


**KNOW  
YOUR  
RIGHTS**

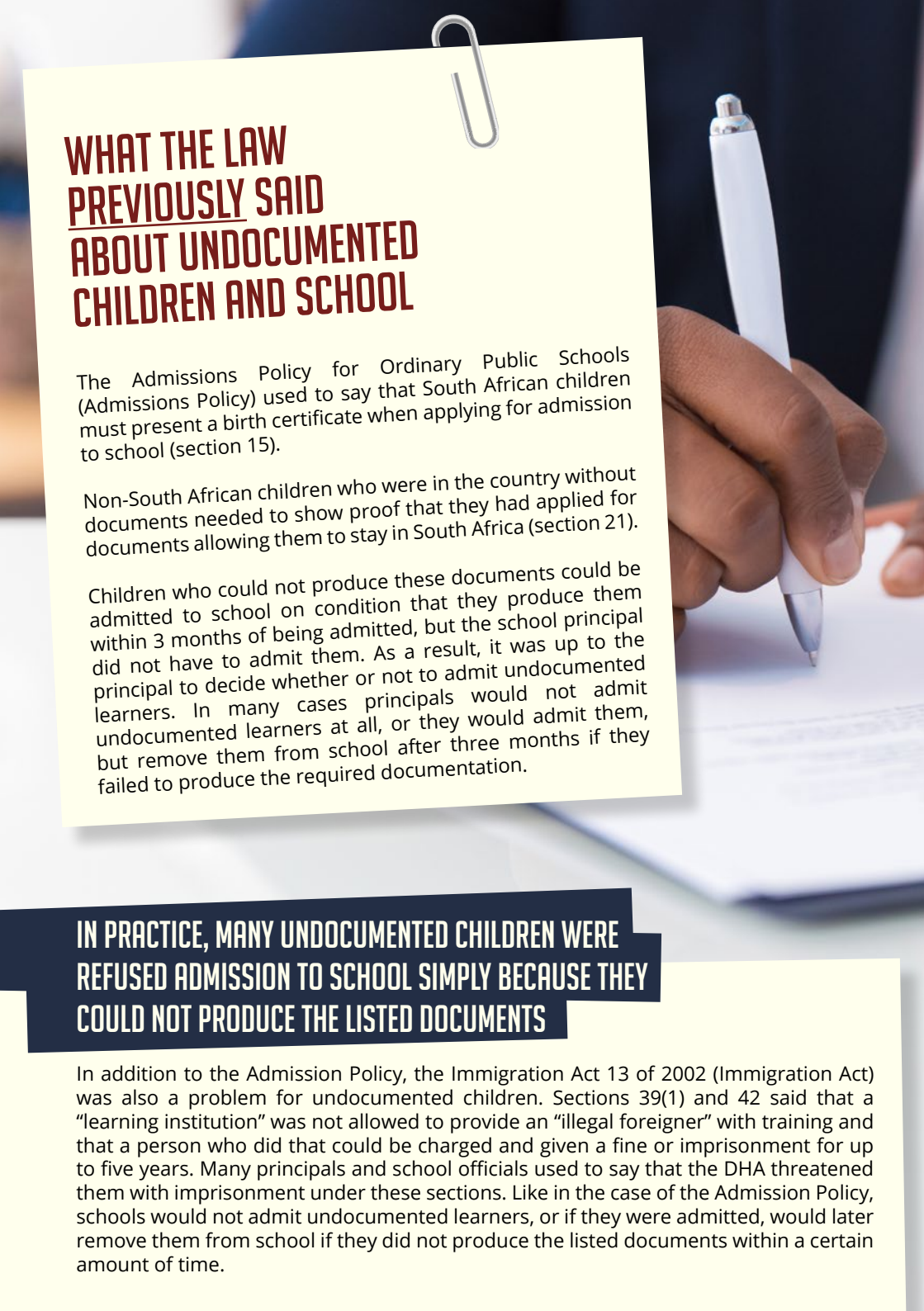
# UNDOCUMENTED LEARNERS: YOUR RIGHT TO EDUCATION



## LEARNERS CAN BE UNDOCUMENTED FOR VARIOUS REASONS. SOME OF THESE REASONS INCLUDE:



- ✘ The child's mother has never had a birth certificate or an identity document. Because the law says a mother must provide her identity document to the Department of Home Affairs to register the birth of her child, she is not allowed to register her child.
- ✘ The Department of Home Affairs (DHA) does not allow fathers who are not married to the mother to register the birth of their child, even though they are required to by law. Sometimes the DHA will even request paternity tests, which are often too expensive for fathers to get.
- ✘ 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 are missing or deceased).
- ✘ Non-South African persons migrate to South Africa for various reasons and bring their children with. They are often unable to obtain documentation that allows them to stay in the country. For example, the DHA unlawfully refuses to document children who are 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

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).

Non-South African 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 them within 3 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 or not 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 three months if they failed to produce the required documentation.

## IN PRACTICE, MANY UNDOCUMENTED CHILDREN WERE REFUSED ADMISSION TO SCHOOL SIMPLY BECAUSE THEY COULD NOT PRODUCE THE LISTED DOCUMENTS

In addition to the Admission Policy, the Immigration Act 13 of 2002 (Immigration Act) 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. Like in the case of the Admission Policy, schools would not admit undocumented learners, or if they were admitted, would later remove them from school if they did not produce the listed documents within a certain amount of time.

## WHAT THE LAW SAYS ABOUT UNDOCUMENTED LEARNERS NOW

In 2019, a group of out-of-school children joined an ongoing court case called *Centre for Child Law & Others / Minister of Basic Education* 2840/2017. They asked the court to declare the Admissions Policy and Immigration Act unconstitutional as it violated their right to a basic education.

The court held that sections 15 and 21 of the Admission Policy were unconstitutional as they violated the right to education, the right to equality, the right to dignity, and a child's best interests.

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### IMPORTANT THINGS THE COURT SAID:

- Sections 39 and 42 of the Immigration Act referred to "learning institutions". The court said that meant *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 Education Department is acting unconstitutionally in not permitting children to continue receiving education in public schools just because they don't have identification documents.
- The right to education extends to "**everyone**" within the boundaries of South Africa; the nationality or immigration status doesn't matter.

### 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. A more neutral term to use is "irregular migrant".

## DEPARTMENTAL CIRCULAR 1 OF 2020

After the judgment was handed down the Department of Basic Education (DBE) issued a Circular to many education stakeholders including heads of provincial education departments, schools and school principals.

The Circular told everyone what the judgment said and informed them to follow it.

**A Circular is a notice issued by the DBE telling stakeholders of developments that they should be aware of.**

## WHAT THIS MEANS FOR ME, AN UNDOCUMENTED LEARNER

- If you approach a school, you cannot be turned away because you don't have documents.
- If you are already in school, you cannot be removed because you don't have documents.
- If you don't have documents, your school must accept a different proof of identity, such as an affidavit. Even if you don't know your exact date of birth, you can write as much as you do know in your affidavit.

## MATRIC LEARNERS: DO YOU KNOW?

- The DBE has said that you must be allowed to register to write matric examinations even if you don't have documents.
- Umalusi must give you your National Senior Certificate even if you don't 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."