



## **Right to Education for Irregular Migrant Children in Malaysia; A Comparative Analysis**

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### **ABSTRACT**

Irregular migrants are defined as persons who enter into a particular country through illegal means or persons who had lawfully entered into the country but overstayed after the expiry of their permits. Irregular migrant children are children who are born from these irregular migrant parents. Irregular migrants do not have the right to stay in the country and thus they are subjected to detainment and deportation to their home country according to the law of immigration. This process usually takes time and during this period, many of their children's basic rights may be refused or denied, such as the right to education and the right to health care. In Malaysia, the law does not guarantee the right to education for irregular migrant children and thus, they would continuously be denied of this right so long as they remain in Malaysia illegally. This would significantly affect their intellectual development which is vital for preparation of adulthood. Hence, the paper seeks to examine the legal aspects of the right to education for irregular migrant children under the Malaysian laws and under the International law and to compare that with the laws of United Kingdom.

*Keywords:* Irregular migrant children, right to education, human rights

### **INTRODUCTION**

Education contributes to the strong foundation of a modern society in terms

of its economic and social aspect. In order to compete internationally, society has to be equipped with good educational background which does not only help them to succeed but also ensures a better quality of life. Establishing and providing for the right of education at an early age enables an individual's potential to be utilised to the maximum thus contributing to the development of the country.

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Internationally, the right to education is recognised as one of the most basic human rights as contained and preserved in the 1948 *United Nations' Universal Declaration of Human Rights* (UDHR).

The UNESCO Education for All Report in 2013 has stated that education can increase an individual's income level and develop his productivity, skills in entrepreneurship and innovation. Education also contributes to the economic growth of a country and reduces poverty of a community. In addition, education can be aimed at promoting health and contribute to social development, culture and politics. Unfortunately, in certain places, access to education is still not guaranteed and the poor level of education offered is not sufficient to achieve the above-mentioned purposes. Thus, the law is needed to ensure the accessibility of an education which is not only guaranteed to all, but which standards reached the UNESCO approved level of education for sustainable development community.

This study is done by way of qualitative approach by examining the law on the right to education in Malaysia and compares that to the law in United Kingdom. The comparative analysis with the principle of education in United Kingdom is chosen since Malaysia is a Commonwealth nation and the comparative method will enable this study to explore a range of alternative approaches that can be used as a basis for law reform in Malaysia.

## **IRREGULAR MIGRANTS CHILDREN IN MALAYSIA**

Section 6(1) of the Malaysian Immigration Act 1957/63 provides a requirement of a valid entry permit before a person is allowed to enter Malaysia. This of course, applies only to non-citizens. Anyone who violates the requirement shall be considered as entering Malaysia illegally and referred to as an 'illegal immigrant'. The term 'illegal' is however not sufficiently accurate to classify a person as a human being cannot be illegal. The term illegal refers to the act of the person who has done something wrong in the eyes of law. Therefore, the authors would use the term 'irregular migrant' which refers to a person who enter into a country without valid passports or travel documents. Some of those who fall under this classification are also persons seeking asylum, an act which is not necessarily illegal even though their means of entry might be illegal, refugees and undocumented people or stateless persons (Kassim & Mat Zin, 2011).

Malaysia is not a contracting state to the 1951 Refugee Convention or its 1967 Protocol and thus, it does not differentiate between irregular migrants, asylum-seekers and refugees. In addition, Malaysia does not have an appropriate system in place to govern the status and rights of asylum seekers, refugees or irregular migrants. As such, all are treated alike i.e. being persons who have no authority or permission to be in Malaysia and have no protection of the law.

Irregular migrants enter a particular country for various reasons. Some of

them move voluntarily in search of better economic opportunities (they are termed as ‘economic migrants’) while others are forced to move out by forces beyond their control such as by reasons of war or natural disaster. Those who left their home country either voluntarily or by force often become victims of human trafficking activities. Luke *et al.* (2009) categorised irregular migrants according to different modes of entry into the country of destination. They are:

- (a) Illegal entrants – including those who avoid official immigration control and those who present fabricated documents;
- (b) ‘Over stayers’ – migrants who have extended their stay without legal permission even though their original presence in the country was lawful. They include asylum seekers who are denied to stay in the country and over stayers who failed to renew their period of legal residence.
- (c) Children born to irregular migrants parents. Since the parents often do not have right to stay in the country, the status of ‘irregularity’ is passed onto the child. They are not considered migrants but since their birth is not recognised as legal by the country of residence, they therefore have no right to remain in the country.

‘Irregular migrant children’ are therefore children who are born from these irregular migrants parents. There are between one and two million

undocumented or irregular migrants in Malaysia (Ministry of Human Resources Malaysia, 2013) and among them, it is estimated about 44,000 children who were born from irregular migrant parents were denied schooling (Ministry of Education, Malaysia, Study on Children without Official Identification Documents in Malaysia, Educational Planning and Research Division, Kuala Lumpur, 2009). As persons with irregular status, they have no legal residence in the country they are residing in and in breach of the country’s immigration law and subject to deportation to their home country if detected by the authorities (European Commission, 2009). This is provided under section 6 (1) of the Malaysian Immigration Act 1959/63 which states that “no person other than a citizen shall enter Malaysia unless he possess a valid entry permit to enter the country and any person who has acted in contravention of this provision shall be guilty of an offence and liable to a fine and imprisonment”. Another consequence of being convicted of the offence under section 6 (1) is that the person shall be liable to be deported to their home country [Section 32 (1)].

The lack of legal protection in Malaysia continuously exposes irregular migrants to severe protection risks. Due to lack of legal protection, it would be difficult for the irregular migrants to get affordable health care, social services as well as reliable job opportunities. These affect the social safety of the irregular migrants living in Malaysia, especially the children. For example, irregular migrant

children are not provided with elementary education since the law does not give them the right to attend public schools (UNHCR, 2013). Though education projects run by UNHCR in cooperation with the non-governmental organizations, or community-based education classes are available for children of irregular migrants, the latter face difficulties in accessibility and the programmes themselves also suffer from a lack of funding, facilities and human resources constraints (UNHCR, 2013).

### THE RIGHT TO EDUCATION

The right to education was perceived as having a qualitative and quantitative aspect and its role has increased in the modern society. The right to education or education itself plays a crucial role in developing potential of individuals and to the success of a country in terms of its economic development, social justice, and spiritual strength, moral and ethical standards (McMillan & Simkiss, 2009). The importance of education was emphasised by the court in the case of *Brown v Board of Education of Topeka* 347 U.S.483 (1954) where Justice Warren said that lack of education as a result of denial of such right may reasonably prevent the child from succeeding in his/her life. Though US cases are not applicable to Malaysia, this case highlights the general principle of the importance of education for the purpose of this article. John Locke suggests that education is an individual autonomy, effort and responsibility and it is at the core of the issue of development of a child's

understanding. It is the education that a child receives that determines the way in which his understanding and character will develop, and for the vast majority of people a proper education is crucial if the child is to grow into an adult who will act according to his justified reason (Neill, 1989; Samoff, 2013). As part of the economic, social and cultural rights, the right to education should be protected and defended against any denials and violations (Tomasevski, 2005).

Most countries in the world stipulate that education is a constitutional right given to their citizens, adopting the stipulation in the *1948 United Nations' Universal Declaration of Human Rights* (UDHR) that provides that everyone has the right to education. Even though this Declaration is an internationally acknowledged statement of principles, it does not have a binding force as opposed to a treaty. The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights are treaties which have a force of law on each ratifying states and these treaties were originally statement of principles from the UDHR. Article 13 of the International Covenant on Economic, Social and Cultural Rights (1966) for instance, recognises everyone's right to education.

Article 28 of the United Nations Convention on the Rights of the Child 1989 further laid down the right to education as an undeniable basic right for every growing human being. The International human rights law defines right to education as a universal human right (Tomasevski, 2005) and as such, it is in every child's best

interest to be provided of an opportunity to education as a basic fundamental right and to ensure that they are adequately trained to become effective jobholders in their adulthood (Koren, 2001; Mcmillan, 2011). The United Nations Convention Relating to the Status of Refugees 1951 provides a clear definition of a refugee and establishes legal protection and minimum support in terms of basic human rights including the right to education to be accorded to them by state parties.

Right to education appeared when social rights become prominent in the 19<sup>th</sup> century when it was inserted in the Universal Declaration of Human Rights 1948 (UDHR), International Covenant of Social, Economic and Cultural Rights 1966 (ICSECR) and in the Convention on Right of Child 1989 (CRC). It is the role of the state to ensure that the best interest of a child is adhered to and guaranteed. Article 3(1) of the CRC provides that the primary consideration for all actions involving children must be in the best interests of the child. Any interpretation of what amounts to 'best interests of a child' must not be inconsistent with the objective of the CRC, particularly its general principles, and emphasising the fact a child is an individual who has rights and capable of forming his/her own views.

## POSITION IN MALAYSIA

Bergstom (2010) opines that the right to education is a universal right which includes the right to compulsory and free education and it should be provided

to those who are not yet adults, not yet rational, not yet mature, those who are not generally ascribed to rights. Basic education helps children to mature and develop their own abilities in order to face the world in adulthood (Kundu, 2005). The importance of the right to education in Malaysia can be seen in the High Court case of *Jakob Renner (An Infant Suing Through His Father And Next Friend, Gilbert Renner) & Ors V Scott King, Chairman Of Board Of Directors Of The International School Of Kuala Lumpur & Ors* [2000] 5 MLJ 254 where the court laid down the principle that justice is in favour of providing continuous education for children whose educational needs are likely to be threatened. Though this case was discussed in light of children with disability and in need of special education, it highlights the importance of education for all children being in a group of affected persons. Thus, it is one of the state's functions to guarantee that education is available to all children living within its territory (Jover, 2001).

Malaysia adheres to the principles outlined by the three conventions which are in accordance to the provisions of the Malaysian Federal Constitution and relevant laws and policies. As a member of the United Nation, Malaysia has subscribed to the philosophy, concepts and norms set out in the UDHR. In respect of the right to education, article 26 of the UDHR provides that everyone has the right to education and elementary and fundamental education shall at least be free and compulsory.

Article 28 of the CRC and article 13 of the ICSECR share similar provisions which provides that all state parties shall make elementary education as compulsory and free to all. Malaysia however, has reserved the applicability of article 28(1) (a) of the CRC on the ground that this article is not consistent with the Federal Constitution of Malaysia, its domestic laws and national policies of the Government of Malaysia and with the *Syariah* law. The Malaysian Federal Constitution 1957 provides that the right to education should be guaranteed equally between persons without discrimination on grounds of religion, race and birth place<sup>1</sup>. The primary legislation on education in Malaysia is Education Act 1996 (Act 550) which provides that the government may publish in the gazette making primary education compulsory (Professional Circular No. 14/2002: Implementation of Compulsory Education in Primary Level in 2003 dated 27 November 2002 and Guidelines for Implementation of Compulsory Education in Primary Level in 2003) following the principles under the UDHR and CRC. The same provision also provides that any parents who fail to enrol their children for the duration of compulsory education (6 to 12 years of age) shall be guilty of an offence and shall be liable accordingly. Nevertheless, the current legislations and policies in Malaysia in respect of the

right to education are not friendly towards irregular migrant children living in the country as the legislations have not explicitly nor implicitly guarantee this right to them.

The main obstacle faced by these children is lack of documentation or more importantly, their birth certificate. Many of these children were born from irregular migrant parents and the status of irregularity passes automatically to the children. As Malaysia do not grant automatic citizenship upon birth within the territory, these children will be considered irregular migrant unless their parents can provide relevant documents to the National Registration Department (passport, working permit, marriage certificate among others) as proof of their 'valid & legal existence'. As the result of the denial into public schools, these children receive informal education at home or from their respective communities. The more unfortunate situation is that the children are forced to join the job force at an early age to provide for their family and some may wonder aimlessly on the streets.

There are a number of barriers for irregular migrant children to get access to the right to education in Malaysia:

- (a) Some asylum-seekers fear the risk of being arrested as illegal immigrants and face the risk of being deported if they try to register their children and as such, many irregular migrant children do not have a birth certificate. Without this, the children are not allowed to receive education from public schools. (Taib, 2012);

<sup>1</sup>Section 2 of the Human Rights Commission Act 1999 (Act 597) defines human rights as fundamental liberties as enshrined in Part II of the Federal Constitution, which includes article 12(1).

- (b) In 2009, the government announced that children who are born in Malaysia without birth certificates may acquire their birth validation from the Department of Social Welfare or their village headmen in order to attend public schools in Malaysia. However, it is believed that the awareness of this policy is low among the irregular migrant parents. In addition, this policy does not provide corresponding exemption for children to sit for official examinations (Child Rights Coalition Malaysia, 2012).
- (c) Community-based learning centres or schools run by NGOs (closely supervised/operated by UNCHR) provide good primary level education to migrant children (Lectchamanan, 2013; UNCHR Fact Sheet, 2014) but these schools often face lack of support either financially or physically from the government and Malaysian citizen.;
- (d) The lack of opportunities to pursue higher education has a significant impact on the children's motivation to learn. Many of the children will leave school at an early age to enter the labour force in order to provide for the younger siblings and families as a whole (Child Rights Coalition Malaysia, 2012).

Due to the law on immigration in Malaysia, children are also subjected to detention at the immigration depots. Suhakam (the Malaysian Human Rights Commission) reported that as of October 2013, there were 1406 children detained in 14

immigration depots where limited activities were conducted to accommodate the rights and needs of the children including access to education (Roundtable on the Alternative to Immigration Detention, 2013).

## **POSITION IN THE UNITED KINGDOM**

The right of a child to education is protected and guaranteed under the Universal Declaration of Human Rights 1948 and under the United Nations Convention on the Rights of the Child 1989, in which United Kingdom is a signatory to these two Conventions. In addition to that, the UK has ratified the European Convention on Human Rights and incorporated Article 2 of the First Protocol of the Convention into its Human Rights Act 1998 which also laid down the right to education. The Human Rights Act 1998 which is applicable throughout the UK guarantees the right to education to every person. In the case of *Leyla Şahin V. Turkey* (European Court of Human Rights, Strasbourg, 2005), the Grand Chamber noted that:

*“Article 2 of Protocol No. 1 guarantees everyone within the jurisdiction of the contracting states a right of access to educational institutions, however in order for that right to be effective, there is an additional requirement that the individual should be given official acknowledgement of the studies he has completed.”*

The Children Act 1989 and the Children Act 2004 of the UK provide the same entitlements to refugee and migrant

children as its citizens which include the right to compulsory education and proper healthcare. Section 11 of the Children Act 2004 places a duty on relevant public bodies to perform their functions in order to safeguard and promote the welfare and best interest of children. Lord Hope in the case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 expressed that where children are involved, there is an evident conflict between the need to maintain a proper and effective system of immigration control and to protect the best interests of the children. He further said the best approach is to evaluate whether their best interests are outweighed by the strength of any other considerations.

The law relating to education has also been enacted in a number of legislations in the UK such as Education Act 1996 (applicable in England and Wales) and the Education (Scotland) Act 1980. It is stated in section 1 (1) of the Education (Scotland) Act 1980 that outlines the duty of each education authority to provide a sufficient and effective provision of school education. A similar provision is also stated in section 13 (1) of the Education Act 1996 that a local education authority has a duty to ensure that the children within their area of population shall receive efficient primary education which will contribute towards their spiritual, moral, mental and physical development. The UK has provided legal right to education for 'all children' in their domestic legislations which implicitly include undocumented children. However,

there is a wide divergence between these legal frameworks and the children's ability to access education in practice (PICUM, 2013). Some of the practical obstacles include requirement to show some form of identification upon application for admission into schools, the level of discretion enjoyed by schools at the local level, the migrant parents fear of being detected and the possible deportation, problems with extracurricular expenses, language problems, no recognition given on the children's completing their education and precarious living conditions (Sigona & Hughes, 2012). Though a child's best interest is a primary consideration, the need for the government to control its immigration policy must also be factored in and that may jeopardise the rights of these children (Coram Children Legal Centre, 2013). In the case of *SM and TM and JD and Others v SSHD* [2013] EWHC 1144 involving undocumented children of Jamaican parents who were born and lived in UK, the court allowed the immigration to decide on the welfare of the children. The court states that "Whilst your client, as a child, is obviously not responsible for the decisions made by the adult(s) in his life, their immigration status and history are relevant to the assessment of any justification. To grant your client ILR (indefinite leave to remain) straight away would be unfair to all those who come, and remain legally, would discourage the use of the lawful routes into the UK and undermine the Secretary of State's ability to manage migration in a manner which



she considers to be the best interests of society as a whole. The Secretary of State considers that the public policy consideration could only be outweighed in an exceptional case”.

Some of the barriers that may be faced by irregular migrant children in respect of education in the UK are (PICUM, 2013):

- (a) Administrative barriers. Since the UK legislations only implies the right to education for undocumented children, it gives rise to confusion for officials and undocumented families alike as to as to the children’s right of access to education. The fact that there is lack of national policy guidance and ambiguous national legislation do not help the situation.
- (b) Fear of being detected and consequently deported often discourages the undocumented families from enrolling their children in schools.
- (c) Language barrier tends to limit the children’s access to quality education and hinder their social integration as they are often segregated from other children and classed as children with learning difficulties. The government should address the problem differently as the act of segregating those children minimises their scholastic development.

The position in UK is more advanced in the sense that the domestic law provides the same entitlements to refugee and migrant children as its citizens namely

right to compulsory education, primary health care and other matters relating to the welfare of children.

## CONCLUSION

There is still room for improvement with regard to right to education of irregular migrant children in Malaysia. The first step in rectifying this problem is to ensure they are protected in terms of status and rights. Malaysia should now consider withdrawing its reservation to article 28(1) (a) in providing free and compulsory elementary education to all children despite their immigration status. The next step is enacting a specific legal framework for refugees, where irregular migrants, asylum-seekers and refugees should be distinguished so that these three different groups can be treated according to their respective status and rights. This can be achieved by becoming a signatory party to 1951 Refugee Convention and its 1967 Protocol. The government plays a very important role in deciding the country’s policy when it comes to refugees, children of asylum-seeker or irregular migrant children specifically and ensure that their basic human rights are protected. There is also a need to review the prohibition against irregular migrant children from attending government schools. This is because despite various laws guaranteeing the right to education in Malaysia, there is still reservation in respect of the Constitution, national laws and national policies including the Syariah law. The existing educational projects run by UNHCR

in partnership with Non-Governmental Organisations should be continued and improved in terms of funding, facilities and human resources.

## REFERENCES

- Bergstro, Y. (2010). The Universal Right to Education : Freedom, Equality and Fraternity. *Studies in Philosophy and Education*, 29(2), 167–182. Retrieved from <http://doi.org/10.1007/s11217-009-9174-y>
- Child Rights Coalition Malaysia. (2012). *Status Report on Children's Rights in Malaysia*. Retrieved from [http://www.unicef.org/malaysia/Child\\_Rights\\_Coalition\\_Report\\_on\\_Childrens\\_Rights\\_FINAL.pdf](http://www.unicef.org/malaysia/Child_Rights_Coalition_Report_on_Childrens_Rights_FINAL.pdf)
- Committee on Economic, Social and Cultural Rights, General Comment 13. (2003). *The right to education* (Twenty-first session, 1999). U.N. Doc. E/C.12/1999/10 (1999). Reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 70
- Coram Children Legal Centre. (2013, November 15). *Growing Up in a Hostile Environment: The Rights of Undocumented Migrant Children in the UK*. Retrieved from [http://www.childrenslegalcentre.com/userfiles/Hostile\\_Environment\\_Full\\_Report\\_Final.pdf](http://www.childrenslegalcentre.com/userfiles/Hostile_Environment_Full_Report_Final.pdf)
- European Commission. (2009, July). *Irregular Migration in the U.K.* Clandestino Research Project. Counting the Uncountable: Data and Trends across Europe. Clandestino Project Overview.
- Freeman, C. (2013). Should 'illegal' immigrants be rebranded as 'irregular immigrants? The UN thinks so. *The Telegraph*. Retrieved from <http://blogs.telegraph.co.uk/news/colinfreeman/100227751>
- Human Rights and Equal Opportunity Commission. (April, 2004). *A last resort? The report of the National Inquiry into Children in Immigration Detention*. Retrieved from [https://www.humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf)
- Kassim, A., & Zin, R. H. M. (2011). *Policy on Irregular Migrants in Malaysia : An Analysis of its Implementation and Effectiveness*. Managing International Migration in ASEAN.
- Koren, M. (2001). Human Rights of Children: An Emerging Story. *The Lion and the Unicorn*, 25(2), 242–259. Retrieved from <http://doi.org/10.1353/uni.2001.0021>
- Kundu, R. P. (2005). The Right to Education : Some Theoretical Issues. *Contemporary Issues and Ideas in Social Sciences*, 1-22.
- Letchamanan, H. (2013). Myanmar's Rohingya Refugees in Malaysia: Education and the Way Forward. *Journal of International and Comparative Education*, 2(2), 86–97.
- Lukes, M. S. et.al. (2009). *Irregular Migrants : the urgent need for a new approach*. Migrants' Rights Network.
- McMillan, A. S., & Simkiss, D. (2009). The United Nations Convention on the Rights of the Child and HIV/AIDS. *Journal of Tropical Pediatrics*, 55(2), 71–2. Retrieved from <http://doi.org/10.1093/tropej/fmp024>
- Ministry of Education, Malaysia. (2009) *Study on Children without Official Identification Documents in Malaysia*. Educational Planning and Research Division, Kuala Lumpur.
- MOHR. (2013). *Ministry of Human Resources Malaysia*. Retrieved from <http://www.mohr.gov.my/index.php/en/>
- Neill, A. (1989). Locke on Habituation, Autonomy, and Education. *Journal of the History of Philosophy*, 27(2), 225–245. Retrieved from <http://doi.org/10.1353/hph.1989.0033>

- Samoff, J. (2008). Everyone Has the Right to Education. *African Studies Review*, 51(1), 105–118. Retrieved from <http://doi.org/10.1353/arw.0.0021>
- Sigona, N., & Hughes, V. (2012). *No Way Out, No Way In: Irregular migrant children and families in the UK*. Oxford. Centre of Migration, Policy and Society.
- Suhakam. (2013). *Roundtable on the Alternatives to Immigration Detention 2013*. Retrieved from <http://www.suhakam.org.my/wp-content/uploads/2013/12/Report-on-Roundtable-on-ATD-Malaysia.pdf>
- Taib, F. (2012). Invisible, Vulnerable and Marginalized Children in Malaysia. *Malaysian Journal of Paediatrics and Child Health Online Early*, 18(2), 1-5.
- Tomasevski, K. (2005). Un-asked Questions about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson. *Human Rights Quarterly*, 27(2), 709–720. Retrieved from <http://doi.org/10.1353/hrq.2005.0028>
- UNCHR Malaysia. (2013). *UNHCR Global Appeal 2013 Update – Malaysia*. Retrieved from <http://www.unhcr.org/50a9f82da.html>

