Joint Submission

to the Human Rights Council

at the 41st Session

of the Universal Periodic Review.

South Africa

Introduction

1. The Scalabrini Centre of Cape Town, Lawyers for Human Rights (LHR), the Centre for Child Law, the UCT Refugee Rights Unit and the Institute on Statelessness and Inclusion (ISI) make this joint submission to the Universal Periodic Review (UPR), on the right to a nationality and human rights challenges pertaining to statelessness in South Africa.

2. This submission focuses on:

   I. Unaccompanied or Separated Migrant Children (USMC) and Young Adults
   II. Access to Birth Registration
   III. Administrative - Procedural Barriers in accessing citizenship
   IV. Implementation of Court Judgments

3. An Annex to this submission offers additional information. Section I highlights South Africa's international obligations. Section II contains recommendations to South Africa by Treaty Bodies. Section III contains relevant national law of South Africa. Section IV provides information about the co-submitting organisations.

Previous UPR of South Africa under the First, Second and Third Cycles

4. South Africa was first subject to review under Session 1 of the First Cycle. No recommendations specifically relating to statelessness or the right to nationality were made in this cycle. During the Second Cycle, South Africa was reviewed under Session 13. Again, no specific recommendations relating to statelessness or the right to nationality were made. Nonetheless, three recommendations were made on issues that relate to birth registration and the treatment of undocumented migrants:

   I. Ecuador recommended that South Africa *"improve the detention conditions of undocumented migrants, ensure that they are not detained and deprived of their liberty for prolonged periods and that they have all services available, including access to health, psychological assistance, and appropriate physical infrastructure*

and sanitation"[1], which was supported by South Africa.

II. Mexico recommended that South Africa "*carry out the necessary measures to eliminate the barriers that impede the birth registration of all persons born in South African territory"*[2], including migrants and refugees, which was supported by South Africa.

III. Slovakia recommended that South Africa *"ensure that all children are issued with a birth certificate in order to access various social services, with particular focus on children of migrants*"[3], which was supported by South Africa.

5. South Africa was reviewed under Session 27 of the Third Cycle, where it received four recommendations relating directly to statelessness or the right to nationality:

I. South Africa received three recommendations[4] to ratify/accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These recommendations were noted by South Africa.

II. South Africa received a recommendation from Hungary to *"refrain from depriving citizenship through the blocking of identity documents and establish a dedicated procedure to identify stateless persons"*[5], which was noted by South Africa.

6. South Africa also received eight recommendations in relation to birth registration:

I. Kenya recommends South Africa to "*implement the Convention on the Rights of the Child through the harmonization of its national laws to ensure that the minimum age for marriage is established at 18 years for both girls and boys and remove barriers to birth registration"*[6], which was accepted by South Africa.

II. Serbia recommends South Africa to *"further engage in facilitating administrative procedures for birth registration, especially for disadvantaged children coming from rural and poor areas*"[7], which was accepted by South Africa.

III. Czechia recommends South Africa to "ensure registration of all children at birth as well as delayed registration of children who have not been registered at birth"[8], which was accepted by South Africa.

IV. Turkey recommends South Africa to *"amend legislation and regulations in order to ensure universal birth registration for children born in its territory"*[9], which was noted by South Africa.

V. Mexico recommends South Africa to *"ensure birth registration of all children born on South African territory, regardless of the immigration status or nationality of the parents"*[10], which was noted by South Africa.

VI. Albania[11], Liechtenstein[12] and Portugal[13] recommend South Africa to *"review its relevant legislation and regulations on birth registration and nationality to ensure*

[1] See the Report of the Working Group on the Universal Periodic Review - South Africa, 9 July 2012, A/HRC/21/16, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/151/29/PDF/G1215129.pdf?OpenElement, para 124.58

[2] Ibid., para 124.150

[3] Ibid., para 124.151

[4] See the Report of the Working Group on the Universal Periodic Review - South Africa, 18 July 2017, A/HRC/36/16, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/216/43/PDF/G1721643.pdf?OpenElement , para 139.21 (Belgium and Germany), para 139.22 (Kenya), para 139.23 (Australia)

[5] Ibid., para 139.243

[6] Ibid., para 139.222

[7] Ibid., para 139.236

[8] Ibid., para 139.235

[9] Ibid., para 139.241

[10] Ibid., para 139.240

[11] Ibid., para 139.237

[12] Ibid., para 139.238

[13] Ibid., para 139.239

their full conformity with the Convention on the Rights of the Child", which were noted by South Africa.

Snapshot of Statelessness in South Africa

7. South Africa does not have a mechanism to identify stateless persons, but it is estimated that over 10,000 people are stateless and over 15 million people are unregistered or undocumented, with 3 million under the age of 18.[14] A number of legal, administrative and practical barriers exist in the immigration/refugee, birth registration and citizenship frameworks that increase the risk of statelessness, as explained in this submission. Despite South Africa's international obligations, serious concerns exist relating to children's right to a nationality and the law, policy and practice of birth registration which undermines children's right to a nationality.

I. Unaccompanied or Separated Migrant Children (USMC) and Young Adults

8. USMC encounter several situations during the migration cycle that place them at heightened risk of statelessness and hinder their ability to access basic rights. The ability to access immigration status or birth certificates is often linked to the immigration and documentation status of the parent. In South Africa, gaps in the legal frameworks and how the law is applied results in many USMC remaining in a protracted legal limbo for years without durable immigration status or other identity documentation to prove nationality. This has significant consequences when they reach the age of majority. This section details significant barriers to immigration documentation and nationality within the asylum and immigration regimes, the Citizenship Act, and Children's Court (CC) processes.

9. There is an increasing number of USMC in South Africa who are often placed in child and youth care centres (CYCCs) by an order of the CC while they are minors/dependents and have no option of returning to, no knowledge of, or no meaningful connection to their country of origin. These children can be stateless or at risk of statelessness as there is no legal safeguard for them to obtain citizenship in South Africa.

10. More specifically, lack of access to documentation to evidence nationality and/or immigration status regularisation remains a significant obstacle in accessing nationality for USMC, increasing risks of statelessness.[15] USMC in South Africa can regularise their immigration status and gain access to documentation in one of two ways:

    (1) if the child falls within the definition of a refugee, they can be assisted to apply for asylum;

[14] Lawyers for Human Rights, Statelessness and Nationality in South Africa, Presentation to Department of Home Affairs Portfolio Committee, 9 March 2021, Parliament, Cape Town.

[15] This barrier for USMC to acquire a durable immigration status was identified by the *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* which recommended that Parliament should amend the Immigration Act to provide 'a legal immigration status to unaccompanied migrant children placed in the care system'. See Recommendation 4.12a of the Panel's 2017 report at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf.

(2) if they do not fall within the definition of a refugee, they must obtain an immigration visa or a Ministerial exemption in terms of the Immigration Act - both of which are difficult to obtain.

11. The lack of substantive options for USMC to acquire any form of documentation and regularise their immigration status has significant impacts on their development and increases the risk of statelessness while its effects are particularly acute when they reach the age of majority when they also face the risk of detention and deportation.

Asylum Application

12. The Refugees Act[16] provides for unaccompanied and separated asylum-seeking children to apply for asylum.[17] However, these children often face challenges in accessing the refugee system. Firstly, the number and geographical location of the Refugee Reception Offices (RROs) is limited.[18] Since the beginning of the COVID-19 pandemic, RROs across South Africa have not accepted new asylum applications. The inability for USMC to apply for asylum results in USMC without any regularised immigration status for a prolonged period. Additionally, the capacity and resources of social workers who assist in the asylum application process are limited. Further, the asylum system is not suitable for many placed in CYCCs as few meet the refugee definition,[19] and accessing the asylum process is extremely protracted. In some cases, access to the process may be gained only at the time that the child reaches the age of majority at which point they may be forced to apply for asylum on their own merit, placing them at a severe disadvantage due to the nature of their displacement as a child. In cases where USMC do not have any form of documentation - including identity documentation from their country of origin - they are at increased risk of statelessness.

Immigration Visa

13. The immigration legislative framework in South Africa does not provide for a visa category that caters to USMC who cannot apply for recognition as a refugee.[20] Some migrant children in South Africa may in limited circumstances qualify to apply for a study visa. However, there are significant barriers to applying for a study visa making it unlikely that USMC in South Africa will acquire such an immigration visa.[21]

Permanent residence by exemption

[16] No 130 of 1998 as amended (hereafter Refugees Act). Read with Refugees Regulations, Government Notices, No. R. 1707, No. 42932, 27 December 2019.

[17] Section 21(A) of the Refugees Act, read with Regulation 10.

[18] There are just four RROs in the country that accept new asylum applications (Durban, Pretoria, Gqeberha and Musina). The Cape Town RRO was closed to new applications in 2012 and remains operating on a limited basis despite the closure being found unlawful by the courts.

[19] See for example, Scalabrini Centre of Cape Town, FOREIGN CHILDREN IN CARE: SOUTH AFRICA. A Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo and Western Cape Provinces of South Africa, July 2019, available at: https://scalabrini.org.za/wp-content/uploads/2019/07/Scalabrini_Centre_Cape_Town_Foreign_Children_in_Care_Comparative_Report_South_Africa_2019.pdf.

[20] Immigration Act (No 13 of 2002) as amended (hereafter Immigration Act). Read with Immigration Regulations *Government Regulation Gazette,* Vol. 587, No. 37679, 22 May 2014.

[21] Regulation 12 of the Immigration Act sets out the requirements which include *inter alia* a valid passport, proof of medical cover and proof of sufficient financial means. In addition, all first-time applications must be done in the country of origin. Note some requirements may be waived on application but waivers are difficult to obtain.

14. The only option for USMC outside mainstream immigration or asylum visas is to apply for permanent residence by exemption in terms of section 31(2)(b) of the Immigration Act. However, there is a fee to submit this application,[22] and no set criteria thus receiving this exemption is not guaranteed as it is also subject to ministerial discretion.[23] A special dispensation or visa pathway for USMC specifically would not only be in line with the best interests of the child, but also begin to provide pathways to nationality and citizenship, while reducing the risk of statelessness for this category of vulnerable children in South Africa.

The Citizenship Act

15. The Citizenship Act makes provision for children to be granted citizenship in specific instances but are limited for USMC. Children's access to nationality depends on birth occurring in the country and being registered in South Africa. There is no standard application procedure for sections 2(2) or 4(3) (see Annex I – National Law), resulting in individuals lodging applications via affidavit with lengthy adjudication times and no durable documentation in the interim.[24] Subsequent to litigation, draft regulations have been published to assist in setting out how the Citizenship Act is implemented, but civil society has raised significant concerns over the substance of the draft regulations.[25]

Children's Court Magistrate

16. If USMC are found to be in need of care and protection in terms of the Children's Act,[26] a CC may make an order for the documentation of the child by the Department of Home Affairs (DHA).[27] In practice, few organisations supporting USMC and CC Magistrates are aware of this avenue and relevant orders from the CC are frequently not implemented by the DHA.[28] While the CC order gives the child some protection, it is not enabling documentation and many of these children are at increased risk of statelessness upon reaching the age of majority or when they exit the CYCC.

II. Access to Birth Registration

17. Birth registration is fundamental to the legal recognition of children and, consequently, to their ability to secure a name and nationality. The framework as set out by the Births and Deaths Registration Act (BDRA) remains restrictive and places specific groups of children at

[22] As of 2022, the fee is set at ZAR 1,550.00.
[23] The exemption application is complex, lengthy, and uncertain. Child applicants remain without immigration status for years, and due to complexities and costs involved in this process, not all vulnerable children are able to access the exemption.
[24] As of early 2022, some applicants in the *Minister of Home Affairs v Miriam Ali and Others* case (see below p.12) have been granted citizenship and are now South African citizens. This is an encouraging development but also highlights the protracted nature of the application process.
[25] See below in the Implementation of Court Judgments section for jurisprudence emanating from Sections 2(2) and 4(3) of the Citizenship Act. The publication of draft regulations is the result of this litigation. In regards to concerns with the substance of the proposed draft regulations, see: https://www.scalabrini.org.za/resources/submissions/our-submissions-on-citizenship-act-draft-regulations/
[26] Section 150 of the Children's Act 38 of 2005. The proposed amendment bill, Children's Amendment Bill [B18-2020] which proposes that unaccompanied children is a category presumed to be in need of care and protection.
[27] Orders to document children are usually made in terms of Section 46 of the Children's Act 38 of 2005
[28] Also see section III below.

increased risk of statelessness.[29] The barriers that prevent South Africa from achieving universal birth registration include the following:

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

a. Section 9(1) of the BDRA stipulates that the birth registration of "any child born alive" must be initiated by the parents (or any other prescribed persons).[30] However, the Regulations require parents to have valid documentation and legal status before they are able to register their child.[31] 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 the South African Constitution,[32] at odds with the child's right to a nationality and undermines the protection against statelessness found in section 2(2) of the Citizenship Act. The High Court has found these requirements unconstitutional and ordered parents to submit valid documentation "where it is available".[33] These provisions affect citizens and non-citizens alike. South African citizens without an ID document or those who are blocked from accessing ID documents are unable to register the birth of their child. Asylum seekers and refugees in South Africa also face numerous obstacles in accessing the birth registration system as access is contingent upon the validity of their own documentation.[34]

Restrictive time limit for birth registration:

b. The BDRA mandates that registration must be done within 30 days of occurrence of birth. Birth registration after the initial 30 days is permitted under limited circumstances, and failure to comply with additional requirements can result in the

[29] This was acknowledged by the 2017 report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change which recommended that Parliament should introduce legislative changes to the BDRA to 'ensure that children of foreign nationals are not discriminated against' and amend the Citizenship Act to ensure foreign nationals are not discriminated against in regard to acquiring nationality. Available at: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf see specifically pp. 353-355.

[30] 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.

[31] 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.

[32] Section 28(1)(a).

[33] 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

[34] These barriers are well documented. See for example Roni Amit, 'Queue here for corruption: measuring irregularities in South Africa's asylum system.' *Lawyers for Human Rights and the African Centre for Migration & Society Report* (2015); Amnesty International, 'South Africa: Living in limbo: Rights of asylum seekers denied', October 2019, https://www.amnesty.org/en/documents/afr53/0983/2019/en/

birth not being registered.[35] The late registration of birth process is often protracted as it requires that a screening committee is convened to assess such applications.[36] The requirements for a late registration differ depending on whether a child was born to South African parents, permanent residents, refugees, or other non-nationals.

Foreign Children

c. Since the last reporting cycle, amendments to the Refugees Act have gone into effect implementing a more punitive, bureaucratic and restrictive regime.[37] In 2018, a draft amendment to the Regulations on the BDRA was also published for comment.[38] According to the BDRA draft regulations, foreign children will be issued with a confirmation of birth and not a birth certificate,[39] and will have to approach their embassies for birth certificates.[40] Access to embassies for foreign children is difficult as most embassies are situated in Pretoria, and some states do not have diplomatic representation in South Africa. An additional challenge occurs when embassies only provide limited services and do not issue birth certificates.

d. Further, practices regarding the types of birth certificates issued have been inconsistent. At the time of writing, foreign children born in Cape Town are issued with a hand-written birth certificate, meaning that the birth is not entered into South Africa's National Population Register nor captured digitally. As of 2022, organisations have received reports that the DHA does not re-issue hand-written birth certificates should they be lost or damaged, leaving many parents who have lost birth certificates unable to replace birth certificates. Ultimately, these children are denied proof of nationality and are at increased risk of statelessness.

Covid-19

[35] 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 subregulations 4(3)(a)-(i) and 5(3)(a)-(i) which set out additional requirements such as an affidavit by a South African citizen who witnessed the birth; Fingerprints of the parents or adoptive parents; Certified copies of the parents' identity documents and in the case of foreign nationals, certified copies of valid passports, visas, and asylum/ refugee permits are required; Where applicable: i. a marriage certificate of the parents; ii. a death certificate of any deceased parent; iii. a certified copy of the identity document of the next of kin; and iv. proof of payment. Although the late registration fee is currently suspended by DHA, it remains in Regulations 4(3)(l), 5(3)(m), 8(3)(l). If 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.

[36] BDRA Regulation 6(4). In February 2022, an official from a DHA office in Cape Town reported the screening committee is currently dealing with applications from 2017-18.

[37] Refugee Amendment Acts amending the Refugees Act 130 of 1998

[38] The draft regulations have not yet been finalised and are not in force. https://static.pmg.org.za/181012draftreg-registrationofbirthsdeaths.pdf

[39] A 'confirmation of birth certificate' will result in foreign children being unable to receive birth certificates and will have a significant impact on their ability to access services, basic rights and prove nationality. This provision, if enacted, will place many foreign children at risk of statelessness.

[40] BDRA Draft Regulation 7. This draft regulation conflicts with sections 2(2) and 4(3) of the Citizenship Act which require foreign children to be in possession of birth certificate to apply for citizenship, as well as sub regulation 4(1) of Refugees Regulations which states that asylum seekers and refugees who approach their embassy may be deemed to have 're-availed' themselves to the protection of their country and may have their status withdrawn.

e. Barriers to accessing birth registration have been exacerbated by the Covid-19 pandemic and associated lockdown measures in which a National State of Disaster was declared. All DHA offices were closed for a six-week period, and RROs remain closed to date. This created a backlog of birth registrations and an increase in expired immigration documentation. The South African government should be commended for aiming to ensure that birth registration remained accessible during this period through providing relevant services at hospitals and maternity clinics and for extending the period by which a birth needs to be registered from thirty days to twelve months. Additionally, blanket extensions were issued throughout the pandemic for those whose immigration documentation expired during the period. However, individuals whose permits expired prior to the lockdown were unable to regularise their status during the pandemic, and as the pandemic winds down asylum seekers and refugees have been directed to an online renewal system and are facing considerable difficulties with renewals.[41] The blanket extension has been extended to 30 April 2022, and DHA has indicated that RROs will resume full services from 2 May 2022. Concerns remain that a significant number of individuals have been left out of the online renewal process unable to renew their immigration documentation and thus be unable to register the births of their children. This includes individuals excluded from blanket extensions, those who have encountered barriers when trying to access the online renewal system, as well as new asylum applicants.

III. Administrative - Procedural Barriers in accessing citizenship

18. The definition of a stateless person in article 1 of the 1954 UN Convention includes two main manifestations of statelessness: the law, and the implementation of the law. According to UNHCR the deciding factor is not the law, but whether the State recognises a person as a citizen. Where a state refuses without reasons to recognise a person's citizenship status, that person may be stateless if they have no other nationalities. Just administrative action (or due process) in nationality related matters is therefore crucial to *implementation of the law* and is therefore as crucial as the content of the law.

19. One of the main causes of statelessness in South Africa is a lack of just administrative action (due process) in government decisions regarding an individual's citizenship. Lack of due process affects decisions to both grant and to revoke citizenship. It also affects decisions to issue documentation regarding birth registration and citizenship. Existing South African laws on the right to nationality are either not implemented by the state or are implemented in an unlawful way without regard to the prescribed formal procedures resulting in violation of nationality rights. In addition, recourse mechanisms for administrative failure are insufficient, or inaccessible to the average person.

20. Excessive and unfettered discretion in nationality decisions is detrimental to the right to nationality and has increased the occurrence of statelessness in South Africa. The prevention

[41] 'Refugees struggle to renew their asylum documents with Home Affairs online system' GroundUp, 4 February 2022, https://www.groundup.org.za/article/refugees-struggle-with-home-affairs-online-system/

and eradication of statelessness in South Africa cannot be achieved without just administrative action (due process) in nationality matters.

21. The following examples are drawn from respective practices and are illustrative of how the barriers manifest practically.

    a) **Refused birth registration / citizenship applications**: A parent approaches the Department of Home Affairs to register the birth of their new born child. The government official refuses to accept their application and tells them to leave without providing them with a written decision, written reasons for the rejection, nor an opportunity to make representations or appeal the decision. This can happen repeatedly over the span of months and years. The child is not recognised as a citizen by the state and is denied access to their citizenship, even though the law allows them to be registered and recognised as a citizen.[42]

    b) **Deprivation / denial of citizenship:** An elderly man has been recognised as a South African citizen since his birth in 1952. Throughout his life he has been issued with several identity documents, driver's licences and he voted in every election. At the age of 70, the DHA decided to investigate his citizenship. His ID number is blocked on the system. He can no longer renew his driver's licence or use his identity document to receive his old age grant. He can no longer access free health services like other South Africans of his age to treat his chronic health conditions. At no point did the Department issue him with a formal written decision, with written reasons for the blocking, nor did they give him an opportunity to appeal the decision. The law allows him to be a citizen, but the haphazard and unlawful implementation of the laws deprive him of his citizenship.

22. Section 33 of the South African Constitution specifically protects the right to administrative justice. That is administrative action that is lawful, reasonable, and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The Promotion of Administrative Justice Act (3 of 2000) (PAJA) provides additional directions on how to ensure an efficient administration and fair administrative practices in government decision making, especially where it seriously affects the rights of the individual. In terms of PAJA, and the Constitution, whenever a decision is made (or fails to be made) which affects an individual's citizenship, prescribed processes must be followed which will allow the individual to challenge the state's conduct.

23. As a last resort, an individual ought to have access to courts to seek a judicial review of administrative actions (decisions relating to citizenship) of the state. Section 25 of the South African Citizenship Act gives special statutory review powers to the High Court of South Africa to review the citizenship decisions made by the state. But these special processes are hampered by the fact that hardly any citizen can afford such legal intervention, and, even then, are hamstrung in the proceedings because of a lack of written decisions and reasons. Even where pro bono human rights lawyers intervene on behalf of indigent clients, these processes take years because of the extreme lack of due process on the part of the state. The applicant may have their citizenship restored, but they would have lost a significant number of years to statelessness unnecessarily, and potentially suffered significant prejudice

[42] Note that In South Africa, citizenship is determined at the point of birth registration. If a child is South African, a computerised birth certificate with and identity number is issued. If the child is not a citizen, or the department does not recognise them as a South Africa citizen, they are issued with a handwritten birth certificate with no identity number. Therefore the denial of a birth certificate amounts to denial of one's South African citizenship.

in the intervening period.

24. The High Court of South Africa, in *Nzama v the Minister of Home Affairs*[43] held that the **Minister's failure to take formal decisions on citizenship applications is a violation of the South African Constitution**. In this case the applicant's identity number was blocked for more than ten years, during which he was not able to register his children and add them to his medical aid, and to be admitted as an attorney after completing his Bachelor of Law. He was threatened with deportation, only staying in South Africa because there was no country to deport him to. During this process, he was not formally informed about the decisions regarding his citizenship, nor was he provided with written reasons by the DHA in respect of the blocking of his identity number and effective denial of his citizenship. The court had to intervene and found that such administrative practices are unjust and unconstitutional.

25. The High Court's findings in *Nzama* are in line with the judgement by the African Court on Human and Peoples' Rights (ACtHPR) in *Anudo v Tanzania.*[44] The ACtHPR expanded upon the international law on deprivation of citizenship by finding that **arbitrary denial of citizenship amounts to arbitrary deprivation of citizenship which is prohibited by international law.** The judgement goes further to find that the **burden of proof in such cases falls on the state** and not on the individual. The court relies on articles 13 and 14 of the ICCPR which guarantees due process. The same is provided for under article 7 of the African Charter on Human and Peoples' Rights (ACHPR).

26. These cases demonstrate **the crucially important role administrative justice (due process) plays in access to the right to a nationality**. The *Nzama* case is but one of the many cases which have been brought before South African courts on the same bases (mainly by Lawyers for Human Rights (LHR)), and the many complaints which are recorded in the law clinic at LHR. In addition, many cases of refusal of birth registration have been recorded by LHR and CCL, with many other such refusals reported by partner NGOs across the country. This is but a small representation of the nationwide situation.

27. There are two crucial solutions to this problem:
    a. First, the adoption and implementation of standard operating procedures (SOPs) for the administration of nationality and birth registration applications or denials (deprivation), and investigation of existing citizenship matters. These SOPs should set out procedures in line with the PAJA and the Constitution, including providing written decisions and reasons to persons affected by administrative decisions pertaining to their nationality administration. The SOPs should be made available to all DHA offices and compulsory training must be provided to all offices and frontline officials.
    b. Second, establishing an independent monitoring body to whom contested nationality related decisions may be referred for mediation without having to resort to High Court judicial review (which should remain available as a remedy of last resort). This could take the form of an internal, but independent, appeals authority

[43] *Nzama v the Minister of Home Affairs* (North Gauteng division, Pretoria) 7 March 2018.
[44] African Court on Human and Peoples' Rights, App No 012/2015 (22 March 2018).

or inspectorate. Examples of such a body are already available for other administrative systems in South Africa.

IV. Implementation of Court Judgments

28. In recent years, there has been growing jurisprudence on statelessness and the right to nationality in South Africa. South African courts have issued various progressive judgments that have the potential to contribute to the reduction, prevention and eradication of statelessness in South Africa. However, the DHA has failed to ensure effective implementation of these judgments. This is demonstrated in the following cases.

Centre for Child Law v Minister of Home Affairs CCT 101/20 [2021] ZACC 31

29. This matter deals with two important issues related to access to birth registration. It was initiated in the High Court after DHA had refused to register the birth of child born in South Africa to a South African citizen father and DRC citizen mother. The refusal was due to the fact that the mother's visa had expired, and she could thus not comply with the regulations to the BDRA that require parents to submit valid identity documentation for the birth registration process. The DHA also refused to allow the father to register the child because the parents were unmarried. The High Court declared the requirement for valid identity documentation in terms of the regulations unconstitutional and ruled that such documentation should only be provided "where it is available".[45] The court further ruled that the law preventing unmarried fathers from registering their children's birth was unconstitutional and invalid and all children, regardless of their parent's marital status should have equal access to birth registration. This order was confirmed by the Constitutional Court.

30. However, **despite the judgement, parents seeking to register the birth of their child(ren) are still compelled to produce valid identity documents in practice.** This affects parents with blocked IDs, expired permits or visas, or who are undocumented themselves. The DHA has also made it **compulsory for unmarried fathers to provide 'proof of paternity' in the form of DNA tests to register their children**. Not only is this requirement ultra vires the law, but the exorbitant costs of DNA tests make it impossible for poor or indigent families to meet this requirement. These practices are not in the best interests of the child and fail to uphold the child's right to a name and nationality from birth.

DGLR v the Minister of Home Affairs (GPJHC) (unreported) case number 38429/13 of 3 July 2014

31. In terms of Section 2(2) of the South African Citizenship Act ("SACA") - a child who is born in South Africa, and who would otherwise be stateless, is a South African citizen by birth. However, **since the DHA has not promulgated regulations prescribing the administrative process for such applications nor establishing a Statelessness Determination Mechanism to determine eligibility**, **it is practically impossible to access this provision**.

[45] Menzile Naki and another v Director General: Department of Home Affairs and Another (4996/2016) [2018] ZAECGHC 90

32. This matter concerned a child who was born in South Africa to Cuban citizen parents. The parents soon discovered that their Cuban citizenship had been revoked and they were deemed "permanent emigrants" through the embassy. This meant their child was stateless and they attempted to obtain South African citizenship on her behalf based on Section 2(2) SACA. The DHA refused to grant her South African citizenship and this decision was later reversed by the High Court. The court ruled that it was not in the best interest of the child to remain stateless and that she was entitled to South African citizenship under Section 2(2) SACA. The court further ordered DHA to promulgate regulations that give effect to section 2(2) of SACA by March 2018. To date, DHA has not complied with the order in terms of promulgating the necessary regulations.

Minister of Home Affairs v Miriam Ali (2018) ZASCA 169 SCA

33. In terms of section 4(3) of the South African Citizenship Act ("SACA") - children who are born in South Africa to parents who are not South African citizens nor permanent residents and who have lived in South Africa from birth to the age of 18 years old, qualify for South African citizenship by naturalisation. However, as with section 2(2), **the DHA has also failed to promulgate regulations providing for the practical implementation of this section**.

34. This case involved five young people who were born in South Africa to parents who were either refugees or asylum seekers. They met all the requirements for citizenship by naturalisation under Section 4(3) SACA, but the DHA had refused to receive and grant the applications because it claimed the provision only applied prospectively to children born from 2013[46], and the DHA had thus not enacted any regulations prescribing the administrative process for such applications. The court ruled that the DHA's interpretation was incorrect and that the provision applied retrospectively and prospectively. The court ordered the DHA to promulgate the necessary regulations by 30 November 2019 and to accept all application on affidavit in the intervening period.

35. The *Ali* judgment is augmented by another similar case, that of *Minister of Home Affairs v Jose (2020) ZASCA 152 (25 November 2020)*. That case concerns two brothers who were born in South Africa to Angolan citizen parents. The family was initially granted refugee status, but this status was withdrawn during the Angolan cessation process in 2013. The brothers had attempted to apply for South African citizenship by naturalisation under Section 4(3), but the DHA had refused to receive and grant the applications based on the lack of regulations. With reference to the *Ali* judgement and the Constitutional Court judgment in *Chisuse v Director-General Department of Home Affairs 2020 (ZACC) 20*, the Supreme Court of Appeal held that once a citizenship by naturalisation applicant meets all the jurisdictional requirements prescribed by section 4(3), and critically, clarified there is no room for the exercise of discretion by the DHA and the applicant must be granted citizenship.

[46] Given that Section 4(3) was introduced in an amendment that came into operation in 2013

36. To date, DHA has not complied with the order made in the *Ali* judgment in terms of promulgating the necessary regulations. In late 2020, the Minister of Home Affairs responded to a written Parliamentary Question, indicating that they would comply with the order. In addition, draft regulations were published for comment. However, these draft regulations were flawed in that they did not comply with the interpretation provided in both the *Ali* and *Jose* judgments. After the publication of the draft regulations, no further pronouncement has been made by the Department, and no final regulations passed.[47]

37. To compound matters, the DHAs citizenship section was shut down from March 2020 (at the commencement of the Covid-19 lockdown) to February 2022. During this period, no citizenship applications were being processed, leaving several young people who could have accessed citizenship through Section 4(3) SACA undocumented and in a state of limbo. The shutdown has also exacerbated existing backlogs at the DHA. While the DHA has announced that all citizenship services have resumed, some offices are still refusing to accept applications.

Mubake v Minister of Home Affairs (72342/2012) [2015] ZAGPPHC 1037

38. In this case, the High Court granted an order declaring that the definition of "dependent" under the Refugees Act[48] is not limited to children in the care of their parents, but also includes children who have been separated from their parents and are in the care of other adult asylum seekers or refugees. The case concerned five children fleeing conflict in the DRC, who were orphaned or abandoned by their parents and in the care of aunts or uncles seeking asylum in South Africa. The DHA refused to register and document the children as dependents of their aunts or uncles in the absence of formal proof of guardianship. The court found that it was not in the best interests of the children to leave them undocumented for an indeterminate period and ruled that DHA should immediately register and document them as dependents of their aunts or uncles and the process to obtain proof of guardianship could follow. The court further ordered the DHA to disseminate a departmental directive to all RROs to give effect to this order in all cases of separated migrant children.

39. In practice, the DHA still insists on **proof of guardianship and does not consider the fact that applications for guardianship or foster care are often lengthy and complicated, particularly for asylum seekers and refugees,** creating risks of statelessness among children who are separated from their parents.[49]

Recommendations

40. Based on the above information, the co-submitting organisations urge reviewing States to make the following recommendations to South Africa:

[47] https://www.scalabrini.org.za/resources/submissions/our-submissions-on-citizenship-act-draft-regulations/
[48] Section 1 and Section 3(c)
[49] See for example this recent matter by LHR, where it took 3 years to obtain a foster care order in order to get two migrant children documented under their aunt: https://www.lhr.org.za/lhr-news/press-statement-victory-for-family-unit-and-forcibly-displaced-migrant-children/

I. Regularise the status of all USMC in the care system who are at risk of statelessness by providing them with permanent residence status and a pathway to South African nationality through a no fee, child friendly dispensation in terms of section 31(2)(b) of the Immigration Act.

II. Train and sensitise Children's Court Magistrates and social workers on documentation and rights of USMC in line with their statutory duty.

III. Develop and implement child friendly application procedures at all home affairs offices including refugee reception offices for USMC.

IV. Draft and disseminate a national directive requiring the provision of reasons and an appeal process if applications to acquire South African nationality are rejected.

V. Ensure every child's right to immediate, free birth registration and certification for all children, regardless of their parents' identity, status, or documentation, in accordance with CRC Article 7. More specifically:

   i. Ensure that the current late birth registration process is finalised within 90 days of the application.

   ii. Draft new standard operating procedures for birth registration allowing children of undocumented parents to be registered and for either parent (including fathers) to register the birth of the children born in and out of wedlock.

   iii. Withdraw DNA Circular 5 of 2014 and cease to require proof of paternity in the form of DNA for children born out of wedlock.

VI. Comply with court judgments by promulgating regulations to section 2(2) and 4(3) of the Citizenship Act to facilitate the application for South African nationality for stateless children and young adults.

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South Africa

Scalabrini Centre of Cape Town
Lawyers for Human Rights
Centre for Child Law
UCT Refugee Rights Unit
Institute on Statelessness and Inclusion

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