

Joint Submission to the Committee on the Rights of the Child

**88th Pre-Sessional
Working Group**

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Scalabrini
Centre of Cape Town



CENTRE FOR
CHILD LAW



Institute on
Statelessness and
Inclusion

Joint Submission

to the Committee on the Rights of the Child

at the 88th Pre-Sessional Working Group.

Civil society submission on the right of every child to acquire and preserve a nationality under Article 7 and 8 of the Convention of the Rights of the Child (CRC) in accordance with the Guiding Principles to the Convention

South Africa

Introduction

1. The Scalabrini Centre of Cape Town, Lawyers for Human Rights (LHR), the Centre for Child Law and the Institute on Statelessness and Inclusion (the Institute) welcome the opportunity to make this submission to the Committee on the Rights of the Child (the Committee) regarding South Africa's compliance with the right of every child to acquire a nationality under Article 7 CRC and preserve their nationality under Article 8 CRC. This submission also draws on the Guiding Principles of the Convention, in particular, the freedom from discrimination (Article 2) and the best interests of the child (Article 3).
2. [Annex I](#) to this submission highlights South Africa's international obligations. [Annex II](#) addresses relevant text of the State report to the Committee and previous recommendations made to the State. [Annex III](#) to this submission contains relevant legislative provisions of South Africa, for ease of reference of the Committee. [Annex IV](#) provides information about the co-submitting organisations and the submission.
3. The purpose of this submission is to highlight issues pertaining to South Africa's compliance with Articles 7 and 8 CRC and to guide the Committee in the adoption of its List of Issues Prior to Reporting (LOIPR). Suggested questions for South Africa for consideration of the Committee to include in its List of Issues and in its review can be found in a textbox under each substantive section. Recommendations, which may be drawn on by the Committee's Concluding Observations are listed at the end of the submission. This submission builds further on the 2015 submission on Article 7 CRC by LHR and the Institute in view of South Africa's failure to address the issues raised in the previous submission¹ as well as comply with the Committee's latest concluding observations as laid out in [Annex II](#).

Issues of concern highlighted in the submission to be included in the LOIPR

4. In South Africa vital gaps in the law and its implementation leave children stateless or at risk of statelessness, in violation of their right to acquire a nationality.

¹ Available at: https://files.institutesi.org/CRC_SouthAfrica_2015.pdf

5. The issues of concern highlighted in this submission cover four areas:

- I. Access to citizenship*
- II. Access to birth registration*
- III. Blocked IDs and resultant barriers in accessing citizenship*
- IV. Lack of a statelessness determination procedure*

Issue I - Access to citizenship

6. In the previous submission by LHR and the Institute,² it was noted that access to citizenship is impeded by various obstacles including the following:

6.1. Discriminatory application of the prerequisite of birth registration:

The Citizenship Act governs the acquisition of South African citizenship and sets out the various pathways to obtaining citizenship by birth, by descent or by naturalisation.³ Notably, birth registration is a prerequisite to obtaining citizenship for all children except biological children of South African parents.⁴ This distinction is arbitrary and discriminatory to children of non-South African parents, stateless children, and adopted children of South African parents. It undermines the right of every child to acquire a nationality⁵, it is contrary to the best interest of the child⁶ and the principle of non-discrimination⁷. Furthermore, stateless children and children of non-South African parents cannot easily access birth registration - particularly if their parents are undocumented or stateless themselves - compared to children of persons who have documented evidence of their South African citizenship.⁸ The distinction between adopted and biological children of South African parents runs against section 242(3) of the Children's Act 38 of 2005 which states that adopted children must for all purposes be regarded as children of the adoptive parent and *vice versa*.⁹ While lack of birth registration and statelessness are not synonymous, birth registration is often a key step in establishing a person's identity and acquiring a nationality, and not obtaining registration increases the risk of statelessness.

6.2. Otherwise stateless children born on the territory:

² Available at: https://files.institutesi.org/CRC_SouthAfrica_2015.pdf

³ Citizenship Act (Section 2(1), (Section 2(2), Section 2(3), Section 3, Section 4(3)

⁴ Citizenship Act, section 2(1) read with 2(2).

⁵ Article 7 CRC.

⁶ Article 3 CRC.

⁷ Article 2 CRC.

⁸ See Sub-regulation (3) of Regulation 3, 4, 5 and 8 of the BDRA, 2014 which require parents to submit valid identity documents or passports and permits in order to register the births of their children.

⁹ Section 242(3) of the Children's Act (Act 38 of 2005).

According to section 2(2) of the Citizenship Act, an otherwise stateless child born in South Africa and whose birth is registered is entitled to South African citizenship. However, there are no regulations in place to guide and monitor the implementation of this provision of the Citizenship Act. In 2014, LHR represented a child who was born in South Africa and stateless to have her declared a South African citizen in terms of section 2(2). LHR was successful in this application and the High Court further ordered the Department of Home Affairs (DHA) to publish regulations to section 2(2).¹⁰ The DHA has not complied with this court order to date.¹¹

6.3. Citizenship by naturalisation

Section 4(3) of the Citizenship Act provides for a pathway to citizenship by naturalisation for children born in South Africa to parents who are neither South African citizens nor permanent residents at the time of the child's birth.¹² However, the DHA failed to promulgate regulations providing the practical and administrative steps as well as appropriate forms, that citizenship applicants could use in order to give effect to section 4(3). The lack of regulations was the subject of successful litigation against the DHA.¹³ In July 2020, the DHA published draft regulations in order to give effect to section 4(3) and the court order.¹⁴ However, the draft regulations create or prescribe criteria not provided for in the principle Act, and are therefore outside of the powers conferred by the principle Act.¹⁵ The draft regulations also put into question whether the child of such a citizen by naturalisation would be entitled to citizenship by decent or whether they would have to make application for naturalisation upon reaching the age of 18-years, placing them at risk of statelessness or not being documented until reaching the age of majority. Furthermore, the stipulation that such children must wait until they reach 18-years before they can apply for citizenship is arbitrary, disproportionate and contrary to the principle of the best interests of the

¹⁰ DGLR and KMRG v The Minister of Home Affairs, The Director General of Home Affairs, The Deputy Director General of Civic Services and R Kruger N.O (unreported)

¹¹ Despite three court orders compelling the DHA to make regulations facilitating the implementation of section 2(2), as well as a series of punitive costs orders and recommendations by international human rights monitoring bodies, the DHA has failed to promulgate such regulations. This is despite the fact that in July 2020 the DHA published draft regulations relating to the Citizenship Act, but failed to include any content in those draft regulations pertaining to section 2(2) specifically. These regulations are thus six-years overdue.

¹² Section 4(3) has been interpreted by South Africa's courts to include four, limited, objective criteria: (1) the applicant is born in South Africa, (2) the applicant was born to parents who were not citizens or permanent residents at the time of the applicant's birth, (3) the applicant has lived in South Africa from the date of their birth to the date of reaching the age of majority, and (4) the applicant's birth was registered in terms of the birth and Deaths Registration Act (BDRA).

¹³ *Minister of Home Affairs v Ali and Others* (1289/17) [2018] ZASCA 169 available at <http://www.saflii.org/za/cases/ZASCA/2018/169.html>.

¹⁴ Draft Citizenship Regulations, 2020, available at <https://www.gov.za/documents/south-african-citizenship-act-regulations-draft-comments-invited-24-jul-2020-0000>.

¹⁵ The consequence of the additional criteria and requirements is that they exclude persons who hold the right to apply for citizenship by naturalisation, and are thus *ultra vires*. For more information on the flaws in the draft Citizenship regulations, see the joint comments by LHR, Scalabrini Centre, Centre for Child Law, and others, available at <https://scalabrini.org.za/resources/submissions/our-submissions-on-citizenship-act-draft-regulations>.

child. The draft regulations have not been finalised but if passed in their current form they would be inconsistent with South Africa's Constitution as well as the principle Act.

6.4. Withdrawal of South-African of citizenship:

Sections 6 and 8 of the Citizenship Act provide respectively for the loss and deprivation of South African citizenship specifically targeting naturalised citizens. Section 6 provides for the loss of citizenship by way of certain voluntary and formal acts¹⁶, as well as an application to the Minister for the retention of citizenship. However, the decision is at the discretion of the Minister and no criteria are provided in respect of that decision. Further, there is no safeguard in section 6 ensuring that the provisions will not be applied if such application would render the individual stateless. Section 8 provides for the deprivation of South African citizenship in respect of naturalised citizens¹⁷ with no adequate safeguards against statelessness as it does not require an enquiry into whether the individual would be rendered stateless.¹⁸ Consequently, contrary to the best interests of the child, the parents of South African children can be rendered stateless. Section 10 is particularly problematic in that it allows for the deprivation of nationality from children on the basis of their parents' loss of nationality resulting from sections 6, 8, or 9.¹⁹ This provision makes the child's citizenship contingent upon the parent's, violating Article 2(2) and 8 of the CRC and section 20 of the South African Constitution which stipulates that "no citizen may be deprived of citizenship" while undermining the child's right to a nationality and contrary to the best interest of the child.

6.5. Lack of a special dispensation or exemption permit for Unaccompanied and Separated Migrant Children (USMC) who are not born in South Africa:

There is an increasing number of USMC in South Africa who are often placed in child and youth care centres (CYCCs) while minors/dependents, and either have no option of returning to, no knowledge of, or no meaningful connection to their country of origin. In many cases, when they are placed in a CYCC by virtue of an order of the Children's Court, the Court makes the finding that being in South Africa is in the child's best interests. These children can be stateless or at risk of statelessness as there is no legal safeguard for them to obtain citizenship in South Africa,

¹⁶ For instance, acquisition of another nationality other than through marriage, serving in armed forces of another country.

¹⁷ E.g. if satisfied that naturalisation certificate was obtained by fraud, if naturalized citizen is a dual citizen and it is satisfied that the possession of South African citizenship is contrary to the public interest.

¹⁸ See section 6 (3), 7(1) and 8(1)

¹⁹ Section 10 states: "Whenever the responsible parent of a minor has in terms of the provisions of section 6 or 8 cease to be a South African citizen, the Minister may, with due regard to the provisions of the Children's Act, order that such minor, if he or she was born outside the Republic and is under the age of 18 years, shall cease to be a South African citizen"; also see section 7(3).

or to obtain any form of immigration status. The Citizenship Act only confers citizenship on children born in South Africa unless they are born to South African parents. The only option for these children is to apply for permanent residence by exemption in terms of section 31(2)(b) of the Immigration Act.²⁰ However, there is a fee to submit this application (R1 350, 00) and no set criteria thus receiving this exemption is not guaranteed as it is subject to ministerial discretion.²¹

In light of the various impediment to access to citizenship in South Africa, the Committee is urged to ask South Africa:

- **What steps is South Africa taking to facilitate access to birth registration for stateless children and adopted children of South African parents as well as children born in the territory to non-South African parents?**
- **What steps is it taking to put in place regulations to guide and monitor the implementation of section 2(2) and 4(3) of the Citizenship Act?**
- **How will South Africa ensure that children are not arbitrarily deprived of their nationality in any circumstance, including in the event of their parent's loss, deprivation or renunciation of nationality?**
- **What steps is South Africa taking to identify all undocumented USMC in CYCCs and establish a special dispensation or exemption permit for USMC born in South Africa?**

Issue II - Access to birth registration

7. Birth registration is fundamental to the legal recognition of children and, consequently, to their ability to secure a name and nationality. The recent report launched by Statistics South Africa highlights that over 80% of children under the age of five are registered.²² However, it is the most marginalised and vulnerable children – who fall within the 20% – that continue to struggle to access birth registration and are rendered stateless or at risk of statelessness. The barriers that prevent South Africa from achieving universal birth registration include the following:

7.1. The requirement that the parents of the child have valid documentation:

²⁰ Act 13 of 2002.

²¹ The exemption application is complex, lengthy and uncertain. Child applicants remain undocumented for years, and due to complexities and costs involved in this process, not all vulnerable children are able to access the exemption.

²² <http://www.statssa.gov.za/publications/P0305/P03052018.pdf>.

The Birth Deaths and Registration Act (BDRA) deals with registration of birth of all children born in South Africa.²³ Section 9(1) stipulates that the birth registration of “any child born alive” must be initiated by the parents (or any other prescribed persons).²⁴ However, the regulations to the BDRA require parents to have valid documentation and legal status before they are able to register their child.²⁵ This has the effect of making the legal safeguards for children against statelessness in the Citizenship Act contingent on the legal status of their parents, and perpetuates generational statelessness. This restriction is contrary to section 28(1)(a) of the South African Constitution and Article 2(2) and 7 CRC. It further undermines the protection against statelessness found in section 2(2) of the Citizenship Act, perpetuates the cycle of lack of documentation and legal status (including nationality) and undermines the right to an identity for all children. The High Court has found these requirements unconstitutional and ordered parents to submit valid documentation “where it is available”.²⁶

7.2. Restrictive time limit for birth registration:

The BDRA mandates that birth registration must be done within 30 days of occurrence of birth. While birth registration after the initial 30 days is permitted under limited circumstances.^{27 28} In addition, the late registration of birth process is often delayed further as it requires that a specific panel is convened to assess such applications. Failure to comply with the additional requirements can result in the birth not being registered. Moreover, although, the late registration fee has been suspended by the DHA, it is still included in the regulations.²⁹

7.3. Restrictions on guardians registering the births of children:

Under section 9(1) of the BDRA provision is made for a “prescribed person to register the birth of a child where parents of the child are deceased”, excluding children in the care of legal guardians or family members while their parents are still alive but unable to register their birth. In South Africa, 12 million children do not live with their parents and are cared for by family

²³ Act 51 of 1992.

²⁴ The High Court has interpreted the phrase “any child born alive” to mean “just about any child provided that child was born alive” see: *Naki and others v Director General: Department of Home Affairs* [2018] 3 All SA 802 (ECG) (case no:4996/16) para 26.

²⁵ Considered valid documentation: identity documents, valid passports and valid temporary or permanent residence permits, valid asylum or refugee documentation etc. See Sub-regulation (3) of Regulation 3, 4, 5 and 8 of the BDRA, 2014.

²⁶ *Naki and others v Director General: Department of Home Affairs* [2018] 3 All SA 802 (ECG) (case no:4996/16) paras 29 – 37 and para 39.

²⁷ The late registration of birth process was created to accommodate people who had not been registered under the previous Acts. It is subject to compliance with additional requirements such as proof of birth if it occurred in a healthcare facility, proof of birth affidavit if it occurred at home, affidavit giving reasons for late registration of birth, biometrics of the child etc.

²⁸ In the event that a child is born outside a healthcare facility, regulation 3(3) and regulation 11 of the BDRA require the birth of such child to be confirmed by an affidavit deposed by a South Africa citizen present at the time of the birth. This provision is arbitrary and excludes children born under these conditions, failing to take account of varying birth practices in South Africa, particularly those common in communities of foreign migrants, many of whom may opt for a midwife-led birth. This is particularly common when such communities have experienced discrimination when trying to access the healthcare system.

²⁹ See BDRA, Regulation 4(3)(l), 5(3)(m), 8(3)(i)

members.³⁰ LHR has encountered a number of queries from family members who have unknowingly proceeded with the birth registration of children in their care and the children are unable to obtain IDs once they turn 16 on suspicion of fraud on their birth certificates.

7.4. Children born to unmarried parents:

Section 10 and regulation 12 of the BDRA set up a separate procedure for the birth registration of children born out of wedlock. When a child is born to unmarried parents, it is the mother who must register the birth. A father can only register a child's birth with the mother's consent. This is contrary to section 9 of the BDRA which states that either parent may register the birth of a child. It is not in the best interests of the child and amounts to unfair discrimination of such children on the basis of the lack of formalisation of the relationship between the child's parents.³¹ It is also impossible under the BDRA for a child to have his or her father's details included in their birth certificate, without his consent.³² Consequently, paternal orphans born out of wedlock can never access their father's nationality. This also leaves a gap in respect of the appropriate procedure that should be followed for same sex parents in similar circumstances.³³

7.5. Foundlings:

Only foundlings whose births have been registered in South Africa according to section 12 of the BDRA have access to nationality through section 2(2) of the Citizenship Act. The DHA is however reluctant to register foundlings who are not infants. In its new draft regulations, the BDRA also aims to exclude perceived foreigners. It states that if the orphan or abandoned child is clearly a foreigner, they must be registered as such.

In light of the various barriers to universal birth registration in South Africa, the Committee is urged to ask South Africa:

- **What steps is South Africa taking to ensure universal birth registration, particularly ensuring that the most marginalised and vulnerable children are included?**

³⁰ In South Africa, 12 million children do not live with their parents and are cared for by family members. For more information, please see, Children's Institute "Child Gauge 2018: The shape of children's families and households".

³¹ Children born out of wedlock to non-citizen fathers who wish to add their father's particulars to their birth certificate (with their consent) are required to provide a costly DNA test (R750,00) proving paternity, amounting to multiple levels of discrimination against children born out of wedlock to non-citizen fathers.

³² Even when DNA results are available, the father is required to be physically present and sign to admit paternity.

³³ In relation to this, the child's right to an identity includes the right to know his or her parents, which can be undermined by these restrictive provisions, which also can cause the non-registration of the child's birth and resultantly, undermine their access to South African nationality. LHR has filed a constitutional challenge to these discriminatory provisions which was heard in September 2020 at the Constitutional Court. The judgment is pending.

- **To present disaggregated data on the number of children whose births have not been registered as a result of multiple barriers to birth registration.**

Issue III - Blocked IDs and resultant barriers in accessing citizenship

8. A growing number of South Africans have their IDs blocked either because DHA suspects them of being “illegal immigrants”, or because the ID number has been marked in fraudulent activity or duplicated.³⁴ Once an ID is blocked it can take DHA an indefinite time to resolve the issue, leaving the affected person in limbo. To have the ID ‘unblocked’ substantive proof of citizenship must be submitted including birth certificate, DNA test etc. Children whose parents’ IDs have been blocked by the DHA are at risk of statelessness as they will not be able to access birth registration or obtain their own IDs once they turn 16 years old without their parents’ documentation.

In light of the above, the Committee is urged to ask South Africa:

- **What safeguards against statelessness will South Africa implement for children whose parents IDs have been blocked (and need to access birth registration or obtain their own IDs once they turn 16)?**
- **What steps will South Africa take to ensure that people can take affordable and accessible administrative action against the blocking of their IDs?**

Issue IV - Lack of a dedicated mechanism to identify and regularise the status of stateless persons in South Africa

9. South Africa does not have a dedicated mechanism to identify statelessness. The identification of stateless persons is however of utmost importance in guaranteeing the rights of stateless persons and children living in the country. Without accurate identification there is also a lack of insight into the extent of statelessness in South Africa. This makes it impossible to respond to the phenomenon at a policy level and in order to protect individual human rights.

In light of the above, the Committee is urged to ask South Africa:

- **What steps will South Africa take to ensure a dedicated mechanism to identify and regularise the status of stateless persons is at place?**

³⁴ <https://www.news24.com/witness/news/blocked-id-hell-for-man-20190523>.

Recommendations

- I. Review and amend all legislation, regulations and policies relevant to citizenship access to ensure their full conformity with the CRC, including through the removal of discriminatory requirements in respect of certain groups of children;**
- II. Finalise and publish regulations to give effect to section 2(2) of the Citizenship Act which provides access to citizenship for stateless children and section 4(3) for children born in South Africa to non-citizen parents.**
- III. Take further measures to reduce and ultimately eradicate existing cases of statelessness, particularly among children, including through retroactive implementation of safeguards to provide a nationality to stateless children born on the territory, and through ensuring that the loss, deprivation or renunciation of the parent's nationality does not result in the deprivation of the child's nationality.**
- IV. Identify all undocumented USMC in alternative care and establish a special dispensation or exemption permit for USMC in South Africa, as well as for those who were USMC's placed in a CYCC but have since reached the age of majority.**
- V. Review and amend legislation, regulations and policies, that create barriers to accessing birth registration.**
- VI. Take measures to ensure that people can take administrative action against the blocking of IDs such as adequate prior notice, an opportunity to challenge the decision and a strategy to resolve blocked ID queries expeditiously and cost-effectively, and implement safeguards for children whose parents IDs have been blocked and need to access birth registration or obtain their own IDs once they turn 16.**
- VII. Ratify the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961)**