

# Lawyers for Human Rights and Institute on Statelessness and Inclusion

## Joint Submission to the Human Rights Council at the 27<sup>th</sup> Session of the Universal Periodic Review

### The Republic of South Africa

#### Introduction

1. Lawyers for Human Rights (LHR)<sup>1</sup> and the Institute on Statelessness and Inclusion (the Institute)<sup>2</sup> make this joint submission to the Universal Periodic Review (UPR) in relation to statelessness,<sup>3</sup> access to nationality and human rights in the Republic of South Africa.
2. This submission focuses on:
  - I. The right of children to acquire and retain South African nationality, in particular where they would otherwise be stateless;
  - II. Documentation of adults who were born in South Africa through the Late Registration of Birth Process;
  - III. The blocking of identity documents and resultant barriers to accessing South African Citizenship;
  - IV. The lack of a dedicated Mechanism to identify and regularise the status of stateless people in South Africa; and
  - V. The arbitrary detention of stateless persons in South Africa.
3. It must be noted that there are also other categories of persons who are stateless or at risk of statelessness who have been identified in South Africa and are currently being assisted by LHR. This Submission draws on experience with research, advocacy, litigation, awareness raising and direct support of the co-submitting organisations and their partners, performed in South Africa and internationally. This includes the recent joint submission by the co-submitters to the

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<sup>1</sup> LHR is a South African human rights organisation committed to social justice activism and strategic public interest litigation. In 2011, LHR launched the Statelessness Project as part of the Refugee and Migrant Rights Programme. LHR provides direct legal services to stateless persons; engages government on the need for legal reform to prevent and reduce statelessness; raises awareness the rights of stateless people; and advocates for accession to the 1954 and 1961 UN statelessness conventions. LHR has reached more than 3,000 persons from over 28 countries of origin. LHR has identified numerous categories of stateless persons in the Republic, both migrants and those born in South Africa. For more details of LHR's statelessness project, see:

<http://www.lhr.org.za/programme/rmrp-statelessness-project-accessing-citizenship-and-nationality>.

<sup>2</sup> The Institute is an independent non-profit organisation committed to an integrated, human rights based response to the injustice of statelessness and exclusion through a combination of research, education, partnerships and advocacy. Established in August 2014, it is the first and only global centre committed to promoting the human rights of stateless persons and ending statelessness.

For more information about the Institute on Statelessness and Inclusion and its work please see the website <http://www.institutesi.org/>.

<sup>3</sup> According to Article 1.1 of the 1954 Convention relating to the Status of Stateless Persons, a stateless person is someone "who is not considered as a national by any state under the operation of its law." The United Nations High Commissioner for Refugees estimates more than 10 million people worldwide are stateless and without the protection of any state.

Committee on the Rights of the Child, which reviewed South Africa in September 2016, during its 73<sup>rd</sup> Session.<sup>4</sup>

## The Universal Periodic Review of the Republic of South Africa under the First and Second Cycles

4. South Africa was first subjected to the Universal Periodic Review on 15 April 2008, at Session 1 of the First Cycle, and subsequently on 31 May 2012, at Session 13 of the Second Cycle of the UPR. At this review, there were no recommendations specifically mentioning statelessness and the right to nationality. Related recommendations include removing barriers to birth registration for all children born in South Africa, acceding to core human rights instruments yet unratified, preventing and eliminating xenophobia and discrimination against foreigners and improving detention conditions of undocumented migrants.<sup>5</sup> South Africa was commended on its very progressive constitution, and there were various recommendations more generally related to South Africa's treaty obligations, including under CRC, ICCPR and CAT.

5. Some of the most relevant recommendations under the 2012 UPR include:

Recommendation	Response by South Africa
<i>Complete its accession to the core human rights instruments that are still not yet ratified (Iraq);<sup>6</sup></i>	'Supported'
<i>Reinforce its efforts to prevent and combat racism, racial discrimination, xenophobia and other related intolerance in particular against foreigners (Iran);<sup>7</sup></i>	'Supported'
<i>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 (Ecuador);<sup>8</sup></i>	'Supported'. However, South Africa also responded that: <i>All the South African deportation centres are, by law, required to comply with international standards. There are inspectorate mechanisms in place and in the event that deportees are to be held for periods more than 30 days a requisite court order must be obtained from a competent court. The challenges of prolonged deprivation of liberty are accentuated by lack of proper identification documents for which cooperation with the countries of origin is imperative.</i>
<i>Carry out the necessary measures to eliminate the barriers that impede the birth registration of all persons born in South African territory, including migrants and refugees (Mexico);<sup>9</sup></i>	'Supported' both recommendations. However, South Africa also responded that: <i>All children born in South Africa are registered at birth and not later than the first 30 days of birth. This is a requirement of national</i>

<sup>4</sup> The ISI, LHR joint submission to the CRC can be accessed here:

[http://www.institutesi.org/CRC\\_SouthAfrica\\_2015.pdf](http://www.institutesi.org/CRC_SouthAfrica_2015.pdf)

<sup>5</sup> 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-](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/151/29/PDF/G1215129.pdf?OpenElement)

[ny.un.org/doc/UNDOC/GEN/G12/151/29/PDF/G1215129.pdf?OpenElement](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/151/29/PDF/G1215129.pdf?OpenElement)

<sup>6</sup> *Ibid.*, para 124.1.

<sup>7</sup> *Ibid.*, para 124.38.

<sup>8</sup> *Ibid.*, para 124.58.

<sup>9</sup> *Ibid.*, para 124.150.

Ensure that all children are issued with a birth certificate in order to access various social services, with particular focus on children of migrants (Slovakia).<sup>10</sup>

law. Registration allows all children to access all social benefits in the country.

6. As this submission elaborates, the South African responses to recommendations related to detention and birth registration require further scrutiny.

## South Africa's international obligations

7. South Africa has ratified nearly all core international and regional human rights treaties. Stateless persons benefit from the general application of international human rights standards found in these core treaties, including non-discrimination, adequate standard of living and equality before the law.<sup>11</sup>
8. The right to a nationality and/or protection of stateless persons is further reinforced by a variety of these instruments, including the Universal Declaration of Rights (Article 15), the International Covenant on Civil and Political Rights (ICCPR) (Article 24), the Convention on the Elimination of all forms of Discrimination Against Women (Article 9) the Convention on the Nationality of Married Women; the Convention on the Elimination of all Forms of Racial Discrimination (Article 5), the Convention on the Rights of the Child (CRC, Article 7) and the African Charter on the Rights and Welfare of the Child (Article 6).
9. South Africa has additional international and regional obligations to protect the liberty and security of all persons and to protect against arbitrary and unlawful detention. These obligations derive from the ICCPR (Article 9) and the African Charter on Human and People's Rights (Article 6) which protect the right to liberty and security of the person and freedom from arbitrary detention.
10. South Africa, however, is not a party to either the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention), or the 1961 Convention on the Reduction of Statelessness (1961 Convention).

## South Africa's national legal framework

11. The right to a nationality is enshrined in the **South African Constitution**,<sup>12</sup> according to which, no one shall be deprived of their nationality<sup>13</sup> and "*every child has a right to a name and a nationality from birth.*"<sup>14</sup> While this provision does not stipulate that every child has a right to a *South African* nationality, it should be interpreted in light of South Africa's obligations under Article 7 CRC, which includes an absolute protection against childhood statelessness.

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<sup>10</sup> *Ibid.*, para 124.151.

<sup>11</sup> There are a few exceptions under international human rights in which stateless persons are restricted, such as in the right to vote or to be elected to political office.

<sup>12</sup> The Constitution of the Republic of South Africa, 1996

<sup>13</sup> *Ibid.*, Section 20

<sup>14</sup> *Ibid.*, Section 28(1)(a)

12. **The Citizenship Act**<sup>15</sup> governs the acquisition of South African citizenship. The Act provides citizenship by birth or descent to:

- a. children born on the territory who would otherwise be stateless;<sup>16</sup>
- b. children born on the territory and who have lived in South Africa until age of majority, and whose parents are permanent residents;<sup>17</sup> and
- c. children adopted by South African citizens.<sup>18</sup>

While these provisions could provide strong safeguards against statelessness, in all three instances, contrary to the South African Constitution, birth registration is required before citizenship is awarded. This is a significant concern particularly considering vulnerable children who are excluded from birth registration. The Act also provides for citizenship by naturalisation:

- d. children born in South Africa to other migrants (non-citizen and non-permanent residents); or those on a visa that does not lead to permanent residence status, are entitled to citizenship by naturalisation at the age of 18.<sup>19</sup> This section is also dependent on birth registration.

As will be evident further below, the lack of regulations poses a significant barrier to implementing sections 2(2) and 4(3) – both of which have been designed to safeguard against childhood statelessness. Furthermore, it is important to note that the Citizenship Act does not protect children born outside the country, but resident in South Africa, from statelessness.

13. **The Birth and Deaths Registration Act and its regulations**<sup>20</sup> provide the legal framework for birth registration of all persons born in South Africa. Birth registration must ideally be initiated by both parents, and occur within a prescribed time frame after birth. The late registration of births is possible but is subject to penalties.

14. Provision is also made for the late birth registration of adults whose births were never registered when they were children. The aim was to address the need of South African citizens who were unable to access birth registration due to the poor birth records of black South African's during the apartheid era. However, the Department of Home Affairs is phasing out late registration of births, due to alleged abuse by foreign nationals who attempt to fraudulently acquire South African citizenship.<sup>21</sup>

15. **The Immigration Act:** In the absence of specific legislation protecting the rights of those who are stateless or at risk of being stateless, an exemption application under section 31(2)(b) of the **Immigration Act**,<sup>22</sup> is relied upon to grant legal status to such people. It affords the Minister of Home Affairs the discretion under special circumstances to grant permanent residence to a foreign national in South Africa. This is the only pathway to nationality (through subsequent naturalisation) for these vulnerable persons.

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<sup>15</sup> South African Citizenship Act 88 of 1995

<sup>16</sup> *Ibid.*, Section 2(2)

<sup>17</sup> *Ibid.*, Section 2(3)

<sup>18</sup> *Ibid.*, Section 3

<sup>19</sup> *Ibid.*, Section 4(3)

<sup>20</sup> Birth and Deaths Registration Act 51 of 1992, and Regulations on the Registration of Births and Deaths, 2014

<sup>21</sup> <http://www.dha.gov.za/files/Brochures/Mop-upCampaignBrochure.pdf>

<sup>22</sup> Immigration Act 13 of 2002, and Immigration Regulations, 2014

16. The Immigration Act does not make provision for a legal immigration status for unaccompanied migrant children not born in South Africa. These children are at risk of statelessness.

## **The right of every child to acquire and retain a nationality**

17. LHR and ISI's joint submission to the Committee on the Rights of the Child highlighted four significant concerns directly related to the child's right to acquire and retain a nationality and seven additional concerns related to the law, policy and practice of birth registration which undermines every child's right to a nationality. These concerns are briefly dealt with below:

### *Discriminatory application of the pre-requisite of birth registration:*

18. As explained above, provision of citizenship under the Citizenship Act to a) children born on the territory who would otherwise be stateless (Section 2(2)); b) children born on the territory and who have lived in South Africa until age of majority, and whose parents are permanent residents or other migrants (Section 2(3) and 4(3)); and c) children adopted by South African citizens (Section 3); are dependent on whether the birth of child was registered.
19. Certain children are excluded entirely from birth registration in South Africa<sup>23</sup> and therefore excluded from citizenship. These are often the children of vulnerable and marginalised parents. Particularly undocumented persons who themselves are stateless or at risk of statelessness are unable to have their children's births registered because of restrictions in the Births and Deaths Registrations Act. Other children excluded from birth registration include the children of single fathers when the mother is unavailable or undocumented; the children of migrants without valid immigration status and foundlings who appear foreign. LHR client **Manny** has been refused a birth certificate since being found when he was 2 years old, because he is believed to be foreign. Adopted children are only considered nationals if their births are registered. LHR client **Annie**, who was adopted by South Africans was refused a birth certificate because her foreign birth mother was unable to qualify as a citizen under the Act as a result of the lack of birth registration and was stateless.

### *The lack of regulations to implement Section 2(2) of the Citizenship Act:*

20. Section 2(2) of the South African Citizenship Act provides citizenship to children who are born stateless in South Africa. However, it is not possible for stateless children to apply for citizenship using this provision, because there is no regulation to provide a form to fill out at the local office. There are also no guiding principles on determining whether a child is stateless under the Act. As a result of this legal gap, **Daniella**, a LHR client who was born in Cape Town, South Africa was stateless for the first 8 years of her life. Her mother and father thought that she would automatically be Cuban because they are Cuban. However, they had been away from Cuba for a long period of time and thus barred from transferring their citizenship to their daughter. This was confirmed by the Cuban Embassy in South Africa. Because she was rendered Stateless, Daniella's parents turned to section 2(2) of the Citizenship Act and approached the Department of Home Affairs (DHA) to register her as a South African citizen by birth. DHA did not agree and matter was referred to the High Court. Court ruled in favour of Daniella declaring her a citizen by birth. DHA did not agree with their interpretation of section 2(2), and proceeded to approach the Supreme Court of Appeal, where they settled the matter, agreed to register Daniella as a South African citizen by birth and come up with regulations for section 2(2) by March 2018.

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<sup>23</sup> [http://www.lhr.org.za/sites/lhr.org.za/files/childhood\\_statelessness\\_in\\_south\\_africa.pdf](http://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf)

### Loss, deprivation and renunciation of citizenship

21. The Citizenship Act (section 6, 8 and 10) provides for the loss and deprivation of South African Citizenship of children without safeguards against statelessness.

### Acquisition of citizenship through naturalisation:

22. Section 4(3) of the South African Citizenship Act allows a child born in South Africa to parents with no citizenship or permanent status to apply for South African citizenship, but only once the child becomes an adult at age 18 and the birth is registered. This means that such a child will remain stateless until he is an adult and even then the application is subject to the discretion of the Minister. In addition, there is no form to allow children to apply for this status. Furthermore, the application of this section is currently limited to children born after the provision was enacted in 2013, meaning it currently excludes children like **Rudzani** (an LHR client) who was born in 2007. Rudzani was born in Johannesburg to a Congolese mother. Although his mother registered his birth with the South African authorities, she did not report his birth to the Congolese embassy. Shortly after his birth she abandoned Rudzani without having ensured that he had either Congolese or South African citizenship. Foreign children are issued with birth certificates, but this does not give them South African citizenship. Because of his mother's disappearance, he is unable to prove his link to the DRC in order to obtain citizenship.

### The requirement that the parents of the child have documentation and discrimination in relation to children born out of wedlock:

23. Regulations 3, 4 and 5 of the Birth and Deaths Registration Act require a child's parents to produce a valid identity document or passport with a valid permit in order to register a child's birth. Furthermore, Regulation 12 of the BDRA allows only mothers to register the births of children born out of wedlock even if the father is documented. This leaves the children of all undocumented mothers undocumented and at risk of statelessness. For example, **Nkateko**, aged 6, was born in South Africa. His mother is undocumented but has a claim to South African citizenship. His father is a South African citizen with a valid identity document. Nkateko has a claim to South African citizenship, because of his South African father. However, the Birth and Deaths Registration Act does not allow children to be registered if their mothers are undocumented. It further bars single fathers from registering their children without the mother giving her consent and providing her documents. For as long as his South African citizenship remains unrecognised, he is stateless.

### Restrictive time limit

24. Strict requirements under the law that all births in the country must be registered within 30 days are a concern. While the late registration of births is possible, it is subject to the payment of an administrative fee and compliance with prescribed requirements. Failure on either count can result in the birth not being registered. LHR assists clients who are excluded from birth registration entirely as a result of these strict requirements.

### Restrictions on guardians registering the births of children

25. The current legislation regulating birth registration prevents legal guardians from registering the births of children where the parents are alive, but unavailable. LHR client, **Eve**, has been unable to obtain a birth certificate for years because the law does not allow her grandparents who are her legal guardians to register her birth on account of her mother being alive, but unreachable,

because she left the country and has not made contact with her daughter. **Eve** and other children like her are at risk of statelessness as a result. 24% of children born in South Africa do not live with their biological parents<sup>24</sup> and are potentially excluded from birth registration.

#### Additional conditions for children born outside of hospitals

26. In the event that a child is born outside a health care institution, Regulation 3(3) of the BDRA (for children born in South Africa) and Regulation 11 (for the children of South Africans born abroad) require the birth of such child to be confirmed by affidavit by a South Africa citizen present at the time of the birth. 17 year old LHR client, **Sarah**, has never been able to register her birth because she was born at home without a South African to witness the birth. Her mother passed away leaving her undocumented. She has now had a child of her own who is also undocumented because South African law does not allow the children of undocumented mothers to be registered.

#### Children born out of wedlock

27. Section 10 and regulation 12 of the BDRA make provision for children born out of wedlock. Accordingly, it is the mother who must register the child. A father can only register such a child's birth, with the mother's consent. LHR client **Vusi**, was born out of wedlock and his mother abandoned him. Even though Vusi's mother is unreachable, his birth cannot be registered.

28. It is also impossible under the BDRA for a child to have his or her father's details included in their birth certificate, without the father's consent. Even when DNA results are available, the father is required to be physically present and sign to admit paternity. Consequently, paternal orphans born out of wedlock can never access their father's nationality. It is unnecessary and discriminatory to distinguish between children born within and out of wedlock, when such distinction – as in this case – disadvantages extra-marital children.

29. Furthermore, the DNA test to prove paternity of foreign fathers costs R1,800. This amounts to the multiple discrimination against children born out of wedlock to foreign fathers.

#### Foundlings

30. It is only foundlings whose births have been registered in South Africa, who would have access to nationality through Section 2(2) of the Citizenship Act (the 'otherwise stateless' provision). The procedure requires a social worker to register a child's birth, if such child is orphaned or abandoned. The Department is however reluctant to register foundlings who are not infants. The Birth and Deaths Registration Act in its new regulations also aims to exclude perceived foreigners. It states that if the orphan or abandoned child is clearly a foreigner he or she must be registered as a foreigner. This bars the child from accessing South African citizenship indirectly. LHR client, **Manny**, is 17 and unregistered despite numerous attempts to have his birth registered since age 2 when he was found.

#### Lack of legislation to protect vulnerable children:

31. There is a current gap in the law which allows particularly vulnerable children who are stateless or at risk of statelessness, to reach adulthood without having accessed South African nationality.

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<sup>24</sup> South Africa's Progress in Realising Children's Rights: A Law Review 2014 Paula Proudlock(Editor) [http://www.ci.org.za/depts/ci/pubs/pdf/researchreports/2014/realising\\_childrens\\_rights\\_law\\_review\\_2014.pdf](http://www.ci.org.za/depts/ci/pubs/pdf/researchreports/2014/realising_childrens_rights_law_review_2014.pdf)

The only route such children have to obtaining a legal status and documentation is through **section 31(2)(b) of the Immigration Act**, under which they rely upon the Minister's discretion. This status is not widely applied and even when it is, only provides permanent residence and not citizenship. Those who obtain permanent residence may be able to apply for citizenship after 5 years, but remain stateless until then. This was the situation of **Caleb** who was born in the Democratic Republic of the Congo (DRC). As a young child he fled DRC with his father who settled in South Africa and applied for asylum. Before obtaining refugee status in South Africa, his father passed away, leaving Caleb undocumented and unaccompanied. Caleb was placed in a child and youth care centre where he has been living ever since his father's death. Caleb (is now 20 years old and) has no individual refugee claim. He was very young when he came to South Africa with his father. He does not remember the DRC at all. He cannot establish a claim to nationality in the DRC and cannot be returned there, because he has no known relatives there. The Children's Court has placed him in the care of a South African foster home, but neither the SA Citizenship Act, nor the Immigration Act makes provision for a legal status for someone like him. He is stateless in South Africa.

## **Late Registration of births for adults born in South Africa**

32. In South Africa, not only is birth registration required to access nationality but it also facilitates the issuing of a birth certificate and a South African Identity card. These two documents serve as proof of South African citizenship. As mentioned above, the Births and Deaths Registration Act (BDRA) makes provision for the late registration of birth in order to accommodate adults (and children) with a claim to South African citizenship whose births were not registered within 30 days of the birth.
33. The regulations to the BDRA are overly strict and cumbersome and do not take into account the large amount of South Africans (or foreigners born on the territory) who may not be able to comply with the requirements. As a certain level of documentary evidence is requested, applicants who fail to submit all documents required are rejected with no alternatives offered. The documents requested normally include the identity document of their parents which is impossible to provide if the parents were undocumented or deceased, which is often the case with elderly persons born in apartheid era.
34. LHR client, **Elizabeth** has attempted for the last ten years to register her birth, but has been refused because she cannot produce a birth certificate from the neighbouring country, Lesotho, where she was born to South African parents. Lesotho has a very low birth registration rate and Elizabeth cannot travel there to obtain one without a passport. Elizabeth is also required to bring her South African father (now deceased) to sign for paternity in person despite the many family members who attest to her identity. The lack of flexibility and discretion in these regulations render many people like Elizabeth stateless.

## **The blocking of identity documents (ID) and resultant barriers to accessing South African citizenship**

35. LHR assists a growing amount of South African clients with blocked identities. A blocked identity means that a person's legal status, and connected identity number, is blocked on the Home Affairs system leading them not being able to access their bank accounts, to vote, travel etc. Clients report that they only realise that their identities are blocked when applying for a new identity document or travel document or attempting to access their bank accounts. Upon approaching the



Department of Home Affairs to resolve the problem they are simply told that there is a ‘hit’ on their identity number and that they are ‘illegal immigrants’, but local officials are often unable to inform the affected person as to the steps necessary to unblock their identity. They are referred to the head office, but this office does not receive direct communication from the public. Even with the assistance of a lawyer, the head office often takes more than 6 months to unblock identities or never finalise investigations at all. LHR client, **Gumani**, was assisted by LHR in an application to the High Court to unblock his identity. The South African Constitution requires that all administrative action be procedurally fair, lawful and reasonable. This right includes amongst others the rights to reasons, to the opportunity to make representations and to be informed of the intention to take the decision before it is made, all of which are infringed by this unlawful practice.

36. Another problem is that duplicate or multiple identity numbers have been issued to certain people. This is a phenomenon whereby one person has more than one ID number assigned to them or more than one person share the same ID number. Duplicate ID numbers are largely a result of administrative mistakes, corruption and fraud, as acknowledged by the Department of Home Affairs. According to the Department, nearly 700 000 people have been affected.<sup>25</sup> All these identities were automatically blocked and affected persons were required to bring the following documents 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 certificate and letter from the chief*”. This was impossible for persons whose parents have passed away or who have lost their original first birth certificate, leaving many stateless.<sup>26</sup>
37. Furthermore, local offices exercise discretion concerning the number and types of evidence accepted as proof of one’s claim. Some people are turned away repeatedly and asked for more proof despite providing all required documents, while others are told they cannot be helped unless they produce a specific document that they cannot access.
38. Another group affected by ID blocking is naturalised citizens. South Africa has recently switched to an electronic database for fingerprints. The system is able to compare all fingerprints in the system and to detect whether a person’s fingerprints match passports issued by different countries. Once the system matches the fingerprints of a South African citizen to a foreign passport which has been used to cross a South African border, it automatically blocks the identity number. This is problematic in that it automatically blocks the identities of naturalised citizens. Their numbers are blocked and they struggle for extended periods of time to prove their nationality. LHR client, **George**, struggled for 5 years to reach Home Affairs and resolve his blocked ID. After LHR intervened, his identity was finally unlocked and he was able to obtain a passport to travel to Malawi where his daughter was buried.

## **Lack of a dedicated mechanism to identify and regularise the status of stateless persons in South Africa**

39. South Africa at present 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 living in the country. In its Handbook on the Protection of Stateless Persons, the United Nations High Commissioner for Refugees (UNHCR) observes that “*although the 1954*

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<sup>25</sup> Progress report by Home Affairs August 2012 (<https://pmg.org.za/committee-meeting/14682/>)

<sup>26</sup> <http://www.lhr.org.za/blog/2013/9/id-blocking-growing-threat-nationality>

*Convention does not explicitly address statelessness determination procedures, there is an implicit responsibility for States to identify stateless persons in order to accord them appropriate standards of treatment under the Convention.”<sup>27</sup>* South Africa has not acceded to the 1954 Convention, despite pledging to do so. The obligation to identify statelessness is however, inherently related to the South Africa’s obligations under other international treaties. When particular rights, such as the liberty and security of the person, are engaged, the identification of stateless persons becomes relevant. Without accurate identification of stateless persons there is moreover a lack of insight into the extent of statelessness in South Africa. This makes it impossible to respond to the phenomenon at both a policy level and in order to protect individual human rights.

40. One of the biggest challenges in the context of assisting stateless persons is that South Africa does not formally recognise nor protect stateless persons who do not qualify for refugee status.
41. While stateless persons, in theory, are able to apply for permanent residence status in terms of section 31(2)(b) of the Immigration Act, very few applications have been approved and the processing of the application can take from 8 months to three years. In some cases, the application has never been finalised. LHR has obtained court orders which compel the state to finalise these applications. In some cases, the state has ignored these orders or has rejected the applications despite clear indications that the applicant is stateless.

## **The arbitrary detention of stateless persons**

42. Stateless persons in South Africa are extremely vulnerable to arbitrary and lengthy immigration detention. LHR regularly assist stateless persons or those at risk of statelessness who are held in immigration detention by approaching the High Court of South Africa for an order for their release.
43. Detainees include persons who have failed to establish nationality of their country of origin, country of habitual residence or their parent’s country of origin, as well as persons with an unrecognised claim to South African Citizenship. Once in detention, these persons’ nationality cannot be confirmed by consular officials of foreign countries, or South African Immigration officials. They are usually held beyond the prescribed 120 days within which persons can be legally detained before deportation,<sup>28</sup> released without any path to legal immigration status and often with no documentation whatsoever to prove they have already been through immigration proceedings and could not be deported.
44. Upon release, they are referred to local Home Affairs offices or asked to approach the embassies of countries where they previously resided. These persons have no access to rights or benefits, and are compelled to live on the margins of society where they are vulnerable to exploitation and abuse.
45. The only avenue through which such people can obtain a status is section 31(2)(b) of the Immigration Act, which has been discussed above. Stateless persons are usually not informed that this is an option until they approach legal organisations, leaving countless persons drifting undocumented in South Africa with no hope of a path to a nationality.

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<sup>27</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons*, 30 June 2014, para 144, available at: <http://www.refworld.org/docid/53b676aa4.html>

<sup>28</sup> Section 34(1)(d) of the Immigration Act 13 of 2002

46. LHR stateless client, **Anton**, was held in detention for 7 months before being assisted by LHR to be released through the courts. He, and other clients, report not receiving a change of clothes or reading material and being subjected to assault and refusal of medical treatment.

## **The human rights impact of statelessness**

47. In addition to the issues identified above, stateless persons and undocumented persons (who are of undetermined nationality or at risk of statelessness) are also unable to enjoy fundamental human and constitutional rights in the following ways:

- a. South African law prohibits the employment of persons without valid legal and immigration status. All universities require a valid immigration permit or identity document for admission. Stateless persons or those at risk of statelessness do not have access to the right to work, study or run a business;
- b. Health institutions require a form of identification for the provision of health care services. Access to the right to health care and other socio-economic rights are denied;
- c. Stateless persons are unable to vote, stand for office and exercise other democratic rights which are reserved for citizens;
- d. Stateless children are unable to attend school as children are required to provide a South African birth certificate or study permit in a passport for admission. Their right to education is limited.

## **Recommendations**

48. Drawing on the information provided in this submission, we urge member states to make the following recommendations to the Republic of South Africa:

- I. Sign and ratify the 1954 Convention Relating to the Status of Stateless Persons to ensure:
  - a. Establishing a statelessness determination procedure to identify and protect stateless persons;
  - b. Providing legal immigration status to stateless persons, protecting their rights to residence, movement, work etc.
  - c. Facilitating naturalisation for the stateless;
  - d. Issuing Identity and travel documents;
  - e. Providing administrative services and access to basic human rights
  - f. Issuing temporary immigration permits to protect stateless people from arrest and detention pending the outcome of their application for status.
- II. Sign and ratify the 1961 Convention on to Reduction of Statelessness to ensure:
  - a. Development of legislation and regulations which ensure every child's right to a nationality and that no child is born stateless in South Africa;
  - b. Universal birth registration for all children born in South Africa, particularly foundlings, those born to irregular migrants and undocumented persons.
- III. Supplement the Immigration Act and other legislation to strengthen measures to regularise stateless persons including an amendment or addition of section 31(2)(b) to accommodate issuance of permanent residence permits to people who are stateless.

- IV. Ensure just administrative action on blocking and releasing South African identity documents by discontinuing the practice of blocking identities without consultation and resolving existing cases of blocked identities.
- V. Amend legislation and take other measures to ensure just administrative action in processing applications for birth registrations after 30 days of the birth and ensure that all births are registered regardless of time passed since birth.
- VI. Regularise the status of all unaccompanied and separated migrant children in the care system who are at risk of statelessness by providing them with permanent residence status.
- VII. Amend legislation to remove barriers to birth registration and to:
  - a. Allow the children of undocumented parents to be registered
  - b. Allow the births of children born out of wedlock to be registered where a mother is unavailable or undocumented
  - c. Allow the children of parents without valid immigration permits to be registered
- VIII. Take steps to ensure that all South Africans who were previously undocumented under the Apartheid regime (and their children) are registered and have access to identity documents in order to access the right to nationality and the socio-economic rights which flow from nationality.
- IX. Amend the restrictive policy on children born to foreigners in South Africa so that section 4(3) naturalisation procedures applies to all otherwise stateless children born before the enactment of the provision in 2013.
- X. Amend legislation so children can apply for South African nationality immediately after birth, and not have to wait until they turn 18.
- XI. Develop regulations and facilitated implementation of section 2(2) of the Citizenship Act to allow stateless children born in South Africa to apply for South African identity documents in line with the recent court order to that effect.
- XII. Ensure that all persons arrested for immigration purposes be brought before a court within 48 hours to assess the lawfulness of detention. Ensure that all persons subject to detention immediately undergo a status determination procedure in order to ensure that no citizens, refugees or stateless persons are held in detention.