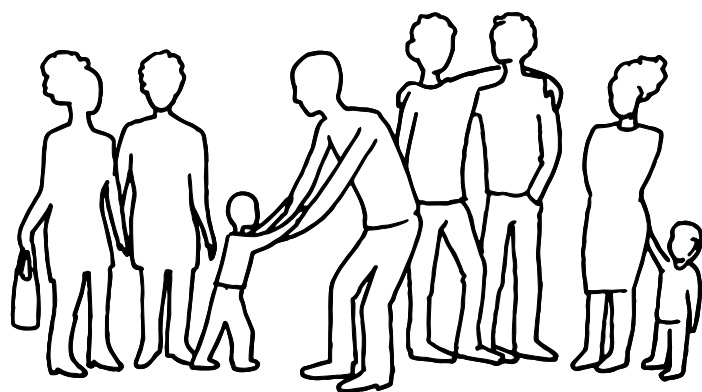


CHAPTER 7
**THE RIGHTS
OF REFUGEES
AND MIGRANT
LEARNERS**

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This chapter is an update of an earlier version by Kaajal Ramjathan-Keogh





OVERVIEW

Global forced displacement increased to record-high numbers in 2020. By the end of the year, 82.4 million individuals had been forcibly displaced worldwide as a result of persecution, conflict, generalised violence, or human rights violations. This is 11.2 million more than in 2019. By the end of 2020, about 4.1 million people were waiting for a decision on their application for asylum, with 1.1 million new asylum-seeker claims being submitted in 2020 alone.

In South Africa, the number of refugees has been declining steadily, with only approximately 78 395 refugees being hosted in 2020. This is a decline of nearly 15 percent since 2018. Although there has also been a decline in the number of asylum-seeker applications lodged each year in South Africa (only 18 104 applications were processed in 2018, compared to 157 204 in 2009), there are still many asylum applications that have not been finalised. This is due to the serious backlogs in South Africa's refugee status determination procedure, with around 147 794 cases still to be determined by the Refugee Appeal Authority in 2020.

In January 2021, the United Nations High Commissioner for Refugees (UNHCR)

and South Africa's Department of Home Affairs launched a project to clear the backlog in four years. This is welcomed, as the Auditor-General had estimated that working at their current pace, it would have taken the Refugee Appeal Authority 68 years to clear the backlog – without taking on any new cases.

Globally, asylum protection is intended to protect those who have been uprooted from their homes. In South Africa, however, poor administration of the asylum process leaves many asylum seekers without the essential documentation to access basic services..

In 2019, according to the United Nations Refugee Agency, about 3.7 million refugee children globally were out of school, with only 24 percent of

refugee children accessing secondary education. Lack of documentation and irregular migration status have been identified as two of the main driving forces behind this phenomenon. This particularly affects girls, who are almost 2.5 times more likely to be out of school in countries affected by conflict or situations of displacement.

Very few people sought asylum and protection in South Africa before 1994. The first large-scale movement into South Africa was the movement of Mozambicans in 2000 following catastrophic flooding in Mozambique, when more than 220 000 people were displaced. After the birth of democracy, South Africa drafted its Refugees Act in 1998, and it became operational in 2000.

WHY DO PEOPLE MIGRATE?

Some people choose to migrate voluntarily; for example, someone who moves to another country for better career opportunities.

Some people are forced to migrate because the circumstances in which they live have become unbearable; for instance, someone who moves due to war or famine.

A refugee is someone who has been forced to leave their home and does not have a new home to go to. Often, refugees do not carry many possessions with them, and do not have a clear idea of where they can find protection. Due to the circumstances in their countries of birth, or the conditions under which they leave their homes, they may enter their new countries without any documentation (such as a birth certificate, passport or permit) to verify their identity. Section 21(4) of the Refugees Act regulates the entry into South Africa (and presence of) asylum seekers without documents.

PUSH AND PULL FACTORS FOR MIGRATION

People have moved from their countries of origin for centuries, for all sorts of reasons. Some are drawn to new places by 'pull' factors; others find it difficult to remain where they are, and migrate because of 'push' factors. Migration usually happens as a result of a combination of these push and pull factors.

Push factors are the reasons why people leave an area. They include:

- Lack of basic services
- Lack of safety/high crime rate
- Crop failure
- To escape from natural disasters such as drought and flooding
- To escape poverty
- To escape conflict, violence, and war
- To escape discrimination based on sex, gender, ethnicity, sexual orientation, race, religion, or other discriminatory grounds.

Pull factors are the reasons people move to a particular area. They include:

- For jobs, business, and educational opportunities
- Better services, such as healthcare and education
- Good climate
- Safety/less crime
- Political stability
- More fertile land
- Lower risk from natural hazards
- To reunite with family members.

In 2020, the top five 'refugee-producing' countries were Syria, Venezuela, Afghanistan, South Sudan and Myanmar. Refugees from Zimbabwe, Ethiopia, Somalia and the Democratic Republic of Congo constituted most of South Africa's refugees in 2020. South Africa does not host as many refugees as other African countries, with statistics indicating that in 2020, it was not among the ten African countries hosting the most refugees.

WHY PEOPLE MIGRATE

People migrate for many different reasons. These reasons may be classified as **economic, social, political or environmental**.

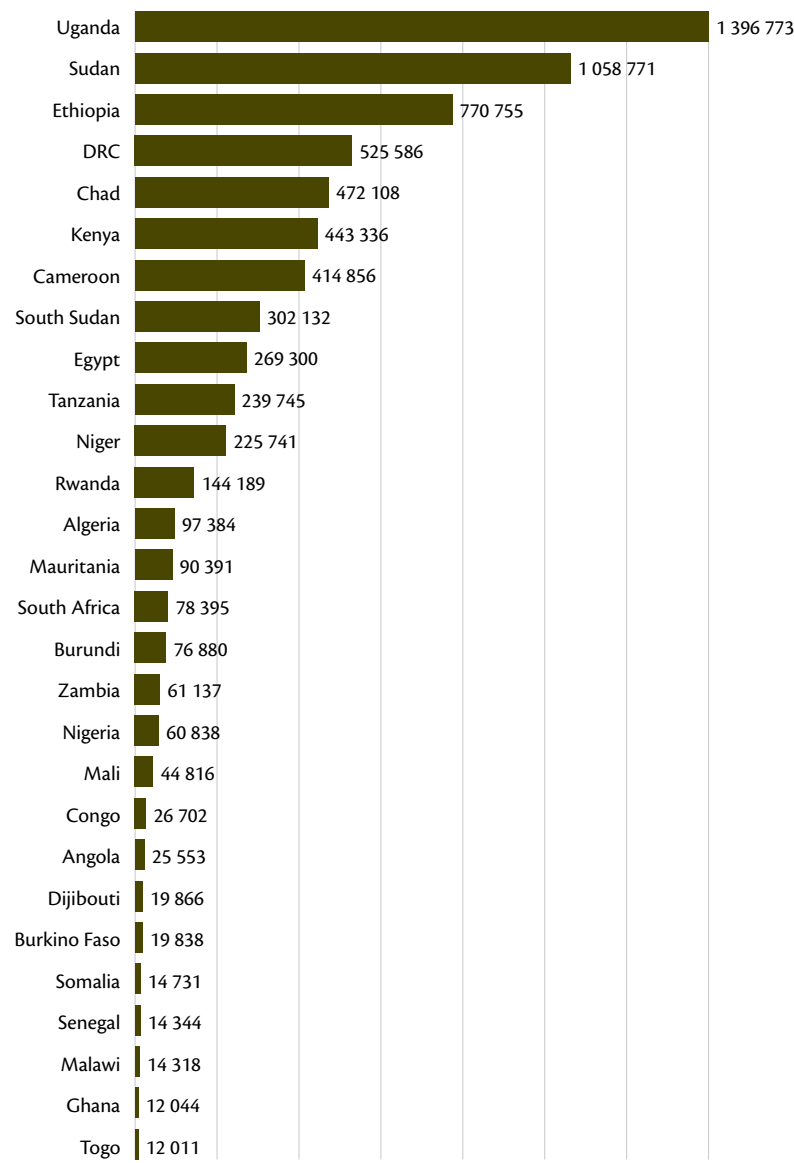
- **economic migration:** moving to find work and better economic opportunities
- **social migration:** moving somewhere to be closer to family or friends, or for a better quality of life, where this is not forced by politics, the economy or the environment
- **political migration:** moving to escape political persecution – persecution based on the violation of fundamental human rights such as race, sex, gender or sexual orientation (to name a few) – or war
- **environmental migration:** causes of migration include natural disasters such as flooding, drought and earthquakes, or climate change

CONFLICTS
THAT BROUGHT
REFUGEES TO
SOUTH AFRICA

- The Somali civil war, spanning more than 20 years since the early 1980s, grew out of resistance to the Siad Barre regime and evolved into clan-based conflicts, invasions, and more recently, resistance to Al-Shabaab. Peace and stability remain tenuous.
- Burundi (1993): Genocide and mass killings caused displacements and migration. Unrest in Burundi flared up again in 2015, this time related to the ruling party announcing that the president would seek a third term in office. This led to mass displacement and the deterioration of the security situation, with more than 381 000 Burundians living as refugees in other African countries, including Tanzania, Rwanda, the Democratic Republic of the Congo, Uganda, Kenya, Zambia and South Africa.
- The Rwandan genocide (April-July 1994) was a genocidal mass slaughter of Tutsi in Rwanda by members of the Hutu majority government.
- The First Congo War (1996-1997) was a foreign invasion of what was then Zaire, led by Rwanda, which replaced dictator Mobutu Sésé Seko with the rebel leader Laurent Kabila.
- The Second Congo War (1998-2003) in the Democratic Republic of the Congo was driven by the trade in 'conflict' minerals (any mineral or its derivative determined to be financing conflict in the Democratic Republic of the Congo, or any adjoining country). Although a peace agreement was signed in 2002, violence and instability continued in many regions of the country, especially in the eastern region.
- The continued conflict in South Sudan (2013-present) has resulted in the biggest refugee crisis in Africa, with nearly 2.3 million South Sudanese having fled to neighbouring countries and 1.87 million being internally displaced. The majority (over 80 percent) are women and children.

Every day, all over the world, people make the most difficult decision of their lives: to leave their homes in search of a better life. Others are forced to flee due to conflict, wars and persecution.

Figure 6: African countries with the most refugees as of June 2020
Source: UNHCR © Statista 2021



LAW AND
POLICY

OVERVIEW OF REFUGEE
AND IMMIGRATION LAWS

Every day, all over the world, people make the most difficult decision of their lives: to leave their homes in search of a better life. Others are forced to flee due to conflict, wars and persecution.

South African refugee policy is regulated by the Refugees Act, which allows refugees to 'seek' and 'enjoy' asylum.

South Africa subscribes to an urban refugee policy, which is a policy that dictates that refugees are not confined to refugee camps, but instead are able to self-settle and integrate into local communities. There is also no automatic detention of asylum seekers or refugees. This, along with what is perceived to be a stable economy, can make South Africa an appealing place to seek asylum. However, there are proposed changes to the Refugee Act which if passed in their current form could have a serious impact on asylum seekers' and refugees' right to free movement and access to certain other rights.

In Africa, the right to seek and enjoy asylum is largely respected, with millions of refugees having found in exile the safety and protection they have lost at home. The generosity of hosting countries in Africa has been outstanding.

But in recent years some core values of asylum protection have been challenged, with instances of *refoulement* (*refoulement* is the forced

return of refugees or asylum seekers to a country where they are liable to be subjected to persecution).

In southern Africa, and especially in South Africa, an increase in mixed migratory movements has also led to growing hostility towards refugees as well as xenophobia, putting pressure on asylum seekers, host countries and protection space. 'Mixed migration' refers to cross-border migration of various groups, encompassing economic migrants, asylum seekers, refugees and any other type of migrants, as opposed to one category of migrant movement.

REFUGEE LAWS

Refugees are a special category of migrant who seek and are entitled to international protection. South Africa's refugee policy currently includes the basic principles of refugee protection, including freedom of movement, the right to work and study, and access to basic social services.

However, there are often many practical barriers to fully accessing these rights. Further, the current socio-economic environment – high unemployment, poor service delivery, and economic inequality – has strained relations between refugees, asylum seekers and host populations. The emphasis that is placed on non-nationals as a cause of this is misplaced.

INTERNATIONAL
ASYLUM
PROTECTION LAWS

Regardless of how they arrive in a country (for instance, irregularly or without documentation) and for what purpose, the rights of migrants, refugees and asylum seekers are protected by international law:

- The Universal Declaration of Human Rights (Article 14) states that everyone has the right to seek and enjoy asylum from persecution in other countries.
- The 1951 UN Refugee Convention protects refugees from being returned to countries where they risk persecution.

WHO IS A
REFUGEE?

The United Nations Refugee Convention states that a refugee is someone who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country". The Convention Governing Specific Aspects of Refugee Problems in Africa (known as the 1969 OAU Convention) provides an additional ground for refugee status, which was included as a result of the United Nations Refugee Convention excluding some of the reasons that Africans become refugees. The additional ground states that "the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either whole or part of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality". The addition of 'foreign domination' as a factor which could make one a refugee was to enable persons escaping apartheid or other colonial regimes to claim refugee status.



WHO IS AN ASYLUM SEEKER?

An asylum seeker is someone seeking international protection, but who has not yet been granted formal refugee status. However, the term 'asylum seeker' is often used as a catch-all term for both refugees and asylum seekers.

WHO IS A MIGRANT?

'Migrant' is an umbrella term for any person who has moved away from the place where they were born. This could refer to in-country migration or the crossing of international borders. A migrant may be either documented or undocumented. The term includes refugees and asylum seekers in its scope.

DUTIES AND RESPONSIBILITIES OF REFUGEES

Article 2 of the Refugee Convention states that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations, as well as to measures taken for the maintenance of public order.

South Africa's laws allow for refugees to be able to access basic services such as health and education. These laws also allow for local integration. In practice, however, local integration does not always work very well.

Failed or rejected asylum seekers may be returned to their country of origin. These are persons for whom a final decision has been made to refuse asylum protection. If they are then unable to regularise their status via the Immigration Act, they may be declared an 'illegal foreigner' (a lamentable term used under the Immigration Act) and be deported.

Dependants of asylum seekers and refugees are able to access the same status as their parents/caregivers if they are able to prove they are dependent.

IMMIGRATION LAWS

Immigration laws regulate the entry, residence and departure of non-nationals.

Nationals of certain countries, such as the Southern African Development Community (SADC) countries (for example,

Botswana and Zimbabwe), are permitted to enter South Africa for a limited short-term period (up to a maximum of thirty to ninety days) without needing to apply for a visa in advance.

All other non-nationals must have a visa issued to them before arriving in South Africa. This excludes people who want to apply for asylum. An asylum applicant may arrive in a country without having obtained a visa in advance and is still entitled to apply for asylum.

However, it must be noted that in general, on their arrival in South Africa, asylum applicants are issued with a five-day asylum transit visa under the Immigration Act. In addition, the Refugees Act does make provision for an asylum applicant to be interviewed to ascertain if there are valid reasons for not having an asylum transit visa. Migration laws are complex, and differ from country to country. An asylum applicant may not be prosecuted for not having a valid passport in their possession. Asylum seekers and refugees may also not be subjected to *refoulement*.

WHO IS A DEPENDANT?

In relation to child dependants, the Refugees Act appears to limit the definition of 'dependant' to include only unmarried minor biological children who are younger than 18 years old. On the face of it, the definition therefore excludes children who are informally in the care of a refugee or asylum seeker – which is the case for many asylum-seeking children who are separated from their parents on their flight to South Africa and end up being informally cared for by others (commonly referred to as 'separated children').

In order to ensure that separated children are catered for under the Refugees Act and are in a position to apply for and obtain permits in a manner appropriate to their circumstances, the *Mubake* decision held that separated children should be included under the definition of 'dependant' in the Refugees Act. Accordingly, in practice separated children should be issued with asylum-seeker permits under the same file and file number as their caregivers.

An application to seek leave to appeal the *Mubake* decision was made by the Department of Home Affairs, but it was not set down or argued within the prescribed time frames and has therefore fallen away. Accordingly, the *Mubake* decision still stands, and separated children must be recognised as dependants of their caregivers.



WHO ARE UNACCOMPANIED AND SEPARATED CHILDREN?

The United Nations Committee on the Rights of the Child's General Comment on the Treatment of Unaccompanied and Separated Children Outside of their Country of Origin (CRG/GC/200516) defines 'unaccompanied child' as a child who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or by custom, is responsible for doing so. As mentioned, a 'separated child' is defined as a child who has been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. The term may therefore include children accompanied by other adult family members.

As mentioned, separated children have a mechanism within the Refugees Act through which to obtain refugee status – as dependants. It is important also to mention the route that unaccompanied children must take in order to obtain refugee status where they demonstrate a claim to refugee status. Section 155 of the Children's Act states that an unaccompanied child must be designated a social worker. The social worker is tasked with doing an investigation, which should include an inquiry into whether or not the child has a claim to refugee status. The social worker is then to accompany the child to make an application for refugee status. It is important to note that not all unaccompanied children are refugees, and only those that are can be assisted to apply for refugee status in the manner described. Regrettably, unaccompanied minor children who are **not** refugees do not have as clear a path to documentation status.

HOW DO OTHER UNACCOMPANIED MINORS APPLY FOR DOCUMENTATION?

As mentioned, unaccompanied children must be designated a social worker who will investigate their case, make recommendations regarding the child, and bring the child before the children's court.

The social worker's investigation includes a finding regarding whether the child has a claim to refugee status. If they have a claim to refugee status, they must follow the process outlined earlier. If they do not, the social worker, together with international social services, will do an investigation into whether or not the child can be repatriated to their country of origin. They will present their findings to the children's court. If they can be repatriated, and the children's court agrees it is safe to do so and in the child's best interests, the child can be repatriated. If it is not possible or safe to repatriate the child for whatever reason, and it is in their best interests to remain in South Africa, then the children's court tends to make a finding that the child is to remain in South Africa. In these instances, the only documentation the child will have is the children's court order. On the basis of these findings, many children remain in South Africa for many years until they are adults, becoming integrated here and losing attachment to their country of origin.

The only option these children have is to apply for permanent residence under Section 31(2)(b) of the Immigration Act. However, many social workers and magistrates are unaware of this provision, and do not make any effort to apply for documentation for the child under it. The section gives the Minister of Home Affairs discretion to grant permanent residence to persons who can demonstrate that special circumstances exist that would justify the granting of permanent residence.

Sometimes the unaccompanied child's integration into South Africa, together with the fact that they cannot be repatriated to their country, is viewed by the Minister as a special circumstance. However, this is not a route through which an unaccompanied child can be guaranteed permanent residence, as it is discretionary; there are no fixed criteria to meet which would guarantee the granting of permanent residence, and there are also no guidelines or policies guiding the Minister's power.



INTERNATIONAL INSTRUMENTS THAT PROHIBIT DISCRIMINATION

There are many other international instruments that expressly prohibit discrimination in education and require positive measures to promote equality. These include:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Convention on Economic, Social and Cultural Rights (ICESCR)
- The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)
- The UNESCO Convention Against Discrimination in Education
- The Convention on the Rights of the Child (CRC)
- The Convention on the Rights of People with Disabilities (CRPD)

PROPOSED CHANGES TO THE REFUGEES ACT

The Refugee Amendment Act 11 of 2017 and the Regulations that came into force on 1 January 2020 make some far-reaching changes to the Refugees Act, which are intended to discourage non-genuine asylum applicants. Of particular concern is the deviation from the urban refugee policy, which has been the cornerstone of South African refugee protection since its inception in 1993.

LIMITED PRESCRIBED APPLICATION PERIOD

Section 13 of the Refugee Amendment Act (amending Section 21 (a) of the principal act) provides that an application for asylum must be made in person, in accordance with the prescribed procedures, within five days of entry into the country. Individuals who fail to lodge their claims within the prescribed period will be excluded from refugee status. This timeframe has proved problematic as it is often impossible for asylum-seekers to access a Refugees Reception Office in such a short amount of time.

The South African administrative process for granting asylum is difficult, and subject to serious delays. It is also plagued by corruption. This results in asylum seekers remaining in limbo for long periods.

THE RIGHT TO STUDY

The issue of the right to study (and work) has been pronounced on by

the Supreme Court of South Africa in *Minister of Home Affairs v Watchenuka and others* (2004). The case concerned a prohibition on the rights of asylum seekers to work and study while they were waiting for their asylum applications to be adjudicated and finalised. The court found that the Minister of Home Affairs could not prohibit asylum seekers from holding the right to work and study.

The power to determine conditions of work and study for asylum seekers is vested in the Standing Committee for Refugee Affairs. The Standing Committee has made a general prohibition of employment and study for the first 180 days after a permit has been issued. It was held that this blanket prohibition conflicted with the Bill of Rights. It was accordingly found to be unlawful and was set aside. The court held that the freedom to engage in productive work is an important component of human dignity and that an unjustifiable violation of section 10 occurred when the employment that was being restricted was the only reasonable means for that person's support.

The court went on to say that the freedom to study is also inherent in human dignity, because without it, a person is deprived of the potential for human fulfilment. It is expressly protected by Section 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education.

The court held that human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human, and they are therefore protected by the South African Bill of Rights.

INTERNATIONAL LAW ON THE RIGHT TO EDUCATION

Article 22 of the Refugee Convention is very clear: refugees must receive the same basic education as nationals.

ACCESS TO EDUCATION FOR REFUGEES, ASYLUM SEEKERS AND MIGRANTS

In South Africa, basic education is available to **everyone**. This is guaranteed in the Constitution, which under Section 29(1) states that **everyone** has the right to a basic education, including adult basic education.

The education system is further regulated by the South African Schools Act and regulations.

Section 3(1) states that it is compulsory for every parent to ensure that every learner attends school from the age of seven years to the age of seventeen years or the ninth grade, whichever comes first. Section 5(1) of the SA Schools Act regulates admission to public schools, and holds that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

NON-DISCRIMINATION IS GUARANTEED IN THE ADMISSIONS POLICY FOR ORDINARY SCHOOLS

- Section 7 of the Admission Policy for Ordinary Schools states that the policy is determined by the governing body of the school in terms of Section 5(5) of the South African Schools Act. The policy must be consistent with the Constitution and the SA Schools Act, as well as the applicable provincial law.
- Section 9 of the policy states that the admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission.
- The Admission Policy for Ordinary Public Schools is currently under review, and the Department of Basic Education published a draft policy for comment in early 2021. The draft policy makes provision for learners who are not South African citizens to be admitted to schools and sets out the documents that must be submitted to the school. In its current form it states that non-citizens must submit a birth certificate upon application. This can be problematic, as refugees and asylum-seekers often lose their birth certificates or have never received them. The draft policy also provides for applications from undocumented learners, and is seemingly an attempt to give effect to the *Centre for Child Law* judgment, which is dealt with below. However, unlike the judgment, the policy 'advises' schools to admit learners even if they do not produce documentation. This is problematic, as it suggests that schools have an option to admit the learners rather than being under an obligation to do so, as the judgment directed the admission of undocumented learners into school. While the policy is still in its draft form and it is unclear when it will come into force, it is problematic and unlawful that despite the clear direction by the court on the rights of undocumented learners in relation to education, the DBE has not compelled the admission of undocumented learners to schools.
- The Admission Policy stipulates that a school governing body (SGB) may determine the admission policy of a school. That policy must comply with the Schools Act and Constitution. The Admission Policy stipulates that the admission policy of a school must not discriminate unfairly in any way against an applicant for admission.
- If a learner is refused admission, the head of the provincial education department (through the principal of the school) must inform the parent of the refusal, and the reasons for the refusal, in writing. In terms of Section 5(9) of the Schools Act, a child has the right to appeal against that decision to the MEC.

BARRIERS TO LEARNING

Both international and domestic law guarantee the right to basic education to **all** learners. The State is obliged to provide basic education to all children, irrespective of nationality, documentation status, or ability to pay for school fees. Unfortunately, this right is not being uniformly respected and promoted in South Africa. There are still many refugee and migrant learners who face significant barriers to learning.

ADMISSION BARRIERS

Section 5 of the South African Schools Act requires students to be admitted to public schools without any form of unfair discrimination. This section goes on to say that the governing body of a public school determines its admission policy subject to the Schools Act, the Constitution, and applicable provincial law.

Unfortunately, many refugee or migrant learners are refused admission to ordinary public schools because they are not able to furnish documents such as birth certificates or immunisation cards. Sometimes it is not possible for a parent or child to ensure that all their documentation is in order before they flee from their home country. When schools require parents or learners to have

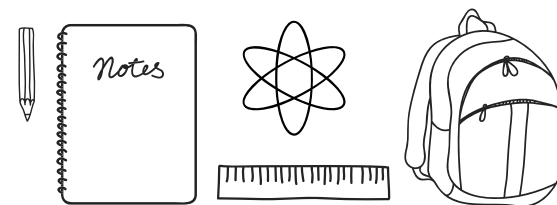
all their documents in their possession, it creates obstacles for these learners.

In 2019, in the case of *Centre for Child Law and Others v Minister of Basic Education*, the Makhanda High Court found that the right to education in the Constitution extends to ‘everyone’, including non-national children who are undocumented. This finding is groundbreaking. The court held that refusing access to education to children who are undocumented violates their rights to education, dignity and equality. The court found that no child can be denied admission to a school or excluded from a school for failing to provide the school with a birth certificate, valid passport or permit. In cases where children do not have these documents, the school must

accept alternative proof of identity, such as an affidavit or a sworn statement. The court also declared Sections 15 and 19 of the Admission Policy for Ordinary Public Schools unconstitutional, as those sections provided that undocumented South African and non-national children were to provide documentation to the school within three months after admission or they could be removed from school.

The case also found that Sections 39 and 42 of the Immigration Act 13 of 2002 do not prohibit the admission of ‘illegal foreign children’ into schools, and do not prohibit the provision of education to ‘illegal foreign children’. Like the finding that ‘everyone’ includes undocumented South African and non-national children, this was also an important finding, as it means

To the extent that the term ‘illegal foreigner’ is employed in this Handbook, it is only in order to reflect or quote the exact wording of the Immigration Act. This term is not only outdated but also lamentable, as it is one of the driving forces of the ongoing xenophobia and violence that non-nationals continue to face, specifically those from African countries.



that schools could no longer be found to have acted unlawfully and be fined for providing education to learners who are undocumented. This was previously the case under the Immigration Act.

To the extent that the term ‘illegal foreigner’ is employed in this Handbook, it is only in order to reflect or quote the exact wording of the Immigration Act. This term is not only outdated but also lamentable, as it is one of the driving forces of the ongoing xenophobia and violence that non-nationals continue to face, specifically those from African countries.

Following on from this judgment, in January 2020 the Department of Basic Education issued Circular 1 of 2020. It advises all public schools across South Africa to follow the judgment in *Centre for Child Law*. The Circular makes provision for schools to accept alternative proof of identification, such as a sworn statement or an affidavit, and advises schools that it is unlawful to exclude a child if they are undocumented. This case and the subsequent Circular have effectively secured the right to education for undocumented non-national children. However, in practice children are still routinely excluded from schools for failing to provide documentation. As a result, in September 2021 the Circular was re-issued by the national Department of Basic Education to the provincial

departments, with an instruction that requesting further documentation over and above a sworn statement or affidavit goes against the judgment. Whether this will have an effect on the admission of undocumented learners is yet to be seen.

Further issues for undocumented learners include the move to an online application process in Gauteng and the Western Cape, which makes it difficult for children without documentation to apply, as the system does not allow for it. There are also reports of undocumented learners being prevented from registering for and writing their matric examinations if they do not have a birth certificate, passport or permit.

This is entirely irrational as it means that learners cannot complete their education and obtain recognition for it in the form of a matric certificate, despite the fact that the *Centre for Child Law* case guarantees them the right to a basic education. The legal principles laid down in this judgment must therefore extend throughout a learner’s entire educational career, including registration for matric examinations and receiving matric results.

WHAT THE LAW SAYS ABOUT ADMISSIONS

According to Section 39 of the National Education Policy Act, the governing

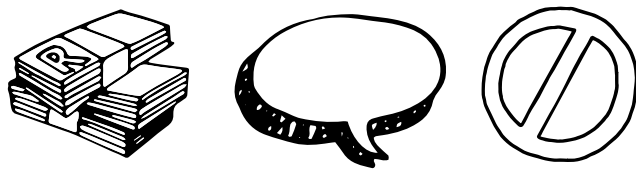
body of a school must inform all parents of learners admitted to a school of their rights and obligations in terms of the South African Schools Act and any applicable provincial law.

Parents must specifically be informed about their rights and obligations in respect of the governance and affairs of the school, including the process of deciding the school budget, any decision of a parent meeting relating to school fees, and the Code of Conduct for learners.

Section 43 of the National Education Policy Act further sets out the rights of appeal: any learner or parent who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council, in terms of Section 5(9) of the Schools Act.

Section 5(9) of the Schools Act states that any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council.

If a learner is refused admission, the parent or learner must ask for a written explanation from the provincial department, through the school principal. If the parent or learner is not happy with the reasons given for the decision, they must lodge a written appeal to the MEC for Education in the province.



FINANCIAL BARRIERS

SCHOOL FEES AND EXEMPTION

A school fee is an agreed amount of money that parents pay to schools, aimed at improving the quality of education of the learners. School fees may not include registration fees, administration or other fees. The school may not charge further fees for additional subjects chosen by learners from the school programme. See Chapter 8 for more information on school fees.

There are often additional financial pressures on refugee or asylum-seeker parents because they struggle to access employment. Schools sometimes demand payment in return for admitting a learner who is not a South African citizen, or ask for additional financial contributions from these parents. These financial obstacles can make it very difficult for refugees or asylum seekers who are already under financial stress to access schooling. They are also unlawful, as the Schools Act does not make a distinction between non-nationals and citizens.

WHAT THE LAW SAYS ABOUT SCHOOL FEES

Section 5 (1) (a) of the South African Schools Act of 1996 states that

no learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body.

Parents who are unable to pay school fees can apply for a fee exemption. Parents will need to submit proof of their monthly income and expenses in order to qualify for an exemption. This can be done at any public school. This process is the same for asylum seekers, refugees and citizens. If your application for an exception is denied, you can appeal the decision with the Head of Department in the province, who must explain to you the reason for the decision.

A learner cannot be excluded from participation in any official school programmes due to non-payment of school fees by the parent. A school may also not retain a learner's report

because the parent cannot afford to pay school fees. Lastly, a learner may not be excluded from school if they do not have the ability to pay for a school uniform or books.

LANGUAGE BARRIERS

As discussed earlier in the chapter, asylum seekers and refugees may come from a variety of different places, and do not always speak the language of the place at which they end up. This can be especially difficult for children, if they are being taught in a language they do not understand. Schools might be hesitant to accept a learner who does not speak the language of instruction.

WHAT THE LAW SAYS ABOUT LANGUAGE

A child may not be turned away from a school if they do not speak the language of instruction. The Department of Basic Education is obliged to find a school in which to place the child.

If the child is unable to speak a South African language, it may be helpful to find a school that offers a bridging course. Not many schools do, as it is not part of official school policy to offer a bridging course.

An alternative is to place the child in an environment where they are able to learn a local-school language before they are placed into a formal school environment. Our Constitution, in Section 29(2), says that

everyone has the right to receive education in the language of their choice in public educational institutions, where that is reasonably practical.

OTHER BARRIERS

REQUIREMENT FOR SCHOOL REPORTS

Some schools may turn away children who do not have previous school reports. This requirement is only for the purpose of placing the child into the correct grade. If no reports are available, the school can carry out an assessment in order to place the child into the correct grade. They may also accept an affidavit from the parent or caregiver.

FAILURE TO RELEASE MATRIC EXAM RESULTS

Sometimes schools tell learners that they will not release matric exam results to learners who do not have passports or study permits. This is unlawful.

You are entitled to engage in all school-related activities, including writing examinations and receiving the results of those examinations, even if you are unable to prove that you are attempting to obtain your documentation.

UNDOCUMENTED MIGRANTS, AND THE ARREST AND DETENTION OF MINOR LEARNERS

Children may not be detained for being in the country illegally.

In a High Court case, *Centre for Child Law v Minister of Home Affairs*, the court said that the detention of children (for immigration reasons) was unlawful. The court said that as a vulnerable group, children are entitled to protection under the Children's Act, regardless of whether they are documented or undocumented. This includes access to places of safety. The court emphasised that Section 28(1)(g) of the Constitution states that every child has the right not to be detained except as a measure of last resort; and in such a case, only for the shortest appropriate period of time. The child also has the right to be kept separately from detained persons over the age of 18 years, and to be treated in a manner and kept in conditions that take into account the child's age.

CENTRE FOR CHILD LAW AND ANOTHER VS NSFAS AND ANOTHER

In December 2020, an application was launched that challenged the National Student Financial Aid Scheme's (NSFAS) guidelines. The guidelines stated that only South African citizens were entitled to apply for funding from NSFAS to pursue higher education. The second applicant, M, the person for whom the case was brought, was a permanent resident at the time that she wished to access higher education. She had been granted permanent residence by the Minister of Home Affairs under a section in the Immigration Act that allowed the

Minister to grant permanent residence to persons based on their unique and special circumstances as former unaccompanied children. Her specific circumstances were that she had fled Burundi as a child, was not assisted by the national child and youth care system to apply for an appropriate permit at the correct time, and found herself living here for years without adequate assistance from that system; and by the time she sought legal assistance, she could not return to her country of origin – but was also ineligible for any permit other than a special circumstances one.

Having been granted permanent residence on the basis of her special circumstances, she then attempted to apply for NSFAS funding to take up an offer to study at the University of Johannesburg. However her decision was not considered on its merits; she was simply advised that she could not, due to her status as a permanent resident (as opposed to being a citizen). That decision was challenged in the North Gauteng High Court – first in order to obtain funding for M, and second to ensure that NSFAS assessed applications in a manner that takes into account the entire context and all facts and ensures that the right to further education is realised. The case was settled out of court and the guidelines have been revised to state that

[r]ecipients of the DHET Bursary Scheme must be South African citizens or permanent residents and must have a valid South African National ID number.

This case is especially important for migrant learners who are eligible for permanent residence or who are permanent residents, particularly for grade 11 and matric learners who wish to plan their education beyond high school.

WHERE CAN FOREIGN LEARNERS AND PARENTS OF LEARNERS COMPLAIN ABOUT UNFAIR TREATMENT AND XENOPHOBIA RELATING TO ACCESS TO EDUCATION?

- Department of Education (Provincial and National levels): Department of Basic Education toll-free hotline 0800 202 933
- Children’s Institute, University of Cape Town
- Equal Education Law Centre
- Refugee Rights Clinic, University of Cape Town
- Consortium for Refugees and Migrants in SA
- Nelson Mandela University Refugee Rights Centre
- SECTION27
- Lawyers for Human Rights
- Legal Resources Centre
- SA Human Rights Commission
- Centre for Child Law

CONCLUSION

Education is a gateway right that allows learners to fulfil their potential and contribute meaningfully to society. In the context of increased global insecurity, the number of migrant learners will continue to grow. This means that countries such as South Africa will have to ensure that these learners are accommodated in schools, so that their right to basic education is realised and they are given the best chance of living dignified lives.

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CASES

Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG) (12 December 2019).

Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T).

Minister of Home Affairs v Watchenuka 2004 1 All SA 21 (SCA).

Mubake and Others v Minister of Home Affairs and Others 2016 (2) SA 220 (GP) (9 July 2015).

LEGISLATION, POLICY AND GUIDELINES

Constitution of the Republic of South Africa 1996.

Department of Basic Education ‘Admission Policy for Ordinary Public Schools’, 1998.

National Education Policy Act 27 of 1996.

Refugees Act 130 of 1998.

South African Schools Act No 84 of 1996.

INTERNATIONAL AND REGIONAL INSTRUMENTS

Convention for the Elimination of all forms of Discrimination Against Women (CEDAW), 1979.

Convention Relating to the Status of Refugees, 1951.

International Covenant on Civil and Political Rights (ICCPR), 1966.

International Convention on Economic, Social and Cultural Rights (ICESCR), 1966.

OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969.

Universal Declaration of Human Rights (UDHR), 1948.

UNESCO Convention Against Discrimination in Education, 1960.

United Nations Committee on the Rights of the Child ‘General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside of their Country of Origin’ CRG/GC/2005/6, 2005.

United Nations Convention on the Rights of the Child (UNCRC), 1989.

United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), 2007

FURTHER READING

R Amit ‘All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination’, *ACMS Research Report*, 2012.

JC Hathaway *The Rights of Refugees under International Law* 2 ed (2005).

F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014).

United Nations High Commissioner for Refugees (UNHCR) ‘Global Trends: Forced Displacement in 2015’, 2016.

UN Women ‘UN Women statement on World Refugee Day (20 June)’, 2016.