

The SADC CRAI Network on Statelessness and the Institute for Statelessness and Inclusion (ISI)

Joint submission to the Human Rights Council at the 29th Session of the Universal Periodic Review

Botswana

Introduction

1. The SADC CRAI Network on Statelessness, represented by DITSHWANELO – The Botswana Centre for Human Rights and Lawyers for Human Rights, and the Institute on Statelessness and Inclusion make this submission to the Universal Periodic Review (UPR) in relation to statelessness,¹ access to nationality and human rights in Botswana.
2. The **SADC CRAI Network on Statelessness** is the Southern African branch of the Citizenship Rights in Africa Initiative (CRAI). The **Citizenship Rights in Africa Initiative (CRAI)** is dedicated to ending statelessness and the arbitrary denial of nationality in Africa.²
3. **DITSHWANELO** is an advocacy organisation with a key role in the promotion and protection of human rights in Botswana society. The Centre seeks to affirm human dignity and equality irrespective of gender, ethnicity, religion, sexual orientation, social status or political convictions.³
4. **Lawyers for Human Rights (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.⁴
5. **The Institute on Statelessness and Inclusion** (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. Over the past two years, the Institute has made over 15 country-specific UPR submissions on the human rights of stateless persons, and also compiled summaries of the key human rights challenges related to statelessness in all countries under the 23rd to the 28th UPR Sessions⁵

¹ 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.

² For more information visit <http://citizenshiprightsafrika.org/>

³ For more information visit <http://www.ditshwanelo.org.bw/index.html>

⁴ For more details of LHR’s statelessness project, see: <http://www.lhr.org.za/programme/rmrp-statelessness-project-accessing-citizenship-and-nationality> .

⁵ For more information about the Institute on Statelessness and Inclusion and its work please see the website <http://www.institutesi.org/>.

6. This joint submission focuses on:

- a. The right of children to acquire and retain Botswana nationality, in particular where they would otherwise be stateless;
- b. Difficulty in accessing birth registration and/or documentation for child refugees when the child is orphaned.

It draws on the combined expertise of the submitting organisations both in Botswana and internationally.

The Universal Periodic Review of the Republic of Botswana under the First and Second Cycles

7. Botswana was first subject to the Universal Period Review on 1 December 2008 during the first cycle. Botswana again appeared before the Human rights Council on 1 January 2013 during the second UPR cycle. Although there were no recommendations specifically mentioning statelessness and the right to nationality, a few previous recommendations received and accepted by Botswana are highlighted below for their relevance.

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

Recommendation	Response by Botswana
Continue to take the necessary measures to make sure that all the population has easy access to free birth registration for newborns - Mexico	Accepted
Improve the reception conditions, health care, access to water and sanitation, adequate housing and food, for refugees; Make sure that refugees are not repatriated in case that their lives are in danger in their country of origin, and promote, through public policies, their total integration into the society out of the refugees camps (Ecuador);	Accepted
Continue its engagement with improving the rights of refugees (Uganda)	Accepted

9. The recommendations related to birth registration and documentation of refugees are further scrutinised below.

Botswana's international obligations

10. Botswana has ratified a number of core international and regional human rights instruments which recognise the right to a nationality. These legal instruments include the International Covenant on Civil and Political Rights (ICCPR, Article 24), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, Article 9); the Convention on the Elimination of all Forms of Racial Discrimination (CERD, 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 (ACRWC, Article 6).

11. While stateless persons have in essence, been denied their right to a nationality, despite the above protections and standards, stateless persons are entitled to the enjoyment and protection of most other human rights enshrined in these core international treaties including protection against discrimination and inequality before the law.
12. Botswana is also party to the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention). But it is not party to the 1961 Convention on the Reduction of Statelessness (1961 Convention).

Botswana's national legal framework

13. The Constitution of Botswana does not expressly provide for the right to Nationality.⁶ The **Botswana Children's Act** of 2009, however, does provide for this right by stating in section 12 that 'every child has a right to a nationality from birth'.⁷ Importantly, this Act has domesticated the CRC, thereby ensuring the domestic application of the Convention.
14. The acquisition of citizenship in Botswana is regulated by the **Botswana Citizenship Act** of 1998 which confers citizenship to persons as follows:
 - a. By birth, if the person is born in Botswana and one of his or her parents is a citizen of Botswana.⁸
 - b. By descent, if born outside of Botswana and at the time of birth, either of the parents is a citizen of Botswana.⁹
 - c. By settlement, if born to a person who has acquired Botswana citizenship due to having lived as a member of a tribe or community or having been customarily accepted as such.¹⁰
 - d. By adoption, when a child younger than three years is adopted by a Botswana citizen.¹¹
 - e. By registration, when the person is a naturalised Botswana citizen or is granted citizenship in recognition of exceptional circumstances.¹²
 - f. By naturalisation, when the person has been resident in Botswana for not less than ten years.¹³
 - g. Dual citizenship is allowed until the age of 21, when the person ceases to be a Botswana citizen.¹⁴
15. These provisions do not address the manner in which (otherwise) stateless children may acquire Botswana citizenship. Children born in the territory of Botswana to stateless or unknown parents are therefore not guaranteed protection against statelessness.
16. In addition, these provisions do not stipulate that every child has a right to *Botswana* nationality, if they would otherwise be stateless. However, they should be interpreted in light of Botswana's obligations under Article 7 of the Convention on the Rights of the Child, which includes an absolute protection against childhood statelessness.¹⁵

⁶ The Constitution of Botswana, 1966.

⁷ Botswana Children's Act 8 of 2009.

⁸ Botswana Citizenship Act 8 of 1998, section 4.

⁹ Ibid, section 5.

¹⁰ Ibid, section 6.

¹¹ Ibid, section 7.

¹² Ibid, section 10.

¹³ Ibid, section 12.

¹⁴ Ibid, section 15. There is currently a Dual Nationality Bill before Parliament, which will look to address the issue of dual citizenship in Botswana.

¹⁵ It must be noted that the position of the Courts is that commitment to an international instrument does not lead to automatic domestic application of the obligations stemming from the instrument. These international instruments are of mere persuasive value. However, the CRC has been domesticated and is therefore now of domestic application through the Children's Act 2009.

17. The three-year time limit for acquisition of citizenship through adoption may create statelessness among children who are adopted after their third birthday, particularly if they did not have a previous citizenship or are liable to losing their previous citizenship upon adoption.
18. The renouncing or automatic loss of citizenship of dual citizens when they turn 21 years of age, is based on the flawed premise that those persons have secured their other nationality, when that may not be the case. The person may lose their other citizenship under a similar law in the other country of their citizenship (if they do not renounce their Botswana citizenship). This creates a risk of statelessness.
19. **The Births and Deaths Registration Act** and its regulations provide the legal framework for birth registration of all persons in Botswana.¹⁶ This Act makes birth registration compulsory in Botswana. Birth registration must be initiated by the father, mother or by the occupier of the dwelling in which the child is born, and must occur within a prescribed period. Late registration of birth is possible, but is subject to penalties.
20. **The Immigration Act** can also be applicable. In the absence of specific legislation protecting the rights of those who are stateless or at risk of becoming stateless, an application for a certificate of exemption under section 32 of the Immigration Act,¹⁷ could be relied upon to grant legal status to such people. Section 31 affords the Minister of Home Affairs the powers to exempt a class of specified persons from obtaining a permit in order to reside or work in Botswana.¹⁸ This is the only pathway to nationality (through subsequent naturalisation) for stateless persons.

The right of every child to acquire and retain a nationality

21. Botswana does not grant any citizenship rights based on birth on the territory (if neither of the parents are Botswana), even for foundlings or children of unknown parents. This is a significant gap in the law, undermining the child's right to a nationality.
22. However, the Children's Act provides for the right of every child to a nationality, and requires that every child receive a birth certificate to prove nationality. Birth registration is readily available to those children born in hospitals and not those who are born at home or who live in remote areas.
23. Furthermore, children born stateless in Botswana will most likely be unable to rely on this provision in order to access Botswana nationality. This is because they have not acquired the right to Botswana citizenship as contemplated by the Citizenship Act. Such a child may apply for naturalisation as a citizen of Botswana after ten years of residing in Botswana. However, Regulation 17(1) of the Botswana Citizenship Act requires that an applicant be in possession of a permanent residence permit. This requirement may be problematic, particularly in relation to child refugees who are orphaned and are unable to claim refugee status as a dependant of a refugee. This group of vulnerable children lacks documentation from their country of origin because their parents may not have registered their births with the embassy, for political reasons. They are thus precluded from applying for either a permanent residence permit or subsequent naturalisation. They are at risk of statelessness.
24. It is also important to note that the Citizenship Act provides for the deprivation of Botswana Citizenship without safeguards against statelessness.¹⁹

¹⁶ The Births and Deaths Registration Act 48 of 1968.

¹⁷ Immigration Act 3 of 2011.

¹⁸ There have been cases where refugees were given citizenship in accordance with the Immigration Act.

¹⁹ The Citizenship Act 8 of 1998, section 18.

Recommendations

25. In light of the information provided in this submission, we urge member states to make the following recommendations to Botswana:

- I. Accede to the 1961 Convention on to Reduction of Statelessness.
- II. Amend the Citizenship Act and regulations in accordance with the Botswana Children's Act, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, to ensure every child's right to a nationality and that no child is born stateless in Botswana.
- III. Take all necessary steps to ensure immediate and universal birth registration of children born in Botswana, particularly foundlings, those born to migrants and undocumented persons and those born outside of hospitals.
- IV. Ensure that all children found in the territory of the state shall, in the absence of proof to the contrary, be considered to have been born within Botswanan territory to Batswana parents.
- V. Amend laws restricting acquisition of nationality through adoption to children below three years of age to ensure that all children (under 18 years of age) adopted by Botswana citizens, acquire Botswana nationality.
- VI. Ensure equal access to documents used to prove nationality, e.g. birth certificates, and provide for alternative systems to prove identity when these forms of proof are not available or cannot be reasonably obtained.
- VII. Ensure that refugees who acquire Botswana nationality are not required to renounce his or her previous nationality if they are unable to. In such situations, the nationality of the state of refuge should be considered as the predominant nationality for purposes of diplomatic protection.
- VIII. Ensure that the Dual Nationality Bill repeals the current automatic loss of Botswanan nationality of dual nationals who have not renounced their second nationality at the age of 21.