Deaths Registration Act*.⁹ and immigrant children residing in South Africa who are unlawfully in the country. In other words, their migration status denotes that they are in the country without the correct authorisation and accompanying documentation required for them to enter, live, stay and/or study in South Africa.¹⁰ While migrants may possess their identity and travel documents, they may still lack the authorisation to study in South Africa due to their lack of relevant visas and permits.¹¹ As such, their presence is not recorded for the purpose of admission at schools, making them fall under the category of "undocumented children". Therefore, in simple terms, undocumented children are those who lack the necessary identity documents to be legally registered as learners within the South African education system.

3 Exploring the contextual meaning of basic education

Basic education is a term used in the South African legal framework and is regarded as equivalent to the term primary education under international law.¹² Neither the *Constitution* nor the *South African Schools Act* 84 of 1996 (hereinafter *Schools Act*) explicitly defines basic education. The *Schools Act's* legal framework governing basic education refers only to compulsory

⁸ Hutchinson and Duncan 2012 *Deakin LR* 84.

⁹ *Births and Deaths Registration Act* 51 of 1992.

¹⁰ Section 1(xvii) of the *Immigration Act* 13 of 2002 (the *Immigration Act*); Regulation 37 of the Immigration Regulations (GN R413 in GG 37679 of 22 May 2014).

¹¹ Perruchoud and Redpath-Cross *Glossary on Migration* 67.

¹² Section 29(1)(a) of the *Constitution* and Art 28(1)(a) of the *Convention on the Rights of the Child* (1989).

attendance from the first school day of the year in which such a learner reaches the age of seven years until the last school day of the year when such a learner reaches the age of fifteen years or the ninth grade, whichever occurs first.¹³ Compulsory attendance aims to ensure that all children, regardless of their background, have access to a foundational level of education.¹⁴ In essence, by legally mandating attendance up to Grade 9, the state is effectively setting a minimum educational standard that everyone is expected to meet. Therefore, the scope of "basic education" includes the years covered by compulsory schooling. The *BELA Act* sets the parameters of basic education from Grade R until Grade 12.¹⁵

The reference to primary education poses the challenge of what exactly is meant by primary education and whether it is the same as basic education. The United Nations Committee on Economic, Social and Cultural Rights explained the proper interpretation of the term "primary education" during its 21st session in 1990. It explained the term as follows:

The Committee obtains guidance on the proper interpretation of the term primary education from the World Declaration on Education for All which states: "The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community" (art. 5). "[B]asic learning needs" are defined in article 1 of the World Declaration. While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: "Primary education is the most important component of basic education."¹⁶

Both terms, "primary education" and "basic education", are used to ensure the fulfilment of fundamental educational rights, with a focus on ensuring free and compulsory education for all children. While basic education can extend beyond primary schooling to include other stages of learning, primary education remains the central focus of international efforts to guarantee that every child receives at least the minimum necessary education for functional literacy, numeracy and societal participation.¹⁷ Therefore, in the context of protecting the right to basic education, it is essential to examine how this right is upheld from both international and domestic legal perspectives.

¹³ Section 3(1) of the *South African Schools Act* 84 of 1996 (the *Schools Act*).

¹⁴ Tomaševski *Right to Education Primers* No 2 8.

¹⁵ Section 1(a) of the *BELA Act*.

¹⁶ CESCR *General Comment No 13: The Right to Education* UN Doc E/C.12/1999/10 (1999) (CESCR *General Comment No 13*).

¹⁷ UNICEF 2000 https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNICEF_Defining_Quality_Education_2000.PDF 3-4.

The next section of this article examines the relevant legal framework in the context of determining whether the right to basic education extends to undocumented children in South Africa.

4 The scope and ambit of basic education under international law

International and regional frameworks protecting the right to basic education serve as benchmarks for assessing State compliance with globally recognised standards. Key instruments such as the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*, the *Convention on the Rights of the Child (CRC)* and the *African Charter on the Rights and Welfare of the Child (ACRWC)* explicitly affirm children's right to basic/primary education.¹⁸ While this article does not provide an exhaustive analysis of the various instruments governing children's right to basic education, it will focus on key aspects of the right, particularly in the context of the accessibility of basic education to undocumented children.

Article 13(2)(a) of the *ICESCR* provides that primary education must be compulsory and free for all children. A compulsory education system must ensure that all children, regardless of their legal status, can attend school without fear of discrimination or exclusion.¹⁹ The implementation of *ICESCR* is monitored by the Committee on Economic, Social and Cultural Rights (CESCR). The CESCR also adopts General Comments, which are intended to define the provisions of the *ICESCR* and related topics to bring more clarity and certainty to their interpretation.²⁰ In General Comment No 13 the CESCR considers immediate free and compulsory primary education as a core obligation. It reaffirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State Party, including non-nationals, irrespective of their legal status.²¹ In General Comment No 20 the CESCR provides that all children within a state, including those with an undocumented status, have the right to receive education.²² This suggests that South Africa, as a party to this instrument, must provide basic education to all children, including undocumented children.

¹⁸ Article 13(2)(a) of the *International Covenant on Economic, Social and Cultural Rights* (1966) (the *ICESCR*); Art. 28(1)(a) of the *Convention on the Rights of the Child* (1989) (the *CRC*); Art. 11(3)(a) of the *African Charter on the Rights and Welfare of the Child* (1990) (the *ACRWC*).

¹⁹ CESCR *General Comment No 13* paras 51 and 57.

²⁰ OHCHR 2020 <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx>.

²¹ CESCR *General Comment No 13* paras 51 and 57.

²² CESCR *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (Art 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/20 (2009) para 20.

The 4A framework developed by Tomaševski is the cornerstone of the CESCR General Comment No 13 on the right to basic education.²³ It clarifies the scope and content of the right to basic education. In terms of the 4A framework, governments must ensure that education is available, acceptable, accessible and adaptable.²⁴ Crucial to this discussion is the accessibility of basic education. The State is obliged, amongst other things, to

- (a) ensure universal access at an appropriate age, progression through the system and completion of education cycles by all children;
- (b) prohibit discrimination on the grounds of nationality, gender, race, and other status, and actively promote the inclusion of vulnerable children;
- (c) address administrative obstacles such as onerous documentation requirements.²⁵

Furthermore, Article 28(1)(a) of the *CRC* requires States Parties to make primary education compulsory and free. In the context of the article, emphasis is placed on one of the four general principles of the *CRC* - non-discrimination.²⁶ While all the other principles are equally crucial, non-discrimination is particularly relevant to the issue of undocumented children's access to basic education.²⁷ Article 2(1), read together with Articles 3(2) and 4 of the *CRC*, prohibits discrimination against children within the state's jurisdiction and provides that a child should not suffer discrimination based on his or her or their parents'/guardians' race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth or other status.²⁸ The Committee on the Rights of the Child reiterates in General Comment No 6, addressing the situation of unaccompanied children, that the enjoyment of the rights stipulated in the *CRC* is not limited to children who are citizens but extends to all children, including undocumented children.²⁹ This is because the *CRC* confers rights to all children irrespective of their nationality or immigration status.

Lastly, Article 11(3)(a)-(b) of the *ACRWC* obliges States Parties to provide free and compulsory basic education to all children. Article 11(2) states that

²³ CESCR *General Comment No 13* para 55.

²⁴ Tomaševski *Right to Education Primers No 3* 27.

²⁵ SAHRC *Charter of Children's Basic Education Rights* 34.

²⁶ Article 2(1) of the *CRC*.

²⁷ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) para 11.

²⁸ Articles 2(1), and (3(2) and 4) of the *CRC* (requiring States to take all appropriate legislative, administrative, and other measures to implement the rights recognised in the *CRC*).

²⁹ Committee on the Rights of the Child *General Comment 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin* UN Doc CRC/GC/2005/6 (2005) para 12.

education must be directed towards the development of children, including their personalities, their talents and their mental and physical development.³⁰ From the above discussion, it can be inferred that international legal instruments strongly affirm the right to basic education and explicitly extend this right to undocumented children, irrespective of their nationality or migrant status.

A discussion of the nature and scope of basic education in South Africa follows.

5 The scope and ambit of basic education in South Africa

Section 29(1)(a) of the *Constitution* guarantees the right to basic education to everyone.³¹ The *Schools Act* obliges public schools to admit and educate all learners and ensure the fulfilment of their educational needs without engaging in any form of unfair discrimination.³² The South African Constitutional Court confirmed the absolute nature of the right to basic education in *Governing Body of the Juma Masjid Primary School v Essay*.³³ The right to a basic education is unqualified, and the obligation to provide basic education is immediately realisable.³⁴ As the right is unqualified, there is no internal limitation in section 29(1)(a), which requires that the right be progressively realised within available resources.³⁵ Globally, the right to basic education enjoys the distinction of being an empowerment right – a right that enables access to other human rights.³⁶ Commissioner Lindiwe Mokate of the South African Human Rights Commission describes the right to basic education as a:

central facilitative right that is not qualified by expressions such as "available resources", "progressive realisation", or "reasonable legislative measures" which apply to other socio-economic rights enshrined in our *Constitution*.³⁷

The right to basic education can be limited only in terms of section 36 of the *Constitution*, the general limitation clause.³⁸ The right to a basic education further constitutes the minimum core obligation.³⁹ The minimum content of

³⁰ Article 11(2)(a)-(h) of the *ACRWC*.

³¹ Section 29(1)(a) of the *Constitution* states: "Everyone has the right - (a) to a basic education, including adult basic education."

³² Section 5(1) of the *Schools Act* and s 4(a)(1) of the *BELA Act*.

³³ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para 43.

³⁴ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para 43.

³⁵ *Simbo* 2013 LDD 485-486.

³⁶ *McConnachie, Skelton and McConnachie Constitution and the Right to a Basic Education* 34.

³⁷ *SAHRC Charter of Children's Basic Education Rights* 12.

³⁸ Section 36 of the *Constitution*.

³⁹ *CESCR General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)* UN Doc E/1991/23 (1990) para 10.

a right refers to its essence, that is, the "essential element without which a right loses its substantive significance as a human right".⁴⁰ The government is obliged to fulfil the essential elements of this right. Omissions and negligence that impact the minimum core obligation of a right result in violation of the state's obligations under section 7(2) of the *Constitution*, which dictates that the State must respect, protect, promote and fulfil the rights in the Bill of Rights. A decent society is not based on rights; it is based on duties to one another, and for rights to be realised, duties must be understood and performed.⁴¹ In essence the State is duty-bound to realise the right to basic education and to make it accessible to all learners within the jurisdiction of South Africa.

Through this lens, the article explores the current status of South Africa's response to the obligation to provide basic education and to make it accessible to undocumented children, as well as the related legal developments. Firstly, the article interrogates the court's interventions in determining whether the right to basic education extends to undocumented children.

6 A review of the legal changes related to undocumented children's admission

6.1 Judicial approach

Centre for Child Law v Minister of Basic Education

In *Centre for Child Law and 37 Children*⁴² the court had the opportunity to respond to the question of whether excluding undocumented children from enrolment in public schools in South Africa is legal. The case involved two distinct applications. The first was filed by the Centre for Child Law and the School Governing Body of Phakamisa High School and concerned the legality of the Eastern Cape Department of Education policy decision to stop funding schools with undocumented learners.⁴³ Thirty-seven children brought the second aspect of the application on behalf of all children in a similar situation in South Africa.⁴⁴ The application challenged the lawfulness of clauses 15 and 21 of the Admission Policy for Ordinary Public Schools, 1998 (hereinafter Admission Policy), as well as sections 39 and 42 of the *Immigration Act* 13 of 2002, on the basis that they violate several constitutionally protected rights of undocumented children.⁴⁵

⁴⁰ Coomans *Clarifying the Core Elements of the Right to Education* 7.

⁴¹ Eekelaar *Family Law and Personal Life* 133.

⁴² *Centre for Child Law v Minister of Basic Education* 2020 1 All SA 711 (ECG) (the *Centre for Child Law and 37 Children*).

⁴³ *Centre for Child Law and 37 Children* para 9.

⁴⁴ *Centre for Child Law and 37 Children* para 12.

⁴⁵ *Centre for Child Law and 37 Children* para 14.

Clause 15 of the Admission Policy requires that parents must provide official birth certificates for their children when applying for admission of their children to public schools, and if they are unable to produce such birth certificates the children may be admitted conditionally for only three months.⁴⁶ This denotes that upon failure to meet the condition, the learners face potential exclusion. Clause 21 of the Admission Policy requires that persons who are unlawfully in the country applying for admission of their children into public schools must show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the *Immigration Act*.⁴⁷ On the other hand, section 39 of the *Immigration Act* states that no learning institution shall knowingly provide training or instruction to an illegal foreigner and a foreigner whose status does not authorise him or her to receive such training or instruction,⁴⁸ while section 42(1) of the *Immigration Act* states that persons and institutions that admit illegal immigrants may be charged for aiding and abetting illegal foreigners.⁴⁹

In a robust judgment, the court found clauses 15 and 21 of the Admission Policy invalid and inconsistent with the *Constitution*.⁵⁰ The court observed that children could not be prevented from accessing basic education because it is significant to the development of children and provides a foundation for a child's lifetime learning and work opportunities.⁵¹ To this end, access to school – an important component of the right to a basic education - is a necessary condition for the achievement of this right. The court also held that limiting this right to a specific group of children violates the most fundamental rights of the child as enshrined in sections 9, 10, 28(2) of the *Constitution*.⁵²

Conversely, sections 39 and 42 of the *Immigration Act* were declared constitutional, but the court pointed out that these provisions should be interpreted in a manner consistent with the *Constitution*, meaning that they should not be read in a way that prevents children from receiving basic education in schools.⁵³ The rationale was predicated on the understanding that the *Immigration Act* makes no mention of basic education, even though it was enacted when the *Constitution* already recognised the right to basic

⁴⁶ Clause 15 of the Admission Policy.

⁴⁷ Clause 21 of the Admission Policy.

⁴⁸ Section 39(1)(a)-(b) of the *Immigration Act*.

⁴⁹ Section 42(1) of the *Immigration Act*. It provides that: "no person, shall aid, abet, assist, enable or help an illegal foreigner; by providing or allowing them to receive instruction or training".

⁵⁰ *Centre for Child Law and 37 Children* para 93.

⁵¹ *Centre for Child Law and 37 Children* para 94.

⁵² The right to equality and dignity, and the principle of the best interest of the child.

⁵³ *Centre for Child Law and 37 Children* paras 127-128.

education.⁵⁴ Therefore, the terms "learning institution" or "training or instruction" in the *Immigration Act* need not be interpreted as referring to a basic education that schools provide to children. The court affirmed that in any event the right to basic education is not subject to limitation in this instance, even pursuant to section 36 of the *Constitution*, which addresses general limitations.⁵⁵ As a result, all public schools in South Africa were ordered to admit undocumented children.

Drawing inferences from the foregoing, the judgment carries significant legal implications for undocumented children in South Africa, reinforcing their entitlement to basic education without prejudice. As highlighted by the Abidjan Principles, Overarching Principle 1, under the principles of equality and non-discrimination, States bear the obligation to respect, protect, promote and fulfil the right to education to all individuals within their jurisdictions.⁵⁶ Kouamé, from the Ivorian Network for the Promotion of Education for All, made remarks in response to the adoption of the Human Rights Council resolution on the right to education, which acknowledged the Abidjan Principles. He acknowledges that African States and institutions at the highest level are taking the lead in addressing these challenges and emphasises the importance of establishing global standards, following the example set by the Human Rights Council.⁵⁷ Against this background, it is imperative to explore at this juncture the legal developments which have emerged following the court judgement.

6.2 Legislative approach

6.2.1 Department of Basic Education Circular 1 of 2020

Given that the *Constitution* and the case law guarantee a robust, immediately enforceable right to basic education for undocumented children, this must be mirrored and effectuated through corresponding education laws and policies. Immediately after the *Centre for Child Law and 37 Children* judgment, the Minister of Basic Education issued the Department of Basic Education Circular 1 of 2020, which addressed the admission criteria for undocumented children.⁵⁸ The directive instructed all public schools in South Africa, for the purposes of the admission of a learner, to:

⁵⁴ *Centre for Child Law and 37 Children* para 124.

⁵⁵ *Centre for Child Law and 37 Children* paras 95-96.

⁵⁶ Overarching Principle 1 of the *Abidjan Principles: Guiding Principles on the Human Rights Obligation of States to Provide Public Education and to Regulate Private Involvement in Education* (2019).

⁵⁷ Global Initiative for Economic Social and Cultural Rights 2019 <https://www.gi-escr.org/latest-news/historic-recognition-of-the-abidjan-principles-by-top-un-human-rights-body>.

⁵⁸ Department of Basic Education Circular 1 of 2020.

- (a) Accept an official birth certificate, but in the absence of that-:
- (b) Accept alternative proof of identity such as an affidavit or sworn statement deposed to by the parent, caregiver or guardian of the learner wherein the learner is fully identified.
- (c) Amend the unconstitutional provisions of the Admission Policy with immediate effect.⁵⁹

Steps have been taken to implement *the Centre for Child Law and 37 Children's Judgment*, with some degree of success. The next section reviews some of the measures undertaken to enforce the judgment.

6.2.2 Basic Education Laws Amendment Act 32 of 2024

As indicated earlier, the *BELA Act* has been signed into law. However, the implementation of sections 4 and 5 concerning admission and language policies has been delayed due to ongoing disputes surrounding these provisions.⁶⁰ Nevertheless, the pertinent consideration for this article lies in the measures undertaken to date. The *BELA Act* aims to ensure that education structures are aligned with the constitutional and international mandate to respect, protect, promote and fulfil the right to basic education.⁶¹ One of the key amendments introduced by the *BELA Act* is the provision regarding the admission of undocumented learners. The *BELA Act* explicitly states that a learner may not be denied admission to a school due to a lack of documentation.⁶² This provision addresses a critical gap in the *Schools Act*, which previously offered no specific guidance on the admission of undocumented children.

Building on this crucial amendment, the *BELA Act* outlines specific procedures for the submission of documents during the admission process while also making provisions for exceptional cases.⁶³ Section 1(n) firstly requires those in possession of the necessary documents to submit them for admission. These documents apply to the following categories of learners: South African citizens, learners whose parents are foreign nationals holding either permanent residence permits or temporary residence visas, learners whose parents are refugees or asylum seekers, and learners in alternative care.⁶⁴ However, an exception has been provided.

Section 4, amending section 5 of the *South African Schools Act*, 1996, provides:

⁵⁹ Department of Basic Education Circular 1 of 2020 paras 1.2(c) and 2.3.

⁶⁰ Presidency of the Republic of South Africa 2024 <https://youtu.be/Cl62rjYJOMM>.

⁶¹ Preamble of the *BELA Act*.

⁶² Section 4(b)(1A) of the *BELA Act*.

⁶³ Section 1(n) and 4(b)(1A) of the *BELA Act*.

⁶⁴ Section 1(n) of the *BELA Act*.

- (1) A *public school* 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.⁶⁵
- (1A) 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*, and the *principal* of the *school* must advise the *parent* or guardian to secure the *required documents*.⁶⁶

The *BELA Act* represents a crucial and positive advancement in South African education law. Its primary objective is to eliminate any form of discrimination against learners, particularly undocumented children, whose rights were previously unacknowledged under the *Schools Act*.⁶⁷ The government is commended for addressing the international and constitutional mandates⁶⁸ by creating education policies centred on equality and equity. The recent developments seek to correct discriminatory admission practices that have historically excluded undocumented children and those from migrant backgrounds from accessing equal education opportunities.⁶⁹ However, the delay in implementing section 4 of the *BELA Act*,⁷⁰ which addresses the admission of undocumented children, has significant consequences for the affected children and raises serious concerns. The potential effects of this delay will be discussed later.

6.2.3 Admission Policy for Ordinary Public Schools GN 38 in GG 44139 of 10 February 2021 - call for comments

On 10 February 2021, as part of its efforts to implement the *Centre for Child Law and 37 Children* judgment, the Department of Basic Education released a draft amendment to the Admission Policy for Ordinary Public Schools (hereinafter Proposed Amended Admission Policy), inviting public comment.⁷¹ This policy plays a crucial role in shaping undocumented children's access to basic education, as it establishes the criteria and procedures for their admission into schools.⁷² Sibanda and Beckmann stress that "admission policies" are key enablers of the right to a basic education, and the realisation of the right to a basic education is largely

⁶⁵ Section 4(a)(1) of the *BELA Act*.

⁶⁶ Section 4(b)(1A) of the *BELA Act*.

⁶⁷ Aims as provided in the Preamble of the *BELA Act*.

⁶⁸ CESCR *General Comment No 13* paras 51 and 57; s 29(1)(a) of the *Constitution*.

⁶⁹ Reference to the Eastern Cape Education Department Circular 6 of 2016, which stopped funding public schools enrolling undocumented children.

⁷⁰ Specific reference to s 4(b)(1A) of the *BELA Act*.

⁷¹ Call for Comments on the Admission Policy for Ordinary Public Schools (GN 38 in GG 44139 of 10 February 2021) (the Proposed Amended Admission Policy).

⁷² As stated in clauses 15 and 23 of the Proposed Amended Admission Policy.

dependent on the appropriateness and the regulation of the policy itself.⁷³ The amended policy introduces the following changes:

Clause 15 of the new draft provides that:

15. When a parent applies for admission of a learner to an ordinary public school, the parent must present an official birth certificate (with an identity number) of the learner or a written affirmation or sworn written statement (in the form of an Affidavit) about the age of a learner to the principal of the school.
- 15.1. If the parent is unable to submit the birth certificate or has only submitted a written affirmation or sworn written statement about the age of a learner, the learner must be admitted.
- 15.3. If the parent fails to submit the birth certificate of a learner, the principal must admit the learner and refer the matter to the Head of Department concerned. The Head of Department must hold the parents accountable to acquire birth certificates for their children. The Head of Department may liaise with the nearest office of the Department of Home Affairs for assistance relating to the matter. It remains the primary responsibility of parents to acquire birth certificates for their children.⁷⁴

It can be observed that even though the draft policy requires learners to submit identification documents, it explicitly allows for the submission of an affidavit as an alternative. The acceptance of an affidavit as the sole document for school admission represents a significant advancement in improving educational access for undocumented children. This measure directly responds to the court's ruling, which highlights the necessity of accepting alternative proof of identity, such as an affidavit or sworn statement.⁷⁵ Notably, the amended clause does not specify a timeframe for the submission of missing documents, which was a critical issue in the court case.⁷⁶ This immediately relates to the United Nations *Education 2030 Agenda*,⁷⁷ which seeks to advance the UN's Sustainable Development Goal 4, ensuring inclusive and equitable quality education for all.⁷⁸

In addition to that, clause 23 further provides that,

The right to education extends to everyone within the boundaries of South Africa, the nationality and immigration status is immaterial. All schools are advised to admit learners and serve their education requirements irrespective of whether the learner or parent of a learner does not produce documents listed in paragraphs 15, 17 to 20 of this policy.⁷⁹

⁷³ Sibanda and Beckmann 2021 *South African Journal of Education* 8.

⁷⁴ Clauses 15, 15.1 and 15.3 of the Proposed Amended Admission Policy.

⁷⁵ Department of Basic Education Circular 1 of 2020 paras 1.2(c) and 2.3.

⁷⁶ *Centre for Child Law and 37 Children* paras 64 and 74.

⁷⁷ *Education 2030: Incheon Declaration and Framework for Action for the Implementation of Sustainable Development Goal (2015) (the Incheon Declaration)*.

⁷⁸ Goal 15 of the *Incheon Declaration*.

⁷⁹ Clause 23 of the Proposed Amended Admission Policy.

It can be inferred that this revision was designed to address concerns related to sections 39 and 42 of the *Immigration Act*, as discussed in *Centre for Child Law and 37 Children*. The proposed amendments to the Admission Policy deserve commendation for their clarity and responsiveness to these legal challenges. Since ratifying the *ICESCR*, whose Committee mandates equal access to education regardless of immigration status, the state has made significant progress.⁸⁰ Additionally, the Committee on the Rights of the Child has accented the necessity of providing education for all children regardless of their legal/migration status,⁸¹ highlighting the importance of this policy adjustment. As a member of the United Nations, South Africa has committed to implementing and working towards achieving the Sustainable Development Goals - 2030.⁸² One of the key goals of the Sustainable Development Goals and the African Union Agenda 2040-2063 is to ensure children's well-being and their equal enjoyment of the rights to survival, protection, development and participation. This includes providing access to basic education, enabling them to reach their full potential.⁸³ Providing education to undocumented children not only upholds their basic right to education but also aids in fulfilling the targets outlined in SDG4.⁸⁴

On the other hand, despite these laudable advancements, several areas still require further attention. The following discussion provides some areas for concern and potential improvement recommendations.

7 Shortcomings and proposed remedial strategies

7.1 A revamp of the provisions of the *Immigration Act*

Argumentatively, the court's ruling in *Centre for Child Law and 37 Children* does not adequately address the stance of sections 39 and 42 of the *Immigration Act*. This argument is supported by the *Immigration Act* Regulation, published in GN R413 in GG 37679 of 22 May 2014, which explicitly denotes that a "learning institution" includes a "school contemplated in section 1 of the South African Schools Act" - referring to basic education.⁸⁵ The Regulation establishes a legal framework and

⁸⁰ CESCR *General Comment No 13* paras 51 and 57.

⁸¹ Committee on the Rights of the Child *General Comment 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin* UN Doc CRC/GC/2005/6 (2005) para 12.

⁸² Stats SA 2019 https://www.statssa.gov.za/MDG/SDGs_Country_Report_2019_South_Africa.pdf.

⁸³ Aspiration 9-20 of the *African Agenda for Children 2040: Fostering an African Fit for Children; Resolution 25* in UNGA *Transforming Our World: The Agenda for Sustainable Development* UN Doc A/RES/70/1 (2015).

⁸⁴ Goal 4 of the *Incheon Declaration*.

⁸⁵ Regulation 1(c) of the *Immigration Regulations* (GN R413 in GG 37679 of 22 May 2014).

provides detailed guidelines for implementing the *Immigration Act*.⁸⁶ When discussing the rights of migrants, it is vital to acknowledge that the *Schools Act* emphasises the right to basic education, while the *Immigration Act* governs the status and treatment of foreign nationals.⁸⁷ If the wording of the *Immigration Act* conflicts with the *Constitution* and, more broadly, the *Schools Act* or lacks clarity regarding educational access, this could lead to legal uncertainties. Therefore, a clear and precise definition of a "learning institution" must be incorporated into the *Immigration Act*. The Consultative Council of European Judges has pointed out that the responsibility for amending or clarifying the law ultimately lies with the legislature.⁸⁸ Inconsistencies in judicial decisions often arise from ambiguously drafted statutes, which hinder courts from achieving a uniform and broadly accepted interpretation of the law.⁸⁹

While the court provided its interpretation of sections 39 and 42, it is argued that these provisions need revision to eliminate any remaining ambiguity. Amending the language in the *Immigration Act*, notwithstanding the court's interpretation, remains crucial to ensure clarity, consistency and legal certainty.⁹⁰ According to Brugger, "the principle of legal certainty is manifested in the following: a) clarity of definition of legal norms; b) clarity in the rule of law; c) stability of legal norms; d) clear institutional responsibility of the authorities".⁹¹ While judicial decisions provide important interpretative guidance, relying solely on court judgments can lead to the inconsistent application of the law, particularly in future cases or in its implementation by administrative authorities. The *Constitution*, in section 39(1)(c), permits the consideration of foreign law. Consequently, it is recommended that the *Immigration Act* formulate its provisions in the following manner:

The *Argentina Immigration Act* specifies that:

Under no circumstances shall a foreign national's illegal migration status preclude enrolment as a student in a public, private, national, provincial, or municipal educational institution at the elementary, secondary or higher levels. Officials of the educational institutions shall provide orientation and guidance regarding the corresponding procedures to correct illegal migratory status.⁹²

The *Mexican Migratory Act* explicitly states that:

Migrants may access public and private education services, independent of their migratory status and in accordance with the applicable regulations and

⁸⁶ Section 7 of the *Immigration Act*.

⁸⁷ Preamble of the *Schools Act* and the *Immigration Act*.

⁸⁸ CCEJ 2017 CCEJ 2017 <https://rm.coe.int/opinion-ccje-en-20/16809ccaa5> para 46.

⁸⁹ CCEJ 2017 CCEJ 2017 <https://rm.coe.int/opinion-ccje-en-20/16809ccaa5> para 46.

⁹⁰ Shcherbanyuk *et al* 2023 *Juridical Tribune* 21.

⁹¹ Brugger 1996 *Tul Eur & Civ L F* 211-212.

⁹² Article 7 of the *Argentina Immigration Act* Law 25.871.

legal provisions ... With respect to the provision of educational and medical services, no administrative act will establish restrictions on foreigners that are more extensive than those generally established for Mexicans.⁹³

The aforementioned migratory laws clearly outline their position on the admission of undocumented children, thus providing a benchmark for South Africa.

7.2 Legal systemic uniformity

Secondly, while the primary focus of this article is on undocumented children, it is essential to examine the broader legal systemic flaws embedded within recent school admissions policies and legislation. Although these provisions do not explicitly target undocumented children, they perpetuate a cycle of exclusion for all children. If these legal inconsistencies are not rectified, the ongoing shortcomings will continue to entrench exclusionary practices, inevitably leading to a surge in protracted litigation and judicial intervention. It is, therefore, important to ensure that the legal and policy frameworks governing the admission of learners are comprehensive and uniform, leaving no child at risk of exclusion.

The admission requirements outlined in the *BELA Act* and the Proposed Amended Admission Policy differ considerably, leading to a conflict between these two frameworks. Although both legal frameworks generally require similar types of documentation when a person applies for a learner's admission, the *BELA Act* introduces additional requirements such as the parents' passports and visas.⁹⁴ It is important to note that the primary purpose of documentation in the admission process is to verify the learner's age and determine the appropriate grade placement.⁹⁵ The rationale for necessitating these parental documents for admission purposes is unclear. Furthermore, the Proposed Amended Admission Policy requires a birth certificate from the "country of origin" for foreign children, a requirement that is not included in the *BELA Act*.⁹⁶ Moreover, both the policy and legislation use the conjunction "and" when listing the required documents, which suggests that all listed documents must be submitted together, not just some of them.⁹⁷ To address this issue, the article argues that the section should be rephrased to clarify that "Parents or guardians of the learner,

⁹³ Article 8 of the Mexican *Migration Law* of 2011.

⁹⁴ Section 1(n) of the *BELA Act*. "(b) where both parents of the learner are foreign nationals and hold either permanent residence permits or temporary residence visas, the following documents: (i) the learner's foreign issued birth certificate; (ii) the learner's passport; (iii) a study visa or permanent residence permit issued to the learner; (iv) the parents' passports; and (v) the parents' temporary residence visas or permanent residence permits".

⁹⁵ Regulation 14 of the Regulations Relating to the Admission of Learners to Public Schools (Gauteng Gen N 1160 in PG 127 of 9 May 2012).

⁹⁶ Clause 20(a)(i) of the Proposed Amended Admission Policy.

⁹⁷ Clause 20 of the Proposed Amended Admission Policy and s 1(n) of the *BELA Act*.

'where available' 'may' submit any 'one' of the following documents." While these required documents are important, it is crucial to ensure that they are not overly burdensome. Excessive documentation, particularly documentation not directly related to age verification or grade placement, ultimately undermines the goal of inclusive education and the judgments established in *Centre for Child Law and 37 Children*.

Moreover, the Proposed Amended Admission Policy specifies a requirement for an official birth certificate that includes an "identity number", a condition not addressed in the *BELA Act*.⁹⁸ According to the *Births and Deaths Registration Act*, not all birth certificates are issued with identity numbers.⁹⁹ For instance, children born to a South African parent and a non-South African parent, or to both non-South African citizen parents without valid visas, receive a birth certificate that does not contain an identity number.¹⁰⁰ While a policy cannot supersede or amend the law, it must nevertheless align with legislative frameworks.¹⁰¹ Consequently, admissions policies must conform to existing legislation, and the legislation itself must be harmonised with the *Constitution* and relevant international legal obligations.¹⁰² In principle, the law ought to be as clear, foreseeable and consistent as possible. Courts are more effectively equipped to guarantee the uniform application of laws when such laws are logically coherent, meticulously drafted, clearly expressed and devoid of unnecessary ambiguities or internal inconsistencies.¹⁰³

7.3 Use of online portals - gatekeeping

Thirdly, in addition to the discrepancies in the drafting of recent developments, another major challenge confronting undocumented children that demands immediate attention is the use of online portals as a gatekeeping strategy for accessing basic education. A significant barrier to basic education for undocumented children arises from the online application portals for school admissions implemented in provinces such as Gauteng and the Western Cape.¹⁰⁴ The experience of children being denied

⁹⁸ Clause 15 of the Proposed Amended Admission Policy.

⁹⁹ Section 5(3) of the *Births and Deaths Registration Act* 51 of 1992 and Regulation 8(3) and 8(5) of the Regulations on the Registration of Births and Deaths (GN 128 in GG 37373 of 26 February 2014).

¹⁰⁰ Regulation 8(5) of the Regulations on the Registration of Births and Deaths (GN 128 in GG 37373 of 26 February 2014).

¹⁰¹ *Fuo* 2013 *PELJ* 7.

¹⁰² *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* (252/99) [2001] ZASCA 59 (17 May 2001) para 59.

¹⁰³ CCEJ 2017 <https://rm.coe.int/opinion-ccje-en-20/16809ccaa5> para 44.

¹⁰⁴ Gauteng Provincial Government 2022 <https://www.gauteng.gov.za/Publications/PublicationDetails/%7Bf9bdd652-1500-4af2-9085-1dc22823de46%7D>; Western Cape Education Department 2023 <https://wcedonline.westerncape.gov.za/admissions2023-24>.

access to schools due to the use of online portals¹⁰⁵ highlights the broader legal deficiency in South Africa's school admission policies, which remain misaligned with section 29(1)(a) of the *Constitution*. Parents highlight the impossibility of completing the online admission process without an identity number.¹⁰⁶ The online portals provide no guidance for applicants without identity documents, leaving them with no clear alternative means of application.¹⁰⁷ A 2023 report from parents revealed that even when they visit schools in person, they are often turned away by the school principals, who insist that admissions are processed exclusively through online applications.¹⁰⁸ In *Equal Education v Minister of Basic Education* the court highlighted the ongoing and systematic exclusion of vulnerable children from schools, expressing serious concerns about this issue.¹⁰⁹ Additionally, individuals who attempt to submit alternative documentation, such as affidavits, in person often encounter resistance and threats of being reported to security officials.¹¹⁰ This has effectively barred many children without identity documents/numbers from enrolling in public schools. As the world continues to evolve, other provinces are likely to adopt similar online application systems, leading to the exclusion of many undocumented children.¹¹¹ Until these systems are modified to adopt a more inclusive approach, many undocumented children will continue to face significant barriers to accessing basic education across South Africa. It is essential for all key educational stakeholders to urgently address this issue to ensure that all children, regardless of their documentation status, have equal access to educational opportunities.

7.4 Beyond policy provisions - privacy and confidentiality

The author respectfully submits that it is imperative that schools maintain the privacy and confidentiality of each learner's documentation status to uphold the rights of undocumented children and foster a secure educational environment.¹¹² Beyond policy provisions, there must be rigorous

¹⁰⁵ Province of the Northern Cape 2023 <http://www.northern-cape.gov.za/index.php/component/content/article?id=1610:all-systems-go-for-online-admission-system>.

¹⁰⁶ Mutandiro 2023 <https://groundup.org.za/article/undocumented-children-struggle-to-find-schools/>.

¹⁰⁷ SECTION27 *et al* 2021 <https://eelawcentre.org.za/wp-content/uploads/final-submission-s27-ccli-lrc-eelc-lhr.pdf> paras 26-31.

¹⁰⁸ Mutandiro 2023 <https://groundup.org.za/article/undocumented-children-struggle-to-find-schools/>; SECTION27 *et al* 2021 <https://eelawcentre.org.za/wp-content/uploads/final-submission-s27-ccli-lrc-eelc-lhr.pdf> paras 26-31.

¹⁰⁹ *Equal Education v Minister of Basic Education* 2021 1 SA 198 (GP) para 87.

¹¹⁰ Mutandiro 2023 <https://groundup.org.za/article/undocumented-children-struggle-to-find-schools/>.

¹¹¹ SECTION27 *et al* 2021 <https://eelawcentre.org.za/wp-content/uploads/final-submission-s27-ccli-lrc-eelc-lhr.pdf> para 29.

¹¹² Article 16(1) of the CRC and s 14 of the *Constitution*.

implementation. Under no circumstances should a learner's documentation status be disclosed to external departments, including law enforcement or immigration authorities, even under the guise of assisting the child. Blessed-Sayah has probed the issues that arise when such information is repurposed for immigration enforcement rather than its intended use, highlighting how this shift infringes upon the child's right to privacy.¹¹³ Joint General Comment 3 from the Committee on the Protection of the Rights of All Migrant Workers and their Families, along with General Comment 22 from the Committee on the Rights of the Child, highlights that the sharing of any child's information between duty bearers and immigration authorities is not aligned with the best interests of the child.

Children's personal data, in particular biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, use and retention of and access to, data. The Committees urge due diligence regarding safeguards in the development and implementation of data systems, and in sharing of data between authorities and/or countries. States parties should implement a "firewall" and prohibit the sharing and use for immigration enforcement of the personal data collected for other purposes, such as protection, remedy, civil registration, and access to services. This is necessary to uphold data protection principles and protect the rights of the child, as stipulated in the Convention on the Rights of the Child.¹¹⁴

Plyler v Doe is a landmark judgment in the United States of America regarding the admission of undocumented children to schools.¹¹⁵ Beiter asserts that the court placed considerable emphasis on the paramount importance of safeguarding privacy in matters concerning undocumented children:

It has been suggested that undocumented children's right of access to public education entailed various procedural rights. Schools should not ask about a student's status. They should not treat one student differently from others on the basis of undocumented status. They should further not make inquiries of a student or parent that might expose the undocumented status of either. Schools are not entitled to contact the immigration authorities about any undocumented student. Should a school inadvertently discover the undocumented status of a student, it may not supply such information to the immigration authorities.¹¹⁶

While the government has made commendable strides in meeting its international obligations by facilitating the admission of undocumented children into schools, if the environment to which these children are exposed lacks adequate security and confidentiality, many parents may be disinclined to disclose their own or their children's undocumented status.

¹¹³ Blessed-Sayah *Children Moving Across Borders* 142-151.

¹¹⁴ *Joint General Comment No 3 of the CMW and No 22 of the CRC in the Context of International Migration: General Principles* UN Doc CMW/C/GC/3-CRC/C/GC/22 (2017) para 17.

¹¹⁵ *Plyler v Doe* 457 US 202 (1982).

¹¹⁶ Beiter *Protection of the Right to Education* 420.

This reluctance could ultimately deter them from enrolling their children in school altogether.

8 Conclusion

South Africa's commitment to inclusive education and its adherence to international obligations are evident in its policies, legislation and court rulings that advocate that schools accommodate all learners. The State has made significant legal strides in promoting inclusivity and prohibiting discrimination within the education system. The litigation initiated by the *Centre for Child Law and 37 Children* has played a pivotal role in clarifying the legal rights of undocumented learners in South Africa.¹¹⁷ While the judgment and order are not without flaws, they represent substantial progress in enhancing access to education for these children, compelling education authorities to take affirmative steps to facilitate their school attendance.¹¹⁸ This case established a crucial legal precedent by recognising documentation status as a potential ground for discrimination under section 9(3) of the *Constitution*, paving the way for future litigation in this area and reinforcing commitments to international legal standards.¹¹⁹ However, the court's role in these matters is inherently limited. The effectiveness of such judgments relies on a government willing to enforce them, an engaged civil society committed to monitoring compliance, and an informed understanding of these rulings among those directly impacted.

The circulars and policies issued by the Department of Basic Education serve as regulatory guidelines rather than binding legislation. While they provide authoritative direction for schools, they do not hold the weight of an Act of Parliament.¹²⁰ While the *BELA Act* has been enacted, the specific sections related to the admission of undocumented children have yet to be implemented. The urgent implementation of section 4 of the *BELA Act*, which facilitates the admission of undocumented children into South African public schools, cannot be overstated. The delay in realising this provision creates a significant gap between the legal recognition of children's rights and their actual realisation. Every day of delay exacerbates the exclusion of undocumented children from classrooms, constituting a violation of their constitutional right to education as guaranteed by section 29(1)(a) of the *Constitution*. These children already face numerous barriers due to their legal status. Further delaying their access to education only compounds their vulnerability. Therefore, the swift and unequivocal implementation of section 4, along with addressing other areas of concern highlighted in the article and establishing robust monitoring and compliance mechanisms, is

¹¹⁷ *Centre for Child Law and 37 Children* para 93.

¹¹⁸ As illustrated by provisions in the recent legal frameworks.

¹¹⁹ *Centre for Child Law and 37 Children* para 93.

¹²⁰ Lewis 2010 *ICT Policy Review* 3.

essential to ensuring that undocumented children receive the education to which they are legally entitled. Without these measures, the constitutional and international obligations will remain unfulfilled, and thousands of undocumented children will continue to be denied their fundamental right to education, exacerbating the existing inequalities and social divisions in South Africa.

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List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
BELA Act	Basic Education Laws Amendment Act 32 of 2024
CCEJ	Consultative Council of European Judges
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
Deakin LR	Deakin Law Review
ICESCR	International Covenant on Economic, Social and Cultural Rights
LDD	Law, Democracy and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
Stats SA	Statistics South Africa
Tul Eur & Civ L F	Tulane European and Civil Law Forum
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund