

# Citizenship and Statelessness

Challenges and Concerns

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Parvesh Bava



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# 1 Introduction

For those of us who have passports or identity documents, the key that these documents hold to accessing our basic human rights is a fact that we take for granted. We open bank accounts, enter into contracts (including marriage), register for social security, go to hospital and register the births of our children, later enrolling them in school, all without a thought to our 'ticket' to these services: our documentation. Yet for those *without* the ability to obtain proof of their identity, lack of documentation becomes the source of their social, economic and political exclusion.

A stateless person is one 'who is not considered as a national by any State under the operation of its laws.'<sup>1</sup>

The practical manifestation of statelessness is ordinarily the inability to access documentation; a state that does not recognise a person as a national will also not take responsibility for their documentation. Persons who have been denationalised will often have their documentation forcibly removed. Those stateless persons who are undocumented from birth will most likely never, without legal assistance, know what it is to hold an ID with their name on it. In some cases, people only discover they are stateless during deportation proceedings when no country will issue an emergency travel document to authorise their deportation.

In the African context, statelessness is often confused with a lack of belonging. Doubts as to whether statelessness can exist in Africa are thus usually centred around notions of the large African family and cultural assumptions; how can an African be stateless if he, as all Africans, comes from an identifiable town/village and has an extended family or a chief who can vouch for him? However, a stateless person may well have an established family and home life and may well feel a real sense of belonging in their place of origin. Being stateless does not imply that a person has no roots. Also, while many Africans do come from an identifiable place and family, exceptions exist in the context of forced migration that is a reality across Africa.

In reality, nationality is not a matter of how much a person feels that he belongs in or comes from any particular place. The crux of the matter is whether he qualifies under the law and is considered a national by the state in question.

Documentation is usually the issue that will bring statelessness to your doorstep as an attorney, paralegal or social worker. People

1 Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons.

who are unable to access documentation will often require assistance in accessing their legal rights, either as a citizen or as a stateless person. Such clients will ordinarily not identify their problem as one of access to nationality or statelessness, but rather as inability to access a birth certificate, an identity document, a passport, social services or economic participation.

The task of a legal practitioner or social worker to assist such persons is challenging on many levels. There is a marked lack of understanding of the problem of statelessness amongst the state authorities who are best positioned to prevent or reduce it. Statelessness is a little-known concept even in the human rights field. Further, few legal mechanisms exist to cope with stateless persons in South Africa, as in most African countries. In absence of signature and ratification of the UN statelessness treaties or a dedicated domestic legal framework, assisting a person who is stateless is therefore a daunting task that requires the creative use of a combination of international customary law or *jus cogens*,<sup>2</sup> human rights law and principles, and South African constitutional law, citizenship and immigration law and administrative law.

Having identified this legal vacuum, Lawyers for Human Rights (LHR) launched a Statelessness Project in March 2011.

This guide was drafted with the intention to aid other attorneys, paralegals and social workers in promoting access to citizenship and combating statelessness on our territory. The guide is a compendium of lessons learned in our effort to assist clients in accessing nationality. It is by no means a complete and fixed composition; it is a work in progress that will be updated over time with relevant legislation, policy and practice. LHR is hopeful that this guide will assist in demystifying the current legal framework as it relates to questions of nationality and statelessness, and will provide us all with the tools to play an active role in the ongoing reform of this field of law.

The guide begins in section 2 by defining some relevant concepts and terms in the field of citizenship and statelessness. Section 3 outlines the international and South African laws that can be used to resolve clients' problems.

Section 4 takes you step-by-step through how to assess a client's citizenship or stateless status, with the ultimate goal of making a plan of action to resolve the client's problem.

Section 5 is broken up into specific populations of concern and focuses on the solutions available to resolve your client's problem.

2 *Jus cogens* (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. [http://www.law.cornell.edu/wex/jus\\_cogens](http://www.law.cornell.edu/wex/jus_cogens) (accessed 9 September 2013).



Section 6 focuses on how to prevent statelessness through assisting children in need of care and protection, such as unaccompanied foreign minors, orphans and foundlings, to access birth registration, immigration status and a path to nationality.

Section 7 is a checklist with strategies to assist different types of clients. It is a summary of legal solutions outlined in sections 5 and 6. This checklist will help ensure that you consider all possible legal options for each client.

Section 8 takes you through how to represent stateless persons who are in immigration detention with the goal of release and path to citizenship in South Africa.

Section 9 touches on the importance of advocacy in this area of law due to the critical need for law reform.



## Case study

"It is painful to see my daughter growing full of dreams and developing every day into a more clever person, knowing deep inside she has an uncertain future."

In reported efforts to discourage emigration of its nationals, Cuba assigns 'permanent emigrant status' to any person who departs the country for a certain period (previously over 11 months, now increased to 24 months). Couples are not permitted to travel together without fear of losing their right to residence.

In the case of Maria,<sup>3</sup> who was born in South Africa to Cuban parents, the Cuban Embassy in South Africa issued a letter confirming that she is not recognised as a national due to her parents' emigration status. Her parents presented this letter to Home Affairs in an effort to access South African citizenship for the child under section 2(2) of the Citizenship Act, which provides citizenship for children born on the territory who are stateless. Home Affairs responded that the child should be given permanent residence, not citizenship. However, even her three permanent residence applications have not been processed.

The parents discovered this problem when the child's grandmother in Cuba was ill. They could not obtain a travel document for their four-year-old to go from South Africa to Cuba to meet her grandmother because neither country would recognise her as a citizen.

This case is illustrative of the challenges that remain in enforcing the right to nationality for stateless children born in South Africa. In 2014 the High Court of South Africa declared Maria to be a South Africa citizen by birth in terms of section 2(2) of the Citizenship Act. The Minister of Home Affairs was also ordered to make a regulation to facilitate the implementation of this section to allow more people to access it.

"Sometimes as a mother I try to understand. Wow, my child, the minute she was born she was brought into this nightmare, that is being a 'stateless person'. How is it possible a child can be born and at the same time, the most elemental right that any human being is entitled to is denied? I have been going through diverse feelings: scared for the future of my child, hopeless when no one seemed to be sensitive about her future, though the law states she is entitled to citizenship. But bureaucracy is blind and careless. The law does not apply itself, but needs to be put into practice."

3 Name has been changed to protect her identity.

## 2 Finding a solution for clients: immigration status and citizenship

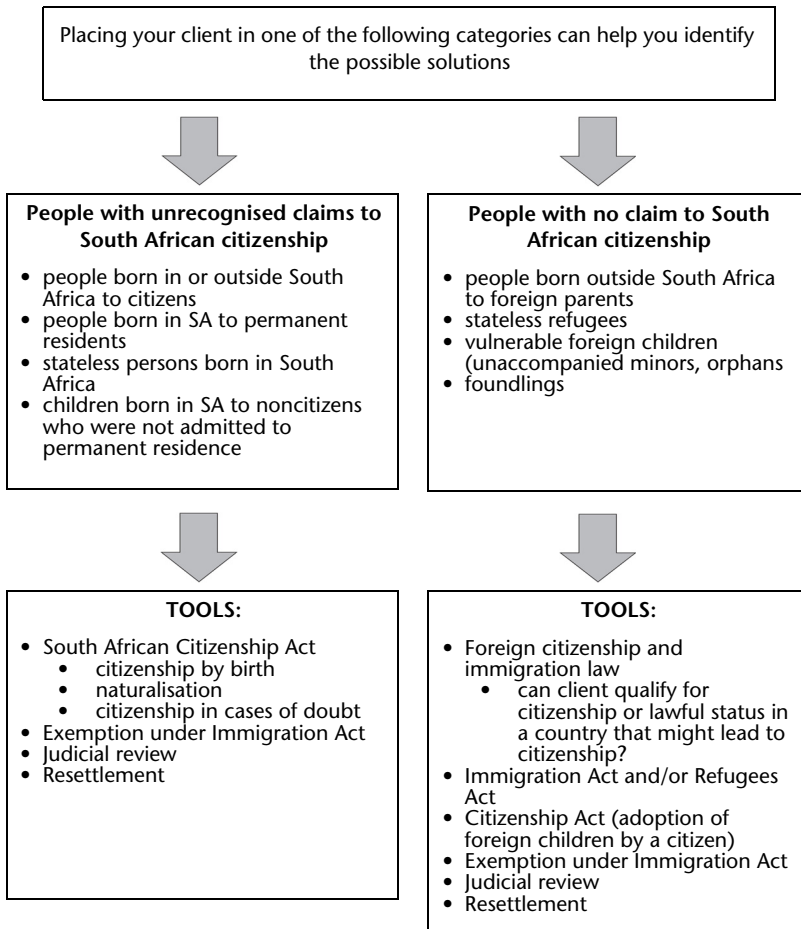
In ideal scenarios, you may resolve the client's problem while trying to determine if the client is indeed stateless – sometimes, a competent authority will reply to your inquiries to confirm that a client merely needs to complete certain administrative steps to access citizenship. Other times, the competent authority will simply be more cooperative in assisting your client when contacted by an attorney. However, in other cases, you will find that contacting the competent authority is just the first step in what becomes a long battle to try to access nationality for your client.

The next step is to find a solution for that client. Sometimes this can prove a very challenging task. However, do not lose hope. There are many cases where legal practitioners can assist clients in resolving their problem. We hope that readers will share with us effective methods they have employed, so we may update this guide in the future with more tools to help the stateless.

This section covers how to assist people in accessing immigration status and a path to citizenship. We have broken the section into two main categories: (1) people who have an unrecognised claim to South African citizenship and (2) people who have no claim to South African citizenship.

## Planning a way forward for your client:

### Accessing immigration status and a path to citizenship



## People with an unrecognised claim to South African citizenship

Some people who will be considered 'stateless' in South Africa have legal claims to South African nationality that they are unable to access for a variety of reasons – for example, due to inability to meet the administrative requirements in order to access citizenship; corruption; or suspicion on the part of Home Affairs officials that they are foreigners trying to fraudulently access South African citizenship.<sup>100</sup> Such people born in South Africa could be considered *in situ* stateless persons, given that they have not crossed an international border. As outlined above, if a person qualifies under the law for nationality but the authorities in question – in this case, Department of Home Affairs or South African foreign missions – do not recognise that person as a national, he or she is stateless in accordance with the UN conventions. Some examples include: citizens whose IDs have been blocked due to suspected fraudulent acquisition; people who are rejected for late registration of birth (the avenue to obtain an ID number); and people who were born abroad to a South African citizen parent, but who cannot meet the requirement of a foreign birth certificate in order to register their birth in South Africa.

LHR has found, not surprisingly, that clients with claims to South African citizenship present high success rates in terms of securing nationality. Section 15 of the Citizenship Act is always an option for trouble cases, as it allows the Minister to issue a citizenship certificate 'in case of doubt.'

For those who have exhausted their options under the Citizenship Act, an exemption for permanent residence (detailed below) is the last resort. LHR has made such an application on behalf of a South African who could not satisfy Home Affairs that he is a citizen due to insufficient proof (no proof of birthplace or parentage and no known, living witnesses to testify to his family history).

If such an exemption application is rejected, that decision can be taken to court for judicial review or the case can be referred to the UN High Commissioner for Refugees for stateless status determination and resettlement to another country. See below.

<sup>100</sup> Some people who qualify for South African citizenship under the law are suspected of being foreigners by local Home Affairs officials if they 'look' foreign, have an accent due to spending time living abroad, have one parent who is foreign or often if they live near an international border where informal migration is high.

This section will cover the following categories:

- People with blocked ID numbers
- People born abroad to South African citizens
- People born in South Africa to citizens
  - ✘ Births to undocumented South Africans
  - ✘ Late registration of birth applicants
  - ✘ Births to a single father and/or undocumented mother
  - ✘ Births outside a registered hospital or clinic
- People who lost or renounced South African citizenship
- People born in South Africa to permanent residents
- Citizenship in cases of doubt
- People born in South Africa and stateless

### ***People with blocked ID numbers***

It can often be more difficult for a citizen who had an ID issued in the past but now has a blocked ID number to get a new ID document than a citizen who has never had an ID to get his first one. The biggest reason: suspected fraud.

For many reasons, the South African National Population Register has been compromised over the years.<sup>101</sup> One crisis is the phenomenon of duplicate or multiple IDs, which occur when one person has more than one ID number assigned to them<sup>102</sup> or where more than one person shares one ID number. Such ID numbers have been 'blocked' on the Home Affairs system. This phenomenon is largely a result of corruption, fraud and administrative mistakes. According to Home Affairs statements in

101 In a parliamentary briefing, the Director-General explained '... the legacy of apartheid with relevance to duplicate documents, and the difficulties that arisen when trying to amalgamate the apartheid system's various population registers. Prior to amalgamation, reference book holders were allocated with identity numbers without their knowledge. A pre-printed list of ID numbers was utilised to allocate IDs. Consequently people applied without using those allocated ID numbers or the pre-printed numbers were misallocated amongst the citizens resulting in duplicates. No fingerprints were taken on allocation of the ID number and there was no verification of fingerprints. In the late Eighties, electronic birth certificates with an identity number were introduced, without fingerprints. Fingerprints were kept manually whilst the identity numbers were kept in the National Population Register.' Parliamentary Monitoring Group 'Duplicate IDs, Uncollected IDs, Residence Permit backlog, Initial Permit Transformation Plan: progress report by Home Affairs' (14 August 2012) available at <http://www.pmg.org.za/report/20120814-briefing-department-home-affairs-status-duplicate-documents-uncollect> (accessed 3 October 2013). Another crisis occurred when fingerprints eventually were put into the electronic system. Not all fingerprints taken were of proper quality to enter into the system. Thus, ID numbers were identified that 'did not have corresponding fingerprints which left us vulnerable to identity fraud and theft.' See South African Government Information, 'Transcript copy: Briefing by Director-General Mkuseli Apleni regarding progress of the National Population Registration campaign and new tariffs', available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=17279&tid=30731> (accessed 3 October 2013).

102 This can occur where a person is registered under the incorrect date of birth, applies to amend the date of birth, and receives a new ID number without the first being cancelled.

March 2011, nearly 600 000 persons have been affected.<sup>103</sup> The department acknowledges that corruption has played a role.

Individuals typically learn that their ID has been duplicated when they appear at local Home Affairs offices to register the birth of a child, register a marriage, or to get a new ID or passport. Home Affairs officials deny the requested service and inform the person that his or her ID has been 'blocked.'

Those persons who are unable to meet department requirements to prove that they are the true citizen, and who do not hold a second nationality, are effectively stateless because Home Affairs does not recognise them as nationals. Given the high numbers of foreigners who have obtained South African IDs by fraud or forgery, or by bribing Home Affairs officials, suspicions are high across the country as to whether the holder of a blocked ID is in fact South African. This is especially the case for South Africans who have a parent from another country or who have lived in other countries.

Home Affairs' strict requirements to regain access to blocked ID numbers and its haphazard implementation of ID investigations at the local level rob citizens of their rights. Furthermore, some persons simply cannot provide the proof the department requires. Without legal assistance many of them are, quite practically speaking, stateless in terms of the 1954 Convention – they are not viewed as nationals by South Africa nor any other state. As a result, they cannot obtain passports or enter or leave the country. LHR has had clients whose bank accounts are frozen due to ID blockage. Affected persons cannot buy or sell property, register their children's births or their marriages, vote, run for office and more. Without a valid ID they cannot get jobs and often lose jobs,<sup>104</sup> but cannot access UIF (unemployment insurance funds) because a valid ID number is required.

Home Affairs declared that all duplicate ID numbers will be cancelled by December 2013 if the holder does not come forward. This decision was taken in the run up to the release of the new South African Smart ID, which is replacing identity books.<sup>105</sup> It is likely that as individuals come forward to swap out their ID books for Smart IDs, more people will discover that their ID number has been blocked. Approximately 22 000 South African duplicate IDs

103 See transcript copy: 'Briefing by Director-General Mkuseli Apleni regarding progress of the National Population Registration campaign and new tariffs', available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=17279&tid=30731> (accessed 26 March 2013).

104 One of LHR's blocked ID clients lost his job at Bleskop mine. He had to scan his fingerprints when reporting for work and the mine discovered that his ID number is blocked. Consequently, he was fired.

105 See SA News article, 'New Smart ID to be introduced this year' available at <http://www.sanews.gov.za/south-africa/new-smart-id-card-be-introduced-year> (accessed on 9 September 2013).



were invalidated ahead of the May 2014 general elections, because they were not accounted for by owners.<sup>106</sup>

Persons with blocked IDs are often provided a small piece of paper listing the documents they must submit in order to confirm their South African citizenship: 'a handwritten birth certificate, baptismal certificate, primary school letter, clinic card (immunisation card), birth record from the hospital, parents identity documents, death certificates, and letter from the chief.' Those unable to meet Department requirements to prove that they are the genuine citizens remain with their IDs blocked – often without being given any reason or being advised of their right to appeal the decision.

Local offices exercise discretion concerning the amount and type of evidence that is accepted as proof of one's claim. Some persons are turned away repeatedly and asked for more proof, despite the client having providing all required documents; while others are told they cannot be helped unless they produce a specific document that they cannot access.

To assist a victim of ID fraud or duplication, a good first step is finding out what proof the client has of his or her South African nationality or permanent residence. Gather all available proof and write a letter to Home Affairs (Deputy Director-General for Civic Services, Director-General, and office managers of the local offices in question) requesting the written reasons for the decision to block the ID and all evidence against the client. The letter should contain the following:

- Client's personal history (birth place, parents' nationalities, how he/she acquired citizenship or permanent residence)
- How client discovered ID was blocked – including Home Affairs office approached, which dates, what client was told on each occasion by DHA officials
- Summary of attempts client has made to resolve the issue
- Summary of ways in which client has been impacted (cannot register birth, use bank account, etc.)
- Annexure of supporting documents
- Request for written reasons for ID blockage and any and all evidence considered in blocking ID.

LHR has discovered that finding a contact in Head Office of DHA to whom you can send your letter and annexures is an effective way of having the client's background investigated and the ID blockage removed. It is at Head Office – in the duplicate ID section – where the ID will be released following an investigation that is generally conducted by the Immigration Inspectorate.

106 See The Citizen news article 'Thousands of duplicate SA ID documents invalidated' available at <http://citizen.co.za/130648/thousands-of-duplicate-sa-id-documents-invalidated/> (accessed 1 December 2014).

Under section 5 of PAJA, if no reply to a request for written reasons is forthcoming in 90 days, it shall be presumed in judicial review proceedings that the action was taken without good reason. Litigation may be the only remedy to unblock your client's ID.<sup>107</sup>

Section 3 of the Promotion of Administrative Justice Act protects the right to written reasons for a decision, notice of the right to appeal, right to judicial review of administrative decisions and a host of other measures that can be used in litigation regarding blocked IDs. In particular, written reasons must be provided to the client before Home Affairs blocks the ID in order for such an action to be lawful and just. Given the nature of the right at stake, clients should also be afforded the rights outlined in section 3(3) of PAJA: an opportunity to obtain assistance and legal representation, present and dispute information and arguments and appear in person.

See above, which summarises important provisions of the Identification Act 66 of 1997 relating to seizure or cancellation of ID books (sections 18 and 19 and its regulations).

<sup>107</sup> In 2013 LHR obtained a court order in the North Gauteng High Court compelling the Minister of Home Affairs to release the block on a client's ID and interdicting the Minister from blocking the ID pending the final outcome of the investigation into his status.

## Case study

“I felt that sense of rejection, hopelessness. I felt so unworthy in life. I was no longer accepted as a human being ... It was the most depressing situation I have faced in my lifetime. I was in a situation of non-existence.”

J.S. was born on a farm near Skeerpoort, South Africa. J.S.’s mother was South African. His father was a Zimbabwean who came to work on the mines and later the farms. When he was 15, the family moved to Zimbabwe. J.S. returned to South Africa as an adult.

In 2012, J.S. applied to renew his South African passport but he was told that his ID was blocked. He was not given reasons for the blockage of his ID. Often this occurs if an ID has been duplicated or fraud is suspected. He was told to either apply for permanent residence or go back to Zimbabwe. But years ago he had turned in his Zimbabwean passport to that country, where dual nationality is prohibited. J.S. needed his passport in order to go to Zimbabwe to pay his children’s school fees and to take them to school after the holiday. Further, his work as a driver requires a valid passport in order to make cross-border deliveries.

After contacting Home Affairs and providing evidence, Lawyers for Human Rights was successful in getting his ID unblocked.

“On my own, I don’t think I would have succeeded. I was already threatened with deportation. I frequented Home Affairs offices and they sent me from pillar to post. They didn’t give me the slightest chance to explain my situation. It appeared to me that there was no longer any light at the end of the tunnel. I was so happy to get my status back. There are quite a large number of people who are in the same situation I was faced with, who are in pain. I know of people who committed suicide because of it.”

### ***People born abroad to South African citizens***

Persons born abroad to South African nationals are entitled to South African citizenship by birth under section 2(1)(b) of the Citizenship Act.<sup>108</sup> A child of a South African citizen may apply for birth registration with the South African authorities within South Africa or in the country of their birth.

Section 13 of the Births and Deaths Registration Act states:

If a child of a father or a mother who is a South African citizen is born outside the Republic, notice of birth may be given to the head of a South African diplomatic or consular mission, or a regional representative in the Republic.

Regulation 11 states that:

A notice of birth given for a child born of South African citizens outside the Republic as contemplated in section 13 of the Act shall be ... accompanied by ... an unabridged birth certificate or other similar document issued by the relevant authority in the country where the birth occurred.

However, some children who are born abroad are turned away from local Department of Home Affairs' offices on the advice that they may only register their birth at the South African consulate in their country of birth. This becomes problematic in instances where there is no consular presence in that territory or where the child is unable to return to the birth country. Some of these children are told to return to the country of their birth and apply for a passport from that country in order to register their births in South Africa. There is no provision which requires this. It is also practice at the local offices to ask the applicant to obtain confirmation of the authenticity of the birth certificate from the country of birth. This is not required by the BDRA or regulations and is the responsibility of the office of application.

Given that a birth certificate 'issued by the relevant authority in the country in which the birth occurred' is a prerequisite to birth registration for children born abroad to citizens, access to citizenship for those born abroad is dependent on the functionality and ease of access to the birth registration system in the country of birth.

As an attorney, your first consideration is whether you can assist the client to access a birth certificate from the country of birth. Contact the foreign mission in question and find out what is required and whether the mission assists with birth registration. If it is not possible to obtain a birth certificate, consider the following.

108 Under the law in place prior to January 2013, such persons were categorised as 'citizens by descent.' It is unclear if the amendments will be enforced retroactively, such that people born before January 2013 to citizens abroad are now citizens by birth rather than by descent. See section 3.2.2 above.

The Department of Home Affairs does not generally allow citizens born abroad to register their birth 'late' with the same flexibility as those born in the Republic. However, as an attorney you should advocate for your client to be able to make an application for late registration of birth procedure as outlined in regulation 3, 4 and 5 to the Births and Deaths Registration Act.

Nowhere in the law does the late registration of birth procedure preclude itself to South African citizens *born on the territory*. The only relevant qualifying factor is that the applicant have a South African citizen parent.

The fact that citizenship is the basis for all other fundamental rights means that the Births and Deaths Registration Act should be read with flexibility to allow citizens born abroad to access citizenship even if they are unable to obtain a foreign birth certificate. This flexibility or discretion has been eliminated entirely by the 2010 amendments to the BDRA and regulations, in terms of which certain prescribed requirements must be met failing which the application will be rejected.

If the client is refused access to birth registration, write a letter to the local Home Affairs office, copying the Deputy Director General for Civic Services, requesting: (1) the decision in writing, (2) written reasons for the decision and (3) an internal appeal of this decision.

The refusal to register the client's birth and hence citizenship can be reviewed in court under the Promotion of Administrative Justice Act and potentially section 25 of the Citizenship Act. An application to compel the registration of the client's birth or recognition of citizenship can also be brought.

Another possibility you may want to consider prior to litigation is section 15 of the Citizenship Act, which allows the Minister to issue a citizenship certificate in cases of 'doubt.' An application under section 15 has no prescribed form or content. There is no regulation to this section to the Citizenship Act. It is also unclear how long it may take to obtain a decision. Section 15 applications can consist of a letter to the Minister requesting a citizenship certificate in case of doubt, explaining why the client could not qualify for foreign birth registration and attaching all documentary proof of the client's citizenship and personal history.



## Case study

"I hope to get citizenship and to go back to school, to become engaged in the community activities. I bring worry to my family because they think of my well-being and vulnerability to arrest. They may expect me to get educated and assist but I cannot do this. I hope to eventually assist and provide for my family.  
I fear arrest because I am undocumented.  
I am not free ..."

Y.V.C. ('Victor')<sup>109</sup> was born in Malawi in 1989 to a South African mother and Malawian father. While he was still a child, both his parents passed away. Victor was then raised by an informal 'uncle' who told him of his South African roots. After his uncle died, Victor came to South Africa in search of his remaining family. Remarkably, he was able to trace his grandmother. However, he was told at Home Affairs that he could not register as South African without a birth certificate from Malawi, which he did not have. Malawi only recently enacted legislation to make birth registration compulsory under the law.

Having travelled to South Africa without a passport, Victor was arrested and detained for the purposes of deportation on the charge of being an illegal foreigner. LHR intervened and was able to assist Victor in proving his maternal connection with his South African grandmother using a blood test. LHR hopes to assist Victor in accessing late birth registration in South Africa.

109 Name changed to protect identity.





## Case study

"I was born in Lesotho but I am South African. That is the only thing I want in my life. I feel like I'm a mess. There is nothing I can do. I have spent many years sitting at home and doing nothing. When I wanted to write my matric it was a mess – I didn't have an ID. When you go to even computer lessons they still want a document and I felt bad. There is a lot I want to achieve but I can't because I don't have an ID. In years to come, Neo must go to school but they will want his birth certificate and he doesn't have one."

Elizabeth Nthunya was born in Lesotho in 1982. Her mother was a Lesotho citizen, while her father was South African. When she was three years old, she came to stay with her paternal grandmother in South Africa. Over the years, she struggled to register as South African because she does not have a birth record from Lesotho, which is required in terms of the Births and Deaths Registration Act. Lesotho has very low rates of birth registration. Home Affairs told her to go back to Lesotho and find her mother. Eventually, she returned to Lesotho for her mother's funeral. She discovered that the clinic where she was born does not have records prior to 1985. She returned to South Africa but Home Affairs still refuses to assist her. Her father and grandmother have since passed away, but she has five South African aunts and uncles willing to testify to her identity. Elizabeth eventually managed to get a birth certificate issued from Lesotho. The South African Home Affairs Department, however, refused to accept the certificate, because it was not issued at the time of her birth. This reveals another barrier to foreign birth registration. South African citizens who obtain birth certificates through late registration of birth in their country of origin will not be considered for birth registration in South Africa.

Elizabeth has a son born in South Africa to a South African father, but Home Affairs will not allow them to register the child's birth because Elizabeth does not have an ID. Thus her son is also unable to access his South African citizenship, even though his father has a valid South African ID document.

Elizabeth's case illustrates the generational impact that lack of documentation has on the right to nationality. Such strict requirements – for a foreign birth certificate and for the mother's ID document – result in complete block to citizenship for Elizabeth and her son, with consequences on their economic mobility, right to work and education, and their physical and emotional health.

## ***People born in South Africa to citizens***

### ***Births to undocumented South Africans***

Parents who are not in possession of identity documents are routinely turned away when trying to register their children's births and to receive birth certificates at Home Affairs. At present, the forms for 'notice of birth' in the regulations the Births and Deaths Registration Act require that parents have a valid ID number in order to complete the forms required for birth registration. Parents are required to get IDs for themselves first, generally through the late registration of birth process. Those unable to provide adequate proof of their citizenship (due to lack of documentation from apartheid era combined with deceased parents) are unable to get an ID and then unable to register their children. The result is a domino effect where entire families remain undocumented and are trapped in a cycle of poverty and statelessness. Where parents do obtain IDs, it is often a good deal of time after giving birth and their child's birth also turns into a late registration.

Generally, births to undocumented South Africans will not be registered within the first 30 days after birth (due to the requirement of an ID for a parent to register a birth) and thus they will turn into cases of 'late registration of birth.' To assist such clients, ask them to gather all documentary proof of birth and upbringing in South Africa. Draft affidavits for clients and any witnesses whom they can find who can attest to their personal history and, ideally, their birth on the territory to a citizen parent. Then accompany the client to a local Home Affairs to assist him/her to make an application for late registration of birth. See the next section for more information on this process.

Litigation may be the only option in order to enforce the right to birth registration and citizenship for this group. Please refer to the legal framework outlined above concerning the right to universal birth registration. For children, the Constitution's protection of every child's right to a name and nationality from birth will be a strong tool for legal advocates in litigating to enforce the right to birth registration for children of undocumented parents.

### ***Late registration of birth (LRB)***

According to the Births and Deaths Registration Act 18 of 2010, at section 9(3A):<sup>110</sup>

Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, *unless the notice of the*

110 Section 9(3A) substituted section 9(3)(a) which referred to children registered after one year.

*birth complies with the prescribed requirements for a late registration of birth. [emphasis added]*

In theory, this procedure (late registration of birth) exists to allow for universal access to birth registration for previously disadvantaged persons. Unfortunately, in the past several years, LRB has been targeted by Home Affairs for eradication due to it becoming an avenue for fraudulent acquisition of citizenship.<sup>111</sup> DHA has stated several times that it will end the process of LRB,<sup>112</sup> although the procedure is still in force under current law and available at local offices. From the state's perspective, this procedure must have its limits in order to guard against fraud. Given that birth registration in South Africa is so intrinsically linked with citizenship, the Department of Home Affairs certainly needs to ensure the veracity of an applicant's claim, not only to birth registration but also to citizenship in the Republic. That being said, it is the work of social workers and legal practitioners to ensure that these safeguards against fraudulent access to South African nationality are not so burdensome and restrictive as to unduly limit access to the essential service of late birth registration. Achieving a fair balance in this procedure is a fine art, to be exacted most accurately on a case-by-case basis.

Although a chain of referral may exist within the Department in theory, in practice difficult or unusual cases are turned away and *not* referred to superiors at all. The result is that window-level employees of the Department of Home Affairs are determining who is able to submit applications and hence to access their right to South African citizenship. Further, some of the Department of Home Affairs local offices appear to impose several administrative requirements that are not aligned with current law and that are not sensitive to unusual cases. LRB applications are administered at the discretion of local office managers or the officer responsible for late birth registration. In terms of the 2010 amendments this discretion

111 See LexisNexis, 'Preliminary Note on Citizenship' stating 'The system of "Late Registrations of Birth" became a relatively easy method of acquiring South African Citizenship post 1994, by either birth or descent and also unfortunately became one of the most abused sections of both the Citizenship Act and also the Births, Death and Marriages Act in the acquisition of fraudulent Birth Certificates and Identity Documents. The reason for this can be attributed to the fact that all that had to be submitted in order to register a birth was a so called "School Certificate" or a Baptismal Certificate, coupled to a rather simple affidavit effectively blaming the prior Government for not providing access to registration facilities at the time of the birth of the applicant. Registration of birth then ensued. This process became a gold mine for unscrupulous "street agents" who fabricated the aforementioned documents, obviously for a fee.'

112 News 24, 'Late registration of birth to end' (18 March 2010) <http://www.news24.com/SouthAfrica/Politics/Late-birth-registration-to-end-20100318> (accessed 3 October 2013); City Press 'Militant with SA passport: Pandor blames late registration of birth' (26 September 2013) <http://www.citypress.co.za/news/militant-sa-passport-pandor-blames-late-registration-birth/> (accessed 3 October 2013).

is taken away, but no replacement for the administration of these cases have been provided. It is likely that even more applicants will be rejected at local office level.

In our experience, local offices routinely refuse to assist the following categories of persons in accessing late birth registration:

- Persons born abroad to South African citizens who do not have a birth record from the birth country
- Persons who are unable to show a letter from the school they attended and/or are unable to produce a clinic card or maternity certificate from the clinic in which they were born. Where applicants are not able to provide a witness to their birth, they are routinely turned away without any alternative solution being proffered.
- Persons who are unable to produce a witness that is a South African citizen. Where the applicant is not able to provide a citizen witness, he or she is routinely turned away. This requirement does not facilitate and actually frustrates one of the main goals of the Births and Deaths Registration Act, which is registration of all births in the Republic. In some cases the only living witness to a person's birth in the Republic may not be a South African citizen. There is also the troubling, discriminatory suggestion by this policy that citizens are more credible witnesses than non-citizens.

### ***Assisting clients to access LRB***

The Regulations to the Births and Deaths Registration Act prescribe procedures for a late registration of birth. Where the procedure was previously more flexible and discretionary, the following requirements are listed in regulation 4 (regulation 5 which applies to children registered after one year requires basically the same and is not more discretionary):

4 Late registration of birth of children of South African citizens

(1) A notice of birth given later than 30 days after the birth but before the child is older than one year, shall be given in accordance with subregulation (3).

(2) Where both parents of a child whose birth is sought to be registered in terms of subregulation (1) are deceased, the notice of birth must be given by the next-of-kin or legal guardian of the child.

(3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA-24/LRB illustrated in Annexure 1B and be accompanied by –

(a) proof of birth on Form DHA-24/PB illustrated in Annexure 1D attested to by a medical practitioner who –

(i) attended to the birth; or

(ii) examined the mother or the child after the birth of the child;

(b) an affidavit attested to by a South African citizen who witnessed the birth of the child where the birth occurred at a place other than a health institution on Form of DHA-24/PBA illustrated in Annexure 1E;

(c) biometrics, in the form of a palm, foot or fingerprint, of the child whose birth is sought to be registered in the appropriate space on Form DHA-24 illustrated in Annexure 1A;

(d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken on form DHA-24/A illustrated in Annexure 1C;

- (e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be;
  - (f) a certified copy of a valid passport and visa or permit, where one parent is a non- South African citizen;
  - (g) where applicable, a certified copy of the death certificate of any deceased parent;
  - (h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;
  - (i) where applicable, a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian;
  - (j) Form DHA-288/A illustrated in Annexure 2A;
  - (k) where applicable, Form DHA-288/B illustrated in Annexure 2C; and
  - (l) proof of payment of the applicable fee.
- (4) Where a woman gives birth to more than one child during a single confinement, the notice of birth contemplated in subregulation (1) must be given for each child separately on Form DHA-24 illustrated in Annexure 1A with all the supporting documents contemplated in subregulation (3) and the exact time of each birth must be recorded in that Form.
- (5) A notice of birth which does not meet the requirements of subregulations (3) and (4), shall not be accepted.

The regulations reveal that the Department of Home Affairs is now permitted to deny a person access to late registration of birth on the grounds that he or she is unable to produce all required documentary proof. Where a client is unable to submit an application for late registration of birth, as an attorney you should send a letter to the manager of the office in which such refusal was made, copying if possible the District Manager, the District Co-ordinator, and the Deputy Director-General of Civic Services. Such letter should request the decision in writing along with written reasons for the decision within 90 days in terms of PAJA.



## Case study

“It is hurting and you don’t even like it when people are talking about IDs. You feel shame. Even when something goes wrong, they say, ‘she doesn’t even have an ID, what can she do?’ My situation impacted my family ... even the time I wanted to sell vegetables...goods are cheaper wholesale, but you need an ID. It was hard because we are all dependent on what I am selling and we are living from hand to mouth.”

Mary Chombo Mwale was born in South Africa in 1962. Mary’s mother was South African. Her father was from Malawi and became a South African citizen through marriage. At age 16, her family moved to Malawi. Mary later married a Malawian and started a family.

When her husband passed away, Mary decided to move back to South Africa with her four children. She had never had a birth certificate, so she applied for late registration of birth. She was told by Home Affairs officials to ‘go back to Malawi’. She went to four different offices, often bringing as a witness her elderly neighbour who knew her when she grew up as a child in Soweto. But she was repeatedly turned away and told ‘we do not assist foreigners’. Eventually, Home Affairs told Mary that she must renounce Malawian citizenship in order to be recognised as South African – an unlawful request. She duly renounced her citizenship at the Malawian Embassy.

Finding herself stateless, Mary approached LHR. LHR corresponded with the Department of Home Affairs and Mary’s application for late registration of birth and a South African ID were processed and approved.

“Now I’m feeling free. I even showed my friends that now ‘I’m just like you’. I’m the happiest. I even thank God for hearing my prayers. I can tell other people they must be open. They have problems that they don’t want to speak out about. They just become discouraged. But persistence has helped me a lot. It works.”

### ***Clients rejected for late registration of birth***

If the reason for the rejection is that the application does not meet the requirements for LRB contained in regulation 4 and 5, it may be necessary to apply for a certificate of citizenship in cases of doubt in terms of section 15 of the Citizenship Act. If the reasons are not justified in term of the Act or Regulations, or if no reasons are received within 90 days, the decision may be taken on judicial review.

Should the Department decline to approve a client's application for late birth registration, the client is entitled to written reasons for the decision in terms of section 5 (1) of PAJA. The first step which you can take on behalf of your client is thus to request that such written reasons be provided.

If you either receive written reasons and the reasons are unsatisfactory, or you do not receive any response to your request, your clients will have grounds for the judicial review of this decision or an internal appeal of the decision. According to section 5 (2) of the PAJA, the reasons given for the Department's decision to refuse to approve your client's application must be 'adequate'. It is also stipulated in section 5 (3), that the decision will be regarded as being taken without good reason should the local office fail to provide adequate written reasons. You may decide to pursue judicial review of the decision at the outset. Your client is entitled to this procedure. It may be more effective, however, in practice, to refer the application and the reasons for its refusal to either the District Manager or the Deputy Director-General for Civic Services.

If the client and his witness are at any stage called in for interviews, prepare the client and witnesses for this interview. Request to be present at the interview ahead of time (see section 3(3)(a) of PAJA; legal representation may be necessary to protect the client's right to just administrative action). The client and his/her witness will be interviewed separately and their answers will be compared against each other to evaluate credibility and veracity. Advise your client's witness not to make any statements to which they do not have personal knowledge. Accompany the client and his witness to the interview and ask for minutes to be given to you following the interview.

### ***Birth to a single father or to an undocumented mother and South African father***



## Case study

“As a father, with an undocumented wife, I am not recognised. I am unable to apply for my children’s documentation. My children cannot access grants and other services. Even when I show my ID to apply, officials say they need my wife’s documents and she is not documented. About two years ago social workers said they would assist me, but they never came back. I have no hope in them anymore and my family suffers a lot ...”

L.G. was born in South Africa to a South African father and an undocumented foreign mother. Home Affairs refuses to register her because her mother has no form of identification. This is in spite of the fact that her father is present, willing to register his child and has a South African ID document.

The Births and Deaths Registration Act allows either parent to register a child’s birth. However, when a child is born out of wedlock, in order to register the child in the *father’s* surname – for example, in the case where the mother has no identity documents and thus cannot register the child in her own surname – the mother must be present and willing to sign consent to acknowledgement of paternity. But in practice, mothers are not permitted to sign such consent if they are not themselves documented. As a result, their children remain undocumented regardless of whether the father is a South African citizen. Such children are effectively in the same position as if both parents were foreigners.

The Children’s Act allows fathers to obtain court orders confirming paternity in such cases, but this is not well known or advertised.

Lawyers for Human Rights is assisting L.G.’s father is obtaining such a court order so that he may register his children.

According to section 9, 'Notice of birth,' subsection (1) of the Births and Deaths Registration Act, notice of a child's birth may be given by 'any one of his or her parents.' This seems to allow either parent to register a child regardless of whether the child was born in or out of wedlock.

Section 10, 'Notice of birth of a child born out of wedlock,' discusses only under which parent's surname a child born out of wedlock may be registered. In practice, however, Home Affairs' implementation of section 10 prevents single fathers of children born out of wedlock, or fathers who have an ID in cases where the mother is undocumented, from registering their children.

Two possible scenarios are described by section 10 for the registration of a child born out of wedlock: (1) either the single mother presents herself and registers her child alone, in her own name [in terms of subsection (1)(a)], or (2) the mother presents herself and her child together with the father [in terms of subsection (1)(b)], in which case they can choose to register the child under either parents' surname. The notice of birth form, DHA 24, requires a mother to sign her consent to the father's acknowledgement of paternity.

Accordingly, the registration of a child born out of wedlock is only envisioned in terms of the Act in the presence and with the consent of the child's mother. The father may not have his paternity recognised at registration of the child's birth without the signed consent of the mother.

To complicate matters further, even where both parents are present, LHR has seen many cases where the father is not able to register a child if the mother is undocumented because Home Affairs requires the mother's proof of identity in order for her to sign consent to acknowledgement of paternity. See current section 10(2):

... the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.

This problem often arises in cases where the mother is an undocumented foreigner who cannot get identity documents from her country of origin and the father is a South African. Even though the father is a citizen, with an ID, in LHR's experience Home Affairs refuses to register the child without the mother's identity document. Even temporary asylum seeker permits are permissible proof of identity, but mothers without any documents are simply turned away without receiving birth certificates for their children. LHR sees this often in the case of mothers from Lesotho (who tend to not have any identity documents but also do not apply for asylum).

Further, the department has an unofficial policy, in cases of South African citizens, of requiring a mother to be registered before the child will be registered. Again, LHR has seen this policy enforced even when the father is also a South African citizen who has a valid ID document and is standing at Home Affairs trying to register his child.

There is hope in such cases. Although the Department of Home Affairs does not always inform fathers of their rights, the father may have his paternity recognised officially. Under section 26(1) of the Children's Act, a person who claims to be the father can apply to a court for an order confirming his paternity of the child, if the mother refuses to consent; is incompetent to give consent due to mental illness; cannot be located; or is deceased.<sup>113</sup>

Armed with an order of paternity, the father is entitled to register the birth of his child 'unaccompanied' by or without the consent of the child's mother.<sup>114</sup>

You should consider trying to assist a client to obtain a court order to this effect – instructing Home Affairs to register the child under the father's surname – pursuant to section 46(1)(h)(viii) of the Children's Act which allows Children's Courts to 'instruct an organ of state to assist a child in obtaining access to a public service to which the child is entitled'.

The only fathers for whom this option is not available are the biological fathers of a child conceived through the rape of or incest with the child's mother; or a father who is biologically related to a child only by reason of being a gamete donor for purposes of artificial fertilisation.<sup>115</sup>

LHR also recommends meeting in person with the supervisor for birth registration at local offices and office managers to resolve this issue before resorting to litigation. However at some point litigation may be necessary in order to enforce a client's right. In that case it would be helpful for a court to review these sections of the Births and Deaths Registration Act in terms of their constitutionality. At present, these laws and policies are discriminatory towards children born out of wedlock and children with an undocumented mother.

### ***Birth outside of a hospital or registered clinic***

Children born outside of a hospital or registered clinic also may encounter difficulties in obtaining birth registration due to failure to

113 See sections 26(1)(i)-(iv).

114 This is also possible if the father wishes to be added to the birth register after the child has been registered and the mother does not consent. See section 11(5) of the Act and its accompanying regulation.

115 See section 26(2) of the Children's Act.

produce to Home Affairs a maternity certificate or clinic card from the time of birth. Children of foreign parents struggle in this regard even more than children of citizens, for whom Home Affairs will consider affidavits from parents and others in the registration process in lieu of a maternity certificate.

If a client was born at home or outside of a hospital or registered clinic, the client or her parent will likely only approach you after case has become a 'late registration of birth.' In these cases, the LRB process outlined above should be followed.

The 2010 amendments have entered a new requirement to the registrations of children who have foreign parents. The parents must produce a valid passport, visa or permit as the case may be otherwise the birth may not be registered.<sup>116</sup> The foreign father must also undergo a paternity test at his own cost in order for his particulars to be added to the birth certificate.

Every person born on the territory is entitled to birth registration, which protects each person's fundamental right to a nationality – whether South African or otherwise. The birth certificate is the key to proving their citizenship claims so as an attorney or social worker, always come back to the Constitution and international customary law when trying to advocate on behalf of clients.

### ***People who lost or renounced South African citizenship***

#### ***Lack of safeguards in loss of citizenship***

At present, the Citizenship Act allows the Minister to deprive a child of his or her citizenship in the case of a parent having lost his/hers (in accordance with the provisions of sections 6 or 8 of the Act). If the other parent does not retain citizenship, the child may become stateless. There is no safeguard against statelessness (i.e. 'unless the child would be rendered stateless'). Ideally, as provided in the 1961 Convention, such deprivation should only be permitted if the child would not become stateless as a result.

An amendment to Section 6 the Act recently provided new grounds for loss of citizenship at 6(3):

Any person who obtained South African citizenship by naturalisation ... shall cease to be a South African citizen if he or she engages, under the flag of another country, in a war that the Republic does not support.

This provision is troublesome, considering that (1) it applies seemingly automatically and yet (2) provides little detail on how it would be determined that a particular war is one which the

116 Regulation 8 to the Births and Deaths Registration Act.

Republic does not support, and (3) has no safeguard to prevent deprivation that would result in statelessness.

In addition, South Africans can lose their citizenship automatically under section 6(1) of the Citizenship Act if, after turning 18, they voluntarily acquire the citizenship of another country other than by marriage. Such loss can be prevented by applying to the Minister to retain South African citizenship.

Section 7(1) of the Citizenship Act allows a citizen to renounce South African citizenship before securing citizenship elsewhere. Typically, this can occur if a South African is applying to naturalise in a country that does not permit dual nationality – the applicant must renounce South African citizenship but risks becoming stateless if the naturalisation application is rejected or if the person later loses their naturalised status. On its face, the Act does not provide a safeguard to prevent statelessness in this situation.

If a client faces any of the above problems, you can assist the client in applying to resume South African citizenship as per section 13 of the Citizenship Act. Given that resumption applications are discretionary, you can also assist a client in contesting any negative decision in court.

### ***People born in South Africa to permanent residents***

The revised Citizenship Act states that children born in South Africa to permanent resident parent(s) shall be citizens by birth provided that they reside in South Africa until age of majority and provided that their birth was registered. This is a change from the previous law, which allowed such children to be registered as citizens immediately after birth.<sup>117</sup>

This amendment creates a gap in the law that places children at risk of becoming stateless. Should they leave South Africa for any period, it is unclear whether they would qualify for citizenship. While the draft regulations to the South African Citizenship Amendment Act of 2010 provided for exceptions for temporary absence from the country, the final regulations as enacted are silent on this point.

Although children of permanent residents should be able to access permanent residence status while they await their chance to get citizenship at age 18, such children will be stateless until they reach age 18 if they do not hold their parents' nationality.

Regulation 8(2)(a) to the South African Passports and Travel Documents Act allows stateless permanent residents to obtain travel documents, but this provision is not known by local offices.

117 See section 2(2) of the Citizenship Act prior to the 2010 Amendment Act.

Such children may struggle to obtain travel documents and thus their right to freedom of movement is at risk, along with the right to family unity that can be implicated due to inability to travel to meet relatives in the parents' country of origin. This legal amendment also prolongs the period of time during which children are reliant on their parents for immigration and nationality status. There is an 18 year period during which time parents can pass away, documents can be lost and other factors can intervene to frustrate a child's ability to access nationality when he or she becomes a major.

This legal amendment may also be unconstitutional. Section 28(a) of the Constitution of the Republic of South Africa provides that 'Every child has the right to a name and nationality from birth.'

The amendment does, however, give children the right to choose their nationality when they become adults. This is beneficial for children born to parents from countries that prohibit dual nationality. Such children will not be foreclosed from choosing to take their parents' nationality due to having acquired South African citizenship by operation of law. That being said, countries such as Malawi and Zambia allow dual nationality until age of majority, at which time a person must choose which nationality they will keep before turning 22 years old. The risk is that people unaware of these citizenship requirements will lose their chance to acquire their parents' nationality due to failure to comply with administrative requirements, which often include renouncing other nationality claims (even though they often do not have any other nationality claims, making renunciation impossible).

To assist children of permanent residence who cannot access their parents' nationality, contact the foreign missions of the countries in question to confirm their citizenship status and see if there is any way they can acquire citizenship.

If this fails, consider filing an application for citizenship for stateless persons born in South Africa under section 2(2) of the Citizenship Act.

Section 15 of Citizenship Act allows the Minister to issue citizenship certificates in a case of doubt in the event that the client has trouble proving his or her claim to citizenship via birth to a permanent resident parent. See the following section for more information on this provision.

Judicial review of a decision not to register a client as a citizen can be brought under the Promotion of Administrative Justice Act, rule 53 of Uniform Rules of Court and potentially section 25 of Citizenship Act (allows High Court to review any decision of the Minister regarding citizenship). An application to compel registration of client is another litigation option.

An exemption for permanent residence under section 31(2)(b) of Immigration Act is the last resort for people who Home Affairs refuses to acknowledge as citizens.

### ***Citizenship in cases of doubt***

Where any of the above attempts to access South African citizenship fail, legal practitioners can be relieved to learn that the current citizenship law allows for recognition of citizenship 'in cases of doubt.'

According to section 15 of the Act, the Minister may in such cases, subject to his or her discretion, 'issue to any person in respect of whose South African citizenship there is any doubt, a certificate that he or she is a South African citizen'.<sup>118</sup> A certificate issued under this section is intended as conclusive evidence that the person to whom it relates was a South African citizen by birth, descent or naturalisation, as the case may be, at the date of the issue of the certificate, but shall not be deemed to imply any admission that the person to whom it has been issued was not a South African citizen previously. This discretionary tool provides a possibility for persons unable to prove their claim to citizenship through the ordinary channels to achieve effective recognition and access to their nationality.

There is no accompanying regulation to this provision and thus it is unclear what documents or burden of proof the applicant must comply with in order to be successful. There is no form or application procedure outlined in the regulations. Lawyers for Human Rights has submitted letters to the Minister on behalf of clients seeking protection under this provision. We have not at the date of publication, received a decision on any of the applications submitted under this provision.

We recommend that applications under section 15 be addressed to the Minister of Home Affairs and consist of the following:

- Client's personal and family history
- Basis of client's citizenship claim
- Client's attempts to access citizenship and reason for the case being one of 'doubt' (explanation as to why the client lacks the ordinary proof of citizenship)
- Outline of the legal framework applicable, particularly focusing on fundamental rights impacted by client's inability to access citizenship
- Annexures attaching all of the client's documentation (including documents that do not go towards proving citizenship, but that establish his or her credibility in other ways such as proving where s/he grew up) and affidavits from witnesses to his or her personal history.

118 Section 15(1) of the Citizenship Act.

It is possible to submit a *combined section 15 AND exemption application*. In such an application, you would motivate that the Minister grant the client a citizenship certificate in case of doubt, and that if the Minister refuses to register the client as a citizen, that the Minister then should consider the client for an exemption for permanent residence under section 31(2)(b) of the Immigration Act. The reason this is a good option is that once a person has exhausted the options for recognition of his or her South African citizenship, the Immigration Act is the only avenue towards legal status in the Republic (given that the person is not viewed as a national). However, one must be sure to explain all options to the client and to receive instructions. The client may wish to pursue judicial review of the citizenship application prior to pursuing an exemption under the Immigration Act.

We recommend that section 15 applications be hand-delivered or sent via registered mail to Home Affairs' Head Office in Pretoria, attention to the Minister of Home Affairs but copying the Director-General, Director of Legal Services and the Deputy Director-General for Civic Services. Where a decision is not reached in a reasonable timeframe (3-6 months), a judicial review application can be brought under Promotion of Administrative Justice Act for failure to make a decision. An application to compel a decision can also be brought.

A negative decision can be reviewed by a High Court under section 25 of the Citizenship Act, PAJA or uniform rule 53.

### ***People born in South Africa and stateless***

Section 2(2) of the South African Citizenship Act<sup>119</sup> provides as follows:

- Any person born in the Republic and who is not a South Africa citizen by virtue of the provisions of subsection (1), shall be a South African citizen by birth, if –
- (a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and
  - (b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992).

This provision, if enforced, should protect against statelessness by granting any child born on South African territory citizenship if they would otherwise be stateless. South Africa is one of few African countries that have this unique provision to prevent statelessness and to protect the right to a nationality. It is furthermore remarkable that South Africa grants this right *from birth* – there are no requirements such as a specific length of residence. The only administrative requirement is that the birth is registered.

<sup>119</sup> Previously section 2(4)(b) prior to the South African Citizenship Amendment Act of 2010.



### ***Interpretation and application of section 2(2)***

There is no accompanying regulation to this section of the Citizenship Act. Thus, the above legislation must be viewed and interpreted in light of the definition of 'stateless' in international law and practice.

#### ***'Does not have citizenship or nationality of another country'***

Section 2(2) makes a distinction between (1) a child who *'does not have citizenship or nationality of another country'* and (2) a child who *'does not have the right to such citizenship or nationality.'* Thus two different meanings must be intended.

The phrase 'does not have the citizenship or nationality of any country' applies to several groups.

First, this provision refers to those who may qualify for citizenship or nationality under the law of another country, but who are simply not recognised by the state in question due to discrimination, inability to prove their nationality or other reasons. They may have the right to such citizenship, but nonetheless cannot access it.

Second, this provision includes those who have a potential claim to or right to claim a foreign nationality, but must first submit an application that must be approved before they are recognised as nationals. UNHCR's Concept of Stateless Persons under International Law provides the guidance that:

... whether or not he is a national of a State under the operation of its law requires an assessment of the viewpoint of that State." Those "who appear to be eligible for citizenship, but who must lodge an application are generally not considered to be nationals 'by operation of law,' as the acquisition of nationality is not automatic but rather, discretionary."<sup>120</sup> Until such an application is submitted and approved, such persons "do not have" another citizenship or nationality, regardless of whether they could qualify or have the right to make such an application.

The inclusion of this phrase protects children's right to citizenship *from birth*. Children need not wait for a discretionary application to be processed or an administrative requirement to be fulfilled at some future date because section 2(2) provides them with the right to South African citizenship provided they were born on the territory and do not have citizenship or nationality elsewhere.

120 UNHCR, *The 1954 Convention relating to the status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation* (October 2003), available at: <http://www.unhcr.org/refworld/docid/415c3cf4.html>.

***'Does not have the right to' citizenship or nationality of any other country***

The phrase 'has no right to such citizenship or nationality' is rather self-evident. Use of the term 'the right' excludes any discretionary procedure. Therefore, section 2(2) grants nationality to any child born in South Africa who is not automatically granted another nationality from birth and who does not qualify for any non-discretionary application for nationality.

This being said, the distinction between 'does not have' and 'has no right to' is somewhat confusing in practice: in all cases where a child does not *have the right to* another citizenship/nationality, he also does not *have* another citizenship/nationality.

***Situation report: section 2(2) in practice***

In spite of South Africa's commendable legislation intended to prevent statelessness from birth, the right to South African citizenship for those born stateless on the territory is rarely, if ever, realised in practice. This is, in large part, due to the administrative procedures for registering children born to foreign nationals in South Africa.

Birth registration is the critical point at which citizenship by birth is assessed and granted in South Africa. According to the Identification Act 68 of 1997, only South African citizens and permanent residents are given identity numbers (see sections 3 and 7(1)).

Under the Births and Deaths Registration Act 51 of 1992 and its regulations, a child born in South Africa will only be entered into the population register (and consequently given an ID number) if at least one parent is a citizen or permanent resident. Section 5(3) of the Births and Deaths Registration Act:

In the case of a non-South African citizen who sojourns temporarily in the Republic, particulars obtained from documents [relating to births and deaths] shall not be included in the population register and the issuing of a certificate in respect of such particulars is the registration thereof.<sup>121</sup>

There is simply no provision in the Births and Deaths Registration Act or its regulations for giving an ID number to a child whose parents are not citizens or permanent residents but who qualifies for South African citizenship under section 2(2) of the Citizenship Act.

In practice, the result is that children who are intended to benefit from section 2(2) – those most at risk of statelessness because of

121 See also regulation 8(5).

their birth outside their parents' country of nationality – are not accessing this right. While applicants for birth registration are assessed as to whether one parent is a citizen or permanent resident, at no point during or after birth registration – the critical point at which ID numbers are assigned – does Home Affairs assess whether or not such children in fact have 'the citizenship or nationality of any other country' or have the right to such citizenship or nationality.

In addition, the children most at risk of statelessness – those whose parents are stateless or are undocumented migrants – face an additional barrier in accessing section 2(2) protection. Section 2(2) requires that a birth is registered in order for a child to access citizenship. However, Regulation 8 of the Births and Deaths Act now requires that the parents have a valid permit when registering the child and that a foreign father must produce a paternity test at his own cost. While this regulation may be intended to aid the child by clarifying the identity of the parents, the result is that a parent who is without an identity document and/or without a valid immigration permit and/or cannot afford a paternity test will not be able to apply for a birth certificate for his or her child. Undocumented parents or those with expired immigration permits are aware that arrest is a possibility and thus delay birth registration.

In addition to the challenges created by the Births and Deaths Act and its regulations, xenophobia and lack of awareness on the part of Home Affairs officials has complicated the enforcement of universal birth registration in South Africa. Since March 2011, Lawyers for Human Rights has consulted with over a hundred clients who have been unable to access a birth certificate for a child born in the Republic. Asylum seekers, refugees, undocumented migrants and marginalised South Africans alike have been turned away for lack of a South African identity document (an unfounded requirement); expired or lost permits; and inability to produce any government-issued identity document.

### ***Stateless children born in South Africa to foreign parents***

Whether a child qualifies for South African citizenship due to lack of another nationality or citizenship – or lack of the right to another nationality or citizenship – depends entirely on his or her parents' countries of origin and the relevant citizenship law and practice of those countries.

For that reason, provided herein is an analysis of the nationality law and practice of a sampling of countries whose nationality laws are likely to create statelessness if their citizens give birth in South Africa.

Please note: For all categories below, analysis is done with the assumption that the birth *has* been registered, as required by section 2(2) of the South African Citizenship Act.

## **Cuba**

The Cuban government views certain citizens as 'permanent emigrants' if they have left Cuba for over 11 months, now 24 months under recent changes to the law in 2013. Professionals who leave the country can also become 'permanent emigrants,' such as doctors, engineers and other highly skilled workers.

'Permanent emigrants' face significant barriers in passing on their nationality/citizenship to their children born outside Cuba. Cuban clients have reported to LHR that some Cuban emigrants who are aware of these problems go back to Cuba to give birth.

According to LHR clients and also public information, permanent emigrants cannot enter Cuba for more than 1 month at a time. They may apply for permission to enter for an additional month, but apparently two months is the maximum. Coincidentally, in order for their children born outside Cuba to acquire Cuban citizenship, the Cuban Embassy in South Africa states that children must establish permanent residence in Cuba (apparently 3 months residence is required).

According to the Cuban immigration department in Cuba as well as an expert witness who testified on Cuban citizenship for the case *Matter of Vazquez*<sup>122</sup> in the U.S., the only requirement for establishing Cuban citizenship for those born outside Cuba is a duly issued birth certificate from the Cuban foreign mission in the country of birth. However, the Cuban Embassy in South Africa refuses to register such children's births (perhaps because it will signify legal recognition of citizenship).

The result is a class of children born abroad who are not regarded as Cuban nationals but who hold no other citizenship or nationality.

### **Legal Guidance:**

1. Any child born in South Africa to two Cuban permanent emigrant parents does not acquire Cuban nationality as of right and thus qualifies for South African citizenship under section 2(2).
2. Any child born in South Africa to a Cuban permanent emigrant parent whose other parent cannot pass on nationality qualifies for South African citizenship under section 2(2).

<sup>122</sup> *Matter of Vazquez* (31 July 2007) See <http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/July%202007/Vazquez073107.pdf> (accessed 3 October 2013).

## ***Somalia***

The Transitional Federal Charter for the Somali Republic, drafted in 2004, provides at Article 10 that:

Every person of Somali origin shall be entitled to citizenship of the Somali Republic provided that he/she was born in the Somali Republic; or his/her father is a citizen of the Somali Republic.

Under this law, a Somali woman who gives birth outside Somalia cannot pass on her nationality to her children.

### **Legal Guidance:**

1. Any person, (1) born in South Africa (2) to a Somali mother, and (3) to a father who cannot by law pass on his nationality, has no right to another nationality and therefore qualifies for South African citizenship under section 2(2).

2. Any person, (1) born in South Africa (2) to a Somali mother, and (3) to a father who is Somali or another national who is deceased, absent or unwilling to acknowledge paternity, does not have another nationality and therefore qualifies for South African citizenship under section 2(2).

If the father is unable or unwilling to acknowledge paternity on the child's birth certificate, then the child will be unable to establish *prima facie* evidence of his or her link to her father, and thus, will presumably be unable to access the father's nationality. The child would qualify under section 2(2) for South African citizenship.

## ***Malawi***

Malawi was historically part of the former Rhodesia and Nyasaland. During colonisation, many Malawians migrated to what is currently Zimbabwe to work in the mines and on the farms. This has resulted in many persons becoming stateless, due to a combination of Malawian and foreign citizenship laws and broad interpretation thereof.

Malawi does not permit dual citizenship for adults. The result, as outlined in section 7 of the Malawi Citizenship Act of 1966, is as follows: anyone born to Malawian parents, who is 'also, to his own knowledge, a citizen of some other country', must – between his 21st and 22nd birthday – take an oath of allegiance, make a declaration of their wish to retain Malawian citizenship, and make a declaration of their intention to reside permanently in Malawi. If he does not comply by age 22, he automatically loses his Malawian citizenship.

Lawyers for Human Rights and its partners have documented that this legal provision is implemented by Malawian foreign

missions in Zimbabwe and South Africa in such a way that *anyone born outside Malawi*, even if they actually do not qualify under the law for citizenship in the country of birth, loses his citizenship from the viewpoint of Malawi if he does not comply with section 7 by age 22. Malawian authorities simply apply the presumption that the individual has a claim to another nationality by birth abroad.

What this means is that any person born to a Malawian parent in South Africa will lose citizenship if he or she does not fulfil section 7 requirements prior to age 22. This includes the requirement that he or she intend to permanently reside in Malawi – a difficult prerequisite for someone born outside Malawi who has never stepped foot on the territory.

South Africa does not provide citizenship by mere birth on the territory. Even though children born in South Africa to Malawian parents are not entitled to South African citizenship, the Malawian foreign mission will require them to comply with section 7. This interpretation and application of a prohibition on dual citizenship is common across southern Africa – countries adopt a better-safe-than-sorry approach by interpreting legislation broadly. It could be a result of lack of training and knowledge, but foreign missions seem to prefer to err on the side of depriving would-be citizens of nationality rather than doing a legal analysis of the nationality law in other countries where their citizens give birth – in order to determine whether such children actually do become citizens ‘of some other country.’

While children born abroad to Malawian citizens by birth can apply for restoration of their citizenship (section 27 of the Citizenship Act), it is a discretionary procedure – not a right. In addition, applicants must travel to Malawi to submit their restoration applications and yet Malawian foreign missions refuse to issue emergency travel documents to persons who are not already recognised as nationals. Restoration applicants who do not hold another nationality must then travel illegally to Malawi to lodge their – discretionary – applications. Costs are also prohibitive for many would-be applicants: as of 2011, applications cost \$120 and if approved, applicants must also pay unknown and potentially prohibitive ‘citizenship fees.’ In one case, a client of LHR was told by the Malawian Consulate that she could be asked to pay K500,000 – equal to about R12,680 – for the citizenship fee.

Malawi also has a racial requirement in its citizenship law. For children born both inside and outside of Malawi, they must have a parent who is not only a citizen but also ‘a person of African race.’

Another caveat in the law impacts second generation children of Malawian migrants. According to section 5 of the Citizenship Act, Malawians can only pass on their nationality to children born outside Malawi if one parent is a *citizen by birth* (i.e. was born in

Malawi). Thus, persons who are citizens by descent (born outside Malawi) cannot pass their Malawian citizenship to their children born abroad. They may, under section 17, apply for 'registration of minor children' but this is a discretionary procedure that is only available under the law if the child is 'ordinarily resident' in Malawi.

South Africa's section 2(2) protects against statelessness for children born to Malawian nationals in South Africa in the following instances by LHR's understanding:

**Legal Guidance:**

1.1 Any person born in South Africa to two Malawian parents who are citizens by descent does not automatically acquire Malawian citizenship as of right and therefore qualifies for South African citizenship under section 2(2).

1.2 Any person in South Africa born to a Malawian citizen by descent, and whose other parent cannot pass their nationality to the child (due to nationality law, or death, absence or unwillingness of parent to acknowledge paternity/maternity) is also stateless and qualifies for South African citizenship under section 2(2).

2.1 Any person born in South Africa to Malawian citizens by birth, who does not comply with section 7 by age 22, qualifies for South African citizenship under section 2(2) on the grounds that he does not have the right to citizenship or nationality in another country.

2.2 Any person born in South Africa to one Malawian citizen by birth, and whose other parent cannot pass their nationality to the child (due to nationality law, or death, absence or unwillingness of parent to acknowledge paternity/maternity) qualifies for South African citizenship under section 2(2) on the grounds that he does not have the right to citizenship or nationality in another country.

3.1 Any person, born in South Africa to a Malawian who is not of the African race, and whose other parent cannot pass their nationality to the child (due to nationality law, or death, absence or unwillingness of parent to acknowledge paternity/maternity) does not qualify for Malawian citizenship at birth. Therefore, such person qualifies for South African citizenship under section 2(2) on the grounds that he does not have the right to citizenship or nationality in another country.

It should be noted that Zambia has a similar temporal requirement for children born abroad to citizens to confirm their citizenship or lose it by age 22.

***Mozambique***

In the early 1900s in South Africa, many Mozambicans came to work on the mines. Later, Mozambique had a long-standing civil

war during the 1970s. During that time, many births in the country went unregistered. Lack of registration during the civil war was compounded by severe floods which resulted in destruction of many birth records at the local level. Meanwhile, many Mozambicans came to South Africa as refugees during the civil war and as economic migrants after the war.

These factors have had the following impact in South Africa: many Mozambicans living in South Africa have never had any form of ID document – neither from Mozambique nor South Africa. These migrants have had children born in South Africa, whose births go unregistered due to their parents' inability to produce any form of government-issued identification (combined with the fear that undocumented parents feel when approaching Home Affairs). What occurs is a snow-ball effect that results in entire families remaining undocumented and effectively stateless.

In addition, when one looks at Mozambican legislation on citizenship, it is clear that citizenship is not automatic for those born abroad. Persons born to citizens outside Mozambique must actively follow an administrative procedure in order to be considered Mozambican citizens. According to Article 8 of the 1975 Citizenship Act, they shall be Mozambican nationals 'provided':

... they declare on their own behalf if over the age of 18 or through their legal representatives if below that age, that they wish to be Mozambican nationals and expressly renounce any other nationality to which they may be entitled.

As mentioned above, where a person must follow an administrative procedure in order to access nationality, they do not *have* such nationality under the operation of law until they meet administrative requirements and their application is approved.

### **Legal Guidance:**

1. Any person who was born in South Africa to two Mozambican parents, who has not complied with the requirement to declare his wish to be a Mozambican national and to expressly renounce other nationalities qualifies for South African citizenship under section 2(2). If they wish to eventually apply for Mozambican citizenship, they may simply renounce South African citizenship as required by section 8 of the Mozambican Citizenship Act.

2. Any person born in South Africa to one Mozambican parent and whose other parent cannot pass on their nationality (due to nationality law, or death, absence or unwillingness of parent to acknowledge paternity/maternity), similarly qualifies under section 2(2) for citizenship if they have not complied with section 8 of the Mozambican Citizenship Act.

Such an application of section 2(2) would go a long way towards preventing statelessness, particularly among second and third



generation Mozambicans, given that so many former Mozambican refugees and mine workers live undocumented in South Africa and have had children born here. Government amnesties provided a significant number<sup>123</sup> of Mozambicans with permanent residence over the years.<sup>124</sup> However, an unknown number have been unable to regularise their immigration status. Application of section 2(2) to people whose parents have not acquired legal status in the country would serve as a critical stop-gap to prevent statelessness in the Mozambican community and to ensure that the right to a nationality from birth is realised.

### ***Swaziland***

In 2005, a new Constitution was enacted in Swaziland. It contains several provisions that exhibit gender discrimination, some of which mirror the Swaziland Citizenship Act 14 of 1992.

Under article 43(1) and 43(2) of the Constitution, a child born after the Constitution entered into force, regardless of birthplace, will be Swazi by birth if his father is a Swazi citizen under the new Constitution. Also applying to children born after 2005, it appears that mothers are only permitted to pass citizenship by birth if a child is born out of wedlock and not 'adopted by the father or claimed by that father in accordance with Swazi law and custom,' provided that the mother is a citizen of Swaziland by birth<sup>125</sup> (thus Swazi women citizens who were born outside of Swaziland do not pass citizenship to children born out of wedlock abroad). The effect of this law is that Swazi women who marry foreign men may not pass on citizenship by birth to their children. However, Swazi men appear to be unencumbered by marriage to foreign women; their children and their spouses appear to acquire citizenship with ease. Section 44 allows foreign women who marry Swazi men to acquire citizenship from the time of marriage after making a declaration. It also applies retroactively, such that citizenship is also granted to foreign women spouses who married before the new Constitution.

In addition, a child born abroad, such as in South Africa, to a Swazi father also born abroad must notify Swazi authorities of his or her desire to retain Swazi citizenship within one year of attaining

123 The first amnesty from 1995 to 1996 offered permanent residence to contract mineworkers who had worked in South Africa since 1986 and who had voted in the 1994 elections; around 51,504 people applied. The second amnesty in 1996 provided amnesty to 124,073 undocumented citizens of SADC countries living in South Africa who 'met certain conditions.' Between 1999 and 2000, permanent residence was granted to 82,969 former Mozambican refugees who could show that they arrived between 1985 and 1992 and lived in the Northern, North West, Mpumalanga and KwaZulu-Natal provinces. Those living in other provinces were not regularised. Peberdy (n 44 above) 156-158.

124 Peberdy (n 44 above) 156-157.

125 Article 43(4) of the Constitution of the Kingdom of Swaziland (2005).

age of majority. If he does not comply, he will automatically lose his Swazi citizenship as a matter of law according to section 43(3) of the 2005 Constitution.

The Constitution also contains a provision allowing for 'citizenship by descent.' Article 41 states:

A person born, whether before or after the commencement of this Constitution and whether in or outside of Swaziland, is a citizen by descent if by birth that person is a descendant.<sup>126</sup>

Article 42 provides for 'Citizenship by operation of law,' which states to:

(1) A person born in or outside Swaziland before the commencement of this Constitution shall be a citizen of Swaziland by operation of law if at the birth of that person one of the parents was a citizen of Swaziland.

(2) ... "citizen by operation of law" refers to a person who was born before the existence of the status of a citizen of Swaziland and was a member of a class of persons – (a) generally regarded as Swazi by descent; and (b) subsequently declared by law to be citizens of Swaziland.

Taken together, these provisions are somewhat confusing. It would seem that the citizenship by descent category would cover people who would not acquire citizenship by birth due to not having Swazi fathers (presumably they would be considered 'descendants' if their mother was Swazi). Citizenship by operation of law appears to offer another opportunity for citizenship as long as one parent was Swazi – either through citizenship or ethnicity. There appears to be no different treatment towards citizens by descent or by operation of law as opposed to citizens by birth, making the purpose of the distinction unclear.

Nonetheless, there are a number of loopholes in these provisions that could create statelessness. In lieu of providing explicit legal guidance, we would suggest that you contact Swazi authorities in each individual case to see if the person is recognised as a citizen. If not, you can consider a section 2(2) application.

### ***Lesotho***

According to the Lesotho Constitution of 1993,<sup>127</sup> citizenship is not automatically acquired for people born outside Lesotho unless one of the parents was born inside Lesotho.

Article 39. A person born outside Lesotho after the coming into operation of this Constitution shall become a citizen of Lesotho at the

<sup>126</sup> The Swaziland Citizenship Act 14 of 1992 uses the term 'descendant of an ancestor who was a citizen of Swaziland' in section 4(1).

<sup>127</sup> Available at: <http://www.unhcr.org/refworld/docid/3ae6b57e4.html> (accessed 4 November 2011)

date of his birth, if at that date either of his parents is a citizen of Lesotho otherwise than by descent.<sup>128</sup>

The 1971 Lesotho Citizenship Act provides at section 11(1) that a child of Lesotho citizens can be registered as a citizen by application to the Minister, provided the child is 'lawfully sojourning in Lesotho' and has 'lawfully sojourned there for a period of five years commencing on or after 4 October 1966.' This effectively excludes children living abroad from qualifying for registration.

The practical effect of this is that the second generation of Lesotho migrants will be born stateless. For example, Lebogang was born in Lesotho. As such, she is a Lesotho citizen by birth. She moves to South Africa, where she gave birth to Neo. Neo is a Lesotho citizen by descent. Neo grows up and marries a woman named Elizabeth, who was also born in South Africa to parents from Lesotho and thus is also a citizen by descent. The children of Neo and Elizabeth will not acquire Lesotho citizenship because both of their parents are citizens by descent. It should be noted that the Lesotho authorities are not strictly applying these laws in all cases. As such, one must always consult with the appropriate authorities prior to making conclusions as to a client's status.

#### **Legal Guidance:**

1. Any person born in South Africa to parents who are Lesotho citizens by descent is not regarded as a Lesotho citizen and thus is entitled to citizenship under section 2(2) of the South African Citizenship Act.
2. Any person born in South Africa to a parent who is a Lesotho citizen by descent and whose other parents is unable to pass on their citizenship shall be stateless and thus is entitled to citizenship under section 2(2) of the South African Citizenship Act.

### **Stateless persons with no claim to South African citizenship**

After your status determination procedure, you will determine whether your client has any claim to citizenship in South Africa. If the answer is no, you will proceed to assess the solutions available.

<sup>128</sup> Citizens by descent are, according to article 43(2) of the 1993 Constitution, references to a person who is a citizen of Lesotho by virtue of section 39 of the 1993 Constitution ['A person born outside Lesotho after the coming into operation of this Constitution shall become a citizen of Lesotho at the date of his birth, if at that date either of his parents is a citizen of Lesotho otherwise than by descent.'] or of section 23(2) or 26 of the Constitution of Lesotho of 1966 or of section 6 of the Lesotho Citizenship Order 1971.

As for all clients who are stateless or at risk of statelessness, the 'first prize' will always be access to nationality. This must always be the first port of call as an attorney or social worker. In practice this will usually involve liaising between the client and consular authorities in an attempt to pave the way towards recognition of your client.

If, however, your status determination reveals that your client does not qualify under the law of any state, or no consular authority will extend protection to your client at your request, your client is stateless and can be assisted in accessing nationality through a period of permanent residence in South Africa.

### ***Permanent residence exemption: a path to nationality in South Africa***

#### **Immigration Act 13 of 2002**

31(2). Upon *application*, the *Minister*, as he or she deems fit, after consultation with the Board, may under terms and conditions determined by him or her –  
(b) grant a *foreigner* or a category of *foreigners* the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision; provided that the *Minister* may –  
(i) exclude one or more identified *foreigners* from such categories; and  
(ii) for good cause, withdraw such right from a *foreigner* or a category of *foreigners*; ...

The only means which currently exists to protect such stateless persons who were not born in South Africa is section 31(2)(b) of the Immigration Act, which allows for a special application to the Minister for permanent residence for an individual or category of foreigners (such as stateless persons) for an indefinite or definite period. The application must show that '*special circumstances exist which justify such a decision.*' In other words, this is a catch-all provision that can provide protection to persons who can show good cause why they ought to be granted permission to remain on the territory, despite the fact that they do not meet the ordinary requirements for permanent residence in South Africa. If permanent residence is granted, the client can then work his or her way to naturalisation after 5 years of residence.

An example of an exemption for permanent residence application drafted by LHR. The regulation to the Immigration Act's section 31(2)(b) now contains a direction which stipulates that the aim of this provision is '*... to promote economic growth through the employment of foreign labour ...*'. One could

argue that the documentation of stateless people will promote economic growth, but a stateless person would not be able to fill in the entire form which seems to require a passport and proof of employment. The recent regulation shows that the intent is to use this provision for economic goals rather than humanitarian. It is best to present all information that makes your client's case sympathetic and shows that he or she has 'special circumstances;' is suffering prejudice by remaining undocumented; and would be a positive contributor to the South African society if allowed to remain. Be sure to include any supporting documents – birth certificates, school documents, etc. – as annexures to your application. Retain the originals and **only submit copies** to Home Affairs, as they do not return exemption applications once a decision has been made.

We also recommend that exemption applications be delivered to the Minister, care of Legal Services either by hand or registered mail. LHR has in the past made an 'acknowledgement of receipt' form for hand delivery confirmation of receipt.

Consult the UNHCR guidelines on statelessness when drafting your client's exemption application. These guidelines explain the factors that go into statelessness status determination as well as the burden of proof, standard of proof and other relevant considerations for decision makers. Given that South Africa has no law or policy on statelessness, it should apply the UNHCR guidelines in assessing stateless status and whether someone qualifies for protection due to statelessness.

There are four sets of UHCR guidelines<sup>129</sup> on statelessness, all issued in 2012:

- No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (UNHCR Definition Guidelines);
- No. 2: Procedures for Determining Whether an Individual is a Stateless Person (UNHCR Procedures Guidelines);
- No. 3: The Status of Stateless Persons at the National Level (UNCHR Status Guidelines); and
- No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness (UNHCR Child's Rights Guidelines).

If an application for exemption is rejected, that decision is reviewable in court under the Promotion of Administrative Justice Act and uniform rule 53. Resettlement to another country is the last resort option for clients who have failed to receive any form of protection in South Africa. See section 6.3 below for more information regarding resettlement.

129 All of the guidelines are available on [www.refworld.org](http://www.refworld.org).

### ***Accessing refugee status in South Africa***

Stateless persons may concurrently be refugees. Indeed, the 1951 Convention relating to the Status of Refugees and South Africa's Refugees Act, No. 130 of 1998 recognise this. Both legal instruments provide refugee status to people who are outside their country of nationality or, if stateless, outside their country of habitual residence, who have a fear of persecution on the basis of race, religion, nationality or membership of a particular social group or political opinion.

Under the 1951 Refugee Convention, a stateless refugee should receive protection as a refugee, since the arbitrary denial of citizenship due to one's race, religion, nationality, membership of a particular social group or political opinion can indicate persecution. Refugee status provides more benefits than stateless status generally and thus should be the first port of call, particularly in South Africa where there is no parallel scheme requiring the protection of stateless persons.

Given that a stateless person may also be a refugee, you must ensure that confidentiality requirements for refugees who might also be stateless are upheld in statelessness determination. Every applicant in a statelessness determination procedure is to be informed at the outset of the need to raise refugee-related concerns, should they exist.<sup>130</sup> The identity of a refugee or an asylum-seeker must not be disclosed to the authorities of the individual's country of origin.

Where refugee status and statelessness determinations are conducted in separate procedures and a determination of statelessness can be made without contacting the authorities of the country of origin or without disclosing the client's identity, both procedures may proceed simultaneously. However, to maximize efficiency, where findings of fact from one procedure can be used in the other, it may be appropriate to first conduct interviews and to gather and assess country information for the refugee determination procedure.

It is possible, even, that your client's statelessness is at the very heart of his or her claim to refugee status. This overlap can occur where a person has been denationalised for discriminatory reasons which fall under the listed grounds of the Refugee's Act.

A refugee is defined in the Refugees Act as follows:

A person qualifies for refugee status ... if owing to a well founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group; is outside the country of his or her nationality and is unwilling or unable to avail

130 UNHCR Procedure Guidelines (n 7 above) para 26 - 30.

himself or herself of the protection of that country or, not having a nationality and being outside of the country of his or her habitual residence is unable or, owing to such fear, unwilling to return to it.<sup>131</sup>

Further, a stateless person qualifies as a refugee if he or she 'owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere'.<sup>132</sup> Dependents of refugees are also protected in the Act with refugee status.

Yet there remain challenges for access to refugee status for stateless persons. In part, this stems from the limited space in asylum applications to explain issues of statelessness or complex nationality issues. In part, it stems from applicants' lack of awareness that deprivation of nationality is relevant in the context of refugee status. Applicants themselves are often not aware that they have in fact lost their nationality at all – particularly when it was the result of an amendment to the citizenship law that rendered them stateless unbeknownst to them. Thus Home Affairs officials need to be trained on nationality issues as they relate to refugee claims, so that they can assist clients with protection needs who may not understand how their experience relates to persecutory nationality law and implementation.

Rejection of stateless refugees' applications is also a result of the lack of awareness on behalf of refugee status determination officers (RSDOs), the Standing Committee of Refugee Affairs (SCRA) and the Refugee Appeal Board (RAB) of complex citizenship scenarios and country of origin information regarding the denial of nationality to specific groups or types of persons. LHR has seen stateless people approaching its offices in order to change the nationality listed on their asylum permits; for example, Palestinians born in Iraq whose nationality is recorded as 'Iraqi' or people of Burundian descent born in Tanzania whose nationality is recorded as 'Tanzanian' and who are in fact not recognised as nationals in either country.

There are scores of asylum-seekers in South Africa from Ethiopia, Eritrea and Zimbabwe who have had their nationality arbitrarily withdrawn – in clear violation of international law – as a result of their perceived race or nationality. This includes those of Eritrean ethnicity in Ethiopia who are presumed by Ethiopia to have acquired Eritrean nationality during that state's succession. Some 15 000 Ethiopians expelled to Eritrea are not accepted as Eritrean nationals.<sup>133</sup> Those of foreign descent who were born in or resided in Zimbabwe, but were stripped of their citizenship in 2001 for

131 Section 3(a) of the Refugees Act

132 Section 3(b) of the Refugees Act

political reasons, are now required to comply with sometimes insurmountable administrative procedures in order to 'register' or 'restore' their citizenship.

People who have been denationalised by their country of birth due to a Convention reason, often race, political opinion or impugned (foreign or dual) nationality, may very well qualify under the law for refugee status. The UK and the US have recognised such claims, specifically those involving denationalised Ethiopians of Eritrean ethnicity and denationalised Estonians of Russian ethnicity.<sup>134</sup> Even in these countries applicants have succeeded only by appealing to the higher courts with the assistance of legal representation.

The complexity of these cases requires more attention and education of Home Affairs officials in South Africa, as well as access to affordable legal services for asylum-seekers with such claims.

133 International Committee of the Red Cross annual reports for 2005, 2006 and 2007. Those allowed to stay and register for resident permits are not allowed to work nor are they issued exit visas allowing them to leave. In effect, they are aliens (United Kingdom Border Agency, 'Eritrea – Country of Origin Information Report' (2009), para. 30.05-07.

134 See *Stserba v Holder*, 646 F.3d 968 (US) and *ST Ethiopia UK* (2011) IAC.



## Case study

M.A. was born in a small town on the border between Ethiopia and Eritrea. When she was 12 years old, Ethiopia expelled her mother, who was ethnic Eritrean, to Eritrea during the conflict between the countries. Shortly thereafter, Eritrean soldiers stormed the town and attacked MA's family store, killing her father and other family members. She survived and was taken to hospital by a cousin who helped her escape Ethiopia.

She eventually entered South Africa where she applied for asylum. Her asylum application was rejected as manifestly unfounded on the grounds that she left her country because there was no one left to take care of her.

LHR assisted her to appeal the decision in the High Court. Her claim is based on the arbitrary deprivation of her nationality under the law; the likelihood that she would remain stateless if returned to Ethiopia; that she would face persecution as an ethnic Eritrean and former asylum-seeker in Ethiopia and that she would face risk of forced conscription in Eritrea. In 2014 the High Court substituted the decision of the RSDO to reject her claim to refugee status and declared that she qualifies to be recognised as a refugee. Insert footnote: *FAM v The Minister of Home Affairs and Others* Case number 6871/2013.

### ***Discriminatory denationalisation: a Zimbabwean case study***

In its original, post-independence Constitution, anyone born in Zimbabwe to a citizen, permanent resident or ordinary resident was a citizen by birth. In 1983, Zimbabwe amended the Constitution to prohibit dual nationality and introduced an amendment to the Citizenship Act requiring renunciation of foreign citizenship in order to retain Zimbabwean citizenship. In 2001 the government required anyone with even a theoretical claim to foreign citizenship to renounce that citizenship, this time in accordance with foreign law, and to reapply for Zimbabwean citizenship within a 6 month period. Critics report that this was a political measure designed to disenfranchise voters with questionable allegiances.<sup>135</sup> It is estimated that several hundred thousand African migrants and their children born in Zimbabwe are currently stateless; they were stripped of their citizenship by this amendment, which was advertised only in Harare and only to the white European population. If they did not access their parent's citizenship by descent, due either to their parent's death or lack of documentation or due to a conflict of laws, such persons were rendered stateless. A 2003 amendment provided that children born in Zimbabwe prior to 1980 to migrants from a South African Development Community (SADC) country could apply for a citizenship certificate. Many Zimbabweans in South Africa may not qualify for this provision since it requires that the applicant remained in Zimbabwe from birth (with limited exceptions).

A 2009 Constitutional amendment seemed to provide citizenship to persons with one Zimbabwean citizen parent and one foreign parent. However, the Zimbabwean Consulate in South Africa denied such individuals consular protection between 2011 and 2012 and told them they are not citizens. In Zimbabwe, they were consistently unable to access citizenship without legal action. Even when after the High Court ordered the Registrar-General to recognise an applicant's citizenship, from 2002 until 2013 the Registrar-General has consistently continued to deny individuals citizenship through (intentional) misinterpretation of the law.

In March 2013, Zimbabwe approved a new constitution. This constitution effectively allows dual citizenship for people born in Zimbabwe to SADC nationals, who are now considered citizens by birth. In the run-up to the presidential elections in June 2013, numbers of people who had lost their citizenship under the 2001 amended citizenship act were able to exchange their 'Alien' IDs for 'Citizen' IDs (conveniently, allowing them to vote) upon presenting a birth certificate showing birth in Zimbabwe. Only time will tell how widely and how effectively this new constitutional provision is

135 B Manby, *'Struggles for Citizenship in Africa'* (2009).

enforced. At the time of this writing, the Zimbabwe Citizenship Act has not been amended and thus is now unconstitutional; it still prohibits dual nationality and provides that persons born in Zimbabwe to 'foreign' parents have lost their citizenship.

A denationalised client from Zimbabwe may still be able to make a case for refugee status on the basis of arbitrary withdrawal of nationality due to race/tribe/ethnicity or membership of a social group (those persons born in Zimbabwe to parents from other countries). However, it is likely that he or she would need to show that the 2013 constitutional amendments either are not being applied to him/her personally (an application to restore citizenship was rejected) or to show country research establishing that the new constitution has not changed the way the Registrar General implements the Citizenship Act.

Citizenship and Statelessness: Challenges and Concerns

5 F N I E

S/N A M E G O m/o date of this registration

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16 A L I E N

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Sex

District of Origin

Citizenship Classification

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## Case study

“I did not choose to be stateless. Perhaps that is my destiny. Well, I do not know if it was God or Satan who made me stateless.”

L.N. (‘Luis’) was born in Zimbabwe in 1975 to a Zambian father and Malawian mother, who had met and married as migrant workers decades ago. While he was a citizen at birth, he later was told by Zimbabwean authorities in South Africa that he is no longer a Zimbabwean citizen due to changes to the citizenship act in 2001. He had applied for South Africa’s Zimbabwe Dispensation Project, which allowed Zimbabweans to obtain work or study permits. But he could not obtain a passport from Zimbabwe as a non-citizen, and remains undocumented in South Africa.

“So who am I? Where do I belong? Zimbabwe is the only country I have ever known as home. That my parents were from other countries is meaningless because I know of no family in Zambia or Malawi. My family is destroyed. I am here in South Africa. My wife is in Harare. My children are in a rural area ... at the moment I’m desperate ... I’m failing to support my kids in Zimbabwe. With everything I’m failing, because of that citizenship.”

## Last resort options: litigation and resettlement

As noted throughout the above sections, the courts are always an option to enforce a client's rights. In particular, above outlines the areas of South African law relevant to this field. The right of every person to fair administrative action, the right to human dignity found in the Bill of Rights and section 25 of the Citizenship Act are strong tools in this field of law, which is so devoid of specific protections for the right to citizenship.

Where all else fails, as attorneys and social workers you may approach the UN High Commissioner for Refugees (UNHCR) to request that your client be considered for resettlement to another country. Resettlement is a procedure that allows people who cannot access basic human rights in their current country of residence or in their country of origin to receive protection in a third country.<sup>136</sup> The third country will provide immigration status and a path to citizenship for resettled people. Most countries also provide resettled persons with social assistance to help them integrate, find work and adjust to life in a new country.

Given that UNHCR is the organisation mandated to assist stateless persons internationally, it is also the organisation that primarily can assist in resettlement of stateless persons. In accordance with the *General Conclusion on International Protection* No. 95 (LIV), UNCHR considers resettlement of non-refugee stateless persons 'on an exceptional basis.'<sup>137</sup>

UNHCR's Resettlement Handbook provides that the organisation considers stateless persons for resettlement where the person:

Does not have in the current or a former state of habitual residence a secure, lawful residence status which brings with it a minimum standard of treatment equivalent to that set out in the 1954 Convention relating to the Status of Stateless Persons; and

Has no reasonable prospect for acquiring such a residence status or nationality; and

Has acute protection needs which cannot be addressed inside the country of current or former habitual residence.

Even where UNHCR identifies a person as qualifying for resettlement, it cannot guarantee that it will locate a country willing to accept the person for resettlement.

<sup>136</sup> UNHCR Resettlement Handbook, chapter 1. (4 July 2011) <http://www.unhcr.org/3d464b239.html> (accessed 30 September 2013).

<sup>137</sup> UNHCR Resettlement Handbook, chapter 7.2.2. <http://www.unhcr.org/3d464ee37.html> (accessed 30 September 2013).

Consult the UNHCR Resettlement Handbook<sup>138</sup> for more information. It will be helpful to know the relevant criteria that UNHCR considers prior to approaching the local UNHCR office in South Africa to enquire as to whether your client may be considered for resettlement. Resettlement may be an option available to stateless persons and LHR is not aware of any cases where stateless persons have been resettled out of South Africa at the date of publication.<sup>139</sup>

138 UNHCR, 'Resettlement Handbook' available at <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=4ecb973c2> (accessed 30 September 2013).

139 LHR submitted requests for resettlement for a stateless client to UNHCR in January 2014 and awaits the outcome of the request.

### 3 Checklist of strategies to assist clients

For ease of reference, this section is broken into two main groups: (1) people with unrecognised claims to South African citizenship; and (2) people with no claim to South African citizenship.

People with unrecognised claims to South African citizenship		
Groups of Concern	Problem	Steps and solutions
Citizens whose IDs have been blocked	IDs are blocked by Home Affairs due to suspected forgery, fraud, misuse or duplication of an ID number. Duplicate IDs occur when one person holds two ID number or when two people hold the same ID number. Home Affairs requires citizens to prove their citizenship to have ID unblocked.	<ul style="list-style-type: none"> <li>• Write <b>letter requesting written reasons</b> (blocked). Attach any and all evidence of client's citizenship and family history and other documents supporti</li> <li>• Under section 5 of PAJA, if no reply is was taken without good reason.</li> <li>• <b>Judicial review or application to compel</b> rights.</li> <li>• See section 3 of PAJA which outlines the a person adversely affected by an administrative decision.</li> <li>• See also the Identificati ID books.</li> <li>• <b>Exemption</b> acknowledge as citizens.</li> <li>• Per client instructions, <b>judicial review of decision not to grant exemption</b></li> <li>• <b>Resettlement</b> does not need to appeal to the highest</li> </ul>



Citizenship and Statelessness: Challenges and Concerns

<p>People born abroad to South African citizens</p>	<p>Without a foreign birth certificate, Home Affairs in South Africa refuses to register their birth and consequently their citizenship is not recognised.</p>	<ul style="list-style-type: none"> <li>• Assist client to obtain <b>foreign birth certificate</b> from country of birth (through foreign mission or by writing to civil registry). Most countries do not process birth certificate applications unless the person is present in the country in question.</li> <li>• If client is refused birth registration: <b>internal DHA appeal</b> (letter to office manager, copying Deputy Director General for Civic Services, requesting internal appeal of decision not to register client)</li> <li>• <b>Section 15 of Citizenship Act</b> allows the Minister to issue citizenship certificates in a case of doubt. This provision could be used in cases where client does not have foreign birth certificate. However there is no clear application procedure and decisions can take a long time since must be approved by Minister.</li> <li>• <b>Judicial review</b> of decision not to register client's birth and acknowledge citizenship can be brought under the Promotion of Administrative Justice Act, rule 53 of Uniform Rules of Court and potentially section 25 of Citizenship Act (allows High Court to review any decision of the Minister regarding citizenship). Note: under amended Citizenship Act, birth registration is not required before citizenship by birth passes under operation of law (as result of birth to a South African citizen either in or outside the country).</li> <li>• <b>Application to compel</b> registration of client is another litigation option.</li> <li>• <b>Exemption</b> for permanent residence under section 31(2)(b) of Immigration Act is the last resort for people who Home Affairs refuses to acknowledge as citizens.</li> <li>• <b>Resettlement</b> to another country through UNHCR is the last option if all of the above fails (judicial review need not be conducted before resettlement is considered, since client does not need to appeal to the highest possible level, (s)he just needs to show that (s)he exhausted local remedies for protection).</li> </ul>
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<p>Adult citizens who have never had a birth certificate or ID (late registration of birth applicants)</p>	<p>This group includes:</p> <ul style="list-style-type: none"> <li>- people in marginalised communities (in farm areas,<sup>a</sup> rural regions and also close to international borders) - generally who were born in apartheid outside of an urban area;</li> <li>- people who have migrated within South Africa (such as farm workers) and are unable to afford to return home for documents requested by Home Affairs;</li> <li>- citizens who cannot register their births because their parent(s) are also undocumented; and</li> <li>- those who were born outside a hospital or clinic and have no documentary proof of birth.</li> </ul>	<ul style="list-style-type: none"> <li>• Assist client in <b>available</b> to prove birth in South Africa.</li> <li>• Draft <b>affidavits</b> for client and his/her and witnesses' relationship to client and knowledge of his history.</li> <li>• Assist client in making application for <b>registration of birth</b></li> <li>• <b>Request written reasons</b> negative decision.</li> <li>• Assist client with <b>internal appeal</b> of any negative decision.</li> <li>• <b>Judicial review</b> of PAJA, under the Promotion of Citizenship Act (allows any decision of the Minister regarding citizenship).</li> <li>• <b>Exemption</b> acknowledge as citizens.</li> <li>• Per client instructions, <b>judicial review of decision not to grant exemption</b></li> <li>• <b>Resettlement</b> does not need to appeal to the highest</li> </ul>
<p>Children with single fathers or undocumented mothers</p>	<p>For children born out of wedlock, section 11 of the Births and Deaths Registration Act is interpreted by Home Affairs to require the presence of a mother with an identity document in order for a child to have his/her birth registered.</p>	<ul style="list-style-type: none"> <li>• <b>Write a letter</b> birth registration, copy child whose mother is unavailable or undocumented.</li> <li>• Assist father to obtain from Children's Court, DHA to aid in birth registration.</li> <li>• <b>Judicial review</b> of decision no birth of client.</li> <li>• <b>Application to compel</b> Home Affairs to register the birth of the client.</li> </ul>

Citizenship and Statelessness: Challenges and Concerns

<p>Stateless people born in South Africa (who are entitled to citizenship under section 2(2) of Citizenship Act)</p>	<p>No other country will recognise the person as a citizen or national (for example, due to conflict of laws, discrimination, state succession, amendments made to citizenship law resulting in client becoming stateless, or client's loss or deprivation of citizenship)</p>	<ul style="list-style-type: none"> <li>• Write to foreign missions and obtain <b>written confirmation of current citizenship status</b> of client.</li> <li>• Attempt to obtain <b>citizenship</b> for client in parents' country, or other relevant countries, if possible. (This step is not obligatory where client is not currently a recognised citizen. A section 2(2) application can be launched immediately.)</li> <li>• <b>Application for citizenship under section 2(2)</b> of Citizenship Act: submit letter to Deputy Director General for Civic Services requesting that the person be registered as a citizen under section 2(2).</li> <li>• <b>Judicial review</b> of negative decision, or court <b>application to compel</b> registration of client as a citizen by birth.</li> <li>• If client is over age 18, <b>citizenship by naturalisation</b> per section 4(3) of Citizenship Act, for a child born in SA to parents who are 'not South African citizens or who have not been admitted into the Republic for permanent residence,' may be a faster option to pursue than exemptions. There are no regulations to this provision and so it may be accessible to people whose parents were irregular migrants.</li> <li>• <b>Exemption</b> for permanent residence under section 31(2)(b) of Immigration Act is the last resort for people who Home Affairs refuses to acknowledge as citizens.</li> <li>• Per client instructions, <b>judicial review of decision not to grant exemption</b> to client.</li> <li>• <b>Resettlement</b> to another country through UNHCR is the last option if all of the above fails (judicial review need not be conducted before resettlement is considered, since client does not need to appeal to the highest possible level, (s)he just needs to show that (s)he exhausted local remedies for protection).</li> </ul>
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## Citizenship and Statelessness: Challenges and Concerns

People who lost or were deprived of South African citizenship	<p>The former 1949 Citizenship Act had several grounds for loss or deprivation of citizenship that no longer exist in the 1995 Citizenship Act.</p> <p>The 1995 Act does, however, have several provisions on loss or deprivation of citizenship. See sections 6, 8, 10, 11 and 12.</p>	<ul style="list-style-type: none"><li>• <b>Resumption of citizenship</b> can qualify to resume citizenship under 88 of 1995.</li><li>• <b>South Africa</b> citizenship or nationality - and thus is left stateless by the loss or African citizenship.</li><li>• <b>Judicial review</b> deprivation of citizenship.</li><li>• <b>Exemption</b> acknowledge as citizens.</li><li>• Per client instructions, <b>judicial review of decision not to grant exemption</b></li><li>• <b>Resettlement</b>  does not need to appeal to the highest</li></ul>
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Citizenship and Statelessness: Challenges and Concerns

<p>People born to permanent resident parent(s) after January 2013</p>	<p>Persons in this category who are unable to access the citizenship of their parents may be stateless until they are able to qualify for South African citizenship when they reach age of majority (the law was changed as of 1 January 2013 so that children of permanent residents must wait until age 18 to qualify for citizenship). They may also be stateless if only one parent is a permanent resident and the other parent is not a citizen. The new law seems to require both parents to be permanent residents in order for citizenship to be granted (the term 'parents' is used as opposed to previously, where 'one of his or her parents' was used).</p>	<ul style="list-style-type: none"> <li>• <b>Attempt to access citizenship</b> for client in his/her parent(s) country of nationality through correspondence with foreign missions.</li> <li>• <b>Citizenship for stateless persons born in South Africa:</b> section 2(2) of the Citizenship Act is a path for such persons to access citizenship prior to turning 18 if they are not recognised as citizens or nationals of any other country or even after turning 18 (if, for whatever reason, they cannot obtain citizenship through section 2(3)).</li> <li>• <b>Section 15 of Citizenship Act</b> allows the Minister to issue citizenship certificates in a case of doubt.</li> <li>• <b>Judicial review of decision not to register client as a citizen</b> can be brought under the Promotion of Administrative Justice Act, rule 53 of Uniform Rules of Court and potentially section 25 of Citizenship Act (allows High Court to review any decision of the Minister regarding citizenship).</li> <li>• <b>Application to compel</b> registration of client is another litigation option.</li> <li>• <b>Exemption</b> for permanent residence under section 31(2)(b) of Immigration Act is the last resort for people who Home Affairs refuses to acknowledge as citizens.</li> <li>• Per client instructions, <b>judicial review of decision not to grant exemption</b> to client.</li> <li>• <b>Resettlement</b> to another country through UNHCR is the last option if all of the above fails. (judicial review need not be conducted before resettlement is considered, since client does not need to appeal to the highest possible level, (s)he just needs to show that (s)he exhausted local remedies for protection).</li> </ul>
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Citizenship and Statelessness: Challenges and Concerns

<p>People born in South Africa who do not have a citizen parent and whose parents were not admitted for permanent residence</p>	<p>This group could include children of irregular migrants or 'illegal foreigners' as referred to in the Immigration Act.</p> <p>The term 'admitted for permanent residence,' although not defined in the Citizenship Act, likely means admitted legally with the possibility to acquire permanent residence over time. If the parents were already permanent residents at time of birth, the child would qualify for citizenship by birth.</p> <p>Thus, 'not admitted into the Republic for permanent residence' likely refers to those not admitted in a capacity that would lead to permanent residence.</p> <p>Section 1(1)(i) of the Immigration Act states that 'admission' to the Republic refers to lawful admission at a port of entry.</p>	<p>allow such children to <b>naturalise</b></p> <p>18.</p>
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- a. According to the Director Ge registration of births which are beyond 15 something we want to deal with. The minister to find a solution.' <http://www.bdlive.co> down-on-late-registration-of-births (accessed 3 October 2013).

People with no claim to South African citizenship		
Groups of Concern	Problem	Steps and solutions
Stateless migrants	Migrants and immigrants can be stateless due to not acquiring citizenship in any country, loss or deprivation of citizenship, state succession, conflict of laws, discriminatory implementation of laws, or failure to meet administrative requirements for citizenship recognition.	<ul style="list-style-type: none"> <li>• <b>Application for refugee status</b> for stateless persons who are also refugees in terms of the Refugees Act. After 5 years of refugee status, client can apply for permanent residence, and 5 years later may apply to naturalise (see section 5 of South African Citizenship Act).</li> <li>• <b>Attempt to access citizenship</b> for client in his/her parent(s) country of nationality through correspondence with foreign missions (if no fear of persecution or if inquiry can be made without disclosing client's identity).</li> <li>• Obtain <b>written confirmation of current citizenship status</b> of client from competent authority.</li> <li>• If client is not recognised by any state, an <b>exemption</b> for permanent residence under section 31(2)(b) of Immigration Act is the only path towards legal status and citizenship in South Africa under current law (unless they qualify for refugee status).</li> <li>• Per client instructions, <b>judicial review of decision not to grant exemption</b> to client.</li> <li>• <b>Resettlement</b> to another country through UNHCR is the last option if all of the above fails (judicial review need not be conducted before resettlement is considered, since client does not need to appeal to the highest possible level, (s)he just needs to show that (s)he exhausted local remedies for protection).</li> </ul>

## Citizenship and Statelessness: Challenges and Concerns

Foundlings	Foundlings are children found on the territory whose parentage and/or citizenship are unknown.	<ul style="list-style-type: none"><li>• Work with social worker to <b>foundling</b>. local DHA depending on the age of the child. The Hague Convention on Certain Questions Relating to Conflict of Nationality Law, domesticated).</li><li>• <b>child</b> under section 12 of the Births and tool.</li><li>• <b>Citizenship in cases of doubt</b> Citizenship Act.</li><li>• <b>Citizenship by descent</b>: section 3 of the Citizenship Act grants</li><li>• <b>Citizenship by naturalisation</b> migrants.</li><li>• <b>Exemption</b> section 31(2)(b) of Immigration Act can provide a path to natu 5 generally for adults).</li><li>• Per client instructions, <b>judicial review of decision not to grant exemption</b></li><li>• <b>Resettlement</b></li></ul> <p>does not need to appeal to the highest</p>
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Citizenship and Statelessness: Challenges and Concerns

<p>'Vulnerable foreign minors': unaccompanied foreign minors (UAMs), orphaned and abandoned foreign children</p>	<p>Vulnerable foreign minors often do not have documentation from their birth country and have no legal guardians to assist them with birth registration. Even if they go through Children's Court proceedings, these proceedings ordinarily do not deal with the child's immigration status or birth registration. This creates the risk that the person will become stateless as an adult.</p>	<ul style="list-style-type: none"> <li>• Refer vulnerable foreign minors to <b>Department of Social Development</b> social worker. Provide any needed assistance in making permanency plan for child.</li> <li>• If it is determined not to be in child's best interest to seek repatriation to their birth country, work with child's social worker to make application for child's <b>immigration</b> permit and <b>birth registration</b>. Children's Court can issue an order instructing an organ of state to assist a child in accessing a public service to which he or she is entitled (see section 46(h)(viii)).</li> <li>• <b>Citizenship by descent</b>: section 3 of the Citizenship Act grants citizenship by descent to children adopted by South African citizens.</li> <li>• <b>Naturalisation</b>: if vulnerable minors were born in South Africa, it may be possible to apply for their as per section 4(3) of the Citizenship Act as amended if their birth was registered.</li> <li>• Assist with <b>asylum application</b> if child has refugee claim.</li> <li>• Assist with application for <b>exemption for permanent residence</b> under section 31(2)(b) of Immigration Act if child has no refugee claim but it is not in his or her best interests to be repatriated (due to neglect, abandonment, abuse or death of parents/caregivers).</li> <li>• Refugee status (and then permanent residence) or an exemption for permanent residence can eventually qualify the child to apply for <b>naturalisation</b> under section 5 of the South African Citizenship Act (1995).</li> <li>• <b>Judicial review of decision not to grant exemption</b> to client.</li> <li>• <b>Resettlement</b> to another country through UNHCR is the last option if all of the above fails (judicial review need not be conducted before resettlement is considered, since client does not need to appeal to the highest possible level, (s)he just needs to show that (s)he exhausted local remedies for protection).</li> <li>• <b>*Note</b>: If vulnerable minors were born in South Africa, it may be possible to apply for their naturalisation as per section 4(3) of the Citizenship Act as amended. See above.</li> </ul>
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Citizenship and Statelessness: Challenges and Concerns

<p>Children born to undocumented foreign parents in South Africa</p>	<p>Home Affairs requires proof of identity for parents in order to list their names on the birth register. As a group at high risk of statelessness, birth registration is critical to protect their right to citizenship through their parents or in South Africa if they are stateless.</p>	<p>states that DHA has the obligation to have no valid ID.</p> <p><b>Judicial review</b> of decision no child's birth or court birth registration.</p>
<p>Children of parents with asylum seeker or refugee permits</p>	<p>Sometimes this group faces challenges accessing birth registration. As a group at high risk of statelessness, birth registration is critical to protect their right to citizenship through their parents or in South Africa if they are stateless.</p>	<p>Africa or abroad to a citizen.</p> <p>right to birth registration.</p> <p>may be possible to apply for their <b>naturalisation</b> as per section 4(3) of the registered. See above.</p> <p>where clients gave birth to <b>request the maternity certificate</b>. Attach power of or permit if any.</p> <ul style="list-style-type: none"> <li>• <b>Write letter to local DHA</b> (registration, office manager) requesting registration of childr applicable law. <b>Accompany client</b> to officials.</li> <li>• <b>Judicial review</b> or <b>application to compel</b> registration of children.</li> </ul> <p>may be possible to apply for their <b>naturalisation</b> as per section 4(3) of the registered. See above.</p>

## 4 Assisting stateless persons in immigration detention

As an attorney, paralegal or social worker, you may encounter clients who have been arrested and detained for immigration purposes. In order to assist them, you will need to determine if there are any grounds for their release from detention. The typical case analysis will include questions as to whether the individual has any legal basis to remain in South Africa – through valid immigration status or a pending application for status; a citizen or permanent resident child, parent or spouse; or an asylum claim that can be pursued under the Refugees Act.

Another avenue to consider in consultations with immigration detainees is whether or not the individual is stateless. If a person is stateless, detention for the purposes of deportation may be inherently arbitrary and unlawful.

Detentions for the purpose of deportation are discretionary administrative detentions authorised by the Immigration Act, but subject to the Bill of Rights and Promotion of Administrative Justice Act. Unfortunately, Department of Home Affairs immigration officials' and police enforce a general policy of detaining all suspected illegal foreigners pending deportation, rather than employing a discretionary, case-by-case approach. As such, there is widespread disregard for the rules and regulations of the Immigration Act and Refugees Act, resulting in unlawful and prolonged arrests and detentions of foreigners, many of whom have in fact lodged applications for asylum or other status.<sup>155</sup> Stateless persons invariably get caught up in this detention frenzy due to their inability to qualify for most immigration permits and their lack of awareness of any pathway to attain lawful immigration status.<sup>156</sup>

Undocumented persons are open to arrest and detention under Section 41 of the Immigration Act which states:

When so requested by an immigration officer or police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the

155 Lawyers for Human Rights, 'Monitoring Immigration Detention in South Africa' (September 2010) [http://www.lhr.org.za/sites/lhr.org.za/files/LHR\\_2010\\_Detention\\_Report.pdf](http://www.lhr.org.za/sites/lhr.org.za/files/LHR_2010_Detention_Report.pdf) (accessed 3 October 2013).

156 The Immigration Act's section 31(2)(b) exemption for permanent residence procedure is one that is not known by the general public. It is not advertised by Home Affairs on its website or in any other forum and thus is only accessed by people who come into contact with a social worker or attorney who knows about the procedure.

Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

Police and immigration officials are permitted under the law to detain an individual for up to 48 hours for the purpose of verifying his or her immigration status.<sup>157</sup>

Section 34 of the Immigration Act provides the basic framework for a detainee's rights. It states that no one may be detained for over 48 hours for purposes other than deportation. In other words, all immigration detention after 48 hours must be for purposes of deportation. Individuals must be given written notice of the decision to declare them an illegal foreigner and notice of their right to request that this decision be reviewed. Detained persons may at any time request that their detention for purposes of deportation be confirmed by a warrant of court and must immediately be released if a warrant is not forthcoming within 48 hours.

Immigration detainees may not be kept in detention for over 30 days without a court warrant. This period may be extended for up to 90 days by court warrant. As per regulation 28, detainees must be given notice of the decision to extend their detention and must be allowed to make representations as to why their detention should not be extended.

The immigration detention of stateless individuals is most often inherently arbitrary due to the impossibility of their deportation.<sup>158</sup> In cases where immigration detention lasts over 48 hours it must be intended for purposes of deportation; therefore, where it is determined that a person is stateless and no country will accept them for deportation, their detention becomes a violation of their rights, in terms of the Bill of Rights, to freedom and security of person and to human dignity.

157 Section 34 and 41 of the Immigration Act.

158 Most often, stateless persons cannot be deported. Due to their stateless status they struggle to obtain travel documents and, likewise, immigration status and the legal right of residence in any country. However, it is possible that you will encounter stateless persons who have some form of identity document or who gained legal residence/immigration status in another country. This could include refugees who are also stateless; they may have been granted refugee status in another country prior to coming to South Africa. It may be possible to deport them to the country where they are recognised as refugees. Further, not all stateless persons have always been stateless – for those who were stripped of their citizenship by law (deprivation and loss of citizenship), it may be possible to deport them to the country of previous residence even though they are no longer recognised as citizens. Often denationalised persons will be afforded permanent residence or some other legal status by law (as under Zimbabwe's 2010 Citizenship Amendment Act, which granted denationalised persons 'Alien' status).

Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for detention of such persons.<sup>159</sup>

Article 9 of the International Convention on Civil and Political Rights, guaranteeing the right to liberty and security of person, prohibits unlawful as well as arbitrary detention. For detention to be lawful, it must be regulated by domestic law, preferably with maximum limits set on such detention and subject to periodic and judicial review. For detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory. Indefinite as well as mandatory forms of detention are intrinsically arbitrary.<sup>160</sup>

Detention should be used as a measure of last resort and can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective. Alternatives to detention – from reporting requirements or bail/bond systems to structured community supervision and/or case management programmes – are part of any assessment of the necessity and proportionality of detention. General principles relating to detention apply for even stronger moral reasons to children, who, as a rule, are not to be detained in any circumstances.<sup>161</sup>

Where persons awaiting statelessness determination are detained, they must not be held with convicted criminals or individuals awaiting trial. Moreover, judicial oversight of detention is always necessary and detained individuals need to have access to legal representation, including free counselling for those without means.<sup>162</sup>

The lack of awareness and training of law enforcement, immigration officials and foreign diplomatic staff regarding the phenomenon of statelessness often results in prolonged detention of stateless persons. For example, in an answering affidavit to a

159 UN High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html> [accessed 18 June 2012], para 59.

160 UN High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html> [accessed 18 June 2012], para 59.

161 UN High Commissioner for Refugees, *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html> [accessed 18 June 2012], para 60.

162 UNHCR Procedures Guidelines (n 7 above) at para 61.

court application for the release of a stateless person from detention, Home Affairs' deponent stated that:

... many persons facing deportation, deliberately mislead diplomatic staff (interviewing them at Lindela Holding Facility) of countries which the detainees allege they are nationals of. This is done in order to sow confusion amongst diplomats of a number of countries, as a consequence of which, more often than not, all the countries involved in the identification process of an illegal foreigner refuse to acknowledge the nationality of the person concerned, thereby achieving the aim of the (sic) detainee namely, to frustrate any attempts to have him deported.<sup>163</sup>

National stateless status determination procedures in the form of domestic legislation and then appropriate training are needed in order to reduce the risk of prolonged and/or arbitrary detention of the stateless.<sup>164</sup>

## Stateless persons' right to release from immigration detention

The Immigration Act distinguishes between two periods of detention: (1) Detention *pending* deportation in terms of section 34(1)(d), which allows for detention of 30 days and which on a warrant of a court can be extended 90 further days;<sup>165</sup> and (2) detention for *any purpose other than deportation* (namely for the purpose of determining a person's immigration status) in terms of section 34(2) which allows for a maximum period of 48 hours of detention.<sup>166</sup> Thus, under the Immigration Act, the prolonged detention of stateless persons cannot be lawful.

163 *Ahmed Abdul Nibigira v Minister of Home Affairs and others* 2011 10 (SGHC). Available at <http://www.saflii.org/za/cases/ZAGPJHC/2011/178.pdf> (accessed 3 October 2013).

164 UNHCR Procedures Guidelines (n 7 above) at para 62.

165 The section provides:

### 34 Deportation and detention of illegal foreigners

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned –

(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days ...

Once it has been established that a person is stateless and cannot be removed from the territory, their continued detention becomes arbitrary. To hold otherwise would be to condone the potential of indefinite detention – which would certainly be unconstitutional in the event that the person has committed no crime.

Problematically, no dedicated provision exists for the release of undocumented persons from detention. The law as it stands makes very little provision for the protection from arbitrary detention of persons who cannot be deported, but who also do not qualify as legally present in the territory. Very little is understood of this dilemma and it appears that neither the officials at Lindela nor indeed the judiciary know how to handle the matter.

Since there has yet to be a positive judgment declaring that the detention of the stateless who cannot be deported is inherently unlawful, it is useful for practitioners to use the established standard that no person may be detained in excess of 120 days for immigration purposes. One caveat to note is that you must be sure that the 120 day period has expired before launching proceedings, otherwise your client's application may be dismissed (more below). If your client has been detained for less than 120 days, it may be an opportunity to seek judicial review and a judgement as to the lawfulness of detention where an individual has been determined to be stateless and no country will accept him for deportation. This could result in a valuable legal precedent that can help shape the law on detention of stateless persons in South Africa.

Judges may be reluctant to grant an order authorising the release from detention of a person who has no immigration status in the country and no clear path to one. The only recourse open to persons who are unable to otherwise regularise their presence in South Africa but who are unable to leave the territory by reason of their statelessness is to make application to the Minister of Home Affairs for exemption for permanent residence in terms of section 31(2)(b) of the Immigration Act. Ideally, attorneys should launch exemption applications for detained stateless persons prior to the launch of urgent applications for their release from detention, since it will help for counsel to be able to show the court that the individual has made an application that the Minister is considering.

In drafting a court order for release, we strongly recommend that attorneys include a request for the issuing of a 'Form 20' Authorisation for Illegal Foreigner to Remain in the Republic

166 The section provides:

(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.

Pending an Application for Status. Home Affairs has taken a policy decision that it will only issue Form 20s where a person has received a court order (in spite of the fact that the Form 20 remains part of the regulations to the Immigration Act).<sup>167</sup>

LHR has been successful in obtaining the release of a number of stateless persons from detention at Lindela Repatriation Centre. However, all releases have so far been obtained by relying on the statutory maximum period of detention for deportation of 120 days. LHR has not received any judgements clarifying the question of whether or not a stateless person can lawfully be detained for deportation after it has been determined that he or she cannot be deported.

LHR received an unfavourable judgment in the case of *Ahmed Abdul Nibigira v Minister of Home Affairs and others* on 28 November 2011 in the South Gauteng High Court.<sup>168</sup> The applicant, who was detained at Lindela, was interviewed by relevant foreign missions and could not be deported to any nation. However, Judge Kgomo dismissed the urgent application for his release. He found that the application was launched prematurely because the applicant had not yet been detained for over 120 days when the court application for his release was launched; and further that the procedures outlined in terms of the Immigration Act, in terms of warrants for detention and extension of detention, had been properly complied with. He also dismissed the application because he agreed with the respondents' point in limine that the magistrate who took the decision to extend the warrant of detention should have been joined to the proceedings.

The judgment admitted that 'There is no country that is prepared to acknowledge [the applicant] as a citizen,'<sup>169</sup> but mused,

Where would the applicant go if there was a need that he be released from detention? Would that court sanctioned release have meant that he should be allowed to roam South Africa despite the fact that he came in illegally and he has no right or papers to allow him to be here? Must the police or immigration officials not arrest and detain him for deportation again? Surely the above scenario is not what the legislature intended when this Immigration Law [sic] passed.

J Kgomo did not seem troubled by the alternative to releasing the applicant from detention, namely his continued and potentially indefinite detention at taxpayers' expense. He also disregarded the

167 DHA officials have informed LHR that the department no longer issues form 20s due to fraud concerns. Thus, with a court order instructing DHA to release a client from Lindela, a prayer for a Form 20 should be included in order to protect the client from repeated arrest and detention pending the outcome of his exemption application.

168 This is a reportable judgment available at <http://www.saflii.org/za/cases/ZAGPJHC/2011/178.pdf> (accessed 3 October 2013).

169 *Nibigira* (n 137 above) para 96.



fact that the applicant had in fact made an application for status through permanent residence exemption.

In order to obtain Nibigira's release as expeditiously as possible, LHR did not appeal the negative decision but instead launched a new court application for the client's release after the 120 day detention period passed. We were successful in obtaining the client's release in the second application.

Attorneys and counsel seeking to obtain release of a stateless person from detention prior to 120 days of detention should be prepared to distinguish their case from *Nibigira* or to explain why the judge's reasoning in that case was flawed.

## **Protection from arbitrary arrest through documentation**

As noted above, a significant challenge in securing the release and protection from further arrest of stateless persons is the lack of dedicated interim documentation available to section 31(2)(b) applicants. The regulation which corresponds to section 31(2)(b) and the provision itself makes no mention of the status of applicants pending the outcome of their application.<sup>170</sup>

The Form 20 Authorisation for Illegal Foreigner to Remain in the Republic Pending an Application for Status, referred to above, does not refer specifically to section 31(2)(b) but can be used to provide a document to exemption applicants pending a decision from the Minister.

Section 32(1) of the Immigration Act states that 'Any illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending his or her application for a status' Regulation 26(1) states that:

Upon requesting authorisation (to remain pending an application for status) an illegal foreigner who has neither been arrested for the purpose of deportation nor ordered to depart and who wishes to apply for a status after the date of expiry of his or her permit, shall ... demonstrate ... that he or she was unable to apply for such status for reasons beyond his or her control; submit proof to the Director-General that he or she is in a position to submit his or her application for status; and if required ... pay a deposit.

Regulation 26(2) states that 'Authorisation to remain in the Republic as contemplated in section 32(1) ... shall be granted in a form substantially corresponding to Form 20 contained in Annexure A.'

<sup>170</sup> Regulation 28 and DHA Form 47.

These provisions enable a form of documentation, although lacking in biometric data,<sup>171</sup> for persons who have made an application for status under section 31(2)(b). Stateless applicants can explain why they were unable to apply for status 'for reasons beyond his or her control' – usually, due to lack of a travel document, which disqualified them from the majority of immigration permits available, combined with the widespread lack of awareness of the section 31(2)(b) exemption provision amongst the general public. They can argue as to why they should receive a Form 20 even where they have 'been arrested for the purpose of deportation' or 'ordered to depart' (right to freedom and security of person, right not to be repeatedly arrested and detained arbitrarily after impossibility of deportation is proven).

As noted, it is challenging to obtain a Form 20 for clients without a court order instructing DHA to issue a Form 20.

Thus, it is worthwhile to mention that the Immigration Act has another form that can be useful in documenting exemption applicants while they await a decision from the Minister (which can sometimes take several years). Immigration officers also can issue a Notice by Immigration Officer to Person to Appear before the Director-General. This form includes a reason for the appearance, a location to appear and a date to appear. LHR has succeeded in obtaining this document for an exemption applicant who did not have a court order; the Immigration Inspectorate was investigating his case as requested by DHA's Permitting Section. The Inspectorate issued a *Notice to Appear* which provided some form of protection from arrest. However, the Pretoria metro police appeared not to recognise this document and confiscated it from the client.

## **Preventing deportation to a country where a person would not access citizenship**

As soon as a country is willing to accept an immigration detainee for deportation, the South African government sees its job as accomplished in terms of the Immigration Act. However, as an attorney you must be sure that the client's right to citizenship will be realised upon deportation to that country.

A detainee may be accepted for deportation by a country but may nevertheless be stateless or at high risk of statelessness. The diplomatic interviews aimed at accepting detainees for deportation use a low burden of proof, in contrast to the administrative

171 Form 20s do not have photographs or fingerprints and thus it is challenging for law enforcement to confirm that the individual holding the document is the valid holder.

procedures for accessing citizenship in the country. Interviews by diplomatic officials at Lindela consist of questions intended to establish the credibility of the detainee and how well the person knows the country. The following are some examples of questions asked: *What is the capital city? What does the flag look like? What is the national anthem? How do you get from city A to city B in this country (by train, car, walk)? Who is president? What are the national languages and which one do you speak? From what city/village were your parents or grandparents from? What tribe does your family belong to? What are your earliest childhood memories of your home country?*

On the other hand, most administrative applications for citizenship – through national IDs, birth registration or passports – require documentary proof of one's birthplace and parentage. Even if you can answer all the questions asked of you by diplomatic staff during deportation interviews, you may not be able to produce the documents and witnesses required by civic services in the home country.

In countries that face a large amount of irregular immigration, local home affairs authorities might be extremely recalcitrant to issue persons with identity documents upon return. For example, many persons of Rwandan origin have been known to pass themselves for Congolese citizens. As a result, the Congolese authorities are particularly strict in assisting persons who may 'seem Rwandan' or who claim to be from the region bordering on Rwanda. Such persons may well be accepted by the Congolese authorities for deportation to the DRC, but upon return have no means to prove their claim and find themselves in a situation of statelessness.

However, other countries that are accepting large numbers of refugees for repatriation, such as Rwanda and Angola, have lenient standards of proof during these repatriation efforts. People who are deported or repatriated during that time will likely not face insurmountable challenges even if they have a dearth of documentary evidence of their citizenship.

The UN treaties on statelessness do not have any provisions for *non-refoulement* – that is to say, stateless persons are not protected in terms of the treaties from deportation to a country where they will not be able to access citizenship. That being said, signatory states to the conventions may not act in a way that contravenes the object and purpose of the conventions. Deporting or accepting for deportation a person who would not be able to meet the administrative burden of proof for citizenship in the country is tantamount to *refoulement* for stateless persons. It is a violation of their right to acquire citizenship and a violation of their fundamental right to human dignity. They could face prolonged

and sometimes indefinite detention if deported to a country where they cannot obtain citizenship.

In advocating for detained stateless persons, you should ensure that any diplomatic authority that accepts a person for deportation can provide written assurance that the individual qualifies as a national and will be recognised by the competent nationality authority upon arriving in the country in question.

## 5 Defining the concepts

### Citizenship or nationality

The terms 'citizenship' and 'nationality' will be used interchangeably throughout this guide.<sup>4</sup> These terms refer to the legal bond between a person and a state. This legal relationship provides the individual certain rights such as the right to enter, leave and reside in a state, to vote, to be elected or appointed to public office, to access public services, to diplomatic protection when outside the country and to other rights that are not available to noncitizens. Each state has set out laws regulating the granting of citizenship and nationality to people who qualify and explaining the procedures for people to obtain state recognition as a citizen/national.

In the 1955 *Nottebohm* case, the International Court of Justice said,

According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.<sup>5</sup>

### Stateless

The internationally accepted definition of 'stateless' is found in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (the 1954 Convention):

For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

Although South Africa is not yet signatory to this Convention, it is nonetheless bound by this definition; the International Law

4 In the past, the distinction between citizenship and nationality was more pronounced than it is today. For example, as noted by Bronwen Manby, 'In African countries under colonial rule or South Africa under apartheid, only those of European descent had both nationality and full citizenship rights. Similarly, it used to be common for women to have nationality of a state but not full citizenship, because they did not have the right to vote. Today, human rights law principles of nondiscrimination require that all those who are nationals of a state enjoy the same rights.' B Manby *Citizenship law in Africa, a comparative study* (2009) ix.

5 *Liechtenstein v Guatemala* ICJ (1955) ICJ Reports 23.

Commission has concluded that the definition in Article 1(1) is part of customary international law.<sup>6</sup>

The UN High Commissioner for Refugees (UNHCR) issued four sets of guidelines in 2012 (UNHCR Statelessness Guidelines)<sup>7</sup> to assist state parties to interpret and apply the principles and provisions of the UN statelessness conventions. These guidelines<sup>8</sup> provide clarity that persons who are not viewed by the state as a national, for whatever reason, fall under the 1954 Convention – including those who legally qualify for nationality but who nonetheless are denied such recognition by the state in his/her individual case. These guidelines state that ‘cases cannot be settled through analysis of nationality laws alone as the definition of a stateless person requires an evaluation of the application of these laws in practice.’<sup>9</sup>

The first relevant question is:

- **Does a person qualify for citizenship under the law of any country?**

If not, (s)he is stateless.

If the person qualifies as a citizen under a literal reading of the law, one must then ask,

- **What is the viewpoint of the state?**

If a person qualifies under the law, but the state does not view him/her as a national, then the person is also stateless in terms of the 1954 Convention.

Those who are not stateless as described above may be classified as persons ‘at risk of statelessness’ for various reasons, outlined below. This classification can help mobilise government and international organisations to work to assist these groups and prevent statelessness from occurring. People at risk of statelessness

6 See International Law Commission, ‘Articles on Diplomatic Protection with commentaries’, (2006), which states that the Article 1 definition can ‘no doubt be considered as having acquired a customary nature’. The Commentary is accessible at [http://untreaty.un.org/ilc/guide/9\\_8.htm](http://untreaty.un.org/ilc/guide/9_8.htm) (accessed 3 October 2013). The text of Article 1(1) of the 1954 Convention is used in the Articles on Diplomatic Protection to provide a definition of stateless person.

7 UNHCR, ‘Guidelines on the Definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons’ (UNHCR Definition Guidelines) (2012); UNHCR, ‘Guidelines on Procedures for Determining Whether an Individual is a Stateless Person’ (UNHCR Procedures Guidelines) (2012); UNHCR, ‘Guidelines on the Status of Stateless Persons at the National Level’ (UNHCR Status Guidelines) (2012); UNHCR, ‘Guidelines on Ensuring Every Child’s Right to Acquire a Nationality through Articles 104 of the 1961 Convention on the Reduction of Statelessness’ (UNHCR Child’s Rights Guidelines) (2012).

8 UNHCR Procedure Guidelines (n 7 above).

9 UNHCR Procedure Guidelines (n 7 above) para 40.

will often include those with high risk factors for statelessness (such as people born outside their parents' country of nationality or those orphaned abroad) but who have not yet attempted to access nationality through administrative procedures.

## **At risk of statelessness**

This is a term that describes a person whose nationality status is undetermined and who has a high risk of becoming stateless due to his or her circumstances.

Not all persons who are undocumented are stateless. However, certain categories of undocumented persons have a heightened risk of being or becoming stateless.

People who have not had their births registered or have not yet applied for enabling documents such as birth certificates, identity documents (IDs) or passports, cannot be considered 'stateless' – they may be able to access nationality should they approach the relevant authorities. However, when combined with other factors, undocumented people are at risk of statelessness.

Risk factors include:

- Birth outside one's parents' country of nationality;
- The death or desertion of one or both of parents;
- Irregular migration across international borders;
- Mixed nationality parentage;
- Proximity to international borders with high cross-border movement;
- Loss of clinic cards or other similar records;
- Birth outside of a registered clinic or hospital; and
- Persons impacted by laws that do not allow dual nationality and that require adherence to administrative procedures in order to retain nationality when the person reaches the age of majority.

These factors increase the risk that a person will not be recognised by any state, despite having a legal claim to nationality. In many cases, these factors indicate a likelihood that there will be a conflict of laws between countries, leaving the person without citizenship in any state.

However, until such a person approaches the relevant authority to attempt to access nationality, their nationality status remains undetermined – and hence they are 'at risk of statelessness.'

## **Birth registration**

Birth registration refers to the permanent and official recording of a child's existence by an administrative branch of a state. This process is ordinarily completed when the government of a state issues

parents a birth certificate for their child. At a minimum, the birth certificate reflects the child's legal name, date of birth and place of birth.

Many countries issue both 'abridged' and 'unabridged' birth certificates – or 'short' and 'long' birth certificates, respectively. Abridged/short birth certificates generally reflect only the individual's date of birth, place of birth, name and identity number ('ID number'), if applicable; they do not reflect the parents' information.

Unabridged/long birth certificates also include the parents' names, nationalities, dates of birth and ID numbers in addition to the child's details. The unabridged birth certificate is typically required for individuals to prove a claim to nationality through their parents.

## **Undocumented person**

An undocumented person is someone who has no government-issued proof of identity. This is a person who, for whatever reason, does not hold a birth certificate, passport or any other government-issued identity document (such as an I.D. book or card) from any nation.

This is not to be confused with the colloquial term 'undocumented migrant,' which in this guide we refer to as 'irregular migrant.' An irregular migrant is one who does not have legal immigration status or who entered a country without following proper immigration procedures.

## **Irregular migrant**

The term 'irregular migrant' in this guide refers to a migrant who does not have lawful immigration status or who entered a country without proper immigration procedures being followed.

### ***Jus soli***

This is the Latin term for 'right of the soil,' which describes a system of law that grants nationality on the basis of birth on the territory.<sup>10</sup>

10 Manby (n 4 above) 32.



### ***Jus sanguini***

This is the Latin term for 'right of the blood,' which describes the granting of nationality by birth to a national (irrespective of place of birth).<sup>11</sup>

### ***In situ* stateless persons**

Stateless populations which arise in a non-migratory context may be referred to as *in situ* populations. These are populations or persons who are residing in their country of birth yet who are not recognised as nationals of that country or any other country.

### **Nationality acquired by automatic modes versus non-automatic modes**

Nationality can be obtained either automatically or through application/an act of an individual. Where a person meets the requirements for the grant of nationality and acquires such nationality by operation of law, or without having to take any positive steps towards its acquisition, he or she can be said to have acquired nationality automatically.<sup>12</sup> Ordinarily this occurs at birth. A common example is where a person is born in a country to a national of that country and acquires nationality by operation of law.<sup>13</sup>

Non-automatic modes of acquiring nationality occur where a person meets the requirements for the grant of nationality, but is required to undertake some positive administrative action in order to realise such a claim.<sup>14</sup> In this event, he or she will only acquire nationality upon the successful completion of the relevant application process.

The requirements that this person must fulfil in order to acquire said nationality may be both factual and administrative. An example is someone who is born in South Africa, to nationals of another country, who must register his or her birth with the authorities of the other country and make a declaration of loyalty at age 18 in order to access the nationality of that country. The fact of his birth to a national is insufficient for the grant of nationality.

11 Manby (n 4 above) 32.

12 UNHCR Definition Guidelines (n 7 above) para 19.

13 UNHCR Definition Guidelines (n 7 above) para 19.

14 UNHCR Definition Guidelines (n 7 above) para 19.

## **Discretionary versus non-discretionary applications for citizenship**

Where acquisition of nationality is not automatic, and a person is required to make an application, such application may be discretionary or non-discretionary in nature.

Non-discretionary applications require only that the administrative steps prescribed be followed in order for the applicant to acquire the relevant nationality. The administrative authority receiving the application will have no authority to reject it.<sup>15</sup> An example is a person born in South Africa to permanent resident parents – she can acquire South African nationality at age of majority, provided that she lived in the Republic from birth until becoming a major and provided that her birth was registered in accordance with South African law. Once she meets these requirements, the administrative procedure to acquire citizenship is non-discretionary.

This is in contrast to applications for citizenship by naturalisation, which are discretionary in the sense that the Minister may reject an applicant if he or she feels that the person is not of good moral character, does not speak an official South African language well enough, or for a number of other reasons.<sup>16</sup>

15 UNHCR Definition Guidelines (n 7 above) para 25.

16 See section 5 of the South African Citizenship Act 88 of 1995.



## Case study

“There are no words to describe the feeling, if you are not recognised as a citizen and become stateless of TWO countries. The frustration of your situation and no one wants to understand. The anger at being denied a simple basic right. The anxiety and worry of doors being shut and deportation always at your back. The helplessness of not knowing which way to turn. Mainly confusion, as a simple matter gains more and more politics.”

A.T. (“Annie”) was born in Zimbabwe in 1969 to a South African mother and Zimbabwean father. Her mother and father met while travelling and settled down and married in Zimbabwe. Annie grew up in Zimbabwe and had an ID card as a citizen, issued when she was sixteen years old. Later when Annie married and tried to register her marriage in Zimbabwe, she was told she is no longer a citizen (as a result of amendments to the citizenship law). Annie was told to renounce South African citizenship and reapply for Zimbabwean citizenship, but she had never registered as a citizen in South Africa. Unable to get Zimbabwean nationality, she moved to South Africa with her husband hoping to access the citizenship of her mother. But given that she did not have any passport or other documents from her mother, who was then deceased, she could not establish her claim to South African citizenship.

Lawyers for Human Rights assisted Annie in making an application for immigration status through her spouse, which required administrative discretion given that she did not hold a passport from any nation.

“My whole existence in this country has been a problem because of not having citizenship and documents. Simple tasks like signing a cell phone contract cannot be done. Or getting a valid South African driver’s licence. I can’t even sign my daughter’s school application forms. Or open a bank account. I pray every day for a proper status to be given to me. I do not want to carry this burden anymore.”

## 6 Advocacy

Lawyers for Human Rights strongly encourages all actors to engage in advocacy concerning access to citizenship and the protection of stateless persons and the reduction and prevention of statelessness. Legal practitioners are particularly well placed to use their experience in the field to motivate for positive change.

Please see LHR's 2013 report, *Statelessness and Nationality in South Africa*,<sup>172</sup> for exhaustive advocacy points relating to birth registration, law reform and the need for ratification of the UN treaties on statelessness.

Drafting of shadow reports is also a useful tool for advocates of the stateless. Awaiting signature of the statelessness conventions, legal practitioners may wish to place their emphasis also on alternative paths to the recognition of the rights of stateless persons in our territory. South Africa's obligations under international human rights law are applicable to all persons within its jurisdiction, without discrimination of any kind, and hence irrespective of their legal status. As such, practitioners in this area of law will maintain a keen interest in the extension of the appropriate protections to stateless persons in South Africa under the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Social and Economic Rights; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention on the Rights of the Child (CRC); Convention on the Rights of Persons with Disabilities (CPRD); the African Charter on Human and Peoples' Rights (the African Charter); and the African Charter on the Rights and Welfare of the Child.

The effective implementation of these conventions and their monitoring mechanisms can have a profound effect on the alleviation of the precarious conditions faced by many stateless persons, which can include the absence of a legal identity and non-enjoyment of civil, political, economic, social and cultural rights as a result of lack of access to education; limited freedom of movement; situations of prolonged detention; inability to seek employment; inability to own property; inability to access to basic health care.

172 Available at <http://www.lhr.org.za/publications/statelessness-and-nationality-south-africa> (accessed 26 September 2013) or at <http://www.refworld.org/docid/519df3594.html> (accessed 26 September 2013).

Legal practitioners are encouraged to document their clients' experiences and to submit reports of any breaches of rights that they may have experienced to the treaty body tasked with reviewing South Africa's compliance with the relevant human rights convention. Cases of denial of access to birth registration, for example, can be submitted in a shadow reports.

Pending the submission of reports to the relevant treaty bodies to which South Africa is bound, we can continue monitoring South Africa's compliance with its reporting obligations. Breaches of the state's reporting obligations can themselves be advocated against through communications to the Department of International Relations and Co-operations. Within this government department is a subdivision known as 'Human Rights and Humanitarian Affairs', the key role of which is to promote and protect human rights by fostering interdepartmental co-operation on the implementation and monitoring of the UN human rights normative instruments. This is the division that has the ultimate responsibility for our arrears in reporting under the Conventions to which we are signatory.

At present, South Africa is in serious arrears with regards to its reporting obligations under these conventions. South Africa is in breach of its reporting obligations in the following areas:<sup>173</sup>

- South Africa has yet to submit a single report under the International Convention on Civil and Political Rights (ICCPR) following its signature and ratification of this covenant in 1998. The initial report was due in 2000 and two periodic reports have fallen due in March 2005 and March 2010 respectively.
- South Africa's last report to the Committee on the Elimination of Racial Discrimination under Convention on Elimination of All Forms of Racial Discrimination (1969) was submitted in 2004, despite the fact that reports under this convention are due every two years. The Committee requested an additional report for submission in August 2007. This report was not submitted. Further, the consolidated fourth, fifth and sixth periodic reports (which were due in January 2010) have yet to be submitted.
- Although South Africa's initial report to the Convention on the Rights of the Child was due and submitted in 1997, the second and third periodic reports hereunder fell due in July 2002 and July 2007 respectively, and these have not been submitted to date.
- Despite submitting its initial report under the African Charter on time, we are concerned that a pattern of late and delayed reporting has subsequently been established in respect of this treaty. The second, third and fourth reports were due in October 2000, October 2002 and October 2004, respectively. These were submitted late as a consolidated report only in May 2005, and a subsequent report has yet to be made. The fifth, sixth and seventh periodic reports were due in October 2006, 2008 and 2010 respectively. These reports have, however, not been submitted to date.
- South Africa ratified the African Children's Charter in January 2000, but has yet to submit even the initial report (which fell due in

173 As of March 2012. Information provided to LHR by South African Human Rights Commission.

## Citizenship and Statelessness: Challenges and Concerns

January 2002) to the African Committee of Experts on the Rights and Welfare of the Child. The second, third and fourth reports have since also fallen into arrears.

## 7 Assessing citizenship and identifying a stateless person in practice

In this section, we will cover how to assess a person's citizenship status and how to identify a stateless person in practice. We recommend the following steps in determining whether or not a person is stateless and assessing what solutions are available to resolve a client's situation (namely, to access citizenship or a path to citizenship):

- **Step 1:** Personal history interviews
- **Step 2:** Analysis of the states to which the client has ties
  - Does an internationally recognised state exist?
    - ☒ What are the laws of relevant state(s)?
  - Has the client acquired citizenship?
    - ☒ Citizenship by birth or descent
  - Does the client qualify to apply for citizenship?
    - ☒ Naturalisation or citizenship by registration
      - Marriage
      - Habitual Residence
    - ☒ Other possibilities
  - Has the client lost or been deprived of citizenship?
  - What is the practice in this state towards people like the client? Towards the client himself/herself?
- **Step 3:** Make your initial assessment
  - Client is not stateless
  - Client is at risk of statelessness
  - Client is currently stateless
- **Step 4:** Contacting competent authorities for confirmation of citizenship status
- **Step 5:** Apply UNHCR guidelines and make final assessment, allowing you to plan which legal remedies to pursue for the client

*Practice tip:* One must be careful not to label a client stateless prematurely. In dealing with other actors, such as foreign missions or government agencies, referring to a client as 'stateless' leads to avoidance of responsibility towards the individual by various states.<sup>71</sup>

71 UNHCR TPLP Distance Learning Revised Africa Chapter 1 (2011).



### ***Citizenship and stateless status determination***

Given that the first priority is always to assist clients in accessing citizenship, the first task of a legal practitioner is to determine the nation(s) to which a person has relevant links. All citizenship options should be explored before resorting to other legal solutions.

The internationally accepted definition of 'stateless' is found in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (the 1954 Convention):

For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.

An individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met. Article 1(1) can be analysed by breaking the definition down into two constituent elements: 'not considered as a national ... under the operation of ... law' and 'by any State'.

First, the legal practitioner must gather all relevant information regarding the personal circumstances of the client. Second, the information gathered during preliminary interviews is used to conduct research into any potential claims to nationality that the client may have.

It is only upon completion of these steps that a determination as to the client's citizenship or stateless status can be made, allowing you to make a plan of action to resolve his problem.

### **Step One: Personal history interview**

An assessment of the client's citizenship or stateless status will begin with the personal history interview. The client's testimony concerning his or her life helps identify which states and nationality procedures need to be considered in determining a client's status.

Any and all documentary evidence which a client has to demonstrate the veracity of his or her claims ought to be gathered at this stage. In any given case, the following non-exhaustive list of evidence is helpful:<sup>72</sup>

- testimony of the applicant (e.g. written application, interview, affidavit);
- identity documents (for example, a birth certificate, extract from civil register, national identity card, voter registration document);
- travel documents (including expired ones);

72 UNHCR Procedures Guidelines (n 7 above).

- documents regarding applications to acquire nationality or obtain proof of nationality, including receipts for applications submitted;
- certificates of naturalisation;
- certificates of renunciation of nationality;
- written responses by states to enquiries on the nationality of the applicant;
- marriage certificates of both the client and his/her parents;
- military service record/discharge certificate;
- school letters of attendance, certificates or diplomas;
- medical certificates/records (for example attestations issued from hospital on birth);
- vaccination booklets;
- identity and travel documents of parents, spouse and children;
- immigration documents, such as residence permits of country(ies) of habitual residence;
- employment documents;
- property deeds, tenancy agreements, house permits;
- school records, baptismal certificates; and
- record of sworn oral testimony of neighbours and community members.

LHR uses an intake form to gather all information required to make a preliminary assessment of the client's potential claims to citizenship, including through birth in a country, parentage, marriage, or through immigration status that could lead to naturalisation (including through work permits or relatives permits to care for a citizen child). If the client has children, a second form is completed to assess the children's citizenship and birth registration needs. These initial intake forms are very detailed, but every piece of information is relevant in assessing the client's citizenship status and any possibilities for acquisition of citizenship.

## **Step Two: Analysis of the states to which the client has ties**

The second step in status determination will involve research. Having gathered all the information that the client has to offer as well as documentation, the legal practitioner must now examine the laws and circumstances of the nation(s) to which the client has relevant links.

### **(1) *Does a state exist?***

When determining whether an individual is stateless under Article 1(1), it is most practical to look first at the matter of whether the individual has a link to a territory that is recognised as a State under international law. This might exclude from consideration at the outset entities that do not fulfil the concept of 'state' under international law. Under the 1933 Montevideo Convention on the Rights and Duties of States, 'The state as a person of international law should possess the following qualifications: (a) a permanent

population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.’

Indeed, in some instances consideration of this element alone will be decisive. Examples of areas that are not recognised states under international law include contested areas like Western Sahara, areas on the Sudan and South Sudan borders (such as Abeyei) and Palestine.

In situations where there are differences of opinion between various other states regarding an entity's statehood, it would be relevant to consider whether South Africa has an official stance towards that entity. It may also be relevant to consider whether the entity has received large-scale recognition of statehood by other states or whether it has become a member state of the United Nations.<sup>73</sup>

## **(2) What are the laws of the state?**

The next step is to examine the issue of whether the individual is or is ‘not considered as a national by any State under the operation of its law.’

Every state with which the client has links must be assessed. A good resource for citizenship law is [www.refworld.org](http://www.refworld.org). It is also wise to contact the foreign missions of the states in question to obtain reliable and up to date citizenship laws.

Should the literal letter of the law of these countries reveal that the client does not qualify as a national, the client can likely be determined to fall within the definition of a ‘stateless person’.

It may be necessary to obtain written confirmation from a foreign mission that a client is not a citizen of that state when presenting the client's case to the South African government (in order to obtain protection through an exemption).

### ***Does the client have a claim to citizenship by birth or by descent?***

Most countries grant citizenship either on the basis of birth on the territory (*jus soli*), birth to a national (*jus sanguini*), or a combination of the two.

As a result, the client may be able to access the nationality of the country in which they were born (if the law of this country grants nationality *jus soli*) and/or the client may be able to access the nationality of his/her parents through nationality by descent (if the law of the country of the parents grants nationality *jus sanguini*).

73 UNHCR Definition Guidelines (n 7 above) para 13.

It is also possible that the client will qualify for neither. This can occur, for example, when a child is outside his parents' country, which only allows citizenship to children born on the territory, in a country that only grants citizenship to children of citizen parents.

### ***Does client qualify for naturalisation?***

Naturalisation or citizenship by registration, as it is called in some countries, offers a discretionary path to citizenship for some foreigners who do not qualify for citizenship on any other grounds.<sup>74</sup>

- **Naturalisation through marriage**

Naturalisation through marriage may grant a person a valid claim to the nationality of their spouse. For this reason, if your client is married, it is important to establish the nationality of the spouse and the law relating to the grant of nationality through marriage in his or her country. In some countries, citizenship is (or was under previous law) granted automatically by operation of law upon marriage to a citizen (i.e. former Rhodesia).

Generally, the marriage will need to be registered civilly in order to be recognised for citizenship purposes. Important qualifying elements in this area of law may be requirements that a foreign spouse has been resident on the territory for a specific length of time and that the marriage itself has subsisted for a certain length of time.

For example, a person will qualify for permanent residence in South Africa under the Immigration Act<sup>75</sup> if such person has been the spouse of a South African citizen or permanent resident for a period of five years and the Director-General of Home Affairs is satisfied that a good faith spousal relationship exists. The spouse will qualify for South African nationality once having held such permanent residence for a continuous period of two years.<sup>76</sup>

Another important element to be mindful of is the possible lapse of this grant of permanent residence and/or citizenship through a spouse should the marriage dissolve. For example, permanent residence is granted to the spouse of a South African citizen on the above grounds with the condition that such permanent residence permit 'shall lapse if at any time within two years from the issuing

74 Manby (n 4 above) 6.

75 Section 26 of the Act, as amended by the South African Immigration Amendment Act No. 13 of 2011.

76 Section (5)(a) of the South African Citizenship Act.

of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death.<sup>77</sup>

- **Naturalisation through habitual residence**

Many countries will grant nationality upon application to persons who have been habitually resident on the territory for a certain period of time. The challenge for most stateless persons is that generally, such laws require lawful entry and lawful residence, which is not possible if a person cannot obtain a travel document.

- **Other possibilities**

Other possibilities for access to permanent residence exist on grounds such as the purchase of property in the territory. Mauritius, for example, grants the right of permanent residence to any person who purchases property of more than a stated value within the territory.<sup>78</sup> While most stateless people are impoverished and would not be able to access such a provision, this example shows that no stone should be left unturned when researching nationality law options for clients.

### ***Has the client lost or been deprived of citizenship?***

It is possible that a client who believes herself to be a citizen of a particular country actually lost or was deprived of citizenship unbeknownst to her. Generally, loss of citizenship is automatic (by operation of law), while deprivation of citizenship tends to be by order of a government official (for example, the Minister of Home Affairs).

Persons who have naturalised are more vulnerable to withdrawal of citizenship than citizens by birth. It is important to review not only the laws which grant nationality by naturalisation to determine whether or not they apply to your client, but also those which deal with loss or deprivation of citizenship.

However, even citizens by birth can lose their citizenship. For example, if South Africans obtain citizenship in another country 'by some voluntary and formal act other than marriage' without applying to retain to the Minister of Home Affairs to his or her citizenship, they 'shall cease to be' South African citizens.<sup>79</sup>

77 Section 26 of the Act, as amended by the South African Immigration Amendment Act No. 13 of 2011.

78 Elma Global, 'Immigration and Permanent Residency in Mauritius' available at <http://www.second-citizenship.org/permanent-residence/immigration-and-permanent-residency-in-mauritius/> (accessed 3 October 2013).

79 Section 6(1)(a) of the South African Citizenship Act.

The 1949 South African Citizenship Act had categories for loss of citizenship which were later repealed and such persons can apply to resume their South African citizenship under current law.<sup>80</sup>

### **(3) *How are the laws of relevant states implemented?***

Citizenship and statelessness determination requires a mixed assessment of fact and law; the attorney must assess the law as it stands on paper as well as how it is implemented in practice.

Thus, after conducting an analysis of the laws of the countries to which the client has ties, you must conduct research into state practice and its implementation of the law. During the initial consultation, you will have asked (1) if the client has ever had any form of enabling documentation (birth certificate, ID or passport) and (2) if he has ever had trouble accessing one of these documents. The client's answers to these questions will be telling. Generally, stateless people only discover that they are not recognised as citizens when they try to access a state service that requires proof of identity or when they try to access civil registration, such as when registering a baby or a marriage.

If a client has never had an enabling document he is already at risk of statelessness. If he or she tries to access an enabling document and is turned away, this risk increases. You will need to ask the client detailed questions in order to determine the reason he was turned away. There could be many reasons – xenophobia, discrimination due to ethnicity or tribe, inability to meet administrative requirements or corruption (client could not pay the bribe requested for rendering the service).

As soon as the client is told by even a window-level official of a competent authority that he or she is not a citizen, the client is stateless under the Convention (unless he holds citizenship in another country). UNHCR stateless definition guidelines explain that this decision does not need to be appealed in order for the client to meet the Convention definition.<sup>81</sup> Just because the decision could later be overridden by a more senior official or a court does not change the fact that at present, the client is not recognised. The current legal status of the client is the determinative factor, rather than whether or not the client could,

80 Section 13 of South African Citizenship.

81 However, it is pertinent to consider the level of judicial independence in a country in preparation for advocating on your client's behalf in South Africa. There is discrimination towards certain groups when it comes to implementation of certain countries' citizenship laws. In some cases people have been successful in appealing to the courts to enforce their right to citizenship while in other countries, the judicial system also does not provide relief to their problem. In addition, even where courts are independent, one must also assess the extent to which judicial decisions are respected by government officials.

potentially, at some future date, appeal the initial decision internally or in court.<sup>82</sup> Of course, as an attorney you will want to try to assist the client to go beyond the window-level official to access citizenship. But for advocacy's sake, a decision by a window-level official is binding.<sup>83</sup>

However, if the client was turned away because he did not have one of the necessary documents to prove his citizenship, he may not be stateless unless the document in question is one that is impossible for him to obtain. For example, a client was born abroad to South African citizens. In order to register at Home Affairs in South Africa as a citizen, he must submit a birth certificate from the country of birth. He does not have this document and is unable to obtain it (his parents passed away, he has no other documents or witnesses in that country to help him get a birth certificate and he has attempted to get a birth certificate but has been turned away). In such a situation, the client is stateless if he has no other nationality, even though he had South African parents. On the other hand, if the same client tries to register as South African and was turned away because he did not have his foreign birth certificate, which is sitting at home and could easily be brought into Home Affairs, he should not be regarded as stateless.

Information concerning state practice can be obtained from a variety of sources, governmental and non-governmental. The complexity of nationality law and practice in a particular state may justify recourse to expert evidence in some cases.<sup>84</sup>

For such country-related information to be treated as accurate, it needs to be obtained from reliable and unbiased sources – preferably more than one source. Recommended sources include state bodies directly involved in nationality mechanisms, or non-state actors which have built up expertise in monitoring or reviewing such matters. It is important that country-related information is continuously updated so that changes in nationality law and practice are taken into account. That being said, the country-related information relied on should be contemporaneous with the events that are under consideration in the case in question. In addition, where the practice of officials involved in applying the nationality laws of a state appears to differ by region, this must be taken into account with respect to country-related evidence.<sup>85</sup>

82 UNHCR Definition Guidelines (n 7 above) para 21.

83 If the window-level official took a decision in another country, and the local foreign mission in South Africa does not recognise the client as a citizen, it is safe to rely on those two factors as conclusive proof of statelessness, with which you can motivate that the client receive an exemption in South Africa.

84 UNHCR Definition Guidelines (n 7 above) para 33.

85 UNHCR Definition Guidelines (n 7 above) para 34.

## Step Three: Make your initial assessment

After assessing the client's story, the relevant citizenship law and state practice, your client will fall into one of the following three categories:

- **Client is not stateless**

You could determine through your interviews with the client and through country research that the client is not stateless. Perhaps the problem is that the client lost his passport or birth certificate and he requires assistance in reissuance of such documents.

- **Client is at risk of statelessness**

If your client qualifies for nationality in a country under the letter of the law, and has not yet attempted to obtain citizenship, he or she may be at risk of statelessness. Your client may be more successful in accessing his or her citizenship if assisted by an attorney, even if he has very little documentary evidence of his claim.<sup>86</sup>

At this point in time, you will want to contact the relevant authorities of the countries in question in order to confirm whether the client is or is not a citizen. The next section will deal with this process in detail.

LHR views children born in South Africa to foreign parents who do not have birth certificates as a population at high risk of statelessness. We routinely assists foreign parents in accessing birth registration for their children born in South Africa and in this way work towards preventing statelessness from occurring.

- **Client is stateless**

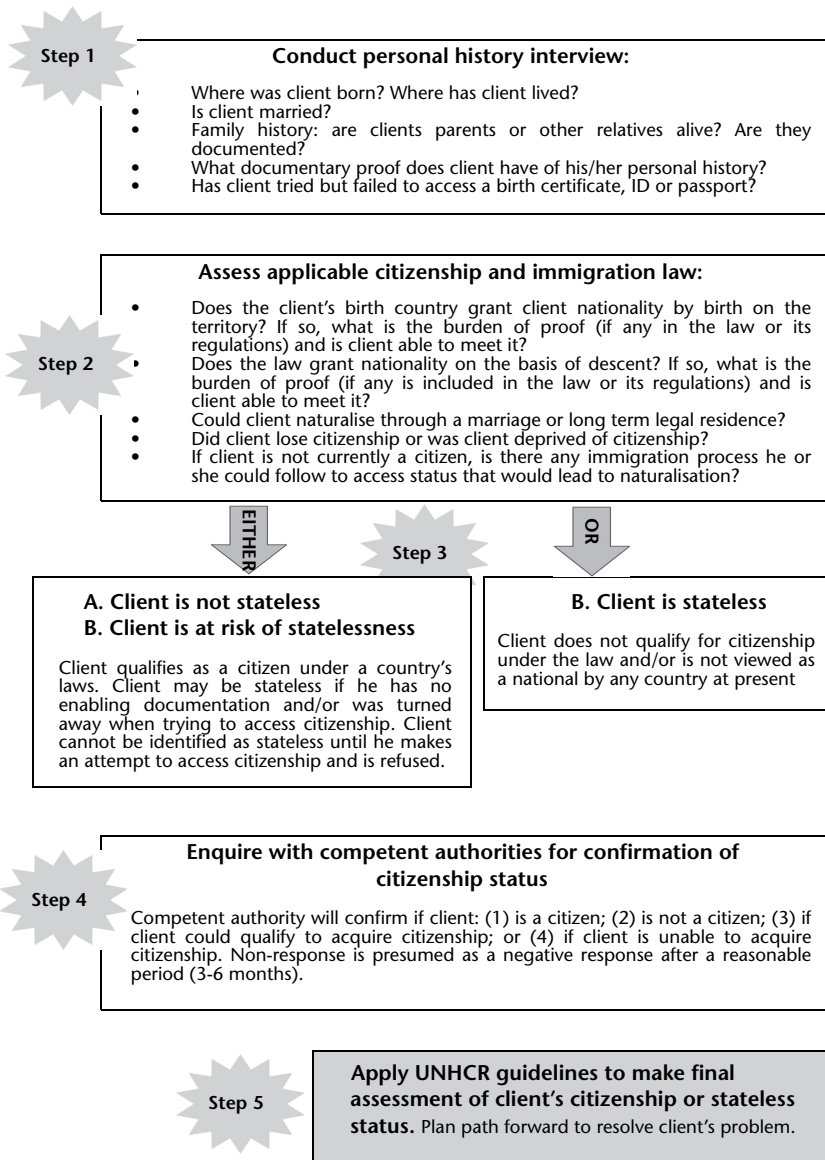
You may find that your client either a) does not qualify as a citizen under any state(s)'s laws or b) qualifies under the law, but has for whatever reason been refused recognition by the state(s) in question despite attempts to claim citizenship.

In these scenarios, your client is currently stateless. You will next confirm his or her status with the competent authorities of the countries in question.

86 However, we should note that some foreign missions will be offended if an attorney contacts them on a client's behalf before the client has tried to obtain assistance alone. For the sake of positive relations with these officials, it may be worthwhile to ask the client to try to access services by himself before you, as an attorney, become involved.



## Flow Chart: Assessing a client's citizenship status



## **Step Four: Approaching competent authorities to confirm nationality status**

Information provided by competent authorities is sometimes of central importance to statelessness determination procedures, although not always necessary in cases where there is otherwise adequate proof.<sup>87</sup>

The first question is what qualifies as a 'competent authority' on matters of citizenship and nationality. UNHCR's stateless definition guidelines explain that 'Competence in this context relates to the authority responsible for conferring or withdrawing nationality from individuals, or for clarifying nationality status where nationality is acquired or withdrawn automatically.'<sup>88</sup> See paragraphs 20 to 39 of the definition guidelines for detailed information on identifying the appropriate competent authorities. In the South African context, Department of Home Affairs is the centralised competent authority when it comes to clients with any claim to citizenship. For clients born in other countries, who have no South African parentage, the competent authorities will likely be the government agency that is the equivalent of Home Affairs in those countries or the country's local foreign mission in South Africa. If a foreign mission in South Africa is unsure of a client's nationality status, it will often contact the relevant government department in the country for a response.

Through contacting the relevant countries' foreign missions or government agencies, you can obtain confirmation of your client's citizenship status. LHR suggests faxing a letter to the head of foreign missions or writing a letter to foreign Home Affairs or similar civil registry office (if applicable) explaining the client's personal history, outlining the law and asking if the client is currently recognised as a national/citizen and if not, would he or she qualify for any path to citizenship under the laws of that country. Such a letter should also, where appropriate, request an interview for your client by the relevant officials.<sup>89</sup>

The best confirmation of a client's citizenship will be in the form of a written response following an in-person interview with the client by officials of a competent authority. Some foreign missions are more cooperative and responsive than others, however, and

87 UNHCR Definition Guidelines (n 7 above) para 44.

88 UNHCR Definition Guidelines (n 7 above) para 20

89 Of course, if a client has a reasonable fear of persecution, interviews are not appropriate. In such a case, a letter to foreign missions need not include the client's name and instead can include enough details to allow officials to assess his or her citizenship status under relevant laws without disclosing her/her identity. Such letters of inquiry would not constitute 'reavailment' of the country's protection and so would not jeopardise a client's application for asylum if one is pending.

lack of response must after a reasonable period (3-6 months) be presumed to be confirmation that the country in question does not recognise the individual as a citizen.<sup>90</sup>

Where a response from a foreign authority includes reasoning that appears to involve a mistake in applying the local law to the facts of the case or an error in assessing the facts, the reply must be taken on face value. It is the *subjective opinion* of the other state that is critical in determining whether an individual is its national for the purposes of the stateless person definition.<sup>91</sup>

Under no circumstances is contact to be made with authorities of a state against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that he or she is neither a refugee nor entitled to a complementary form of protection.

### ***Standard of Proof***

The standard of proof or threshold of evidence necessary to determine statelessness must take into consideration the difficulties inherent in proving statelessness, particularly in light of the consequences of incorrectly rejecting an application. Requiring a high standard of proof of statelessness would undermine the object and purpose of the 1954 Convention. States are therefore advised to adopt the same standard of proof as that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a 'reasonable degree' that an individual is not considered as a national by any state under the operation of its law.<sup>92</sup>

In the South African context, because there is no formalised procedure for stateless persons to obtain protection under the law, no standard for proof of statelessness exists. Even under section 2(2) of the Citizenship Act, which provides citizenship to persons born in South Africa who do not have the citizenship or nationality of any other country, there is no regulation<sup>93</sup> or guidance on assessing such claims.

To require proof of statelessness is to require proof of a negative – that a person is *not* considered as a national by any state. This presents significant challenges; a non-national will not ordinarily

90 UNHCR Definition Guidelines (n 7 above) para 34.

91 UNHCR Definition Guidelines (n 7 above) paras 38-39.

92 UNHCR Definition Guidelines (n 7 above) para para 39.

93 In July 2014 LHR obtained a court order in the North Gauteng High Court of South Africa compelling the Minister of Home Affairs to make a regulation to section 2(2) of the South African Citizenship Act to facilitate its implementation. In this same order a South African born stateless child was declared to be a South African citizen by birth.

have evidence showing a *lack* of an identity in the same way that a national will ordinarily have an ID document.

There are, however, exceptions to this rule. Denationalised Zimbabweans, for example, will often be in possession a Zimbabwean-issue metal IDs which identifies the card-holder as a non-national. Those who used to hold such IDs identifying them as nationals, and who were subsequently denationalised, will often testify to these having been seized by the local authority. In order to replace their IDs, denationalised Zimbabweans were allowed to reapply for a new ID which identifies the holder as 'alien.'

In the absence of such clear proof of statelessness, it is always useful to have evidence that verifies your client's account of his/her personal history; even if this evidence does not go towards establishing nationality or lack thereof, it can assist with establishing credibility. A birth certificate or hospital record, for example, can be attached to the application in evidence that a client was indeed born in a country and to the parents whom he/she has described. School certificates and letters of attendance will serve to support your client's claims as to where he grew up and resided prior to coming to South Africa.

Your client may not have this evidence on hand, but it may be traceable with your assistance. You may wish to make enquiries for such documentation directly to the foreign authority concerned, particularly if your enquiry speaks to the content of foreign registries. If such authority, however, is unavailable or uncooperative you may wish to call or write directly to the school, hospital or other establishment/department in question. In seeking documentary evidence of your client's personal history, you may wish to enlist the help of the International Committee of the Red Cross (ICRC), an organisation specialising in family tracing.

In circumstances where you are unable to assist your client in accessing any documentary proof corroborating his life story, you may be forced to make his/her case purely on the basis of his/her testimony. In such cases it is encouraging that UNHCR has determined that:

Given the nature of statelessness, applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.<sup>94</sup>

94 UNHCR Procedures Guidelines (n 7 above) at para 38.

## Step Five: Apply the UNHCR guidelines and confirm client's citizenship or stateless status

Be sure to carefully read the UNHCR Guidelines before you move forward in identifying your client's citizenship or stateless status and creating a plan of action to assist your client.

There are four sets of UHCR guidelines<sup>95</sup> on statelessness, all issued in 2012:

- No. 1: The definition of 'Stateless Person' in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons<sup>96</sup> (UNHCR Definition Guidelines);
- No. 2: Procedures for Determining Whether an Individual is a Stateless Person (UNHCR Procedures Guidelines);<sup>97</sup>
- No. 3: The Status of Stateless Persons at the National Level (UNCHR Status Guidelines);<sup>98</sup> and
- No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness (UNHCR Child's Rights Guidelines).<sup>99</sup>

After considering all of the above, you will be able to confirm your assessment of the client's citizenship or stateless status.

The reason for this exercise is to evaluate what options are available to resolve the client's problem. If a client is stateless and has no potential to acquire citizenship, you can advise her of the option for an exemption for permanent residence through section 31(2)(b) of the Immigration Act. On the other hand, if you find during your research that the client is either a citizen under the law of a country or has an opportunity under the law to obtain citizenship upon application, you will need to advise your client and take instructions from your client as to whether to pursue these options or not.

If the client is not *currently* recognised as a national of any country, he or she can make an application for stateless status and protection, according to the UN conventions, even if he or she has the possibility to acquire citizenship in a country by application. The convention focuses on the person's current status in order to guard against putting stateless persons in an indefinite limbo by

95 All of the guidelines are available on [www.refworld.org](http://www.refworld.org).

96 Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4f4371b82&skip=0&query=unhcr%20guidelines%20statelessness> (accessed 30 September 2013).

97 Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4f7dafb52&skip=0&query=unhcr%20guidelines%20statelessness> (accessed 30 September 2013).

98 Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5005520f2&skip=0&query=unhcr%20guidelines%20statelessness> (accessed 30 September 2013).

99 Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=50d460c72&skip=0&query=unhcr%20guidelines%20statelessness> (accessed 30 September 2013).

requiring that they pursue and await the decision of all potential citizenship claims prior to qualifying for international protection.

If during your research you find that there is a chance of the client acquiring citizenship if he applies, for example, for citizenship in his parents' country of origin, you must allow him to decide if this is an option he would like to pursue. You can advise him on the chances of success of such an application and the likely waiting time for a decision, advising him that during this time he will remain without immigration status in the Republic. It is also recommended that you evaluate the case on the totality of the circumstances and advise the client of the strength of his or her exemption application if it is submitted at present. For example, if you were the Minister, would you expect this person to have made an application for citizenship in their country of origin prior to launching an exemption application in South Africa? There will be cases where the chance of success is so low (due to client's lack of documentation, death of parents or discrimination towards people like the client) or the waiting period so unpredictable that it would be unreasonable to expect a person to do so.

## 8 Legal framework on nationality and statelessness in South Africa

At present, the following are the mechanisms in place to promote access to citizenship, to protect stateless persons and to resolve undetermined citizenship status in South Africa. Attorneys, paralegals and social workers can use these legal tools to enforce clients' rights to nationality as well as other fundamental rights.

### International law

Below is a summary of international law that can be utilised to advance the rights of stateless persons in South Africa.

#### *The right to birth registration*

The primary international instruments dealing with the issue of birth registration are the 1989 United Nations Convention on the Rights of the Child,<sup>17</sup> the 1966 Covenant on Civil and Political Rights<sup>18</sup> (CCPR) and the 1999 African Charter on the Rights and Welfare of the Child (ARC).<sup>19</sup> South Africa is state party to each of these and thus is bound to uphold their provisions and not to take actions contravening their goals and principles.

The conventions make clear that all children, regardless of their nationality, race, legal or other status, are entitled to a name, a nationality and immediate birth registration. Article 24(1) of the CCPR explicitly states that 'every child' has the right to the protection which his status as a minor grants him 'without any discrimination as to ... national or social origin.' The ARC defines a child as anyone below 18 years of age without exception.

The ability to claim one's rights as a minor requires proof of birth date, particularly for children as they reach the teenage years and it becomes more difficult to estimate age by appearance. The birth certificate is a child's key to proving his or her age. The right of the child to immediate birth registration applies universally to *all* children regardless of their nationality. The immediacy of the right and the universality of its formulation combine to create an

17 See Article 7(1).

18 See Article 24.

19 See Article 6.

indisputable obligation on states to facilitate birth registration (a) in the country of birth and (b) for *all* children born in the territory.

### ***The right to a nationality***

“To me, nationality means that sense of belongingness and also where you are accepted as part of the community, part of the nation. Where you feel embraced as a human being, where you enjoy your rights as a person.”

-JS, a South African whose ID was blocked due to suspected fraud

The Universal Declaration on Human Rights, which is generally agreed to be the foundation for international human rights law, states unequivocally at Article 15,

Everyone has the right to nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

South Africa has signed and ratified a number of international instruments that protect the right to nationality: 1957 Convention on the Nationality of Married Women; 1965 Convention on the Elimination of all Forms of Racial Discrimination; 1979 Convention on Elimination of all Forms of Discrimination Against Women; 1989 Convention on the Rights of the Child; the 1966 International Covenant on Civil and Political Rights; and the 1999 African Charter on the Rights and Welfare of the Child.

See below for specific provisions relating to the right to nationality in each of these international instruments:<sup>20</sup>

- **1957 Convention on the Nationality of Married Women**

Neither the celebration nor dissolution of marriage between one of its nationals and an alien, nor the change of nationality by the husband during the marriage, shall automatically affect the nationality of the wife.

Neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.

The alien wife of one of [the Contracting State's] nationals may, at her request, acquire the nationality of her husband through specially privileged naturalisation procedures.

20 For a helpful summary of treaties South Africa has signed and/or ratified, see University of Minnesota's Human Rights Library, at <http://www1.umn.edu/humanrts/research/ratification-southafrica.html> (accessed 3 October 2013).



- **1965 Convention on the Elimination of all Forms of Racial Discrimination**

States must 'guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law', particularly in the enjoyment of fundamental human rights, including the right to nationality.

- **1979 Convention on Elimination of all Forms of Discrimination Against Women**

States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

States parties shall grant women equal rights with men with respect to the nationality of their children.

- **1989 Convention on the Rights of the Child**

States parties shall respect and ensure the rights ... of each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his parents' of legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The child shall be registered immediately after birth and shall have the right from birth to a name and the right to acquire a nationality ...

- **1966 International Covenant on Civil and Political Rights**

Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth the right to such measures of protection as are required by his status as a minor, on the part of his family, society and State.

Every child shall be registered immediately after birth and shall have a name.

Every child has the right to acquire nationality.

- **1999 African Charter on the Rights and Welfare of the Child**

Every child shall have the right from birth to his name; every child shall be registered immediately after birth; every child has the right to acquire nationality.

State parties shall ensure that their constitutional legislation recognises the principles according to which a child shall acquire nationality of the State in the territory in which he was born if, at the time of birth, he is not granted nationality by any other State in accordance with its laws.

### ***The United Nations statelessness conventions***

South Africa has yet to sign and ratify either the 1954 Convention relating to the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness. As a result, legal practitioners in

South Africa can appeal to these treaty regimes only as examples of accepted international standards of best practice.

Regarding South Africa's progress towards signature and ratification of the treaties: in December 2011, South Africa delivered a pledge at a United Nations ministerial-level conference in Geneva that South Africa would sign and ratify the stateless treaties following an internal consultative process. In November 2012, LHR presented before the Parliamentary Committee on Home Affairs to encourage South Africa to honour its pledge by the end of 2013.<sup>21</sup> The response was positive, but to date no action has followed. The committee expressed concern over how to prevent an 'explosion' of statelessness on the territory should South Africa ratify the treaties. In other words, the committee members were concerned that people would destroy their identity documents and passports in hopes of claiming stateless status and protection. LHR highlighted that identification of a stateless person is a process which is not easily open to fraud. Statelessness is a legal status that can be confirmed in collaboration with officials from individuals' countries of origin and former residence. Furthermore, the potential for fraud is not a sufficient reason to neglect the fundamental human rights and need for protection of the many genuinely stateless persons on the territory.

- **1954 UN Convention relating to the Status of Stateless Persons (the 1954 Convention)**

The 1954 Convention is the cornerstone of the international protection regime for stateless persons. It is the primary international instrument adopted to date to regulate and improve the legal status of stateless persons internationally.

The 1954 Convention is part of a broader set of universal and regional standards. However, it is the only legal instrument that establishes the international legal status of 'stateless persons' and addresses directly the practical concerns specific to stateless persons. It not only sets out the definition of a stateless person, but also specifies the treatment to be accorded to stateless persons by state parties.

The 1954 Convention protects stateless people's basic human rights and needs until their nationality can be resolved, prevents discrimination, requires issuance of identity and travel documents to stateless persons (Article 28), prevents expulsion save on grounds of national security or public order (Article 31) and requires facilitation of naturalisation of stateless persons (Article 32). It further provides in Article 25 that,

<sup>21</sup> See a summary of LHR's presentation here: <http://www.lhr.org.za/news/2012/press-statement-lhr-makes-statelessness-submissions-parliament> (accessed 3 October 2013).

(1) When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange such assistance be afforded to him by their own authorities.

(2) The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to stateless persons such documents or certifications as would normally be delivered to aliens by or through their national authorities.

This could include provision of services to the stateless such as birth registration, marriage registration and issuance of police clearances.

The Convention addresses a variety of matters which have an important effect on day-to-day life such as gainful employment, public education, public relief, labour legislation and social security. In ensuring that such basic rights and needs are met, the Convention provides the individual with stability and improves the quality of life of the stateless person.

Ratification of this Convention would require that South Africa establish a stateless status determination procedure and provide certain minimum protections to stateless persons. It would greatly improve the status of stateless persons in South Africa, given that few protections currently exist in law. It would help relieve the overburdened asylum system by taking stateless persons without a refugee claim out of that system. Finally, it would benefit South African civil society and promote social cohesion by providing measures of security to extremely marginalised and vulnerable persons who cannot be deported and who need a durable solution.

The standard of treatment that signatory states must provide to the stateless is essentially the same as that required for refugees under the 1951 UN Convention relating to the Status of Refugees and its Protocol (1951 Refugee Convention). The Refugee Convention is, however, more favourable than the Statelessness Convention in certain respects, most notably because of its prohibition against refoulement and its requirement of non-penalization for illegal entry.<sup>22</sup>

22 UNHCR, Massey, H 'UNHCR and De Facto Statelessness' 2010 <http://www.unhcr.org/refworld/pdfid/4bbf387d2.pdf> (accessed 11 July 2012) 15.

**Suggested reading:**

- For detailed analysis of how South Africa would need to reform its law to comply with the statelessness conventions, see LHR's 2013 report, 'Statelessness and Nationality in South Africa.' <http://www.lhr.org.za/publications/statelessness-and-nationality-south-africa> (accessed 30 September 2013).
- For an article-by-article analysis of the 1954 Convention, see 'Convention relating to the Status of Stateless Persons: Its History and Interpretation: A Commentary by Nehemiah Robinson', Institute of Jewish Affairs, 1955, republished by UNHCR in 1997.
- For a more succinct overview, see Paul Weis, 'Convention relating to the Status of Stateless Persons', *International and Comparative Law Quarterly*, Vol. 10, 1961, pp.255-264.

- **1961 UN Convention on the Reduction of Statelessness (the 1961 Convention)**

Broadly speaking, the 1961 Convention guides states on how to draft nationality laws that prevent statelessness from arising in a state's territory or as a result of its citizenship laws for its Diaspora abroad.

The treaty places restrictions on the citizenship laws that a state may enact and prescribes certain clauses which a state must enact. At a minimum: individuals will be granted nationality under certain circumstances in which they might otherwise be stateless; loss and deprivation of nationality will not result in statelessness; and in no case will deprivation of nationality be arbitrary.

The 1961 Convention focuses on avoiding statelessness. It encourages granting nationality from birth. It regulates loss or renunciation of nationality, making both conditional on retention of nationality. It encourages non-discrimination against family members when one person loses nationality. It prevents deprivation of nationality on racial, ethnic, religious or political grounds and guarantees due process where deprivation is permitted.

Significantly, the 1961 Convention requires state parties to confer nationality on persons who would otherwise be stateless as a result of transfer or acquisition of territory. Finally, it establishes that the UN High Commissioner for Refugees will examine stateless persons' claims and assist them in presenting claims to appropriate state authorities.

The Convention allows states ample flexibility to make declarations and reservations to protect national security.

South Africa could gain critical guidance from the 1961 Convention on aligning our national policies and legislation so as to prevent statelessness. It should also be noted that through its provisions, this Convention would actually strengthen and protect true South Africans' citizenship rights by strengthening due process wherever nationality may be lost or deprived.

## **South African Legal Framework**

No dedicated, local legal mechanism exists for the identification or protection of stateless persons or persons at risk of statelessness in South Africa. However, there is a patchwork of legislation which covers some of the protection needs of such people and which allows access to South African citizenship. These include provisions allowing for: access to nationality in cases of doubt; appeal of citizenship decisions in High Court; Ministerial discretion for the grant of permanent residence in circumstances where an applicant can show 'special circumstances'; procedures for the late registration of births; and judicial review of administrative decisions impacting enabling documents and nationality.

The exact provisions which legal practitioners can use will be dealt with in greater detail under the following sections that identify the legal assistance appropriate for each category of client. The following section serves only as a brief overview of the law applicable in this area of practice, the basic manner in which the Act is applicable and the amendments of which one must be aware. Specific provisions are highlighted only where these are of particular importance in relation to stateless persons in South Africa.

### ***South African Constitution***

The Bill of Rights, at Chapter of the 1996 South African Final Constitution (the Constitution) establishes the rights and privileges that constitute fundamental human rights in South Africa. A number of provisions of the Bill of Rights apply to both citizens and non-citizens equally, protecting all individuals' innate humanity regardless of their nationality or status in the country. These provisions, in turn, protect stateless persons present in South Africa.

The South African Constitution states in section 28(a): 'Every child has the right to *a name and a nationality from birth*'<sup>23</sup> (emphasis added). This right exists for citizens and non-citizens alike. It is noteworthy that the Constitution protects the right to

23 Section 28(1)(a) of the Final Constitution of South Africa (1996).

nationality *from birth* – it goes further than even the African Charter on the Rights and Welfare of the Child, which only protects the child's right to *acquire* a nationality (unless the child is stateless at birth, in which case the ACRWC protects the child's right to acquire the nationality of the birth country).<sup>24</sup>

It should be noted that the Constitution protects the right of every child to 'a' nationality, not necessarily to South African nationality. However, the South African Citizenship Act is more explicit in section 2(2), which provides that any person born on the territory who is stateless is entitled to South African citizenship by birth, provided the birth is registered in accordance with South African law.

The right to nationality may begin at birth but does not end when a person reaches adulthood; on the contrary, when a person reaches adulthood, the importance of nationality only increases. An identity document becomes necessary to do just about anything to improve one's position in life, such as furthering one's education, getting a job, opening a bank account, applying for financing, buying a car and a house and much more. The Constitution's protection of the child's right to a nationality enables legal practitioners to advocate for all people's right to nationality by linking section 28(a) to the right to human dignity in section 10 of the Bill of Rights, which also applies to all persons, regardless of citizenship.

The Constitution also prohibits deprivation of nationality, in section 20 where it states simply: '*No citizen may be deprived of citizenship*' (emphasis added). There are sections on deprivation of citizenship in the Citizenship Act, finalised in 1995, prior to the final Constitution's promulgation on 18 December 1996, that violate this constitutional provision. Despite several amendments to the Citizenship Act since its enactment, the sections on deprivation of citizenship still stand.

The Bill of Rights also protects the fundamental rights that flow from nationality, such as the *right to equality* (section 9), the *right to freedom of movement* (section 21), the *right to freedom and security of person* (section 12), and again, importantly, the *right to human dignity* (section 10). These rights apply to citizens and non-citizens alike and can be used as critical tools to protect the rights of the stateless in South Africa. Indeed, it is these specific rights which are most often denied to stateless persons as a result of their lack of nationality and immigration status.

In assisting specific clients, practitioners can examine the Bill of Rights more closely to distinguish which rights are reserved for

24 Article VI of the 1999 African Charter on the Rights and Welfare of the Child.

citizens and which rights can be used to protect clients depending on their situation.

### ***South African Citizenship Act 88 of 1995***

The South African Citizenship Act 88 of 1995 (the Citizenship Act or the South African Citizenship Act), governs the acquisition and loss of South African citizenship.

South African *citizenship by birth* is accessible through this Act to persons born on the territory to a citizen<sup>25</sup> or to permanent residents;<sup>26</sup> persons born abroad to a South African citizen;<sup>27</sup> and people born on the territory without access to any other nationality.<sup>28</sup>

*Citizenship by descent* is given to children adopted by South African citizens<sup>29</sup> (who, presumably, did not have South African citizenship status at the time of adoption).

The Act also allows for *naturalisation*<sup>30</sup> for persons who have lived and/or worked in the territory for a certain period of time, for example as spouses of citizens and as permanent residents.

It is interesting to note that certain citizens must first register their birth 'in accordance with the Births and Deaths Registration Act' 51 of 1992 (the Births and Deaths Registration Act) in order to access citizenship – namely:

- (1) those born on the territory who are stateless,<sup>31</sup>
- (2) those born on the territory, to parents admitted for permanent residence, who live in the Republic until age 18,<sup>32</sup>
- (3) those adopted by a South African citizen,<sup>33</sup> and
- (4) those born on the territory to parents *not* admitted to the Republic for permanent residence who live in the Republic until age 18.<sup>34</sup>

A person born in or outside South Africa to a South African parent now does not need to register his or her birth in order for citizenship to be granted by operation of law. Previously, birth

25 Section 2(1)(b) of the South African Citizenship Act 88 of 1995 (the Citizenship Act).

26 Note that in 2010 amendments to the Citizenship Act, a child of permanent resident must wait until age 18 to access South African citizenship, provided he or she can show that he or she resided in South Africa from birth until majority.

27 Section 2(1)(b) of the Citizenship Act. Note that in 2010 amendments to the Citizenship Act, persons born outside South Africa to citizens are now citizens by birth, whereas under previous law such persons were citizens by descent.

28 Section 2(2) of the Citizenship Act.

29 Section 3 of the Citizenship Act.

30 See Section 5 of the Citizenship Act generally.

31 Section 2(2) of the Citizenship Act.

32 Section 2(3) of the Citizenship Act.

33 Section 3 of the Citizenship Act

34 Section 4(3) of the Citizenship Act.

registration was required for those born outside the country to be a citizen.<sup>35</sup>

However, this legal fact does not change the administrative requirements enforced by South African government, which does not in practice recognise citizens born abroad until they have completed the foreign birth registration process in terms of the Births and Deaths Registration Act.

A person born within the South African territory today to a citizen also cannot practically access citizenship without having his or her birth registered. Birth registration is now required as a prerequisite to access an ID – it is at birth registration that an ID number is allocated to an individual and he or she is added to the National Population Register.<sup>36</sup>

### ***Recent amendments***

The South African Citizenship Act 88 of 1995 was amended most recently by the South African Citizenship Amendment Act 17 of 2010 (the 2010 amendments). The 2010 amendments came into force on 1 January 2013. Under the amended Act, the importance placed on birthplace is removed; section 2(1)(b) now provides that:

... any person born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.

Previously, people born abroad to citizens were classified as 'citizens by descent.'<sup>37</sup> It is as yet unclear whether this provision applies prospectively only (for people born after January 2013, when the amendments came into force) or whether it will affect the citizenship status of persons born prior to its commencement as well. The common law does not prefer retroactivity of laws generally. In this case, the amendment, if applied retroactively, would change the status of citizens born abroad to citizens 'by birth' instead of citizens 'by descent.' However, in practice, this does not appear to provide any benefit to citizens born abroad. The provisions of the Act which allow different treatment to different classes of citizens refer only to citizens 'by naturalisation' or 'by

35 In terms of the Citizenship Act's former section 3(1)(b), prior to the South African Citizenship Amendment Act of 2010 (2010 Citizenship Amendment Act).

36 See regulation 6(3)(a) of Regulations in terms of section 32 of the Births and Deaths Registration Act 51 of 1992, read together with section 7 of the Identification Act 68 of 1997.

37 See section 3 of the South African Citizenship Act prior to the 2010 Citizenship Amendment Act coming into force in January 2013. This situation is in contrast to the practice at the time of the Citizenship Act's enactment in 1995. In the run up to the 1994 elections and for several years after, individuals were registered and issued IDs without having birth certificates. This policy was permitted because during apartheid, few people outside the urban areas had birth certificates or other proof of birth.



registration' (a category that existed under the South African Citizenship Act 44 of 1949). Citizens by descent do not appear to receive a lesser standard of treatment than citizens by birth. This could be the reason Parliament decided to amend the Act and provide them with the same status.

We would like to note, however, that two sections of the Citizenship Act explicitly state that those who were 'citizens by birth' or 'by naturalisation' 'prior to the commencement' of the Act remain as such after its commencement. The new provision granting citizenship by birth to citizens born abroad does not have a similar proviso. Furthermore, the South African Citizenship Act 44 of 1949 (the 1949 Citizenship Act) was repealed in its entirety and replaced by the 1995 Act. Thus, it is reasonable to conclude that the provisions granting nationality do not have temporal time constraints. If granting of nationality under the 1995 Citizenship Act did not apply retroactively, gaps between the two laws could result in confusion and statelessness.

Another change to the Citizenship Act that occurred with the coming into force of the 2010 amendments in January 2013 is section 2(3): A child born in the country to permanent resident parents will not be a citizen upon birth, but only qualifies upon reaching the age of majority if they show that they have lived in the Republic until that time and their birth was registered. Furthermore and perhaps more significantly, the term 'parents' is used now, where previously that Act used the term 'one of his or her parents' in relation to children of permanent residents. This indicates that now, both parents may be required to be permanent residents in order for a child to qualify for citizenship.

Finally, the recently amended Act provides at section 4(3):

A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if – (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and (b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).

This new provision will protect against statelessness if it is interpreted to allow children of irregular migrants to access naturalisation without needing to fulfil the ordinary requirements of naturalisation (which are often challenging for this group to fulfil given their parents' irregular status). There is no regulation accompanying this provision to provide guidance, but the following commentary is a good indication that this provision will be applied in such fashion.

The Citizens Rights in Africa Initiative (CRAI) wrote as follows<sup>38</sup> during the call for public comment on the Citizenship Act amendment bill:

The proposed new section 4 of the Citizenship Act adds a category of citizenship by naturalisation that is complementary to the additional category of citizenship by birth for children born in the country and still resident at majority. The new section 4(3) provides for children born in the country of parents who are neither citizens nor admitted for permanent residence to apply to be citizens by naturalisation, provided their birth has been registered. The reference to admission for permanent residence is confusing: presumably this section is intended to apply to children of parents who were not admitted legally at all? As stated above, we recommend that such children should qualify for late recognition of citizenship by birth, as do the children of legally admitted parents; a person who has only ever lived in South Africa and has therefore much weaker connections with any other country should not have to fulfil the additional requirements for naturalisation of showing that they are of good character, etc. When combined with the new requirement that a person seeking to naturalise must renounce another nationality if their other actual or potential nationality is of a country which does not allow dual nationality (see below), these additional conditions could be highly problematic.

*We recommend that 4(3) be redrafted simply to provide for a child born in the country who is still resident there at majority to qualify for citizenship by birth and have the right to apply for recognition of that status at majority. [emphasis added]*

Home Affairs' replied to CRAI's comment to say:

The intention is to create an additional category of naturalisation, and the provisions of section 4(3) should be read independently of section 4(1) and (2), as children falling within category of the provision will not have to comply with the provisions of section 5(c) of the Act (as amended).

The Department's view is that there is no need to redraft, as the intention is to deal separately with children born of parents who have not been admitted to the Republic at the time of their birth, and not to grant citizenship by birth, but through naturalisation.

### ***Interpreting repealed citizenship law: the importance of your client's date of birth***

As a result of the numerous citizenship laws in place in South Africa over the years, it is important to note the date of your client's birth. Even though citizenship laws in force prior to 1995 were repealed,<sup>39</sup> they remain significant. As an attorney you must be able to explain to Home Affairs and other parties how your client acquired his or her citizenship when your client encounters any challenge to that claim. It is also necessary to understand repealed legislation because any action in terms of the repealed legislation 'which is capable of being done in terms of a provision of [the

38 [d2zmx6mlqh7g3a.cloudfront.net/.../100907pchemesacitizenship.doc](https://d2zmx6mlqh7g3a.cloudfront.net/.../100907pchemesacitizenship.doc) (accessed 3 October 2013).

39 Section 26 of the South African Citizenship.

1995] Act' is deemed to have been done in terms of the 1995 Act, per section 26(2).

Also, you may need to research and understand the legal bases upon which your client may have lost or been deprived of his/her South African citizenship under law in place prior to 1995. Such persons can apply to restore/resume their citizenship, but they must show how they initially qualified as a citizen in order to proceed with the restoration process.

A client born prior to 1995 may have acquired his or her citizenship under the South African Citizenship Act 44 of 1949 (the 1949 Act). If that is the case, under the South African Citizenship Act 88 of 1995, he or she would remain a citizen if (s)he was a citizen by birth, descent or naturalisation before the 1995 Act came into force.<sup>40</sup>

Even if the client was born post-1995, one of the most important factors in determining his or her citizenship is whether at least one parent was South African at the time of the client's birth. Again, you will need to consult the 1949 Act and potentially earlier legislation.

Understanding the legal basis of your client's citizenship will also be important in cases where his or her ID number has been blocked or duplicated and (s)he must now prove the validity of his or her citizenship.

It is worth mentioning some historical context of the legal changes of the 1900s. For about twenty years prior to 1949, 'there were no South African citizens, only British subjects and Union nationals'.<sup>41</sup> The 1949 Citizenship Act came into force one year after the National Party took power and was 'a key piece of legislation in the implementation of the new national vision of the National Party'.<sup>42</sup> Under it, most British subjects from South Africa acquired South African citizenship (which replaced Union nationality). One year after the 1949 Citizenship Act came into force, the Population Registration Act 30 of 1950 required all citizens to carry identification passes detailing their race. In 1970, the Bantu Homelands Citizenship Act (later renamed the Black States Citizenship Act) came into force. This Act effectively denationalised black South Africans because the Bantu homelands (the Transkei, Bophuthatswana, Ciskei and Venda, known as the

40 See sections 2(1)(a), 3(1)(a) and 4(1)(a) of the South African Citizenship Act 88 of 1995, as enacted in 1995.

41 J Klaaren 'Post-Apartheid Citizenship in South Africa' in DB Klusmeyer & TA Aleinikoff (eds) *From Migrants to Citizens: Membership in a Changing World* (2000) 223.

42 Peberdy (n 44 above) 101.

'TBVC' states) were technically given autonomy and self-governance.<sup>43</sup> Some of these persons were entitled in terms of the Restoration of South African Citizenship Act 73 of 1986 to regain their citizenship but due to major complications, many people were left out.<sup>44</sup> The Restoration and Extension of South African Citizenship Act 196 of 1993 restored the citizenship of many TBVC citizens. The Black States Citizenship Act was repealed on 27 April 1994 by the Interim Constitution of South Africa.<sup>45</sup> However, despite all of these efforts to restore a common citizenship, some homeland legislation remained in place and continued to be enforced, such as the Citizenship of Transkei Act of 1976. Only with the coming into force of the 1995 Citizenship Act did all such legislation get finally repealed.

The 1995 Citizenship Act provides at section 1A(1)(b) that:

The expressions 'in the Republic' and 'outside the Republic' shall be construed as if the former states were part of the former Republic of South Africa, whenever it has to be determined whether any event or action which occurred or took place prior to the commencement of the Constitution, occurred or took place in or outside the Republic.

Additional research may be necessary for elderly clients to establish a client's claim to citizenship through parents or grandparents. The 1949 Act provides that a person born in the Union of South Africa prior to 1949 who was or is deemed to have been a Union national shall be a South African citizen.<sup>46</sup>

Prior to 1949, the South African Nationality and Flags Act of 1927 was in force. This Act created South African citizenship as a category, but South African nationals at that time were also British nationals and the new national flag was flown next to the Union Jack.<sup>47</sup>

### Suggested reading:

- For an in-depth analysis and history of South African citizenship law, see Jonathan Klaaren's chapter 'Post-Apartheid Citizenship in South Africa' in DB Klusmeyer & TA Aleinikoff (eds) *From Migrants to Citizens: Membership in a Changing World* (2000).

43 About.com 'Apartheid Era Laws: Bantu Homelands Citizenship Act No 26 of 1970' available at <http://africanhistory.about.com/od/apartheidlaws/g/No26of70.htm> (accessed 3 October 2013).

44 Klaaren (n 41 above) 226-227.

45 Klaaren (n 41 above) 226.

46 Section 2(1) of the 1949 Act.

47 S Peberdy *Selecting Immigrants: National Identity and South Africa's Immigration Policies 1910-2008* (2009) 82.

### ***Citizenship in cases of doubt***

Given the low levels of documentation in the former black states and the complexity of the various citizenship laws over the years, legal practitioners can be relieved to learn that the current citizenship law allows for recognition of citizenship 'in cases of doubt.'

According to section 15 of the Citizenship Act, the Minister may in such cases, subject to his or her discretion, 'issue to any person in respect of whose South African citizenship there is any doubt, a certificate that he or she is a South African citizen'.<sup>48</sup> A certificate issued under this section is intended as conclusive evidence that the person to whom it relates was a South African citizen by birth, descent or naturalisation, as the case may be, at the date of the issue of the certificate, but shall not be deemed to imply any admission that the person to whom it has been issued was not a South African citizen previously. This discretionary tool provides a possibility for persons unable to prove their claim to citizenship through the ordinary channels to achieve effective recognition and access to their nationality.

There is no accompanying regulation to this provision and thus it is unclear what documents the applicant must submit or what burden of proof the applicant must comply with in order to be successful. There is no form or application procedure outlined in the regulations. Lawyers for Human Rights has submitted letters to the Minister on behalf of clients seeking protection under this provision. We have not yet, to date, received a decision on any of the applications submitted under this provision.

See section below for recommendations on to draft such an application.

#### **The Citizenship Act of 1995 has undergone the following amendments:**

- South African Citizenship Amendment Act, No. 69 of 1997
- South African Citizenship Amendment Act, No. 17 of 2004
- South African Citizenship Amendment Act, No. 17 of 2010 (changes affected sections 2, 3, 4, 5, 6, 8, 10, 11 and 13 of the Act as it currently stands)

48 Section 15(1) of the South African Citizenship Act.

### ***Reviewing a decision under the Citizenship Act***

Another vital mechanism under the Citizenship Act is section 25, 'Review of Minister's decision by court of law:'

- (1) Any provincial or local division of the High Court of South Africa shall have jurisdiction to review any decision made by the Minister under this Act.
- (2) A court hearing a review in terms of subsection (1) may call upon the Minister to furnish reasons and to submit such information as the court deems fit, and the court shall have jurisdiction to –
  - (a) consider the merits of the matter under review; and
  - (b) confirm, vary or set aside the decision of the Minister.

This provision allows attorneys to launch judicial review applications in High Court under the Citizenship Act regarding any right emanating from that Act. This is a separate grounds of review that can be used in conjunction with or in addition to the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and rule 53 of the Uniform Rules of Court.

### ***South African Immigration Act 13 of 2002***

The South African Immigration Act 13 of 2002 (the Immigration Act), governs the following:

- Access to the territory for foreign nationals.
- The grounds upon which a foreign national may acquire temporary and permanent residence in South Africa.
- The arrest, detention and deportation of foreign persons not legally present on the territory.

The provisions of this Act are applicable generally to those who have no claim to South African nationality. It will always be of relevance to persons who were born outside of the territory to foreign nationals and who are seeking a manner in which to be admitted to South African territory.

For those working with statelessness in South Africa, perhaps the most pertinent of all the provisions of the Immigration Act is section 31(2)(b), which allows an application to the Minister for an exemption for permanent residence (exemption) for an individual or category of foreigners (such as stateless persons) for an indefinite or definite period. It allows the Minister to:

- ... grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when *special circumstances* exist which justify such a decision; provided that the Minister may –
- (i) Exclude one or more identified foreigners from such categories; and
  - (ii) For good cause, withdraw such right from a foreigner or category of foreigners. [emphasis added]

This provision provides permanent residence – and even naturalisation, should permanence residence be granted and ordinary residence attained for a period of five years or more<sup>49</sup> – for persons who do not satisfy any of the ordinary provisions applicable to immigrants wishing to remain on the territory.

One of the main barriers that stateless persons face in accessing the most common immigration permits is the requirement of a passport and police clearance from their country of origin. Typically, stateless persons do not have passports and given that no country recognises them as a national, no country will assist in providing a police report. Where an immigrant cannot be removed from the territory due to statelessness, but has no means to legalise his or her stay on the territory under any of the ordinary provisions of the Act, no other mechanism exists to protect his or her right to acquire nationality other than the exemption process. The above provision thus presents the only means by which most stateless persons may access legal status and a path to naturalisation in this country.<sup>50</sup>

The Immigration Act also regulates the detention and deportation of illegal foreigners on the territory. Please refer to section 8 below for in depth analysis of how to assist detained stateless persons.

At present, the immigration laws, policies and practices of most states do not sufficiently take into account the unique characteristics that set stateless persons apart from other migrants. All non-stateless migrants have an effective nationality, benefit from the protection of their state and have a country to be returned to. Stateless persons however, are not considered nationals under the operation of the law of any state, and the de facto stateless do not have an effective nationality. Both groups lack the protection of a nation state, and are unlikely to have consular or diplomatic protection and/or documentation. The failure to recognise the particular circumstances of statelessness has created a protection gap; this is most evident in the context of immigration detention for the purpose of removal.

There are *Guidelines to Protect Stateless Persons from Arbitrary Detention*<sup>51</sup> which provide detailed guidance on how states should treat stateless persons in the context of immigration detention in order to comply with their obligations under international human

49 As per section 5 of the Citizenship Act.

50 Stateless persons who have travel documents or passports are able to apply for other regular immigration permits. Alternatively, a stateless applicant must request administrative discretion in waiving requirements for common immigration permits.

51 The Equal Rights Trust, *Draft Guidelines on the Detention of Stateless Persons*, 2011 available at: <http://www.equalrightstrust.org/view-subdocument/index.htm?id=830>.

rights law, in particular, the rights to equality and non-discrimination and the right to be free from arbitrary detention. These Guidelines also recommend that states implement national statelessness determination procedures, and provide guidance on relevant standards and protections.

The Immigration Act is silent on how to treat a person who is stateless or unable to prove their citizenship. If such an individual is arrested for immigration reasons there is no mechanism to review that detention or regularise that person's immigration status.

Neither the Immigration Act nor the Regulations make provision to admit or assist any person who may be stateless. The new rules require foreign nationals to apply for visas and permits from outside the country and do not cater for persons who may be de facto or de jure stateless and cannot travel into or out of the country.

#### ***Changes to the Immigration Act and Regulations which came into effect on 26 May 2014***

The changes include requirements for parents travelling with children in Regulation 6(12)(a) the need to travel with an unabridged birth certificate. There is no flexibility or discretion towards this requirement in the Regulations.

The Immigration laws deal with the situation of 'Illegal Foreigners' in Regulation 30 but do not provide any direction on how to deal with the situation of an individual who is born to at least one South African parent but who has not had their birth registered and who is unable to prove their citizenship. The Citizenship Act deals with these cases in a limited way but this continues to be a serious gap in the law.



### **Regulation 30 Illegal foreigners**

- (1) Upon requesting authorisation as contemplated in section 32(1) of the Act, an illegal foreigner who has neither been arrested for the purpose of deportation nor been ordered to depart and who wishes to apply for status after the date of expiry of his or her visa, shall –
  - (a) demonstrate, in writing, to the satisfaction of the Director-General that he or she was unable to apply for such status for reasons beyond his or her control; and
  - (b) submit proof to the Director-General that he or she is in a position to immediately submit his or her application for status.
- (2) Authorisation to remain in the Republic as contemplated in section 32(1) of the Act shall be granted on Form 20 illustrated in Annexure A.
- (3) As soon as the final decision in respect of the application for status has been made, the authorisation contemplated in subregulation (2) shall lapse.
- (4) An illegal foreigner who has satisfied an immigration officer that he or she will depart from the Republic as required by section 32(1) of the Act, shall be ordered by that immigration officer on Form 21 illustrated in Annexure A to depart from the Republic within a period of 14 days of having so been ordered: Provided that such period may, for good cause, be extended.

### ***Births and Deaths Registration Act 51 of 1992***

Birth registration is key to nationality in South Africa. For all those who qualify for citizenship or permanent residence, it is the critical moment when a person is entered into the National Population Register. In order to obtain an ID in South Africa, one must first apply for a birth certificate and be issued with an ID number. Only at this point can a South African citizen apply for an ID and passport and conduct other civil registry activities, such as registering one's children's births, registering marriages and registering deaths.

Home Affairs recently took a decision to cease issuance of abridged birth certificates; for all births after 4 March 2013, only unabridged birth certificates will be issued.<sup>52</sup> Unabridged certificates are also known as 'long birth certificates' and include one's parents' details. Abridged certificates are shorter and only include one's name, place of birth, date of birth and ID number.

52 South African Government Information, 'Minister Naledi Pandor to issue unabridged birth certificates to parents of newly born babies at Park Lane Hospital in Johannesburg' (28 February 2013) available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&tid=99998> (accessed 3 October 2013).

The Births and Deaths Registration Act (BDRA) provides for birth registration of all children born on the territory, whether to South Africans or foreign parents. Children born in South Africa who do not qualify for citizenship are entitled to a birth certificate under the Births and Deaths Registration Act. However, they are issued birth certificates that do not include an ID number and the child is not entered into the National Population Register. Before the amendments to the BDRA and its regulations came into force on 1 March 2014, the regulations<sup>53</sup> provided that foreign children receive a handwritten certificate. The newest regulations on the Births and Deaths Registration Act<sup>54</sup> have removed the provision for handwritten birth certificates and all children in the Republic shall receive computer-generated, unabridged birth certificates. This is a positive development since some service providers and foreign authorities are reluctant to accept handwritten birth certificates as authentic. It will also be easier to re-issue these certificates when the original has been lost. LHR has encountered clients who have been required to reregister their children if the handwritten certificate is lost. It is unclear whether there is a birth register for all births on the territory, as the current Acts refer to the National Population Register (record of citizens and permanent residents), which has replaced the reference to a birth register in previous Acts.

The newest amendments to the BDRA and its regulations now make provision for the recording of more 'biometrics', including palm prints, hand measurements and retinal patterns.<sup>55</sup> The local Home Affairs offices are not equipped to implement these provisions yet, but the recording of such biometrics will solve many problems relating to birth registration. At the moment it seems strict requirements for birth registration are implemented, because a child cannot yet be linked to a birth certificate, and therefore his parents, through biometrics. If it is eventually possible to link a birth certificate to a child or an adult through biometrics, strict requirements with regards to birth registration may be relaxed, because of a reduced risk of fraud in birth certificates.

The BDRA requires all births to be registered within 30 days. It has recently been coupled with Home Affairs' National Population Registry Campaign, which has seen an increase in mobile registration clinics, linkage of hospitals to the Home Affairs' birth registration system and efforts to enforce the requirement of a birth certificate for children to enrol in crèche and school, to receive medical treatment, to apply for foster care and social grants and more.

53 GNR.2139 of 9 September 1992: Regulations in terms of section 32 of the Births and Deaths Registration Act 51 of 1992.

54 GNR.128 of 27 February 2014: Regulations in terms of section 32 of the Births and Deaths Registration Act 51 of 1992.

55 See section 1 of the BDRA

The BDRA also provides for procedures colloquially known as 'late registration of birth' (LRB) which apply to any child registered more than 30 days after birth. Before the most recent amendment to the BDRA and regulations, children from 30 days to one year old could be registered with a maternity certificate from the hospital and other supporting documents, such as an affidavit explaining why the birth was not registered within 30 days. Registration of children aged one to 15 years required additional proof, including but not limited to school letters, baptismal certificates and letters from tribal chiefs. For people over 15 years of age, in addition to the above, a witness was required who is 10 years older than the applicant and who has known the applicant since childhood.<sup>56</sup>

The regulations to the amended Act now divide these late registrations of birth into two categories; children who are registered after 30 days, but before 1 year;<sup>57</sup> and children who are registered after 1 year.<sup>58</sup> The discretionary process which was implemented previously has been entirely substituted in the 2014 regulations by a list of requirements, which, if not complied with, must lead to a rejection of the notice of birth.<sup>59</sup>

The late registration of birth process was created to accommodate people who had not been registered under the previous Acts, taking into account the reality that many people were unregistered at the time. The LRB process accommodated those who could not meet the requirements for birth registration and allowed the submission of alternative proof of citizenship. Currently, there is still a need for some South Africans to acquire birth certificates through this process, but the non-discretionary nature of the new regulations will cause many South Africans to remain unregistered. The Department of Home Affairs intends to eliminate the LRB process entirely by the end of 2015, to address the perceived abuse of this system.<sup>60</sup> It is currently unclear what remedy will be available for people who cannot meet the strict requirements of the BDRA or who are not registered within 30 days. The Minister announced that these cases would go through an appeal and adjudication process. Until the nature of this process is revealed, it is unclear what the requirements will be and whether

56 See regulation 6(7) in the repealed Regulations to the Births and Deaths Registration Act.

57 See regulation 4 of the Regulations to the Births and Deaths Registration Act.

58 See regulation 5 of the Regulations to the Births and Deaths Registration Act.

59 See regulation 3, 4, and 5 of the Regulations to the Births and Deaths Registration Act.

60 Budget Vote Speech 2014 by Minister of Home Affairs, Mr Malusi Gigaba (15 July 2014) available at <http://www.dha.gov.za/index.php/statements-speeches/489-address-by-the-minister-of-home-affairs-mr-malusi-gigaba-mp-on-the-occasion-of-budget-vote-11-at-the-extended-public-committee-on-home-affairs> (accessed 22 September 2014)

applicants will require legal representation in order to effectively access it.

The regulations to the BDRA indicate that the Director-General may appoint local and national screening committees to confirm the veracity of the information provided in terms of the LRB process and to make representations to the Minister, who will then accept or reject the application for registration (see regulation 6(4) and 6(5)). Hopefully, the formalisation of these committees<sup>61</sup> will aid in resolving problem cases and improving the quality of interviews that take place during late registration of birth. The regulations require the Director-General to inform the parents in writing if a child's application for LRB is rejected.

The regulations refer only to South African citizens when addressing late registration of birth. It would seem, therefore that birth registration for children who are not South African citizens may not be accessed after 30 days. The BDRA determines that all children born in South Africa must be registered, not just South African citizens. LRB should be accessible for foreign children born in South Africa and cannot be limited to South African citizens. The heading of regulation 5 also refers to children born of South African citizens. It is unclear why this regulation should only apply to such children, as it excludes South African children who are not born South African parents.<sup>62</sup>

The BDRA provides for registration of children born both in and out of wedlock.<sup>63</sup> However, confusion exists in implementing birth registration where a child was born out of wedlock and the mother is not available at the time of birth registration. These children often remain undocumented because the father is unable to register the child without the mother's consent to acknowledgement of paternity.

Where the BDRA and regulations used to make provision for the registration of a child's birth by a person who is not the biological parent, the 2010 amendments have deleted this provision and the birth may now only be registered by a 'prescribed person' when the parents are deceased.<sup>64</sup> In these cases the death certificates of the parents are required. This creates a problem for children who are cared for by grandparents or other family members, which is often the case, and where biological parents are not deceased, but unavailable to register the child's birth.

61 Late registration of birth interviews at the local offices appear to consist of one to three people, but it seems to be a quite informal procedure.

62 In terms of Section 2(2) of the Citizenship Act, a child who is born in South Africa who does not have the nationality of any other country shall be a South African citizen by birth. These children may be children born to foreigners.

63 See sections 9 and 10 of the Births and Deaths Registration Act, respectively.

64 Section 9 of the BDRA and regulations 3, 4 and 5.

Another concern is the section dealing with orphaned and abandoned children. Section 12 of Act states that abandoned children (and orphans as of the Amendment of 2010) shall be registered 'after an enquiry in respect of the child concerned in terms of the Children's Act, 2005 ... by the social worker or authorized officer concerned.' However, LHR has been informed by social workers that this is not consistently implemented for children *born outside South Africa*. This may be because the Act is not clear that registration shall apply regardless of where the orphaned or abandoned child was born.

Under the Act, births to South African citizens abroad may be registered at South African foreign missions or at Home Affairs in South Africa. However, the BDRA requires a foreign birth certificate in order for a citizen born abroad to be recognised and issued an ID number in South Africa.<sup>65</sup> The foreign birth must also comply with the requirements for registration of births which occurred in South Africa (including late registrations of birth).<sup>66</sup> These requirements may be a barrier for children born outside South Africa, but not in a hospital, as the regulations require the submission of an affidavit by a South African who witnessed the birth.<sup>67</sup> Where a child is born abroad, it is possible that the birth will not be witnessed by a South African citizen.

The Births and Deaths Registration Act has recently undergone the following notable amendment:

- Births and Deaths Registration Amendment Act No. 18 of 2010.
- Regulations on the Births and Deaths Registrations Act, 2014.

The Amendment Act and the regulations came into force on 1 March 2014.

#### **Suggested reading:**

- Please see LHR's submissions to Home Affairs on the draft regulations to the BDRA and the Citizenship Act in 2012, available at <http://www.lhr.org.za/publications/submission-draft-regulations-births-and-deaths-registration-act-no-51-1992-submission-d#!> (accessed 30 September 2013)

<sup>65</sup> See section 13 and regulation 11 of the Births and Deaths Registration Act.

<sup>66</sup> See regulation 11(2) of the Births and Deaths Registration Act.

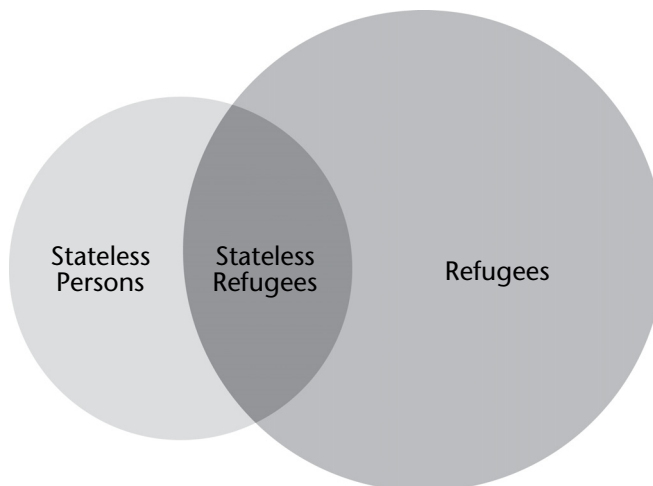
<sup>67</sup> See Regulation 3(b) of the Births and Deaths Registrations Act.

### ***South African Refugees Act 130 of 1998***

The South African Refugees Act 130 of 1998 (the Refugees Act) applies to all persons who wish to apply for asylum in South Africa and defines the standard which such applicants must meet in order to enjoy refugee status on the territory. It is the domestication in South Africa of the 1951 Refugee Convention. It outlines the procedure that such applicants must follow and the rights of those whose applications are successful.

Statelessness and refugee status are separate concepts. However, a refugee may be or may become stateless, and his or her status as a refugee may not be linked to his or her statelessness. However, not all stateless persons will have a fear of persecution and thus not all will qualify as refugees. Similarly, not all refugees are stateless.

A graphic depiction of this scenario presents the following: the groups overlap, but not entirely. Each category retains its own separate meaning, despite the fact that some persons fall under both categories.



When an applicant raises both a refugee and a statelessness claim, it is important that each claim is assessed and that both types of status are explicitly recognised. This is because protection under the 1951 Refugees Convention and the Refugees Act gives rise to a greater set of rights than those available to stateless persons, for whom no dedicated protection mechanism exists in South Africa. Even if the 1954 Stateless Convention were applicable in South Africa, it does not protect migrants who enter South Africa illegally from penalisation, as does the Refugees Act.

There may also be cases where persons who have enjoyed recognition under the Refugees Act have their status revoked and at

that point find themselves stateless, necessitating protection as a stateless person.

See below for more information on refugee status as a legal solution for a stateless person who also qualifies as a refugee.

### ***The Children's Act 38 of 2005***

Amongst other things, the Children's Act 38 of 2005 (the Children's Act) provides access to the Children's Courts and treatment as a child in need of care and protection. This group forms a category of serious concern to persons working towards the prevention of statelessness.

This Act has been amended by Children's Amendment Act 41 of 2007 and the Child Justice Act 75 of 2008. Please see below for in depth analysis of how the Children's Act can help legal practitioners working with children at risk of statelessness.

### ***Promotion of Administrative Justice Act 3 of 2000***

The Promotion of Administrative Justice Act (PAJA) is a powerful tool that gives effect to the right to just administrative action, found in section 33 of the Constitution. Where an administrative action 'materially and adversely affects the rights or legitimate expectations of any person', such action must be procedurally fair.

The heart of PAJA lies in section 3(2) which outlines what an administrator must do to give effect to a person's right to procedurally fair administrative action. *Prior to making the action*, he or she must provide the person with:

- Adequate notice of the nature and purpose of the action,
- A reasonable opportunity to make representations,
- A clear statement of the administrative action,
- Adequate notice of the right to review or internal appeal and
- Notice of the right to request reasons for the action.

For complex cases, legal representation, in-person interviews and the chance to present and dispute arguments and information may be necessary in order to protect a person's rights.

PAJA is a critical legal protection for people wishing to challenge administrative decisions relating to: nationality; enabling documents such as birth certificates, IDs and passports; and forms of protection available to stateless persons through the Refugees Act and the Immigration Act (primarily through section 31(2)(b) exemptions). It allows individuals to request written reasons for administrative decisions; where reasons are not provided within 90 days of a request, it is presumed in any judicial review proceeding that the decision was taken without good reason.

Given the lengthy wait times for many administrative applications, PAJA allows a court to judicially review both an administrative decision as well as the failure to take a decision. Judicial review applications must be brought within 180 days of the conclusion of internal remedies, if applicable, or 180 days after the person affected was notified of the administrative action.<sup>68</sup> If no decision was taken, and the applicant is seeking judicial review of the failure to take a decision, it seems there is no 180 day deadline. It is likely that such proceedings would need to be brought 'without unreasonable delay.' It can always be argued that it is in the interests of justice to allow a person to bring judicial review proceedings even if the 180 day time period has lapsed.

### ***Identification Act 68 of 1997***

The Identification Act 68 of 1997 (the Identification Act) applies to all persons who are citizens or permanent residents of South Africa.<sup>69</sup> These are the two categories of people who are entered into the South African National Population Register and who are permitted to hold identity documents (IDs), referred to as 'identity cards' in the Act.

The Act explains what kinds of information must be stored in the population register about each person (section 8) and also explains in section 7 that identity numbers shall reflect the gender and date of birth of each holder.

This Act becomes useful when dealing with a client whose ID has been blocked, seized or destroyed. Sections 18 and 19 deal with the consequences of tampering with identity cards, obtaining an identity card via fraud or allowing someone else to use one's card. Section 19(4) explains that the Director-General (DG) shall, when it comes to his attention, request a person to return an identity card for cancellation if it was issued to a person who 'is not required in terms of section 3 to be included in the population register.' In other words, it provides unlimited power to the DG to cancel the IDs of people who he thinks are not citizens or permanent residents. Unfortunately, there is no accompanying regulation explaining what the DG's standard of proof<sup>70</sup> must be in this regard or what procedural protections must be complied with. This has led to a situation where Home Affairs officials and border officials may block IDs at the slightest suspicion that a person did not obtain it legally.

68 See section 7(1) of PAJA.

69 Section 3 of the Identification Act.

70 Standard of proof refers to the commonly known criminal law standards of proof, such as 'beyond a reasonable doubt.'



The Promotion of Administrative Justice Act came into force in 2000 and all administrative actions taken under the Identification Act must comply with PAJA.

***South African Travel Documents and Passports Act 4 of 1994***

It is useful for attorneys working with stateless persons to be aware that regulation 8(2) to the South African Travel Documents and Passports Act provides that:

- A document for travel purposes may be issued to any person who is lawfully resident in the Republic, and who –
- (a) does not have the citizenship of another country; or
  - (b) has been granted permanent residence in the Republic and is unable to obtain a passport from the country of which he or she is a citizen; or
  - (c) has been granted refugee status in the Republic.

## 9 Prevention of statelessness

### Assisting children in need of care and protection

Vulnerable children herein refer to foreign as well as South African orphans, abandoned children, unaccompanied minors, separated children and child-headed households.<sup>140</sup> These children tend to be at high risk of statelessness. The main reason for their risk of becoming stateless is their lack of identity documentation, lack of documentary proof of their citizenship and the difficulty of obtaining such proof once their biological parents are out of the picture.

South Africa hosts a large number of children who have migrated to the territory and are currently unaccompanied by a parent or legal guardian. These children may have come alone or with a parent or legal guardian, who later abandoned the child or died. The Department of Social Development, in its most recent *'Guidelines on Separated and Unaccompanied Minors Outside Their Country of Origin'* defines an unaccompanied minor (UAM) as follows:

A child who is outside his or her country of nationality or origin, has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so.<sup>141</sup>

The UN Children's Fund (UNICEF) reports that there are 3.7 million orphans in South Africa. In addition, around 150,000 children are estimated to live in child headed households. While the previous Births and Deaths Registration Act allowed a parent or a 'person having charge of the child or a person requested to do so by the parents or the said person' to register a birth,<sup>142</sup> the 2010 amendments (which came into force on 1 March 2014) and its regulations state that only a parent, legal guardian or next of kin will be able to register a birth. Only where the biological parents are deceased and death certificates can be produced may such births be registered by legal guardians and next of kin. As such, children who are head of household will no longer be able to register their siblings' births. Furthermore, high rates of HIV/AIDS

140 This group is also known in the child protection field as 'orphans and vulnerable children' or 'OVC.'

141 Department of Social Development, *'Guidelines on Separated and Unaccompanied Children Outside Their Country of Origin in South Africa'* (2012) p.4.

142 Section 9(1) of the Births and Deaths Registration Act.

mean that South African citizen parents often pass away prematurely without appointing legal guardians for their children. Informal adoptions are common in rural areas and thus births may not be registered until the child tries to apply for an ID; Home Affairs statements that it intends to further restrict access to late birth registration<sup>143</sup> will make true citizens suffer if they cannot provide the required documentation and parent, legal guardian or next of kin.

Undocumented children who are separated from their parents, for whatever reason, are at a particularly high risk of statelessness because they do not have a parent available to assist them in documenting themselves. Even if a friend or relative of their parents is caring for the child, it is challenging for that person to obtain documentation for the child since the legal guardian or biological parent's presence is required by Home Affairs in order to get a birth certificate or passport. Legal guardianship may be obtained by approaching a High Court, but many people simply informally adopt children without going through this procedure. Often the person in question only faces a problem when he or she tries to apply for an ID, at which point, if the person is over age 18, it is too late for their caregiver to obtain legal guardianship. As they grow older, access to nationality becomes increasingly difficult without a parent to attest to the child's right to nationality.

In South Africa, the law does protect vulnerable children. Such children qualify as children 'in need of care and protection' as contemplated by Section 150(1) of the Children's Act 38 of 2005 (the Children's Act). This Act applies to all persons under the age of 18 without discrimination as to the nationality of the child. A social worker, having identified an unaccompanied foreign child, must follow the procedures applicable to children who are identified as in need of care and protection.<sup>144</sup> This entails an investigation into the child's personal situation,<sup>145</sup> the possible removal of the child to a temporary place of safety<sup>146</sup> and the presentation of a report of the social worker's findings to the Children's Court.<sup>147</sup>

The Constitution and the Children's Act apply to all children without discrimination as to their legal status. Hence, the nationality or lack thereof, or the legality of a child's presence on the territory, is of no relevance to the child's fundamental rights and best interests.

143 City Press (n 86 above).

144 See sections 152-159 of the Children's Act.

145 In terms of section 155(2) of the Children's Act.

146 In terms of section 152 of the Children's Act.

147 In terms of section 155(1) and 155(5) of the Children's Act.



## Case study

“Citizenship means having rights. I am not safe because I don’t have papers ... I know that if I talk too much I will have problems because I don’t have papers, so even when things happen to me which I know are not right ... I’m quiet.”

J.S. migrated from Zimbabwe to South Africa with his mother when he was around 10 years old. Due to not having a birth certificate, J.S. was unable to enrol in school in South Africa. As a teenager, his mother abandoned him. J.S. survived through the kindness of friends and eventually learned how to weld. He never knew his father.

“My dream is to have a document so that I can vote. I want the government to see me and to recognise my problem and to listen.”

Around 2008, J.S. returned to Zimbabwe to try to obtain documentation. However, no record of his birth or identity could be traced. He was further told by government officials that due to his mother having been Malawian, his father being unknown, combined with lack of any relatives and his long absence from Zimbabwe, J.S. would not qualify for Zimbabwean citizenship. Home Affairs in South Africa also turned him away and instructed him to get help from Zimbabwean authorities. J.S. does not qualify for citizenship in Malawi either, given that J.S. has no documentation to show that his mother was Malawian and he is over the legal age limit to apply.

J.S. remains undocumented in South Africa, although he has lived here for nearly twenty years. He is married and has two children, but he cannot register his marriage or his children’s births due to his lack of documentation.

“Me, now I’m old, but now I’m looking to the dreams of my child. I want them to have a future.”

The Births and Deaths Registration Act may also be relevant to foreign children who are orphaned or abandoned and on South African territory. Such an interpretation would be in line with the Children's Act and the Constitution. If South Africa determines through the Children's Court process that a child is in need of care and protection and that repatriation is not in the child's best interest, then South Africa should also be responsible for that child's birth registration (as well as providing an immigration status and path to nationality, as explained above).

To date, however, Children's Court permanency plans do not routinely include a plan for the documentation of children identified as in need of care and protection. This despite the fact that there is a clear obligation on the state to addressing the documentation needs of the child. This obligation bears on the state under the Constitution and international law as a direct result of the fundamental rights to birth registration and the right to a nationality.

The task at hand is thus to minimise the risk that undocumented children become stateless as adults. The primary means of achieving this goal is through birth registration and an immigration status that can provide a path to naturalisation.

Before we begin, however, it is important to highlight that the mechanisms which apply to foreign children are often separate from those which apply to South African children and foundlings. These groups are thus dealt with separately below and it is important your preliminary enquiry determines which category applies.

### ***Standard procedure for dealing with vulnerable children***

Vulnerable children must be referred to the Department of Social Development or a recognised child protection agency to be dealt with as a child in need of care and protection. DSD will place the child in temporary safe care where he can get all his basic needs met, i.e. food, accommodation, clothing and education. They will also carry out an investigation into the child's circumstances over 90 days, then bring the child before the Children's Court for an order setting out the permanency plan for the child. The timeline for this procedure is outlined below.

**Standard Procedure for Social Workers**

Step	Action	Time-period
Step 1	Identify a vulnerable child.	
Step 2	Remove child to temporary place of safety.	Immediate.
Step 3	Application for permission to remove child. Application made through completion of Form 36 and endorsement of the Children's Court.	Within 48 hours of removal.
Step 4	Begin and conclude investigation into the circumstances of the child.	90 days.
Step 5	Make recommendation to the Children's Court on the long term resolution of the child's situation. This is done through the completion of Form 38 and appearance in the Children's Court.  Make an effort to trace the child's family. If family reunification for foreign children is not feasible or possible in the first two years while they are in care; to evaluate and pursue attempts to regularise the child's immigration status before the child turns 18 years old.	
Step 7	Carry out Magistrate's order.	2 years. Every 2 years the order must be reviewed by the Magistrate.

***Foreign orphans, abandoned children and unaccompanied minors***

This category applies to children who were: (1) born in South Africa to foreign parents who later abandoned or orphaned the child; (2) born abroad to foreign parents and later migrated to South Africa alone; or (3) born abroad to foreign parents and later

migrated to South Africa with their parents but were taken away due to neglect or abuse or were orphaned or abandoned.

In accordance with section 1(1) of the Children's Act, an abandoned child means any child who 'has obviously been deserted by the parent, guardian or care-giver' or 'has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months'. 'Orphan' is defined as 'a child who has no surviving parent caring for him or her'.<sup>148</sup>

The main areas where attorneys can assist such children are: birth registration, asylum seeker and refugee status and exemptions for permanent residence.

### ***Birth registration***

For the birth registration of foreign children who fall into these categories, two possibilities exist.

Firstly, the child could access birth registration through Section 12 of the Births and Deaths Registration Act, which provides that an abandoned child whose birth has never been registered under the Act shall give notice of birth after an enquiry into the child has been conducted by the social worker or authorised officer concerned.

While nothing in the Act implies that this provision should apply only to children who have a claim to South African citizenship, Home Affairs tends not to enforce this provision for foreign children born abroad. However, the Act itself states at section 2 that it applies also to 'persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose.'

Further, section 2, which outlines the applicability of the Act, does not narrow its scope on the basis of the place of birth. Section 9(1) of the Act, which deals with notice of birth, provides only a time-limit as a parameter for the registration of births. Births outside the Republic are dealt with in a separate section, but the applicability of this section is limited specifically to children born outside the Republic *to South African citizens*. It is arguable, then, that the Department and the Children's Court ought to read the above-listed provisions as empowering it to register the births of foreign children who were born abroad, but who have been identified as children in need of care and protection by South Africa. This would certainly be an interpretation supported by the fundamental international right to birth registration and the right of

148 Also in terms of Section 1(1) of the Children's Act.



the child to a name and a nationality under the South African Constitution.<sup>149</sup>

Regulation 9(3) of the regulations to the Births and Deaths Registration Act provided that an abandoned child, whether or not such child is a minor or a major, may apply to the Director-General for the registration of his or her birth if notice of such birth has not yet been given under section 12. However, the regulations to the Births and Deaths Registration Act which came into force on 1 March 2014 have repealed Regulation 9(3). LHR has opposed the removal of this regulation in its submission to the Department of Home Affairs in May 2012. Many of these abandoned children, are at risk of statelessness and once they become a major it will be difficult to assist them in terms of this Act without section 9(3).

The above-outlined provisions can be invoked by the legal appointees of the Children's Court (the legal officers assigned to assist the UAMs) who wish to make application for birth registration on behalf of the child. Further, the Court may include in its order a direction to the Department of Home Affairs that the child be documented under these provisions.<sup>150</sup>

Under the DSD 'Standard Operating Procedures (SOPs) for the tracing, reunification or alternative care placements of unaccompanied and separated children in South Africa and Zimbabwe',<sup>151</sup> the onus is on the social worker dealing with the child's case to contact the child's country of origin in an attempt to trace identity documents. Where such attempts are fruitless and no documentation can be traced, the social worker shall approach DHA and request that DHA allows the social worker or child protection officer to assist the child to apply for a birth certificate although the child was not born on the territory.

Two problems exist with such guidelines, both of which can be resolved through the Children's Court's role under the Children's Act. Firstly, in many foreign African countries, the civil registry is not functional. The work of local (South African) social workers in tracing the origins of the foreign child may thus be indefinitely delayed by the lack of response from foreign authorities. As such, as an attorney you should argue that the right of the child to birth registration dictates that a reasonable time-limit be placed on such

149 Section 28(1) of the South African Constitution, 1996. The general international law referred to is outlined in detail at section 3.1 above.

150 The court has the jurisdiction to make such an order by virtue of the power vested in it in terms of Section 46(h)(viii) of the Children's Act, which provision allows for a child protection order to include an order 'instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled.'

151 These guidelines have no legal implications and also focus only on social workers dealing with children of Zimbabwean origins, but they are useful in outlining basic principles that apply to social workers.

investigations. Administering or monitoring this process is within the powers of the Children's Court and ought to be undertaken by them in the best interests of the child. Legal practitioners and social workers are intrinsic to ensuring that this process is addressed in the proceedings before the Children's Court.

Secondly, DHA has, under this procedure, the discretion to refuse to process the social worker's request for registration of the child. The procedures available to the Children's Court under the Children's Act ought to be highlighted. Again, the Children's Court is empowered hereunder (at section 46(h)(viii) of the Children's Act) to order 'an organ of state to assist a child in obtaining access to a public service to which the child is entitled'. Social workers and legal practitioners working with vulnerable children ought to approach the court for orders instructing DHA to issue foreign children with birth certificates in circumstances where this is necessary.

### ***Asylum seeker permits and refugee status***

Where foreign children have a claim to refugee status, they should be assisted in applying for asylum by their legal guardian or social worker, as the case may be.

One challenge is that the asylum system is overused as a method of documenting foreign unaccompanied children due to the fact that no alternative permit exists for them. Many UAMs are put into the asylum system for the sake of getting them an asylum seeker temporary permit, which includes the right to study and serves as a form of identity document for the child. The problem is that many UAMs and orphaned or abandoned foreign children do not have refugee claims. The negative consequence of simply putting them in the asylum system due to lack of a better option is that by the time they reach age 18, their claims are often rejected and they face deportation to a country that they do not know and which may not recognise them as citizens any longer. They are likely to remain in South Africa, the country they know, where they have devised survival techniques and relationships that have meaning for them. LHR has been approached by adults who came to South Africa as UAMs or who were orphaned or abandoned as children, and who never were able to obtain immigration status in South Africa. Several were even interviewed by the diplomatic staff of their countries of origin, but they cannot be confirmed as citizens due to their scant knowledge of the country and inability to speak the language.

In order to prevent this type of situation, LHR recommends that attorneys and social workers dealing with non-refugee foreign unaccompanied, orphaned or abandoned children make

exemption applications on their behalf prior to their turning 18 years old. An exemption for permanent residence under section 31(2)(b) of the Immigration Act may be the only remedy to enable them to attain immigration status.

### ***Citizenship by descent***

Foreign children adopted by South African citizens are granted South African citizenship by descent under current law.

### ***Naturalisation***

It is also worth noting that for children born in South Africa, section 4(3) of the Citizenship Act now allows an application for naturalisation for children whose parents were not citizens or permanent residents at the time of birth, provided their birth was registered and they live in South Africa until age 18. See above which provides analysis of this provision.

### ***Exemptions for permanent residence***

Section 31(2)(b) of the Immigration Act allows the Minister the discretion to grant permanent residence to foreigners with 'special circumstances' and is a possible solution to obtain immigration status for vulnerable foreign minors who do not qualify as refugees and whose best interest is not served by returning to their country of origin. However, access to this procedure in South Africa is a challenge.

Social workers can appeal to the Children's Court to appoint a legal representative for the child in terms of Section 55(1) of the Children's Act, which states,

... where a child involved in a matter before the Children's Court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board referred to in section 2 of the Legal Aid Act 22 of 1969.

The child's right to a nationality dictates that where a child who has not been born on the territory is identified as stateless through the DSD's investigations, South Africa is under an obligation to secure that child's right to nationality through the grant of naturalisation or a path to naturalisation.

A child who cannot be removed from the territory because no country recognises the child as a citizen is stateless. As a result, as soon as it is identified that the child cannot be repatriated, DSD ought to bring this to the attention of the Children's Court.

The Court, in turn, shall assist children in this situation to make application to the Minister of Home Affairs for permanent residence in South Africa on special grounds under s31(2)(b) of the Immigration Act. These applications may highlight that the child's statelessness is highly unlikely to resolve itself the older the child gets (exceptionally, this is possible should a change in law or policy occur in the child's country of origin, thereby recognising the child). Once the child reaches majority he or she will therefore most likely be left in the same situation, but without the protection offered to minors by DSD or the Children's Court. Addressing the child's right to a nationality ought to be done while the child is within the system and has the right to a legal practitioner appointed by the Court.

In situations where a child is not stateless, but it has been determined that repatriation is not in her best interests, an exemption application should also be submitted if the child is not a refugee. Given that no dedicated immigration permit exists for vulnerable children, the exemption procedure is the proper avenue to seek special immigrant status. The Minister has the discretion to issue exemptions for a definite or indefinite period - thus if she so chooses, the Minister could provide a child an exemption until he or she reaches age 18. At that time, the person's circumstances could be reviewed. Ideally, however, exemptions should be granted for an indefinite period to vulnerable foreign children who may not be sent back to their countries of origin (due to abuse, neglect, lack of family to care for them, etc.) in order to provide a durable solution and life stability. It would be unjust to summarily make such children illegal foreigners at age 18 and expect them to return to countries which they do not know when they have developed communities of support and integrated in South Africa. Such a measure would also prevent statelessness in the long run.

### ***Orphaned and abandoned South African citizens born abroad***

Children of South African citizens, born and orphaned or abandoned abroad, are at particular risk of statelessness. Such children are citizens by birth due to having a citizen parent, under the Citizenship Act 88 of 1995; however, in order to access this right in practice, their birth must be registered in accordance with the Births and Deaths Registration Act. Births abroad are often not registered within 30 days as required by the Births and Deaths Registration Act, due to distance to travel to Consular offices as well as lack of South African missions in all foreign nations. After a child is 30 days old, a notice of birth becomes late birth registration which is a much more onerous process.

South African Consular authorities in Zimbabwe reported to LHR in 2011 that orphaned children born in Zimbabwe to South African parents cannot undergo late birth registration through the Consulate. If the state where such an orphan was born prohibits the acquisition of nationality to foreign children born on the territory and, rather, requires a citizen parent, then orphaned children who are refused late birth registration by South African authorities are at high risk of statelessness.

Assisting such persons will involve lodging applications for foreign birth registration at local Home Affairs offices and requesting that the late registration of birth application procedure be applied to the person. Unless a foreign birth certificate is available, these persons will routinely be rejected for foreign birth registration. Given their situation, the flexible standard of late registration of birth should be applied to their case so that they can provide other methods of proving their citizenship such as through friends of the family as witnesses or documents relating to their identity, upbringing and family history.

Foreign social workers and the government agencies in foreign countries that deal with orphaned or abandoned children, as well as International Red Cross (which does family tracing) may also be helpful in establishing proof of the individual's history. If such person was identified as a child in need of care in that foreign country, there will be documentation and court orders involved that can be used to bolster his or her claim before Department of Home Affairs.

### ***Foundlings***

A foundling is a child found on a state's territory with unknown parentage and origins. Presumably, such children would have access to the right to birth registration under section 12 of the Births and Deaths Registration Act (abandoned and orphaned children). In practice, local social workers in Pretoria have informed LHR that these children are sometimes registered as South African citizens where an investigation reveals no information as to the parentage and/or birthplace of the child. However, nothing in the Citizenship Act provides official protection and status to such children.

Work with a social worker to assess if child is a foundling. Social workers may be successful in having local DHA register the child as South African depending on the age of the child. The younger the child, the more likely (s)he may be registered as South African. Article 14 of Hague Convention on Certain Questions Relating to Conflict of Nationality Law, concerning foundlings, may be useful

international guidance (SA is signatory but has not ratified or domesticated the convention):

A child whose parents are both unknown shall have the nationality of the country of birth.

If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known.

Citizenship in cases of doubt under section 15 of Citizenship Act may be another option to pursue. See above.

Where a foundling's birth was registered, he or she may qualify for citizenship due to statelessness under section 2(2) of the Citizenship Act (such application can be submitted regardless of age) or by naturalisation under section 4(3) of Citizenship Act (if the child remains in the Republic until age 18).

An exemption for permanent residence under section 31(2)(b) of Immigration Act can provide a path to naturalisation where there are no other options (see section 5(4) of Citizenship Act for minors and section 5 generally for adults).

## **Birth registration of other foreign children**

### ***Children of undocumented foreign parents***

In LHR's briefing paper, 'Towards Universal Birth Registration in South Africa',<sup>152</sup> we advocated for creative solutions to birth registration in cases where the parent(s) are not documented. A concern of the state is to ensure that the mother who is listed on the maternity certificate from the hospital is the same person presenting herself at Home Affairs to register the child's birth. Identity documents can help the state to feel assured that the woman registering a child is in fact the mother and to confirm her identity, place of birth and citizenship.

However, it is a reality in Africa that many migrants do not have identity documents. LHR has observed that Lesotho and Mozambican citizens may not to have any form of identification from their country of origin, but they also do not apply for asylum in South Africa (and so cannot use asylum permits for proof of identity as do other migrants). Thus they appear at Home Affairs to register their children's births without any form of identity document. The regulations to the BDRA require a valid immigration permit in order for them to register their child's birth.

<sup>152</sup> Available at [http://www.lhr.org.za/sites/lhr.org.za/files/briefing\\_paper\\_towards\\_universal\\_birth\\_registration.pdf#!](http://www.lhr.org.za/sites/lhr.org.za/files/briefing_paper_towards_universal_birth_registration.pdf#!) (accessed 3 October 2013).

As with children of undocumented South Africans, litigation may be the only option in order to enforce the child's right to birth registration. The law requires that every birth be registered within 30 days. Yet, when Home Affairs tells parents that they must first be documented before registering their children, the child inevitably cannot be registered within 30 days. It can take years to sort out complicated cases and get parents' identity documents and during that time, children remain unregistered.

As attorneys, it is very challenging to assist such clients. LHR encourages other practitioners to litigate on this issue in order to obtain legal guidance from the courts. LHR is, at the time of this writing, working on a court case to challenge the requirement that a mother must be documented before her child's birth can be registered and a birth certificate issued. In that case, the child, Nomsa's<sup>153</sup> mother is an undocumented woman from Lesotho. Nomsa's father is South African, but Home Affairs will not allow him to register the child because the mother is required to be present and produce a valid ID in order for the child to be registered.

Generally, if one parent has an ID and the other does not, the undocumented parent will not appear on the birth certificate. This also is a point of concern for family law issues that may arise later. Both parents should be listed on the birth register as well to protect the child's right to an identity – part of which is legal recognition of one's parents. Attorneys should advocate strongly for both parents to be listed on the birth register wherever possible.

A report of the Public Protector,<sup>154</sup> published in March of 2011, does provide some assistance to social workers and legal practitioners in this area. It serves as a useful guide to the standard of service which the Public Protector deems appropriate in circumstances where an undocumented parent(s) approaches the Department of Home Affairs. The report highlights the Department of Home Affairs' obligation to investigate the status of the reporting parents and assist in birth registration even in cases where the parents are not able to produce valid documentation.

### ***Children of parents with asylum seeker or refugee permits***

Where at least one parent has an asylum seeker or refugee permit, and yet has been turned away for birth registration, attorneys should write to Department of Home Affairs' local supervisor for birth registration.

153 Name has been changed to protect the child's identity.

154 Report No. 38 of 2010/11.

Such letters should outline the parents' names and nationalities, the child's birthplace, the name of the hospital or clinic if relevant where the child was born, and should request that the birth be registered. The legislation outlined under the Births and Deaths Registration Act, the Constitution and the international obligations on South Africa to register all births should be highlighted.

### ***Assisting clients to obtain maternity certificates from hospitals***

Foreign mothers are often released from hospital after giving birth without being provided a maternity certificate. A maternity certificate is a critical document needed to register a child's birth with Home Affairs and to receive a birth certificate. Typically the maternity certificate merely states the name of the hospital (it should have the seal or letterhead of the hospital), the mother's name and details, the date of birth and the gender of the child born.

If a client does not have a maternity certificate but gave birth in a hospital or clinic, as an attorney or social worker you should be able to assist the client by writing to request that the certificate be faxed or sent to you. Simply attach the client's power of attorney and fax a letter to the hospital or clinic CEO or manager, copying the head of the post-natal unit, requesting the maternity certificate. This letter should include, at a minimum, the name of the mother and the date she gave birth. With this information the hospital staff will be able to consult the 'births book', confirm the birth and issue the relevant maternity certificate. Be sure that the maternity certificate is stamped by the hospital, otherwise it will not be accepted by Home Affairs.

LHR recommends phoning the hospital in question after faxing through your request to the CEO to make sure it has been received and processed.