# THE LAW IS NOT ENOUGH: REALISING THE CHILD'S RIGHT TO A NATIONALITY IN SOUTH AFRICA

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*The Republic of South Africa ('South Africa') boasts some of the most progressive and inclusive citizenship laws on the African continent, protecting the right to citizenship in both its constitution and subsidiary legislation and affording special protections to children. A simple exercise in comparative law would find that there is no statelessness problem in South Africa but that would be incorrect. A closer look at the implementation of the laws reveals serious problems in the Government's nationality administration, resulting in statelessness. In the South African context, it is not immediately possible to tell whether a child is stateless. It is only once attempts have been made to obtain (recognition of) citizenship and those attempts have failed (because of a faulty system) that a determination can be made. Under customary international law, a person is stateless because of non-recognition of citizenship by any state, whether legally or illegally. As a result, nationality administration procedures are as important as laws. South Africa's failure to formally recognise its citizens because of insurmountable administrative barriers and discriminatory practices is making children in South Africa stateless, rendering its impressive laws useless. This article provides a brief analysis of the historical and legislative context within which South Africa finds itself, then analyses recent jurisprudence on childhood statelessness to illustrate how the right to administrative justice is crucial to South Africa's trajectory of success in ending childhood statelessness, offering recommendations for the way forward.*

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## I INTRODUCTION

More than 60 years since the advent of the 1961 UN *Convention on the Reduction of Statelessness*[1] and 40 years since the *African Charter on Human and Peoples' Rights* ('*Banjul Charter*'),[2] how is the Republic of South Africa ('South Africa') doing in terms of realising the child's right to a nationality? South Africa's constitution[3] is lauded the world over for its revolutionary commitment to a wide range of comprehensive human rights,[4] including the rights of children, but childhood statelessness persists.

This article considers the historical, legislative and implementation factors which may be responsible for the cracks in the system protecting children against statelessness. Children in South Africa today face the cumulative effect of historical, political and social realities in their quest for citizenship.[5] Without citizenship, the new South Africa is a myth to these children and the promise of the constitution, a mockery of their daily realities. Article 1 of the *African Charter on the Rights and Welfare of the Child* ('*ACRWC*') requires those 'Member States of the Organisation of African Unity' whom are parties to the *ACRWC* to adopt 'legislative and other measures' to give effect to the rights in the *ACRWC*.[6] Can South Africa do more to provide legislative protection and to implement the laws it has in a more equal and non-discriminatory way?

The article is divided into four parts. In the first part, it briefly considers the historical context of selective nation-building policies in South Africa, the effects of the apartheid regime and the emerging regressive tendencies in immigration and citizenship policy on the citizenship rights of children today. The second part provides an analysis of the jurisprudential development of childhood citizenship rights in the South African courts and the opportunities and limitations in access to citizenship rights which they reveal. The third part considers which crucial legislative gaps remain and require legal reform. The final part looks at the operation, or implementation, of the law, or lack thereof, which appears to render South Africa's legislative efforts inoperative. The article concludes with brief recommendations for the way forward towards the realisation of the child's right to citizenship in South Africa.

## II HISTORICAL CONTEXT: COLONISATION, APARTHEID AND THE NEW SOUTH AFRICA'S SELECTIVE RAINBOW NATION

Ironically, South Africa's current immigration and internal affairs policies reflect similar attitudes toward what is considered a foreign threat as their colonial and

1 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('*1961 Statelessness Convention*').

2 *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) ('*Banjul Charter*').

3 *Constitution of the Republic of South Africa* ('*Constitution*').

4 Justice Mavedzenge, 'How South Africa Shaped a World Leading Constitution', *Mail & Guardian* (online, 27 October 2021) <https://mg.co.za/opinion/2021-10-27-how-south-africa-shaped-a-world-leading-constitution>, archived at <https://perma.cc/654B-N5NT>.

5 See Institute for Statelessness and Inclusion, *The World's Stateless: Children* (Wolf Legal Publishers 2017).

6 *African Charter on the Rights and Welfare of the Child*, adopted 11 July 1990, OAU Doc CAB/LEG/24.9/49 (entered into force 29 November 1999) ('*ACRWC*').

apartheid contemporaries.[7] The following three quotes from leaders in each of the three eras reflect a strict belief in the absolute right of the state to curate its population free from international interference. In 1913, Jan Christiaan Smuts, Minister of Interior, said: 'It was universally admitted that those who were in a country had the right to the selection of those entering the country'.[8] Cornelius Petrus Mulder, Minister of Immigration in 1969 apartheid South Africa, said: 'Foreigners have no right or claim to residence here. Their residence here is subject to the willingness and decision of the Government'.[9] One year after the first democratic elections, in 1995, Lindiwe Sisulu, Deputy Minister of Home Affairs, said: 'Aliens control stems from the basic right of a sovereign country to decide which non-citizens are welcome within its territory'.[10] It is these attitudes which inform the way South Africa approaches nationality administration and includes or excludes individuals from its citizenship. Today, it is widely accepted that the granting and deprivation of nationality no longer falls strictly within the *domaine réservé* of the state but is subject to international human rights standards,[11] making it more difficult for politicians to rely on state sovereignty as justification for regressive policies.[12] Each of these three eras had their own approach to curating the South African population which still affects children today. Each will be considered in turn.

### A *The Union of South Africa (1910–48)*

South Africa was initially occupied by the Dutch (from 1652) but later became a colony of the British in the early 1800s and remained a British dominion until 1949.[13] In 1909, the *South Africa Act* was passed in the United Kingdom of Great Britain and Ireland (as it then was) ('Britain'), which granted white minority rule over black Africans, Asians, and 'coloured and other mixed races'.[14] The white minority Government enjoyed a level of independence in respect of governance and policymaking but remained a British dominion until 1949. During this period of British-sanctioned white minority rule, various aggressively selective immigration policies were employed to make South Africa progressively more 'white'.[15] Most notably, the 1913 *Immigration Regulation Act* prevented black immigration into South Africa, making the regularisation of black immigrants'

7 Sally Peberdy, *Selecting Immigrants* (Wits University Press 2009) 4.

8 ibid 1.

9 ibid.

10 ibid.

11 Raylene Keightley, 'The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law' (1998) 14(3) *South African Journal on Human Rights* 411, 414.

12 Laura van Waas, *Nationality Matters: Statelessness under International Law* (Intersentia 2008) 36–40.

13 Richard Elphick and Hermann Giliomee (eds), *The Shaping of South African Society 1652–1840* (Wesleyan University Press 1979); 'Britain Takes Control of the Cape', *South African History Online* (Web Page, 4 March 2022) <https://www.sahistory.org.za/article/britain-takes-control-cape>, archived at <https://perma.cc/4JLH-GVX6>; Peberdy (n 7) 11.

14 'Constructing the Union of South Africa; Negotiations and Contestations. 1902–10', *South African History Online* (Web Page, 3 October 2016) <https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10>, archived at <https://perma.cc/X862-G24X>; *South Africa Act 1909*, 9 Edw 7 (United Kingdom).

15 Peberdy (n 7) 107.

statuses practically impossible.[16] Recognising the need for black migrant labour, the Union of South Africa ('Union') concluded labour agreements with neighbouring countries such as Mozambique,[17] which allowed for the provision of labour but did not provide legal immigration status for labourers.[18] The foundation for generations of black migrant labourers and their families lacking proof of legal residence was laid by the impossibility of legally assimilating into South African society for over 80 years, coupled with the massive labour migration actively sought by the Government. The difficulty that black children face today in proving their ancestors' legal residence in South Africa for the purpose of citizenship is a direct result of this racist colonial policy.[19]

It was during this same period that South Africa adopted the *Union Nationality and Flags Act No 40 of 1927* ('*1927 Act*'), the first nationality law in a semi-independent South Africa.[20] It granted Union nationality to persons born and residing in the Union who were not aliens or prohibited immigrants under any law relating to immigration.[21] As such, black migrants were excluded from citizenship from the very inception of citizenship laws in South Africa. Despite the fact that black migration far predates white migration into South Africa, nationality and immigration laws were designed intentionally to exclude black people from the South African national identity and to facilitate the smooth integration of white people.[22]

The process of what Sally Peberdy calls 'selecting immigrants' during colonisation and up until democracy has left a lasting effect on modern policies and laws.[23] The *1927 Act* was largely the basis for the *South African Citizenship Act No 44 of 1949*, which remained in place until 1995, when it was repealed and replaced by the *South African Citizenship Act No 88 of 1995* ('*1995 Act*'). The *1995 Act* was different from its predecessor in some ways but the bases for citizenship remained in line with the previous Acts, extending historical and racial exclusion into the new South Africa. One major development in the *1995 Act* is worth noting as it broke significantly from the past. This was the additional ground for citizenship acquisition provided for children born stateless in the territory.[24] Sadly, there is no record of this section actually being implemented. The *1995 Act* was only meaningfully amended in line with international standards in 2010 when the grounds for citizenship were simplified and more bases for citizenship of those born in irregular migration situations were added.[25] Those excluded from legal immigration status during colonisation were thus consistently excluded from citizenship (which follows only from legal immigration status) until 2013, when the *South African Citizenship Amendment Act No 17 of 2010* took effect. Even

16 ibid 13; *Immigration Act No 22 of 1913* (Union of South Africa).

17 Mozambique was a Portuguese province at the time.

18 Peberdy (n 7) 14.

19 ibid 13.

20 *Union Nationality and Flags Act No 40 of 1927* (Union of South Africa).

21 Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (Stevens & Sons 1957) vol 1, 684, 684.

22 Peberdy (n 7) 11. See also Basil Davidson, *Africa in History* (Orion 1991) 6.

23 Peberdy (n 7) 14.

24 *South African Citizenship Act No 88 of 1995*, s 2(4)(b)(i) (Republic of South Africa) ('*Citizenship Act*').

25 Keightley (n 11) 428. Raylene Keightley, commenting on legislation in 1998, noted that South African laws raise more questions than answers about the acquisition of citizenship.

after 2013, the failure to implement this law perpetuates the cycle of statelessness and statelessness from one generation to the next, affecting mainly black residents and their families.

### B *Apartheid South Africa (1948–94)*

The apartheid policy was officially introduced in 1948 and came into full force in 1961 when South Africa declared itself to be a republic and left the Commonwealth amidst the latter's objections to the former's racist policies.[26] In addition to limiting the non-European population's access to everything from land to educational rights, one of the main objectives of the policy was to systematically exclude them from true South African citizenship.[27] This is evident from the creation of the former Transkei, Bophuthatswana, Venda and Ciskei ('TBVC') homeland states to which black residents were relegated and encouraged to administer their own citizenship.[28] The *Restoration of South African Citizenship Act* only superficially addressed the citizenship of TBVC citizens living in South Africa.[29] The *1995 Act* attempted to remedy this problem by including the territory of the TBVC states in the definition of the territory of South Africa.[30] However, these separation policies still affect citizens today because of the confused amalgamation of the different systems post-apartheid.[31]

Considering South Africa's exclusively white immigration policies and the fact that black labour was still needed for commercial farms and the mining industry, the apartheid Government allowed certain forms of temporary, and even illegal, immigration to suit its labour needs. For decades, black migrants were allowed to travel for work across borders with or without formal status.[32] The apartheid Government encouraged labour migration and ignored its insufficient formal administration. Today, these long periods of stay in South Africa are not recognised as lawful stay towards permanent resident status or citizenship, resulting in subsequent generations being unable to derive legal status from their parents and grandparents. The result is a large (legal) 'foreign population' who have strong links to the State through long-term residence, often stretching over generations.[33] A good example of this scenario is the lack of refugee legislation during the apartheid era when multitudes of Mozambicans fled from civil war in the 1980s to a state where there was no process to regularise their stay. Today, many of the grandchildren of Mozambican refugees live as stateless persons in South Africa because Mozambican law does not allow the transfer of citizenship

26 Peberdy (n 7) 110.

27 See Bentley J Anderson, 'The Restoration of the South African Citizenship Act: An Exercise in Statutory Obfuscation' (1994) 9(2) *Connecticut Journal of International Law* 295.

28 *Bantu Authorities Act No 68 of 1951* (Union of South Africa); *Bantu Homelands Citizenship No 26 of 1970* (Republic of South Africa).

29 *Restoration of South African Citizenship Act No 73 of 1986* (Republic of South Africa).

30 See also *Restoration and Extension of South African Citizenship Act No 196 of 1993* (Republic of South Africa).

31 Jaap van der Straaten and Anna Zita Metz, 'South Africa ID Case Study (English)' (Working Paper, World Bank Group, 2019) 18, 22 <https://documents1.worldbank.org/curated/en/315081558706143827/pdf/South-Africa-ID-Case-Study.pdf>, archived at <https://perma.cc/A565-PPG6>.

32 Peberdy (n 7) 14.

33 ibid 49–50; Jonathan Crush and Vincent Williams (eds), *The New South Africans? Immigration Amnesties and Their Aftermath* (South African Migration Project 1999).

past the first generation born outside of Mozambique[34] and South Africa does not implement its legal safeguards against statelessness, as will be illustrated later in the article.

### C *The New South Africa (Post-1994)*

The advent of democracy was marked by the adoption of the 1996 *Constitution of the Republic of South Africa* ('*Constitution*'), which centres values like human dignity, equality and a common South African citizenship as founding principles of the state.[35] With this, South Africa changed from a system of parliamentary sovereignty to a constitutional democracy based on transformative constitutionalism.[36] It has since been the job of government and the people to realise these constitutional values in every area of society. Section 20 of the *Constitution* protects the right not to be deprived of citizenship.[37] Importantly, the right to administrative justice was introduced, protecting the right to administrative action that is 'lawful, reasonable and procedurally fair', making it finally possible to hold decision-makers to account.[38]

The seminal breakthrough for citizenship rights was the significant amendment to the *South African Citizenship Act* in 2010,[39] after considerable discussion in Parliament on the effects of colonialisation and apartheid on the acquisition of citizenship for people living in South Africa, particularly those previously excluded.[40] The 2010 amendment introduced measures to remove the differentiation between citizens by birth and citizens by descent and introduced a provision for the children of non-citizens to become South African citizens if they were born in South Africa and are still resident there at the age of majority.[41] A provision of citizenship by birth for children born stateless on the territory had been introduced in 1995 and was preserved in the 2010 amendment.[42] The *1995 Act* (as amended) is still not ideal but includes the legal safeguards necessary to end childhood statelessness in South Africa.

Despite the new legal dispensation, there are important developments in the new South Africa that hamper the effect of the progressive laws. The most notable development has been the rise of xenophobia, which has crept into policy and all other legislation which affects documentation of children, such as the *Births and Deaths Registration Act No 51 of 1992* ('*BDRA*'), the *Refugees Act No 130 of 1998*

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34 Patrícia Jerónimo, *Report on Citizenship Law: Mozambique* (Country Report No 2019/06, GLOBALCIT, 2019) 28; Bronwen Manby, *Citizenship Law in Africa: A Comparative Study* (African Minds 2016) 53.

35 *Constitution* (n 3) ss 1, 3. It is worth noting that the 1993 interim constitution phrased the right relating to citizenship differently: see *Constitution of the Republic of South Africa 1993* (No longer in force) ('*Interim Constitution*').

36 Mashele Rapatsa, 'Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) 5(27(2)) *Mediterranean Journal of Social Sciences* 887.

37 The *Interim Constitution* (n 35) has a similar provision.

38 *Constitution* (n 3) s 33.

39 *South African Citizenship Amendment Act No 17 of 2010* (Republic of South Africa) ('*2010 Citizenship Amendment Act*').

40 See the second reading debate of the South African Citizenship Amendment Bill 2010 in Republic of South Africa, *Parliamentary Debates*, National Assembly, 16 September 2010, 104.

41 *2010 Citizenship Amendment Act* (n 39) ss 2(1), 4(3).

42 *Citizenship Act* (n 24) s 2(2) amended by *2010 Citizenship Amendment Act* (n 39) s 2.

('*Refugees Act*'), and the *Immigration Act No 13 of 2002* ('*Immigration Act*'). It has even recently reared its ugly head in the proposed regulations to the *South African Citizenship Act* ('*Citizenship Act*') in which heavily restrictive anti-foreigner measures have been introduced which limit the scope of the new *Citizenship Act*.[43]

The *BDRA* includes discriminatory provisions that make it more difficult and sometimes impossible for foreign parents to register the birth of their children.[44] The *Refugees Act* has been the subject of court cases challenging the way in which it excludes the dependant but non-biological children of refugees and does not cater for unaccompanied refugee children.[45] The *Immigration Act* has become increasingly restrictive in terms of obtaining legal status that could lead to citizenship. The most recent policy on this front is the Department of Home Affairs' *White Paper on International Migration for South Africa*.[46] It sets out the principle for future migration-related decisions and makes it clear that assimilation into the country through permanent residence and citizenship will be reserved for those who can financially contribute to the economy, thus excluding most children.[47]

Apart from the legislative barriers inherent in these laws, the administration of birth registration, refugee status and immigration status has likewise been under fire in the courts for an extreme lack of administrative justice or due process.[48] This has led to massive backlogs in applications for status and birth certificates, causing an increase in irregular migration or citizenship status.

Consequently, South Africa's problem with institutionalised xenophobia and unlawful administration practices has left much to be desired in meeting its constitutional goals. The Constitutional Court and lower courts, having regard to the spirit and purport of the *Constitution*, have developed jurisprudence through precedent-setting judgments on citizenship rights and the legislation which affects an individual's pathway to citizenship. These cases set the tone for the development of the law going forward, but also reveal the weaknesses in South Africa's nationality administration.[49]

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43 See the publication on the draft regulations to the *Citizenship Act* (n 24) for comment at Republic of South Africa, *Staatskoerant*, No 43551, 24 July 2020, 3 <https://static.pmg.org.za/200724SACitizenshipreg.pdf>, archived at <https://perma.cc/87BS-85DK>.

44 *Centre for Child Law v Director General: Department of Home Affairs* [2021] ZACC 31.

45 See, eg, *Mubake v The Minister of Home Affairs* [2015] ZAGPPHC 1037.

46 Department of Home Affairs, 'White Paper on International Migration for South Africa' in Republic of South Africa, *Staatskoerant*, No 41009, 28 July 2017, 66 <https://www.gov.za/sites/default/files/gcis_document/201707/41009gon750.pdf>, archived at <https://perma.cc/HG6S-AU2Y>.

47 ibid.

48 *Ruyobeza v Minister of Home Affairs* [2003] 2 B All SA 697 (C); *Nzama v Minister of Home Affairs* (High Court of South Africa, Davis J, 4 April 2018) ('*Nzama*').

49 For an in-depth study of the history of citizenship in South Africa see Jonathan Klaaren, 'Viewed from the Past, The Future of South African Citizenship' (2010) 69(3) *African Studies* 385; Jonathan Klaaren, 'Constitutional Citizenship in South Africa' (2010) 8(1) *International Journal of Constitutional Law* 94.

## III THE CHILD'S RIGHT TO A NATIONALITY IN SOUTH AFRICA: A JURISPRUDENTIAL BREAKTHROUGH

South Africa's courts have handed down four precedent-setting judgments in the past 10 years on the proper implementation and interpretation of the *Citizenship Act* and one on the *BDRA* (which directly affects citizenship). The relevant courts are the High Court of South Africa ('High Court'), whose decisions can be appealed to the Supreme Court of Appeal of South Africa ('Supreme Court of Appeal') and theirs in turn to the Constitutional Court of South Africa ('Constitutional Court'). The Constitutional Court is the highest court of South Africa and may decide constitutional matters.[50] The Constitutional Court makes the final decision on whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court or a court of similar status before that order has any force.[51] Two of the aforementioned cases were ultimately heard before the Constitutional Court for confirmation of constitutional invalidity — *Chisuse v Director General, Department of Home Affairs* ('*Chisuse*') and *Centre for Child Law v Director General, Department of Home Affairs* ('*Naki*').[52] These concerned the interpretation of the *Citizenship Act* as it relates to citizenship by birth and equality in birth registration and acquisition of nationality. The two other cases were finally decided by the Supreme Court of Appeal as there were declarations of rights but no legislation was declared invalid — *DGLR v Minister of Home Affairs* ('*DGLR*') and *Minister of Home Affairs v Ali* ('*Ali*').[53] These addressed the interpretation of the 'otherwise stateless' provision (s 2(2)) and the provision granting citizenship to foreign children born in the territory at the age of 18 years (s 4(3)). Another case was finally decided in the High Court — *Jose v Minister of Home Affairs* ('*Jose*')[54] — that dealt with the same matter. Each is discussed in turn with an analysis of their significance.

### A *DGLR v Minister of Home Affairs*

> 2. Citizenship by Birth
>
> …
>
> (1) Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if—
>
> (a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

50 *Constitution* (n 3) ss 166, 167(3).

51 ibid s 167(5).

52 *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20 ('*Chisuse*'); *Centre for Child Law v Director General: Department of Home Affairs* [2021] ZACC 31 ('*Naki*').

53 *DGLR v Minister of Home Affairs* (High Court of South Africa, Matojane J, 3 July 2014) ('*DGLR*'); *Minister of Home Affairs v DGLR* (High Court of South Africa, Matojane J, 11 March 2015) 5 [12] ('*DGLR*, Reasons for Order'); *Minister of Home Affairs v Ali* (1289/17) [2018] ZASCA 169 (30 November 2018) ('*Ali*').

54 *Jose v Minister of Home Affairs* [2019] ZAGPPHC 88 ('*Jose*').

> (b) his or her birth is registered in the Republic in accordance with the *Births and Deaths Registration Act*, 1992 (Act No 51 of 1992).[55]

The *DGLR* judgment was the first to address the interpretation and implementation of s 2(2) of the *Citizenship Act*, which provides citizenship by birth to children born in South Africa who would otherwise be stateless. The 'otherwise stateless' provision, a domestication of arts 6 and 7 of the UN *Convention on the Rights of the Child*[56] and the *ACRWC* respectively, is accepted as the shortest, most competent route to ending statelessness worldwide. If this provision was employed consistently by all states, statelessness at birth would be eradicated within a generation because no child would be born stateless. As the golden standard for safeguards in a legislative regime seeking to eradicate statelessness, it is important that the provision is interpreted correctly and implemented effectively.

The consideration of this case in court aired and resolved several barriers to the efficacy of s 2(2). The judgment contributes to the jurisprudence and development of the law in several ways: by clarifying the 'best interests of the child' principle in the context of citizenship rights; by providing the correct approach to determining whether a child is stateless and whether their birth is registered for the purposes of s 2(2);[57] by recognising the need for regulations in facilitating the application of the law; and by employing the special statutory review mechanism for citizenship decisions.

In summary, DGLR was born in South Africa to two Cuban nationals whom had been residing outside of Cuba for longer than a year and were, under Cuban law, no longer legally able to pass citizenship to their child born abroad.[58] This much was confirmed by the Cuban embassy in a *note verbale* confirming the official position of the Cuban State.[59] DGLR did 'not have the citizenship or nationality of any other country' nor did she have the 'right to such citizenship or nationality' as stipulated by s 2(2) and was therefore entitled to South African citizenship by birth. The Department of Home Affairs ('Department') did not agree and declined to recognise her as such. She approached the Court for an order declaring her to be a South African citizen and directing the Department to issue regulations to s 2(2) for its practical application. These orders were granted and confirmed upon appeal to the Supreme Court of Appeal in 2016.[60] Although none of the orders have been complied with at the time of writing this article — which in itself reveals the failure of the Department to implement the law[61] — the judgment's contribution to the development of the law is important to the cases that follow.

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55 *Citizenship Act* (n 24) s 2(2).

56 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

57 *DGLR*, 'Reasons for Order' (n 53) 5 [12].

58 DGLR, 'Founding Affidavit', Submission in *DGLR* (n 53) 6–7 [18]–[19].

59 ibid 8 [27], 9 [31].

60 *Minister of Home Affairs and Others v DGLR* (Supreme Court of Appeal, Maya DP, Shongwe, Theron and Swain JJA and Fourie AJA, 6 September 2016) ('*DGLR* Appeal').

61 See, eg, Lawyers for Human Rights, *Statelessness in South Africa, Re-opening of Refugee Reception Offices and Processing of Documentation for Refugees, and Asylum Seekers, and Trends on Arrests and Detention of Migrations* (Brief to the Portfolio Committee on Home Affairs, 13 September 2022) 4 [7] <https://static.pmg.org.za/220920LHR_submission_to_the_PC_Home_Affairs_Sep_2022.pdf>, archived at <https://perma.cc/XU2B-4Y9U>.

The *Constitution* enshrines the paramountcy of the best interests of the child in all matters which affect the child. It is a substantive right, as well as an interpretive principle and a procedural rule.[62] It does not specify, however, what the best interests of the child might entail in every possible situation, which would depend on each individual case. However, courts often develop the content of this right in different situations, providing a guide for future courts applying it to new cases. In response to the Department's argument that DGLR was able to apply for permanent residence and that it was therefore unnecessary to grant her citizenship, the Court clarified that permanent residence is not a substitute for citizenship and it is not in the best interests of the child to have permanent residency instead of citizenship.[63] This clarification and development of the best interest principle in the context of nationality matters is important to future applications of the section in both the courts and when the Department is determining a child's immigration status, particularly where the Department is reluctant to grant citizenship.

The Department raised three interpretative issues which would have been detrimental to the implementation of s 2(2) but for the Court's subsequent clarification. The Department argued that the handwritten birth certificate issued to DGLR does not qualify as birth registration 'in accordance with the *Births and Deaths Registration Act*', which is required for the *Citizenship Act* for s 2(2) to apply.[64] A handwritten birth certificate is issued to all children born in South Africa who are not citizens, permanent residents or refugees. It means that their births are recorded but not entered into the National Population Register.[65] The Department held that only those whose particulars are entered into the National Population Register are registered for the purposes of the *BDRA*. The Court did not accept this line of reasoning and concluded that the handwritten birth certificate was registration in line with the *BDRA* (which states that the issuance of a birth certificate is a registration of birth).[66] This interpretation is crucial to the operation of s 2(2). If the Department's position were correct, it would mean that hardly any stateless children would qualify for citizenship in terms of s 2(2) because stateless children in South Africa are unlikely to have permanent residency or refugee status.

The Department's second interpretive contention was that DGLR was not stateless because her parents were Cuban nationals.[67] This reveals a basic misunderstanding of the way in which nationality laws operate differently in each country and do not necessarily afford citizenship to all children born to its citizens anywhere in the world, as is the case in South Africa. This primary misunderstanding of citizenship law led the Department to assume the child's citizenship without considering the actual laws and actions of the state involved. The Department's position was that Cuba ought to grant DGLR citizenship and

62 UN Committee on the Rights of the Child, *General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration*, UN Doc CRC/C/GC/14 (29 May 2013) [6].

63 *DGLR*, 'Reasons for Order' (n 53) 5 [12].

64 Minister of Home Affairs and Others, 'Appellants' Heads of Argument' in *DGLR* Appeal (n 60) 10–12 [25]–[29].

65 Sindisiwe Moyo, 'South Africa: Birth but Not Birthright', *Rosalux* (Blog Post, 18 January 2021) <https://rosalux-geneva.org/south-africa-birth-but-no-birthright>.

66 *Births and Deaths Registration Act No 51 of 1992*, s 5(3) (Republic of South Africa) ('*BDRA*').

67 DGLR, 'Respondents' Heads of Argument' in *DGLR* Appeal (n 60) 8 [22].

therefore she could not be stateless. If South Africa only granted South African citizenship to children in cases where it considered the refusal of citizenship by the other country to be fair, many children would be without remedy and statelessness would not be resolved.[68] The Court equally dismissed this argument and commenced a factual enquiry into whether the child had no other nationality and no right to another nationality. Once this was established, the Court was able to apply s 2(2). This interpretation confirmed the need for a purely factual enquiry instead of an inquiry into who ought to grant citizenship, which will be useful for future applications.

The Department's third interpretive contention was that DGLR was not stateless because she had not exhausted all remedies for a grant of citizenship in her parents' country of origin, Cuba, nor did the Cuban embassy have the requisite authority to make determinations of citizenship.[69] The Department also argued that DGLR may at some point in the future be able to apply for Cuban citizenship.[70] The Court rejected these arguments in line with international standards. The exhaustion of all remedies in Cuba would require DGLR to travel to her country of origin, which would be impossible without a passport and would result in excessive costs and delays (inherent in litigation), defeating the ends of justice.[71] According to the United Nations High Commissioner for Refugees ('UNHCR'), an embassy in the country where a child is residing is indeed the relevant authority for making such a decision[72] and notes that there is no requirement that domestic remedies must be exhausted for a finding of statelessness, as this would place an unreasonable burden on an applicant.[73] The customary international law definition of statelessness must be applied to the status of a person at the time when the case is being determined. Whether a person may be able to acquire the nationality of a state in the future is therefore irrelevant to the determination of statelessness.[74] These contentions would place insurmountable barriers in the way of stateless children born in South Africa and were correctly rejected by the Court.

When DGLR's mother first approached the Department to apply for citizenship under s 2(2), she was informed that there were no regulations accompanying the *Citizenship Act* which provide for an application form that could be filled in;

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68 UNHCR, *Experts Meeting: The Concept of Stateless Persons under International Law* (Summary Conclusion, 2010) 4 ('*Summary Conclusion*'):

> where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national for the purposes of Article 1(1) — rather, it is the position under domestic law that is relevant.

69 DGLR, 'Respondents' Head of Argument' in *DGLR* Appeal (n 60) 8–9 [22]–[23].

70 Minister of Home Affairs and Others, 'Appellants' Heads of Argument' in *DGLR* Appeal (n 60) 10 [23].

71 'Annexure KM4' in *DGLR* Appeal (n 60). This annexure includes information from the Cuban Consulate in South Africa about the process required for naturalisation of a child born to Cuban emigrants abroad dated 21 August 2009.

72 UNHCR, *Summary Conclusion* (n 68) 17:

> If an individual is refused such registration or is prevented from applying for it, he or she is not considered as a national for the purposes of Article 1(1).

73 UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (Handbook, 2014) 17 [39]–[40] ('*UNHCR Handbook*'); *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1(1) ('*1954 Statelessness Convention*').

74 UNHCR, *Summary Conclusion* (n 68) 20.

therefore, she could not apply. The official at the local office simply had no idea how to facilitate the application. The Court recognised this fundamental flaw and ordered the Department to issue regulations within 12 months of the order being issued.[75] This would allow local offices to process applications for stateless children instead of requiring a lawyer to escalate the matter to the head office and bring an application to the High Court.

Section 25 of the *Citizenship Act* (as inserted by the *1995 Act*) makes provision for a special statutory review of all decisions made by the Minister under the Act. This additional judicial oversight mechanism makes it easier for the courts to review the decisions of the Minister, including a consideration of the merits of individual cases and even to substitute the Minister's decisions if necessary. Despite the Department's contention that such a substitution is a violation of the separation of powers of government, the Court applied s 25 and declared DGLR to be a South African citizen.[76] The power of the Court to review nationality decisions is crucial to an individual's access to citizenship rights.

The *DGLR* case aired all of the potential interpretive and practical barriers to s 2(2) and by settling these barriers, provided a clear way forward for South Africa's best chance at eradicating statelessness in the country.

### B *Chisuse v Director General, Department of Home Affairs*

> 2. Citizenship by Birth
>
> (2) Any person—
>
> (a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by birth; or
>
> (b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen,
>
> shall be a South African citizen by birth.[77]

The *Chisuse* case was an attempt by five applicants to access their rights to South African citizenship through their South African parents. The case was ultimately heard by the Constitutional Court, which handed down an inspired judgment vindicating the rights of the applicants and providing a constitutionally sound interpretation of s 2(1) of the *Citizenship Act* which had previously been susceptible to exclusionary interpretation. When the *Citizenship Act* was amended in 2010, it removed the distinction between those born to South African citizens outside of South Africa (previously citizens by descent) and those born to South African citizens inside of South Africa (citizens by birth). In the amended Act, both categories are referred to as citizens by birth. There were no significant differentiating consequences for these two categories; Parliament seemed to want to do away with the arbitrary distinction and as a result both categories were included under one section.[78] The way the new section was phrased posed a

75 *DGLR* Appeal (n 60) ord 4(d).
76 ibid ord 3.
77 *Citizenship Act* (n 24) s 2(1).
78 *Chisuse* (n 52).

question as to whether it preserved the citizenship rights of previous citizens by descent or if it only applied to those born after the amendment came into force in 2013.

The Constitutional Court's judgment waded into the history of citizenship rights in colonial and apartheid South Africa, and acknowledged that citizenship is, and has been since the early 1900s, 'a deeply fraught political, social and ideological tool used to define access to membership of the South African polity'.[79] The Court granted the applicants their citizenship after many years of statelessness and in the process created a narrative which set the standard for nationality determination and administration, marked by a sensitivity to the dignity of South Africans who had endured a century of 'othering' and citizenship stripping.

In summary, the applicants had all been born abroad to South African citizens before 2013 (the year the amendment came into force) and their births had not been registered, which had been a requirement for citizenship acquisition prior to 2013. Each applicant had their application for birth registration refused for different reasons but none were provided with formal reasons or the opportunity to appeal the decision. They were sent from 'pillar to post' until they approached Lawyers for Human Rights for assistance.[80] In making their case to the Court, the applicants realised that the amendment to the *Citizenship Act* seemed to exclude them from citizenship. Since the Department was still denying their right to citizenship, this seemingly unintended error had to be corrected by the Courts. In the High Court, ss 2(1)(a) and (b) were declared unconstitutional and an extended reading of the sections was put in place pending the Constitutional Court's confirmation of constitutional invalidity.[81] At the same time, four of the five applicants were declared to be South African citizens. One such applicant was a child born in Accra, Ghana, to a South African citizen who had passed away. The child had been stateless from birth until this judgment was passed in 2021, when she was 14 years old.

Godfrey Dalitso Kangaude, Deevia Bhana and Ann Skelton argue that the law is a narrative.[82] The narrative created by both the legislature and the courts influences the social, political and cultural norms of a society and ultimately affects the level of enjoyment of rights which children can access. In a country where citizenship is a matter of historical violation and xenophobic attitudes are the order of the day, a legal narrative that encourages inclusion and reminds us of the importance of the dignity of the applicants is crucial. The Constitutional Court dedicated a significant portion of the judgment to reframing citizenship within a constitutional South Africa. The Court articulated the importance of an inclusionary citizenship regime as follows:[83]

> Citizenship and equality of citizenship is therefore a matter of considerable importance in South Africa, particularly bearing in mind the abhorrent history of citizenship deprivation suffered by many in South Africa over the last hundred and more years. Citizenship is not just a legal status. It goes to the core of a person's identity, their sense of belonging in a community and, where xenophobia is a lived

79 ibid 1.

80 ibid 3.

81 ibid.

82 Godfrey Dalitso Kangaude, Deevia Bhana and Ann Skelton, 'Childhood Sexuality in Africa: A Child Rights Perspective' (2020) 20(2) *African Human Rights Law Journal* 688, 695.

83 *Chisuse* (n 52) [28].

> reality, to their security of person. Deprivation of, or interference with, a person's citizenship status affects their private and family life, their choices as to where they can call home, start jobs, enrol in schools, and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.

Having regard to the three South African politicians quoted earlier in the article,[84] in office at different times across the 20th century, the Constitutional Court provides a meaningful departure from the exclusionary sentiments regarding citizenship that mark South Africa's history. According to the Court, the *Constitution* was designed to do exactly that: to 'ensure a radical and transformative departure from the past'.[85] The new South Africa is founded upon a common South African citizenship[86] of which no citizen may be deprived[87] and where all citizens are equally entitled to the rights, privileges and benefits of citizenship.[88] The *Chisuse* judgment establishes these principles as a point of departure in nationality matters 'which recognises the fundamental importance of citizenship under the Constitution, bearing in mind our country's history, and recognising the possible violations of the Constitution that would occur'.[89] The judgment situates citizenship rights within a narrative that promotes inclusion, equality and dignity. The law therefore provides a narrative that will influence political, social and cultural attitudes to citizenship going forward, hopefully expanding the space for inclusionary citizenship practices.

In the end, the Constitutional Court did not confirm the declaration of constitutional invalidity of s 2(1) but instead provided an interpretation that includes those born before 2013 and is in line with the spirit, purport and objects of the *Bill of Rights*. As such, the Court prevented a situation in which the applicants and others in similar situations were deprived of citizenship overnight,[90] referring specifically to the possibility of statelessness when determining that the section not be interpreted in this way.[91] The Court confirmed that s 2(1) applies to all persons born to South African citizens anywhere in the world at any point in the past, present or future.[92] This means that it is no longer necessary to interpret the morass of pre-2010 legislation applicable at the point when an individual was born in order to determine their citizenship status. It provides clarity on the way the section must operate to the officials who are charged with applying the law.[93] Finally, the Court confirmed that 'citizenship does not depend on a discretionary decision; rather, it constitutes a question of law',[94] thus confirming that a court is competent to declare citizenship without interfering with the separation of powers of government. This judgment has paved the way for the following judgments in which it has been quoted extensively.

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84 Peberdy (n 7) 1.

85 *Chisuse* (n 52) [29].

86 *Constitution* (n 3) s 3.

87 ibid s 20.

88 ibid s 3(2).

89 *Chisuse* (n 52) 34.

90 ibid.

91 ibid 76.

92 ibid 78.

93 *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2010] (2) BCLR 99 (CC), 124–5.

94 *Chisuse* (n 52) 88.

C *Jose v Minister of Home Affairs and Minister of Home Affairs v Ali*

> 4. Citizenship by Naturalisation
>
> …
>
> (3) A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if—
>
> (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and
>
> (b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No 51 of 1992).[95]

Two cases pertaining to s 4(3) of the *Citizenship Act* have been adjudicated in the South African courts — the cases of *Jose* and *Ali*. As in the *DGLR* case, s 4(3) had not been implemented since its inclusion in the *Citizenship Act* for want of a regulation and because of conflicting interpretive positions. Both these cases declared the applicants to be South African citizens while clarifying the correct interpretation of the Act. In *Ali*, the Department was ordered to issue regulations providing a form to facilitate applications for citizenship at local offices.

The applicants in both cases were born to asylum seekers in South Africa and had lived in South Africa from the time of their birth until the age of 18 years. The importance of these two cases lies in the courts' finding that s 4(3) is applicable retrospectively, applying to all persons born before its inclusion in the *Citizenship Act* in 2013. The *Jose* case goes further than *Ali* in that it also declared that the Minister does not have the discretion to deny these applications once all the prescribed requirements have been met, unlike in naturalisation matters.

Section 4(3) is an important safeguard against statelessness, in that those who are born to refugees and live in South Africa all of their lives are likely to have lost ties with their parents' country of origin, making it difficult, if not impossible, to apply for citizenship in that country. In addition, many southern African countries did not allow dual citizenship until very recently and their laws provide for the deprivation of citizenship if the individual was born in another country and did not formally opt into its citizenship and renounce the citizenship of the country where they were born.[96] Such provisions ignore the fact that the person may not acquire the nationality of their country of birth and assumes that they have done so, automatically cancelling that person's citizenship, leading to statelessness. Section 4(3) recognises the genuine link that a person forms with the country in which they are born and raised and the likelihood that they will remain there, as well as the fact that they may lose the citizenship of their parents' country of birth at the age of majority. It is therefore important that this section is implemented and facilitated by regulations. The Department is yet to promulgate regulations on this section and no further applications have been granted to the anecdotal knowledge of practitioners in the sector. Some lawyers in the field have reported that rejections have been received during 2022, the reasons for rejection being the fact that an applicant's parent has permanent residence. Litigation on this faulty

95 *Citizenship Act* (n 24) s 4(3). This section was added by the *2010 Citizenship Amendment Act* (n 39).

96 See Manby, *Citizenship in Africa* (n 34) 73–74.

interpretation will likely be necessary to bring its application in line with the best interests principle established in the *DGLR* case, as well as the principle that children need to be considered as independent rights-holders whose fates must be determined separately from those of their parents in order to give them the best chance of a constitutionally consistent existence.[97]

### D *The Naki Case*

> Whilst society *may* express its condemnation of *irresponsible liaisons* outside the bonds of marriage, visiting this condemnation on an infant, through the application of the law, is illogical and unjust. This Court has warned against punishing children for the *sins* of their parents; rather, children must be regarded as autonomous right-bearers and not 'mere extensions' of their parents. Moreover, imposing undue burdens on the 'child born out of wedlock' is contrary to the basic concept of our system that legal burdens should be imposed on relationships between individuals. Obviously, no child is responsible for her birth and penalising the child is an ineffectual, as well as an unjust way of forcing parents to comply with stereotypical norms of the supremacy of the marital family.[98]

The *Naki* case,[99] so named for its initial applicant, addresses the right to birth registration, and subsequently citizenship, of children born outside of wedlock to unmarried fathers. When read together, the *BDRA* and its regulations barred unmarried South African fathers from registering the birth of their child if the child's mother was deceased, undocumented or absent, leading to childhood statelessness. The case records the experiences of not only the applicant but approximately 30 other children in the same position. The unmarried fathers desperately attempted to register the births of their children under their names but were blocked due to the fact that the *BDRA* requires the mothers to be legally documented and present to consent to such registration. There was no provision for the registration of a child in the name of the father without the mother's presence and consent.

The Constitutional Court declared the relevant sections of the *BDRA* unconstitutional and severed them from the Act.[100] The result is that a single father may now register his child in his name, regardless of the status or presence of the mother. The case brings the *BDRA* in line with constitutional and international law standards on the equal treatment of children born in or out of wedlock. An issue that remains to be addressed is the fact that the Department still requires DNA proof of paternity in these cases, blocking those who cannot afford to acquire such proof from accessing birth registration and therefore citizenship.[101]

97 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) [42].

98 *Naki* (n 52) [72] (citations omitted).

99 ibid.

100 ibid [71], [88].

101 Department of Home Affairs, *Departmental Circular No 5 of 2014: Requirements Relating to Paternity Tests in Respect of Registration of Births and Referral to National Health Laboratory Services* (Departmental Circular, 3 September 2014).

## IV CRUCIAL OUTSTANDING GAPS IN THE LAW — A SPECIAL DISPENSATION FOR CHILDREN ON THE MOVE

Two categories of children remain at risk of statelessness because of a gap in the otherwise comprehensive South African laws. They are foundlings and unaccompanied migrant children.

### A *Foundlings*

The *Citizenship Act* does not clearly state which nationality rights should be afforded to foundlings in South Africa. In practice, foundling children under two years of age are granted South African nationality under (presumably) s 2(2) of the *Citizenship Act*, which provides nationality to children who are born in South Africa but who would otherwise be stateless.[102] A key requirement of this section is that the child is born in South Africa. Where a child is found at a young age it can easily be assumed that the child is born in the territory and the Department is not opposed to registering them as South African citizens. In *33 Children and ABBA v Minister of Home Affairs*,[103] the Department agreed to register the 33 children as South Africans, even though their place of birth was unknown. All the children were approximately two years old or younger, making it easy to assume that they were born in South Africa. The resolution of status for this category of foundling is thus relatively unproblematic.

However, when foundling children are older, the Department does not automatically grant citizenship nor register the birth of such children, particularly where there are clues that they might be foreign. In a case that has not reached the courts, Lawyers for Human Rights made an application to the Department for citizenship based on the assumption that a child, Manny,[104] was born in South Africa and was stateless (arguing in the alternative for permanent residence on special discretionary grounds).[105] Manny was found at the age of two and placed in alternative care by the Department of Social Development. Because Manny was found with an unrelated woman who spoke Portuguese, the authorities were reluctant to grant him nationality, even though his is exactly the kind of case for which s 2(2) is designed. The fact that he was in the care of a Portuguese-speaking woman caused the authorities to think that he may be Angolan. This approach ignored the fact that the language of caregivers or parents does not prove or guarantee the nationality of the closest country that speaks that language. Manny's social worker spent years attempting to acquire a birth certificate and citizenship from the Angolan embassy to no avail. There was not sufficient proof that his parents were Angolan. The Department should have granted Manny South African citizenship under s 2(2) of the *Citizenship Act*. However, in 2016, the Department

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102 See Lawyers for Human Rights and Institute on Statelessness and Inclusion, Joint Submission to the UN Human Rights Council at the 27th Session of the Universal Periodic Review, 22 September 2016, [30].

103 *ABBA Specialist Adoption & Social Services v Minister of Home Affairs* (High Court of South Africa, Case No 9779/19, commenced 12 February 2019). See also Tessa Peacock and Paula Proudlock, 'ABBA Specialist Adoption and Social Services and Others v Minister of Home Affairs and Others: Case Note' (forthcoming).

104 Not his real name.

105 *Childhood Statelessness in South Africa* (Institute for Statelessness and Inclusion and Lawyers for Human Rights 2017) 9.

granted Manny permanent residence instead, still suspicious that he may be Angolan, even though years of correspondence with the Angolan embassy proved that he was not.[106]

South Africa has signed, but not ratified, the outdated 1930 League of Nations *Convention on Certain Questions relating to the Conflict of Nationality Law*.[107] The treaty requires a state party to regard a child who has been found on its territory and whose place of birth is unknown as having been born in its territory.[108] It further requires the state in which the child was found to grant citizenship to such a child born, or assumed to be born, in its territory where the parents are unknown.[109] This treaty, to which South Africa is not a party, is echoed in the UN *Convention on the Reduction of Statelessness*, to which South Africa is also not party and as such means little for the practical application of nationality rights of foundlings in South Africa today. The *Convention on the Reduction of Statelessness* may be of persuasive value in South African courts because of the constitutional requirement that these courts take international law into account when interpreting the *Bill of Rights* but its weight is questionable.[110] Regardless, a foundling child in South Africa should not be required to approach a court to have access to citizenship. The Department, being aware of this gap, is in a position to amend the law now to fulfil its duty toward children found in its territory.

The *BDRA* provides another possible, but vague, avenue to citizenship for foundling children. Section 12 of the *BDRA* and reg 9 of the *Regulations on the Registration of Births and Deaths 2014*[111] address the registration of births of orphaned or abandoned children. They require the registration of such children, even where their parentage is unknown; however, reg 8 stipulates that where a child is foreign they must be registered as such.[112] The regulation provides no further guidance on how to decide whether a child is foreign, leaving it open to the social worker or Department of Home Affairs official to derive the child's nationality, likely incorrectly, from their physical features or the rumoured name of the unknown parent. This vagueness leaves the child vulnerable to the racial and ethnic biases of the person to whom the child is at mercy. This ambiguous situation is not good enough to relieve South Africa of its duty of care towards that child. The law needs urgent reform in this area.

### B *Children on the Move — Unaccompanied and Separated Migrant Children at Risk of Statelessness*

The *International Covenant on Civil and Political Rights* ('*ICCPR*') places a duty on member states to adopt the necessary measures domestically to ensure that every child has a nationality at birth, even though states are not obligated to grant

106 ibid.

107 *Convention on Certain Questions relating to the Conflict of Nationality Law*, opened for signature on 13 April 1930, 989 UNTS 175 (entered into force 13 December 1975).

108 ibid art 14.

109 ibid.

110 *Constitution* (n 3) s 39(1)(b).

111 *BDRA* (n 66) s 12; *Regulations on the Registration of Births and Deaths 2014*, r 9 (Republic of South Africa) ('*RRBD*').

112 *RRBD* (n 111) r 8.

nationality to every child born in their territory.[113] No discrimination based on the status of the child's parents is allowed. This duty is not confined to children born in the territory. While this duty is clearly on the state where the child is born and the state of the parents' nationality, where children are present in a country and their place of birth and/or parents nationality is unknown, the duty must fall on the state of residence. This is the case with children who have migrated to South Africa independently or with family from whom they have subsequently been separated. Often, young children who migrate are not able to provide proof of the information relevant to the determination and recognition of their citizenship, such as documents regarding their country of birth and the identity and citizenship of their parents. Where the information provided by the children is scant or unverifiable, the state of residence has a duty to create a pathway to nationality.

South African law does not currently make provision for the acquisition of legal status for children born outside of South Africa who are stateless. The *Immigration Act* provides the Minister of Home Affairs with the discretion to grant permanent residence to any foreigner if there are special circumstances.[114] This section can be employed to resolve the status of such children but is not specifically designed for this purpose and its processes are complicated and costly. There is an urgent need for the Department to address this legislative gap and to provide a special dispensation of permanent residence to such children. This will enable them to decide whether they would like to apply for South African citizenship or pursue citizenship in the country of their birth upon reaching the age of majority. This solution provides legal status to unaccompanied or separated migrant children while preserving their options for citizenship elsewhere, if available, and presenting them with a pathway to South African citizenship if they are stateless or after a period of five years. The Department of Social Development, in particular, has raised this as an urgent issue which needs to be addressed by the Department of Home Affairs.[115] Litigation against the Department has previously been averted by a settlement in which 14 unaccompanied or separated migrant children were granted permanent residence under these circumstances.[116] The Department will need to act soon to avoid potential litigation in the future and to ensure children living in its territory have access to their rights.

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113 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See also UN Human Rights Committee, *General Comment No 17: Article 24 (Rights of the Child)*, UN Doc INT/CCPR/GEC/6623/E (7 April 1989).

114 *Immigration Act No 13 of 2002*, s 31(2)(b) (Republic of South Africa).

115 South African Government, Department of Social Development, 'Social Development on Colloquium on Accompanied and Undocumented Migrant Children' (Media Statement, 18 October 2017) <https://www.gov.za/speeches/social-development-colloquium-unaccompanied-and-undocumented-migrant-children-18-oct-2017>, archived at <https://perma.cc/ZR5M-YSJY>. See generally South African Government, Department of Social Development and Department of Home Affairs, 'Colloquium on Separate and Unaccompanied Migrant Children: 16, 17 and 18 October 2017' (Background Paper, October 2017). See also Farren Collins, 'South Africa's Invisible Children', *TimesLIVE* (online, 19 October 2017) <https://www.timeslive.co.za/news/south-africa/2017-10-19-south-africas-invisible-children/>, archived at <https://perma.cc/V87B-AXWL>; 'SA Takes on Plight of Undocumented Migrant Children', *SA News* (online, 18 October 2017) <https://www.sanews.gov.za/south-africa/sa-takes-plight-undocumented-migrant-children>, archived at <https://perma.cc/3KBJ-S8VT>.

116 This was in response to a letter of demand sent in October 2020 on behalf of the Scalabrini Centre of Cape Town by Lawyers for Human Rights to the Minister of Home Affairs.

## V UNDER THE NON-OPERATION OF ITS LAW — A CALL FOR DUE PROCESS

Having regard to the laws discussed previously and the expansion thereof by the courts, one might be tempted to conclude that South Africa has no childhood statelessness problem. That would be wholly incorrect. Recent jurisprudence in the South African courts and also at the continental level has shed light on the devastating effect that a chronic lack of due process can have on the recognition of citizens or potential citizens. The African Court on Human and Peoples' Rights in *Anudo Ochieng Anudo v Tanzania* ('*Anudo*')[117] recently found that an arbitrary *denial* of citizenship amounts to an arbitrary *deprivation* of citizenship, which is prohibited by international law. The denial of nationality by way of burdensome, arbitrary and discriminatory application processes and decision-making, or the complete failure to make decisions or provide processes at all, is not unique to the African context but it is certainly common. In this context, the administration of nationality is as important (or as detrimental) to citizenship rights as the legislation and needs to be assessed.

Despite South Africa's laws and jurisprudence, the Government is failing children on account of its discriminatory practices and inefficient processes. The African Committee of Experts on the Rights and Welfare of the Child ('Committee') has addressed a similar situation emerging from the application of the law in Kenya in the *Children of Nubian Descent* case,[118] and have subsequently released an extensive general comment on art 6 which has liberally expanded the opportunity for the application of this article.[119] Although Kenya's laws provide for the acquisition of citizenship by Nubians on the same basis as other Kenyans, additional hurdles of proof are placed in the way of Nubian children, leading to statelessness. The Committee found this to be a violation of art 3 (prohibition on unlawful/unfair discrimination) of the *ACRWC*.[120] The Committee found that the additional hurdles for Nubian children leave them with no hope for obtaining proof of their citizenship. The same can be said for certain groups of children in South Africa. Every child has similar rights to citizenship but the *BDRA* makes it more difficult for some children to obtain proof of their citizenship in the form of a birth certificate, particularly for the children of migrants and children living outside of the outdated norm of the 'nuclear family'.[121] It is not the citizenship laws themselves but the belaboured system of proof which robs these children of the hope of obtaining citizenship.

The lack of just administrative action or due process in respect of government decisions on citizenship has become one of the main causes of statelessness in

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117 *Anudo v United Republic of Tanzania (Judgment)* (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018) ('*Anudo*').

118 *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v The Government of Kenya* (African Committee of Experts on the Rights and Welfare of the Child, Decision No 002/Com/002/2009, 22 March 2011) ('*Children of Nubian Descent*').

119 African Committee of Experts on the Rights and Welfare of the Child, *General Comment No 2 on Article 6 of the ACRWC: 'The Right to a Name, Registration at Birth, and to Acquire a Nationality*', OAU Doc No ACERWC/GC/02 (2014) (7–16 April 2014).

120 *Children of Nubian Descent* (n 118) 12 [55]–[57].

121 Paula Proudlock and Patricia Martin, 'Children's Rights to Birth Registration: A Review of South Africa's Law' in Paula Proudlock (ed), *South Africa's Progress in Realising Children's Rights: A Law Review* (Children's Institute, University of Cape Town and Save the Children 2014) 7, 34 [8.11].

South Africa. A lack of due process affects both citizenship by birth and naturalisation, and the deprivation of citizenship through identity blocking. Existing South African laws relating to the right to nationality are either not implemented by the state or are implemented in an unlawful way without regard to prescribed formal procedures, resulting in the violation of nationality rights.[122] In addition, recourse mechanisms are insufficient or inaccessible to the average person to remedy failures of the administrative system. In the cases discussed previously, parents were denied birth registration and citizenship documents for their children without being provided with a written decision, written reasons for the rejection or an opportunity to make representations or appeal the decision. Without these procedural safeguards, children remain undocumented for years, having been denied recognition of their citizenship by the state and are therefore stateless. In South Africa, citizenship is determined at the point of birth registration, therefore, the denial of a birth certificate amounts to denial of one's South African citizenship. Where a child's parent is arbitrarily deprived of citizenship, the child is automatically blocked on the National Population Register.[123] The state places the burden of proof on the individual to prove their citizenship again[124] and the child will be regarded as a foreigner until such time as they have successfully proven their citizenship.

The *Constitution* pre-empts this kind of injustice through its inclusion of s 33, which specifically protects the right to administrative justice.[125] Administrative justice, constitutionally construed, is government action that is lawful, reasonable and procedurally fair.[126] Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.[127] This right is given effect by the *Promotion of Administrative Justice Act No 3 of 2000*, which provides additional directions on how to ensure efficient administration and fair administrative practices in government decision-making.[128] This right ensures that whenever a decision is made (or fails to be made) which affects an individual's citizenship, prescribed processes must be followed that will allow the individual to challenge the state's conduct.

The High Court in *Nzama v the Minister of Home Affairs*[129] held that the Minister's failure to make formal decisions on citizenship applications is a violation of the *Constitution*. In this case, the applicant's identity number was blocked for more than 10 years, during which he was unable to register his children or add them to his medical aid,[130] and was unable to be admitted as an attorney

122 See, eg, *The World's Stateless: Deprivation of Nationality* (Institute on Statelessness and Inclusion 2020) 52.

123 Lawyers for Human Rights, Submission to the South African Human Rights Commission on DHA 'Blocking' Identity Documents, 22 August 2022 <https://www.lhr.org.za/lhr-resources/submission-to-the-south-african-human-rights-commission-on-dha-blocking-identity-documents>, archived at <https://perma.cc/YG5Z-3NHT>.

124 Roni Amit, 'Above the Law: Securitisation in South Africa's Migration Management Regime' in Marie-Claire Foblets and Jean-Yves Carlier (eds), *Law and Migration in a Changing World* (Springer 2022) 649, 675.

125 *Constitution* (n 3) s 33.

126 ibid.

127 ibid.

128 *Promotion of Administrative Justice Act No 3 of 2000* (Republic of South Africa).

129 *Nzama* (n 48).

130 'Medical aid' is the equivalent of health insurance in South Africa: see John E Ataguba and Jane Goudge, *Private Medical Aid Membership* (Health Economics Unit Policy Brief, January 2013).

after completing his Bachelor of Law. He was threatened with deportation, only staying in South Africa because there was no country to which he could be deported. During this process, he was not given any formal notice about decisions regarding his citizenship, nor was he provided with written reasons. He was left to guess why his identity number had been blocked. The Court intervened and found that such administrative practices were unjust and unconstitutional. Section 25 of the *Citizenship Act* grants such special statutory review powers to the High Court but is hampered by the fact that hardly anyone can afford legal intervention and, even then, applicants are delayed in obtaining a remedy due to the lack of written decisions and reasons.[131] Even if the applicant's citizenship is restored, they would have unnecessarily lost a significant number of years to statelessness.

The South African Court's finding is in line with the judgment by the African Court on Human and Peoples' Rights in *Anudo,* which found that the arbitrary denial of citizenship amounts to arbitrary deprivation of citizenship.[132] The Court also found that the burden of proof in such cases falls on the state and not on the individual. The Court relied on arts 13 and 14 of the *ICCPR,* which guarantee due process.[133] The same is provided for under art 7 of the *Banjul Charter*.[134] The aforementioned cases demonstrate the crucially important role that administrative justice (due process) plays in enabling access to the right to nationality.

Ideally, children should have access to an independent monitoring body that can automatically review citizenship denial or deprivation.[135] Such a process should be free and child-friendly to enable maximum protection. Only once this process has failed should judicial review be considered. 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 and eradication of statelessness in South Africa cannot be achieved without just administrative action (due process) in nationality matters.

### A *Does the Official Definition of Statelessness Include Those Who Are Without Nationality Because of Undue Process?*

The category of affected persons described in the previous part is not merely 'persons of undetermined nationality' (a sub-category of persons at risk of statelessness), as defined by UNHCR for statistical purposes.[136] They are also not without a nationality simply because they have not attempted to acquire one. Instead, they have been deprived of their nationality arbitrarily after a series of attempts to access their lawful and determinable citizenship. They have long been ignored by international law, presumably because UNHCR is reluctant to classify them as stateless for fear of it resulting in massive portions of states' populations becoming stateless instead of citizens.[137] This might tempt countries of residence

131 *Citizenship Act* (n 24) s 25.

132 *Anudo v Tanzania* (n 117).

133 ibid 100, 111.

134 *Banjul Charter* (n 2).

135 See generally UN Human Rights Council, *Impact of Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, of the Country in Which They Were Born, If They Would Otherwise be Stateless*, UN Doc A/HRC/31/29 (16 December 2015) [42]–[47].

136 UNHCR, *Quick Guides: Researching Statelessness* (Guidebook, March 2021) 56.

137 *UNHCR Handbook* (n 73) 58.

to shift the burden onto another country or UNHCR instead of resolving the situation themselves. This is a valid concern. However, dismissing these cases as beyond the bounds of statelessness does not solve the problem. Moreover, the solution to these cases, once these affected people are found to be stateless, is to highlight the duty of the relevant state to grant them the citizenship to which they are entitled. The African Union's *Draft Protocol on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa*[138] moves in the right direction by expanding the international law definition of statelessness to include persons who are unable to prove their nationality. It further suggests a solution in which states are encouraged to provide a legal process to facilitate the recognition or acquisition of nationality for persons having an appropriate connection to that state and whose nationality is in doubt.[139] This resolves the problem and, therefore, those who are stateless under this definition have a pathway to citizenship in the country where they have a genuine link. This unique construction, which is arguably an expansion on the traditional bases for citizenship (*jus sanguinis* and *jus soli*), is sensitive to the colonial history of Africa as a continent and the way in which African identity, belonging and nation building have been hampered by arbitrary borders and the forced removal of peoples away from their ancestral homes. Laura van Waas notes that the *Statelessness Conventions*' definitions and approaches[140] may not be sufficient to end statelessness and suggests a wider human rights-based approach to the right to nationality.[141] Bronwen Manby emphasises that the statelessness debate as framed by UNHCR is limited because of its emphasis on the requirement of a lack of nationality, instead of a focus on the right to nationality and all the rights that stem from it. She argues that this limited scope is not necessarily helpful in the African context and suggests that persons need access to nationality in the country where they have strongest links because they are most likely to remain there and may not be able to relocate to the country where they have a claim to nationality.[142] This is relevant to the South African context, particularly with regard to children who have been abandoned or orphaned and for whom repatriation is impossible. These children will remain in South Africa without the option of obtaining South African nationality and may become stateless as the links to their country of nationality weaken and proof of such nationality is lost or becomes unattainable.

Regardless, the existing customary international law definition of statelessness already makes provision for those who are arbitrarily denied their citizenship.[143] According to art 1 of the 1954 UN *Convention relating to the Status of Stateless Persons*, a stateless person is a person 'who is not considered as a national by any State under the operation of its law'. The last part of this definition relates to the way in which the law is implemented, that is, the state's actions. There are thus

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138 African Union, *Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa* (Draft Protocol, June 2018) <https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22526_e_original.pdf>, archived at <https://perma.cc/ZDU8-HA4K>.

139 ibid art 1.

140 *1954 Statelessness Convention* (n 73) art 1; *1961 Statelessness Convention* (n 1) arts 5–8.

141 van Waas (n 12) 390.

142 Manby, *Citizenship and Statelessness in Africa* (n 34) 452–53.

143 UNHCR, *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5–9 of the 1961 Convention on the Reduction of Statelessness* (Guidelines, May 2020) [7]–[8].

two potential ways of being stateless under the definition: through exclusion by the law or by the opinion of the state. Ultimately, the state's position on whether a person is a citizen is the determining factor, regardless of whether or not the law allows it. Again, the application of the law is equally, if not more, important than the law itself.

## VI CONCLUSION

Amidst a complicated, racist past and an uncertain, xenophobic present, South Africa's children continue to pay for the sins of adults by suffering a lack of citizenship in violation of their fundamental human rights. The courts have played a significant role in ameliorating the effects of this past and present by providing interpretive clarity on citizenship matters and situating citizenship within a narrative conducive to inclusive nationality practices. The legislature still carries the duty to formally include foundlings and unaccompanied or separated stateless migrant children in South Africa in its legislation by providing a stopgap in the law if childhood statelessness is to be eradicated. As can be seen throughout the aforementioned cases, there is an urgent need for a more just administrative system which ensures due process, such as through the provision of reasons and appeal procedures and recourse to an independent monitoring body. Without due process, none of the laws can reach their legislative goals. Within the South African context, the procedures governing citizenship are as important as the letter of the law when it comes to access to citizenship rights for children and must therefore be urgently addressed. These measures must include child-friendly procedures which allow children to access the process in a way that considers their particular needs. South Africa has a long way to go to resolve these flaws. However, it is not unsolvable but merely a matter of political will.

The unfortunate reality is that despite the dawn of our constitutional dispensation, subsequent legislative reforms and jurisprudential developments, the spectre of our xenophobic past still looms large in the decision-making process. The only cure is to continually hold errant decision-makers accountable. Hopefully, by so doing, a rights-based culture in nationality matters will eventually be instilled. Preferably, the Government of South Africa will adopt an innovative rights-based approach to citizenship matters for children that takes into account the nuances of history. This will speed up the process and ensure that every child in South Africa has a name and a nationality from birth.