



Access to Public Schools for Undocumented Children

1. Introduction

Since a circular from the Eastern Cape Education Department in 2016 forbade undocumented children from accessing basic education in that province, a large number of students have been out of school. This marked a departure from standard policy, and robust community activism, and ultimately successful court action spearheaded by civil society, followed. In the meantime, the actions of the Eastern Cape Department were replicated in a number of school districts across the country.

On 30th January this year, the Daily Maverick, acknowledging the success of the advocacy by civil society groups, reported that 200 excluded children had been readmitted to schools in the Eastern Cape.¹ As numbers have emerged in recent days of admissions and readmissions to schools of children hitherto affected by this exclusionary departure from policy, it is now possible to acknowledge a return to constitutionally-rooted practice.

2. Background

The genesis of the problem lay in the fact that, in 2016, the acting Superintendent-General of the Education Department in the Eastern Cape issued a circular stating that henceforth funding (which incorporates infrastructural support as well as things like stationery), staff allocation, and access to nutritional programmes, would be based not on the actual numbers of pupils in a school, as had been the case before, but on the number of children whose valid identity documents had been entered in to the South African Schools and Management Systems database. This quickly led to a number of schools either expelling such students

or not admitting them in the first instance. At the stroke of the pen this disadvantaged very high numbers of learners. In papers before the High Court it was said that, according to the DBE, there could be as many as a million undocumented children across the country.²

It is estimated that probably about 82% of that number are in fact South Africans. This is due in part to the fact that regulations (particularly Regulation 9 of the Births and Deaths Registration Act) around birth registrations in South Africa are such that parents who have lost their South African IDs, or whose documents have expired or been blocked, cannot be issued with birth certificates for their children.

A study conducted by the Scalabrini Center estimated that 39% of children coming into SA from other African countries are undocumented.³ With regard to immigrant children, there is a real danger that the withholding of birth certificates becomes part of a strategy to dissuade immigration, when instead the provision of a birth certificate should be seen as a stand-alone right for the child, regardless of the parents' status.⁴

The December 2019 judgment acknowledged that in most cases the reasons for the children's undocumented status was far beyond their control, and that it was inherently wrong to punish or disadvantage children on the bases of things over which they had no influence.

3. The Department's Argument

The Department of Education averred that, should the principle of free education be established for

illegal and undocumented children, it would open the floodgates for illegal immigration and the abandonment of children in South Africa by foreign parents, in the hope that they would receive a good education funded by South African tax payers. Free education is seen as a strong pull factor increasing illegal entry into the country. The Department also made the point that there is no reciprocal arrangement for South Africans in other countries, especially in Africa, to benefit from those countries' educational systems. Moreover, the additional expenditure on foreign undocumented children would reduce the funding available for South African children.⁵

Of the 37 excluded children whose plight initiated much of the advocacy, a high number were the children of undocumented mothers from Lesotho and South African fathers. To gain documentation through the fathers requires paternity tests from sanctioned practitioners, but each test costs R1400 and there is often great difficulty in accessing the official practitioner for a host of reasons, including distance. It is also well known that in South Africa very many mothers, especially in rural areas, do not give birth in medical facilities but often in remote areas with little opportunity to register the birth. ⁶ The latter problem, while certainly pertaining to a number of the 37 children, is by no means restricted to them.

The Court's ruling that other forms of identification, such as affidavits and sworn statements, are sufficient proof of existence is to be welcomed. ⁷ Hopefully, other documents such as baptism certificates and equivalents in other religious traditions will also be accepted; other commentators have also suggested clinic records.⁸

A number of campaigns were mounted and CPLO, together with its Scalabrini and Jesuit partners and the SACBC Refugee Commission, hosted two Roundtable Discussions on this vexed topic. The core of the advocacy was the point that, quite categorically, section 29 of the Constitution guarantees every child, irrespective of status, the right to basic education. This was also at the heart of the December judgment.

4. The Judgment⁹

The far-reaching judgment by the Judge President of the Eastern Cape High Court, Judge Mbenenge, held that it was unconstitutional to prevent

children from accessing education simply because they had no identity documents. He underlined the importance of education for all children: "Education is a mighty tool in the hands of the possessor. Its efficacy depends largely on the bulwark that surrounds it – the right to education." The judge then referenced an earlier Constitutional Court judgment:

"Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."

Together with this precedent, the judge also relied on key sections of the Constitution:

"[T]he right enshrined in section 29(1)(a), read with section 28(2)(a) of the Constitution, accords 'everyone' a basic right to education, and not a right subjected to a condition that they provide identification documents; (b) the impugned decision infringes section 28(2) of the Constitution which provides that "[a] child's best interests are of paramount importance in every matter concerning the child"; (c) the decision is also discriminatory within the meaning and contemplation of the equality clause and section 5 of the South African Schools Act 84 of 1996, which states that "a public school must admit learners and serve their educational requirements without unfairly discriminating in any way"; and (d) the right to dignity under section 10 of the Constitution."

Within this framework, the Court found, the admissions policies of the Department of Education were invalid and unconstitutional. The policies in contention were clause 15, which required that birth certificates must be furnished; and clause 21, which stated that in the case of illegal or undocumented children there had to be evidence that the parents or care givers were rectifying the situation, and would do so within three months.

The Department of Home Affairs had earlier indicated, in response to a Circular indicating the need for schools to comply with these regulations, that it did not have the capacity to meet demands for rectification in such a limited time frame. The DBE has meanwhile indicated that it is reworking the admission policies in line with a more 'permissive' approach. This includes extending the period for obtaining the necessary documentation from three months to twelve months.¹⁰

The judge also held that

- it is unlawful to exclude undocumented learners from the nutritional programmes
- Sections 39 and 42 of the Immigration Act 13 of 2008 did not prohibit 'illegal' foreign children from accessing education;
- principals could accept alternative proof of identification, such as affidavits wherein the learner is fully identified; and that the
- Education Department may not, on the basis of a lack of documentation, remove children who are already in school.

5. Conclusion

Besides the obvious benefit of having children who should never have been denied access to education back in school, at least two other issues worth noting have emerged. Firstly, we have seen in this case the insidious way in which a creeping assault on constitutional values can emerge and

attempt to change policies. In this instance it would have resulted in changes orchestrated by bureaucrats via departmental circulars. It could potentially, and almost clandestinely, have subverted hard-won policies in the education field. This highlights the need for constant vigilance in the policy domain. It was also noted that, had this attitude of the Department taken more extensive root, it would have fueled the toxic xenophobic attitudes which are a worrying problem in South Africa.

Secondly, the case affirms the critical role of civil society advocacy. This is a clear example of the importance and efficacy of such interventions. It is hoped that the decision of the Court will be rigorously complied with. The first signs are positive, but as we have often seen there is a temptation to revert to prior behavior. This is especially true if it is coloured by narrow political interests. As the judgment points out, it is in the interest of all that sound education is offered as a right to all children.

As Nelson Mandela noted in June 1995, "Our children are the rock on which our future will be built, our greatest asset as a nation. They will be the leaders of our country, the creators of our national wealth who care for and protect our people."¹¹ This is ultimately what is at stake in this issue.

Peter-John Pearson
Director

¹ https://www.dailymaverick.co.za/article/2020-01-30-new-hope-as-court-judgment-opens-the-doors-of-eastern-cape-schools/?utm_medium=email&utm_campaign=Maverick%20Citizen%20Tuesday%204%20Feb%202020&utm_content=Maverick%20Citizen%20Tuesday%204%20Feb%202020+CID_e99ae6531a4b9262d0c7128b1cff9165&utm_source=TouchBasePro&utm_term=In%20Other%20News

² <https://allafrica.com/stories/201909190344.html>

³ <https://www.news24.com/SouthAfrica/News/39-of-migrant-children-entering-sa-run-the-risk-of-being-stateless-research-survey-20190707>

⁴ <https://scalabrini.org.za/the-impact-of-being-an-undocumented-child/>

⁵ <https://www.news24.com/SouthAfrica/News/victory-for-foreigners-as-court-rules-undocumented-children-have-a-right-to-education-20191213>

<https://allafrica.com/stories/201909190344.html>

⁶ <https://allafrica.com/stories/201909190344.html>

⁷ <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAECGHC/2019/126.html&query=phakamisa>

⁸ <https://allafrica.com/stories/201909190344.html>

⁹ <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAECGHC/2019/126.html&query=phakamisa>

¹⁰ <https://allafrica.com/stories/201909190344.html>

¹¹ http://www.mandela.gov.za/mandela_speeches/1995/950603_qunu.htm