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High Court hands down groundbreaking judgment on the right to basic education

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On 12 December 2019, in the matter of the *Centre for Child Law, the School Governing Body of Phakamisa High School & 37 Children v the Minister of Basic Education & 4 Others*, the Eastern Cape Division of the High Court in Grahamstown handed down a groundbreaking judgment upholding the right to education of undocumented children.

Application one

The matter involved two separate applications. The first application was an application brought by the Centre for Child Law and the School Governing Body of Phakamisa High School (the main application) concerning the lawfulness of a policy decision by the Eastern Cape Department of Education (ECDE) to withdraw funding to schools in respect of undocumented learners.

Prior to 2016, the ECDE had provided teaching staff and funding to all learners at schools in the Eastern Cape regardless of whether or not learners enrolled at schools had birth certificates or other forms of identification documents. This ensured that all children enrolled in schools gained access to a basic education and basic nutrition through the National School Nutrition Programme. In 2016, however, the ECDE issued Circular 6 of 2016 and took the decision to withhold funding to schools in respect of learners who did not have identity numbers or passport numbers captured on the Education Department's Management System Database (SASAMS). The effect of this decision was that schools no longer received funding for undocumented learners enrolled with them. This resulted in undocumented learners being excluded from some schools which were either unwilling to or unable to shoulder the burden of providing an education to unfunded learners.

Application two

The second application was brought by the 37 children, on behalf not only of themselves, but on behalf of all similarly affected children in South Africa (SA) in which they challenged the lawfulness of clauses 15 and 21 of the Department of Basic Education's (DBE) Admission Policy for Ordinary Public Schools of 1998 (Admission Policy) as well as sections 39

and 42 of the Immigration Act of 2002 (Immigration Act) on the basis that they infringed upon several constitutional rights of undocumented children.

Clause 15 of the Admission Policy requires that a parent must provide a birth certificate for the child concerned when applying for admission of their child to a public school and goes on to provide that if the parent is unable to produce a birth certificate then the child may be admitted conditionally, but faces potential exclusion from school after three months if the document is not forthcoming.

Clause 21 deals with so-called “illegal aliens” and provides that when persons who are not lawfully present in the Republic apply for admission of their children to public schools they must show evidence that they have applied to the Department of Home Affairs (DHA) to legalise their stay in the country in terms of the Aliens Control Act.

Sections 39 and 42 of the Immigration Act prohibit “learning institutions” from providing “training or instruction” to illegal foreigners and makes it an offence to “aid and abet” or assist an illegal foreigner to obtain instruction or training contrary to section 39.

Human Rights Commission involvement

The South African Human Rights Commission (SAHRC) represented by Cliffe Dekker Hofmeyr’s Pro Bono Practice, and the public interest law NGO Section 27 were admitted as *amici curiae* and made various submissions to the court.

The SAHRC sought in particular to make representations to the court on the proper interpretation of sections 39 and 42 of the Immigration Act, while Section 27 made submissions to the court on the ambit of the right to access to basic education as provided for under international and comparative law.

The DBE and the DHA defended both applications, strenuously arguing that the policies and provisions in issue were essential measures put in place, inter alia, to prevent or at least dissuade people from illegally entering the country in order to obtain free education for their children. This because traditional methods of controlling and curbing illegal immigration through proper border control and enforcement of laws regulating illegal immigration, so it was argued, were ineffective.

At the hearing of the matter, they sought to argue that the entire matter had become moot because Circular 6 of 2016 had been withdrawn; all learners were in fact being funded and the 37 learners had pursuant to an interim order of the Constitutional Court been placed in schools. Furthermore, the DBE was considering amending its Admission Policy and had issued a Circular in which the period during which parents were required to provide copies of their children’s birth certificates had been extended to 12 months.

Rejected argument

The court however rejected the argument that the matter had become moot and found that an existing, live controversy existed because on the evidence it was clear that due to the personal circumstance and systemic problems existing at the

DHA, it is virtually impossible for many children to obtain the documentation required by the DBE or to regularise their presence in SA. They accordingly remain vulnerable to expulsion from school in terms of the Admissions Policy which has yet to be amended. Indeed, on the evidence put before the court by the DBE itself, the court noted that over a million undocumented children (most of whom are SA children) are in the schooling system - all of whom remain vulnerable to eventual expulsion in terms of the Admission Policy and the amended Circular.

Ruling

In a robust ruling on the merits, the court confirmed that everyone has the right to basic education, regardless of their status or their ability to provide proof of identity through the production of a birth certificate or other official documentation. It is within this context that it scrutinized clauses 15 and 21 of the Admission Policy and found that these clauses unjustifiably limit numerous constitutional rights including the right to equality (section 9), the right to dignity (section 10), the right of children to have their best interest considered paramount (section 28(2)) and the right to basic education (section 29(1)(a)) by excluding undocumented learners from public schools. They were accordingly declared to be unconstitutional.

It was further held that these clauses were not justifiable limitations under section 36 of the Constitution because constitutional rights may only be limited by law of general application. The Admission Policy is not a law of general application but merely a policy and accordingly incapable of sanctioning the limitation of any right contained in the Bill of Rights.

Personal dignity

The court correctly noted that all children have their own dignity and are individuals with distinctive personalities not reliant on or measured in the light of the actions of their parents/guardians. Therefore, the learners (many of whom have no choice in being brought to SA/have been abandoned by their parents and left in the care of others) should not have to bear the negative consequences attached to their parents' actions of either entering the country illegally, failing to obtain their own documentation or perhaps failing to apply to have their children documented.

The court thanked the SAHRC for its invaluable contribution and followed its suggested approach in respect of the interpretation of section 39 and 42 of the Immigration Act. It found that when properly interpreted through the prism of the Bill of Rights as is required by section 39(2) of the Constitution, the reference to "learning institution" and "training" in section 39 of the Immigration Act should be construed not to include the provision of basic education by schools to children. Such an interpretation was consistent with section 29 and section 28(2) of the Constitution and International Conventions. In light of this interpretation, it accordingly found it unnecessary to declare these provisions to be unconstitutional.

Conclusion

The court held in conclusion that Circular 6 of 2016 was invalid and set it aside. The state respondents were also directed to admit all children not in possession of an official birth certificate into public schools in the relevant province and where a learner is unable to provide a birth certificate, the principal of the relevant school is directed to accept alternative proof of identity i.e. an affidavit or sworn statement deposed to by the guardian/parent/care-giver of the learner that fully identifies the learner. It further interdicted/restrained the state respondents from removing or excluding children from schools (including illegal foreign children already admitted) for the sole reason of not being in possession of an identity document/number, permit or passport or if they are unable to produce any identification documentation.

This landmark judgment provides much needed protection to millions of undocumented and vulnerable children in our country. Due to various socio-economic reasons and challenges faced at the DHA, many parents/guardians will never be able to obtain documentation for themselves let alone their children. This unfortunately leads to a vicious circle of statelessness, abuse, crime and poverty. This judgment provides hope to many forgotten undocumented children who have all been victims of circumstance, as the mightiest tool of all is finally at their disposal – the right to education.

ABOUT THE AUTHOR

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