

University of the Western Cape

Faculty of Law

The Right to Birth Registration of Foreign Children in South Africa:

A Human Rights Perspective

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Date: October 2021

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DEDICATION

This research is dedicated to my loving parents Miss Pauline Sibanda and Mr Absalom Mlotshwa. You gave birth to me and showed me the way. I dedicate my research also to my wife Nomazulu and my daughter Lindi Mlotshwa. You have been my support and strength from the day I started my studies and have profoundly sacrificed a part of your life to support my studies. I am blessed to have you in my life and I dedicate all my achievements to you. Last but not least to my spiritual leader Pastor Gem Brown.



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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
BDRA	Births and Deaths Registration Act
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DHA	Department of Home Affairs.
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees



KEY WORDS

- Jus soli.
- Statelessness.
- Refugee.
- Notice of Birth.
- Birth registration.
- Discrimination.
- Xenophobia.
- Non-refoulement.
- Nationality.
- Deportation.



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CHAPTER 1: INTRODUCTION

1.1 Background.

International law explains the significance of the right to a birth certificate,¹ birth registration and what it means to be a national of a specific state.² International law also explains how important the right to birth registration is and how it has historically been connected to the right to nationality.³ Legal scholars have over the years provided insights as to how international and national law can best address the right to birth registration.⁴ In South Africa the DHA does not issue birth certificates to children born to undocumented non-South Africans or documented non-South Africans with both parents holders of foreign documentation with the exception of non-South Africans with permanent residential permit.⁵ This has ripple effects years later in the attempt of acquiring nationality to those children who did not have a nationality or alternative nationality. This chapter is an important foundation for introducing the concept of the right to birth registration of children born to non-south Africans. Depriving a child a birth certificate has international consequences when the child does not have a nationality or alternative nationality. Furthermore the *Nottebohm (Liechtenstein v. Guatemala)* case brought before the International Court

¹ A/HRC/27/22, Birth registration and the right of everyone to recognition everywhere as a person before the law, Report of the Office of the United Nations High Commissioner for Human Rights. P3

² www.ohchr.org/EN/Issues/Children/BirthRegistration/Pages/ReportOnBirthRegistration.aspx. (Date of use 09-10-20)

³ UNICEF, A Passport to Protection: A Guide to Birth Registration Programming, December 2013 (available from www.refworld.org/pdfid/52b2e2bd4.pdf) (Date of use 09-09-20) pp. 6 and 11.

⁴ Hodgkin R & Newell P, Implementation Handbook for the Convention on the Rights of the Child, (UNICEF, 2007), p. 97.

⁵ Birth Registration In South Africa Scalabrini (Available from <https://www.scalabrini.org.za/news/birth-registration/>) (Date of use 24-09-21)

of Justice after World War II serves as a reminder that depriving an individual nationality unfairly has international consequences.⁶

For the past two decades there has been a rising influx of foreigners in South Africa seeking refugee status. Foreigners living in South Africa escaped civil wars in their countries of origin and are looking for better economic opportunities. It is from such a background that children get born while their non-South African parents are looking for legal stability.

Consequently, because of a large number of children born inside South Africa by non-South Africans has led to the DHA's decision in issuing of a notice of birth instead of a birth certificate to children born to non-South Africans.⁷ South African officials have repeatedly expressed concern on the strain put on resources and social services as a result of undocumented migrants.⁸

Birth-right citizenship, also referred to as "jus soli" which is Latin to mean "right of the soil," is the right of citizenship that one acquires for being born in a particular country regardless of the nationality of their parents.⁹ In 2017 the DHA started issuing to any child born to non-South Africans a document known as notice of birth.¹⁰ Where previously all new born babies of foreign parents were issued with birth certificates, as required by the Constitution of South Africa 1996 Act 108 and international law¹¹ on children's rights, the DHA argues that new regulations propose that children born

⁶ Nottebohm case (Liechtenstein v. Guatemala) [1955] ICJ. Available at <http://www.wolrdiii.org/int/cases1955/1.html>.(Date of use 09-07-21)

⁷ <https://citizen.co.za>south-africa>(Date of use 20-06-21)

⁸ <https://www.iol.co.za>news->(Date of use 20-06-21)

⁹ Kreuzer K Reconceiving statelessness: an analysis of potential solutions to realise the right to a legal identity in Europe (2018) 132.

¹⁰ AbouZahr C Civil registration and vital statistics: progress in the data revolution for counting and accountability (2015) 12-14

¹¹ Convention on the Rights of the Child (UNCRC) Article 7

to non-South Africans be issued with a mere “confirmation of birth” which is “not a birth certificate”, according to the new forms of ministerial interpretations.¹²

However according to the South African Citizenship Act 88 of 1995 the position has been that there are three main forms of South African citizenship, namely citizenship by birth, descent and naturalisation¹³: Twenty three years since the enactment of the Citizenship Act 88 of 1995, the DHA decided to influence the course of events differently by omitting to issue birth certificates to children born of foreign parents. When the South African government is failing to enforce the Citizenship Act 88 of 1995, it is actively contributing to the incidence of stateless children to those children who have no nationality elsewhere.



1.2 Purpose of the Study.

The purpose is to explore current transformations in South African legislation that have the potential of excluding children born to non-South Africans - in South Africa the right to a birth certificate and through it birth registration.¹⁴ The mini-thesis further seeks to show whether there is a connection between a birth certificate and the acquisition of nationality. This extends to explaining specifically which provisions under international law, regional instruments and domestic law in South Africa help in the acquisition of nationality. The mini-thesis also seeks to show the relationship between the absence of a birth certificate and the loss of nationality. This is achieved by explaining the relationship between a birth certificate and the right to nationality.

¹² <https://www.businesslive.co.za/bd/national/2018-11-15-groups-oppose-plan-to-stop-issuing-birth-certificates-to-offspring-of-foreigners/> (accessed 21-06-19)

¹³ https://www.suedafrika.org/downloads/Acquisition_of_SAC.pdf (Date of use 20-06-19)

¹⁴ Convention on Children’s Rights (UNCRC) Article 7

Furthermore the purpose is to explore the significance of international law provisions on the right to nationality and to what extent are the provisions binding on member states. The purpose extends to uncovering the significance of the right to nationality and its impact on individuals if it is lost. Furthermore this mini-thesis uses South Africa as a case study to show various ways of nationality acquisition by children born to non-South African parents and the lacunas in the South African legal system that have aggravated statelessness than prevent it. Last but not least it is to expose the challenges faced by the South African legislature in adjudicating cases on acquisition of nationality and trying to work with DHA in addressing those challenges. Although nationality acquisition in South Africa is not automatic this will help in the promotion of a human rights culture to help address the challenges faced by children born to non-South African parents who do not have nationality or who acquire alternative nationality. This puts to a test international, regional instruments and domestic law of South Africa as a member state on how effective can matters pertaining to human rights be addressed.

1.3 Significance of the problem

The right to birth registration is undoubtedly important. This introduces accountability on every state to explain the refusal of issuing birth certificates to children born in their state and at the same time respect the right to a birth certificate. This accountability must extend to enabling children from disadvantaged communities to grow up, play and develop in stimulating, creative and safe settings, whilst learning to respect others and care for their environment and adults participating in respecting children and their rights.¹⁵ All children have the right to a birth certificate, right to

¹⁵ Ogata.S Refugee Children: Guidelines on Protection and Care.(2018) 6

nationality and protection.¹⁶ They have the right to survive, to be safe, to belong, to be heard, to receive adequate care and to grow up in a protective environment.¹⁷ Any child can be vulnerable to violations in many places, including the home however the worst violation is that deliberately inflicted by the government through legislation that creates an invisible child by refusing to give the child identity through birth registration.¹⁸ At the same time it would be arbitrary for any state to refuse helping children without nationality or alternative nationality to acquire nationality. No matter based on endorsed domestic legislation it would be insufficient to justify any conduct by any state to hinder any individual to acquire nationality. It is from such a background that every state must protect the right to birth registration and nationality and avoid discriminating against any child who wishes to acquire nationality.

1.4 Research question.

For addressing the problem of infringement on the rights of children born of foreign parents in the context of South Africa, the following question has been identified as central to the present mini-thesis:

Is the right to birth registration of children born to foreign parents in South Africa an infringement that can be qualified through the lenses of a human rights perspective?

1.5 Sub-questions:

The following sub-questions will be used to answer this question:

¹⁶ The Constitution of the Republic of South Africa, 1996 section 28 and the Children's Act 38 of 2005 Section 150.

¹⁷ Guadagno L eetal Migrants in disaster risk reduction: Practices for inclusion.(2017) 22

¹⁸ T Kälin W & Künzli J he law of international human rights protection.(2019) 21

1. What is the nature of the duty imposed on the state by the 1996 Constitution and international instruments such as UDHR, ICCPR, ICERD, CEDAW, CAT, CRC, ICRMW and CRPD in terms of acquiring nationality to protect the rights of the child that is born to non-South African parents ?
2. What impact does that duty have on the state's obligation to grant nationality to children born to non-South African parents?
3. Is the right to nationality and to birth certificate just substantive rights of children born of foreign parents or serious human rights which need to be viewed critically in the attempt to prevent statelessness?
4. What recommendations can be given to the State to align its birth registration mechanism to the Constitution and similar obligations under international human rights law?

1.6 Methodology.

This mini-thesis engages mainly in desktop research. Both primary and secondary sources will be analysed. The relevant literature used in this mini-thesis will be case law as well as academic databases. Lastly, the materials documenting the experiences from other jurisdictions will be used. Regarding primary sources, the nationality laws represent the baseline for the third chapter. Nevertheless, the reports of the NGOs or various agencies play significant role in the present research. The data that are used in this section are taken from relevant portals and databases.

1.7 Literature review.

The literature on what is the right to nationality of children born to foreign parents about birth registration in South Africa is scant. However, the literature available has

a close relationship with the rights of children born in South Africa to non-South African parents.

Nokuthula Ndlovu in 'Citizenship dilemma: Denying identity numbers to children of permanent residency holders', examines the births of permanent residents' infants born in South Africa. She argues that a notice of birth is issued and so the births of such children are registered in terms of the Births and Deaths Registration Act 51 of 1992, but when it comes to the issuing of a valid South African identity document and birth certificate, hand-written records of their birth are issued without a valid identity number.¹⁹The parents of these children are then compelled as a result to obtain citizenship for their children from the country of descent. The mandate is on the face of it, manipulation to justify the DHA refusal to grant such children valid identity numbers and, alternatively, citizenship.²⁰ The practice of the Department of Home Affairs denying children of permanent residency holder's identity numbers is, therefore, inconsistent with the Births and Deaths Registration Act.²¹ In essence the children of permanent residency holders cannot claim their South African citizenship by birth because they have been forced to obtain citizenship or nationality from another country in respect of which they have a claimable right to citizenship by descent.²²

George J.P and Elphick R explore the promotion of Citizenship and Prevention of Statelessness in South Africa. They argue that it is a reality in Africa that many migrants do not have identity documents especially those from Lesotho and

¹⁹ http://demos.grenadeco.com/de_rebus/category/app/page/6/Date of use 09-09-21)

²⁰ Ndlovu N Citizenship dilemma: Denying identity numbers to children of permanent residency holders (2018) 16

²¹ Sauline BF 'The Practical Guide To Humanitarian Law' (2002) 251-252

²² Ndlovu N Citizenship dilemma: Denying identity numbers to children of permanent residency holders (2018) 16

Mozambique.²³ They also do not apply for asylum in South Africa and so cannot use asylum permits for proof of identity like other migrants.²⁴ Thus they appear at DHA to register their children's births without any form of an identity document.²⁵ The Regulations to the BDRA require a valid immigration permit for them to register their child's birth.²⁶ The law requires that every birth be registered within 30 days.²⁷ Yet, when DHA tells parents that they must first be documented before registering their children, the child inevitably cannot be registered within 30 days.²⁸ It can take years to sort out complicated cases and get parents' identity documents and during that time, children remain unregistered.²⁹

Proudlock P in "South Africa's progress in realising children's rights", offers a logical explanation that increasing numbers of people migrate into South Africa from neighbouring African countries including Somalia the Democratic Republic of Congo and Zimbabwe.³⁰ In 2011 there were approximately 220 000 asylum seekers in South Africa and by the end of that year only 63 000 had been accepted as refugees.³¹ These statistics speaks often to several years of delay in the processing of asylum claims.³² As a result of having to renew permits every few months and the long term closure of the three out of every six urban refugee reception centres a large number of asylum seekers are without documents or lapsed documents

²³ Jessica P eetal *Promoting Citizenship and Preventing Statelessness in South Africa*: A(2014) 120

²⁴ McKnight J, *Through the fear: a study of xenophobia in South Africa's refugee system* (2008)19

²⁵ Jessica P. George J.P and Elphick R *Promoting Citizenship and Preventing Statelessness in South Africa*: A(2014) 120

²⁶ Landau LB eetal, *Xenophobia in South Africa and problems related to it* (2014) 120

²⁷ Jessica P eetal *Promoting Citizenship and Preventing Statelessness in South Africa*: A (2014) 120

²⁸ Amit R & N Kriger N, *Making migrants' il-legible': The policies and practices of documentation in post- apartheid South Africa* (2014) 120

²⁹ Jessica P eetal *Promoting Citizenship and Preventing Statelessness in South Africa*: (2014) 120

³⁰ Meintjes H and Hall K *Demography of South Africa's children* (2013) 38

³¹ United Nations high commissioner for refugees (2012) 2014 UNHCR country operations profile- South Africa. *Statistical snapshot*.[Http://www.unhcr.org-bin/texis/vtx/page?page=49e485aa6&submit=Go](http://www.unhcr.org-bin/texis/vtx/page?page=49e485aa6&submit=Go)(Date of use 09-07-21)

³² Proudlock P *South Africa's progress in realising children's rights*(2014) 17

making them effectively illegal in South Africa.³³ Children born to migrant parents in South Africa who do not yet have lawful permits for residence in South Africa due to these long delays in the permitting processing system, refusals of asylum, or the growing backlog in appealing refused asylum applications currently struggle to access birth certificates.³⁴ Thereby affecting new born babies in the process. This problem escalates when the children grow as it is difficult to access hospital services from government hospital and enrol at school.

George P.J and Elphick R offer another plausible contribution in regard to birth registration of children born to foreign parents. They argue that children born in South Africa to undocumented foreign parents are flatly denied birth certificates at Department of Home Affairs and their parents maybe threatened with arrest.³⁵ The new Draft Regulations that have been proposed to amend and replace (BDRA) No 51 of 1992 if passed will soon require foreign parents to show proof of lawful immigration status and passports in order to register births.³⁶ At present people whom department officials' suspect of being unlawfully present in the territory must be referred to immigration services.³⁷ The Regulations to the Births and deaths Registration Act (BDRA) No 51 of 1992 uses peremptory language that leaves no room for discretion.³⁸ The result is that parents who appear at home affairs to register a birth of a child may be sent to immigration and arrested if they do not have proper immigration permits.³⁹ In effect this serves as a strong deterrent to

³³ Schreier T (2012) –critical challenges to protecting unaccompanied and separated foreign children in the western Cape(2012) 56

³⁴ Giese S & Smith L Barriers to accessing comprehensive social security in Vulnerable rural areas in South Africa (2007) 64

³⁵ George P.J & Elphick R *Statelessness & nationality in South Africa* (2013) 28-48

³⁶ Bouckaert P Prohibited Persons: Abuse of Undocumented Migrants, Asylum-seekers, and Refugees in South Africa.(2014)15

³⁷ Mubangizi JC The protection of human rights in South Africa. (2010) 62

³⁸ Sauline BF 'The Practical Guide To Humanitarian Law' (2002) 251-252

³⁹ Pugh SA Advocacy in the time of xenophobia: Civil society, the state, and the politics of migration

undocumented parents or parents unlawfully present on the territory from registering the birth of their child. Without birth certificates, children born in South Africa to foreign parents risk being unable to access their parents nationality, particularly if the parents pass away.⁴⁰ Yet they do not qualify for any provisions of South African citizenship, including section 2(2), which allows citizenship to pass to children born on the territory who are stateless, provided the birth is registered.

As pointed out earlier that the literature available on what is the right to nationality of children born to foreign parents with regard to birth registration in South Africa is scant, this thesis seeks to contribute to the existing literature knowledge on the processes involved in birth registration of children born to foreign parents. This knowledge will be readily available for scholars to use as reference and draw inference and predictions on how the future of children born to foreign parents will look like in the future South Africa. Furthermore this mini-thesis adds knowledge that will act as a foundation of understanding of a historical context on how the problems of children born to foreign parents started and may have ignited the causes of their depression, desperation and statelessness.

This mini-thesis will provide the 'what', 'when' and 'how' the right to nationality of children born to foreign parents with regards to birth registration is infringed. This may lead to legal reform for South Africa to try and adopt legislation that is inclusive and impact positively on every child, South African and non-South African. In the same vein tis will cause the South African government to re-align the administrative

in South Africa(2014)16

⁴⁰ George P.J & Elphick R *Statelessness & nationality in South Africa* (2013) 26

functions of the DHA to the law of the land to be in line with international instruments protecting the rights of the child.

State Parties have obligations to end statelessness by 2024. Action 2 of the Global Action Plan calls on States to ensure that no child is born stateless.⁴¹ The goal of Action 2 is to ensure that by 2024 all States have provisions in law to grant nationality to children born in their territory who do not acquire another nationality at birth, children of unknown origin found on their territory, and children born to their nationals abroad who do not obtain another nationality at birth.⁴² Other important actions imposing obligations to end statelessness are: Action 1, seeks to resolve existing major situations of statelessness, is critical to ending statelessness among children at birth,⁴³ Action 3, aims to end gender discrimination in nationality laws, addresses one of the main causes of statelessness among children, even in countries that do not have a substantial population of persons whose nationality is not recognized and Action 7, aims to ensure birth registration for all children, is done.⁴⁴

Obligations to prevent and reduce statelessness among children are serious and State parties who derogate from obligations will have punitive measures imposed. This may include withdrawal of financial aid in crucial areas of funding by the CRC and other structures of the United Nations.⁴⁵

⁴¹ UNHCR's Global Action Plan to End Statelessness 2014 – 2024

⁴² Convention on the Reduction of Statelessness 1961, Article 1 and 2(b)

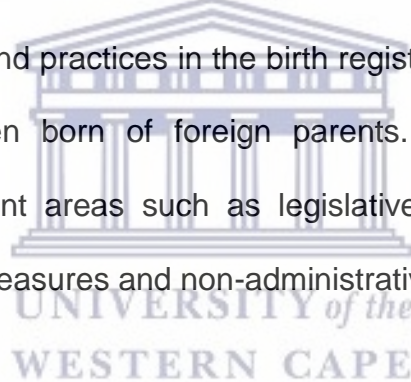
⁴³ UN High Commissioner for Refugees (UNHCR), Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness, 23 February 2015, available at: <http://www.refworld.org/docid/54e75a244.html>. (Date of use 08-08-21)

⁴⁴ Convention on the Rights of the Child, Article 7.

⁴⁵ UN High Commissioner for Refugees (UNHCR), Handbook on Protection of Stateless Persons, 30 June 2014, para 23, available at <http://www.refworld.org/docid/53b676aa4.html> and see note 3, UNHCR Guidelines on Statelessness No. 4, Para. 18-19

1.8 Structure.

The present mini-thesis is divided into four main chapters. The first chapter covers the background of the study, the purpose of the study, research question, sub-questions, methodology, literature review and structure of the mini-thesis. Chapter two covers the right to nationality and birth registration as interpreted by international and regional instruments. Therefore, the second chapter is dedicated to the analysis of the legal framework on the international and regional level. Chapter three covers the right to nationality in the domestic laws of South Africa. The constitution and statutory instruments relevant to South Africa are examined. The third chapter also deals with nationality laws and practices in the birth registration which are crucial but a limitation against children born of foreign parents. Chapter four covers the recommendations in different areas such as legislative measures, administrative measures, non-legislative measures and non-administrative measures.



CHAPTER 2: INTERNATIONAL AND REGIONAL INSTRUMENTS RELEVANT TO NATIONALITY AND BIRTH REGISTRATION

2.1 Introduction

The right of every child to birth registration, which leads to a birth certificate and to acquire nationality are basic rights protected by international and regional instruments. This chapter focuses on international and regional instruments relevant to birth registration and the right to nationality. This encompasses children who don't have birth certificates and nationality or alternative nationality. The relationship between the right to a birth certificate and nationality is explored. Furthermore the relationship between nationality and statelessness is explored to shed more light on issues connected to birth registration and nationality. International instruments and regional instruments treat the right to a birth certificate and the right to acquire nationality as pivotal in an individual's life as all other rights depend on these.⁴⁶ According to a modern understanding of sovereignty and statehood, states exist to protect the people they govern.⁴⁷ Therefore, it is imperative that the right to birth registration and the right to acquire nationality or alternative nationality be given serious consideration as both are important in the foundation of states. This chapter takes an accessible and practical approach to explain the international legal framework providing guidelines for addressing the problem of birth registration and the right to acquire nationality or alternative nationality. Provisions of different international human rights instruments related to birth registration and nationality are examined, first on an international platform followed by regional human rights

⁴⁶ Clayton G *Immigration and Asylum Law 5th ed* (2010) 65

⁴⁷ Strydom H *international Law*. (2016) 304

standards also connected to the right to birth registration and the right to acquire nationality.

2.2 What is birth registration?

Birth registration is defined as ‘the continuous, permanent and universal recording, within the civil registry, of the occurrence and characteristics of birth in accordance with the national legal requirements of a country’.⁴⁸ It establishes the existence of a person under law, and lays the foundation for safeguarding civil, political, economic, social and cultural rights.⁴⁹ Birth certificates are a key form of proof to confirm or acquire citizenship under a State’s domestic legislation because they contain key information to assert the child’s right to a nationality.⁵⁰ They record at a minimum the child’s name, date and place of birth, and the parents’ names.⁵¹ Birth certificates provide evidence of who the child’s parents are although not in all cases. Where citizenship is acquired on grounds of birth in the territory on the ground of jus soli, birth certificates prove the birthplace. According to the United Nations people lacking a legal identity, are largely invisible and forgotten, yet their suffering is really and at times acute.⁵² Birth registration does not itself confer nationality upon a child.⁵³ The process for registering births is distinct from the process whereby individuals acquire

⁴⁸ United Nations, Department of Economic and Social Affairs, Principles and Recommendations for a Vital Statistics System (Revision 2, Series M/19,2001), at: <http://unstats.un.org/unsd/demographic/standmeth/principles/M19Rev3en.pdf>. (Date of use 09-08-21)

⁴⁹ UNHCR, Good Practices Paper – Action 2: Ensuring that no child is born stateless (20 March 2017), at: <http://www.refworld.org/docid/58cfab014.html>. (Date of use 12-03-20)

⁵⁰ UNHCR, UNHCR Action to Address Statelessness: A Strategy Note (March 2010), p. 11f, at: <http://www.refworld.org/docid/4b9e0c3d2.html>. (Date of use 13-03-20)

⁵¹ UNHCR, *Child protection Issue Brief: Birth Registration (August 2013)*, at: <http://www.refworld.org/docid/523fe9214.html>. (Date of use 11-07-21)

⁵² Under the radar and under protected. The urgent need to address stateless children’s rights. (Available at https://ohchr.org/Documents/Issues/Children/BirthRegistration/PlanInternational1_birthRegistration.pdf) (Date of use 24-09-21) p 5-11

⁵³ Petrozziello AJ Bringing the border to baby: birth registration as bordering practice for migrant women’s children. (2019) 18

nationality, which usually happens automatically at birth.⁵⁴ Birth registration is nevertheless important for the prevention of statelessness because it establishes a legal record of where a child was born and who his or her parents are.⁵⁵ This constitutes a key form of proof of whether a person has acquired nationality by birth on territory, *jus soli* or descent *jus sanguinis*, which are the most common bases for acquisition of nationality at birth.⁵⁶ Although international human rights law has long recognised the right of every child to have their birth registered it's still not clear whether the right to birth registration include the right to a birth certificate.⁵⁷ Given that a birth certificate operates to certify the registration of a birth, it becomes logical that a birth not registered leads to inability to obtain proof of name and identity for a child, which in turn creates a problem of legal identity.

2.3 What is nationality?

Nationality is a legal identification of a person in international law, establishing the person as a subject, a national, of a sovereign state.⁵⁸ An example of nationality is South Africa to a South African person born in South Africa. Therefore nationality is such a bond which binds an individual with a state and makes him a member of that specific state and provides for the right of protection from that State with an obligation to abide by the laws promulgated by that State. It is nationality that defines the legal relationship or legal bond between the national and her state, based on social facts of attachment, and which gives rise to rights and duties on the part of

⁵⁴ Breau S The responsibility to protect in international law: An emerging paradigm shift. (2016) 33

⁵⁵ Adgie MK From Invisible Children to Legal Citizens: An Analysis of Low National Birth Registration Rates and Global Efforts to Increase Registration. (2017) 33

⁵⁶ Stein J The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential. (2016) 77

⁵⁷ Skelton A Children's Rights International Law. (2016) 54

⁵⁸ Edwards A, The meaning of nationality in international law in an era of human rights: Procedural And substantive aspects. (2014) 11- 43.

both sides of that relationship.⁵⁹ Nationality affords the state jurisdiction over the person and affords the person the protection of the state against other states.⁶⁰

It is noted that: “nationality does not indicate a person’s ethnic or social origin. Nationality is also an enabling right and can be considered as a key gateway right needed to enjoy one’s other rights”.⁶¹ It is the legal bond between a person and a state, one that conveys rights and responsibilities as well as a status of belonging and membership to that country. While enabling rights are important throughout life, they are perhaps most so during childhood, the formative years when one’s identity; personality and life trajectory are set in motion. Childhood statelessness can therefore have severe implications in terms of human rights, child protection, non-discrimination and development.

By international custom and conventions, states have the right to determine who its nationals are.⁶² In some cases, determinations of nationality are also governed by public international law for example, by treaties on statelessness.⁶³ Therefore the determinations of nationality make the rights and obligations of nationals different.⁶⁴

According to UNHCR: “To be considered a national by operation of law means that an individual is automatically considered to be a citizen under the terms outlined in the State’s enacted legal instruments related to nationality or that the individual has been granted nationality through a decision made by the relevant authorities.”⁶⁵ The

⁵⁹ Zimmern A.E Nationality and Government <https://doi.org/10.1111/j.1467-954X.1915.tb02834.x>
(Date of use 07-07-21)

⁶⁰ Damrosch LF & Murphy SD Basic documents supplement to international law:.(2019) 41

⁶¹ The Child’s Right to a Nationality and Childhood Statelessness taken from
https://files.institutesi.org/crn_texts_materials.pdf(Date of use 31-07-21) p 10-13.

⁶² Woodwell D, Nationality, Nation, and Ethnicity (2007) 89

⁶³ Shils E, Nation, Nationality, Nationalism and Civil Society (2019) 92

⁶⁴ Mathiason J.R World Citizenship: the individual and international governance
<https://www.un.org/esa/socdev/egms/docs/2012/WorldCitizenship.pdf>(date of use 31-07-21)(4-6)

⁶⁵ UNHCR Nationality and Statelessness, A Handbook for Parliamentarians

instruments come in a wide range such as domestic legislation, the Constitution and a Presidential decree.⁶⁶

It is presumed that an individual has a nationality unless there is some evidence to the contrary.⁶⁷ However, sometimes the States with which an individual might have a genuine link cannot agree as to which of them is the State that has granted citizenship to that person.⁶⁸ Proof of nationality under domestic law is usually governed solely by the law of the individual state.⁶⁹ This involves proof to the satisfaction of the competent domestic authorities that deals with issues of acquisition of that country's nationality.⁷⁰ The way in which an individual acquires the nationality of a state often governs the available means of proof, which generally consists of some type of documentary evidence accepted as probative of acquisition of nationality in a particular way.⁷¹ Such documents are typically conclusive only in the absence of contrary evidence demonstrating loss of nationality or fraud in the acquisition of the document. Article 15 of the Universal Declaration of Human Rights protects the right to a nationality and even the right to change nationality.⁷² Factors such as long-term residence outside the country of nationality, or marriage to a foreign national, may lead to a desire to change nationality. The United Nation's

<https://www.un.org/ruleoflaw/files/Nationality%20and%20Statelessness.pdf> (Date of use 31-07-21)(10)

⁶⁶ A/HRC/25/28, Human rights and arbitrary deprivation of nationality Report of the Secretary-General <https://www.refworld.org/docid/52f8d19a4.html> (Date of use 31-07-21)(14-16)

⁶⁷ Boeles P, What is the use of nationality? - Scholarly Publications Leiden (2018) 45

⁶⁸ Walmsley A. Committee of experts on nationality (CJ-NA) Report on Conditions for the Acquisition and Loss of Nationality(2004) 8

⁶⁹ Walmsley A. Committee of experts on nationality (CJ-NA) Report on Conditions for the Acquisition and Loss of Nationality(2004) 8

⁷⁰ Handbook on protection of stateless persons Under the 1954 convention relating to the status of stateless persons geneva, 2014 (13)

⁷¹ Parry, C. Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland, London: Stevens (2016) 69

⁷² The United Nations Universal Declaration of Human Rights. 1948. (UDHR) Article 15

Universal Declaration of Human Rights (1948) stated that nationality is an inalienable right of every human being and no one shall be deprived of his or her nationality.⁷³

2.4 Elements of nationality

Legal researchers are of the view that elements of nationality are as follows: geographical unity or common residence, language, tradition and culture, common political aspirations, common history, common government, common administration, common religion and a common race.⁷⁴ The bearer of the right to nationality is every individual whom the right to nationality has been conferred to, to the extent that he or she can exercise that right to the fullest benefit the right can offer.⁷⁵ General every person has the right to nationality even though this has been offset by deprivation of nationality in many instances.⁷⁶ The right to a nationality is of paramount importance to the realisation of other fundamental human rights.⁷⁷ Possession of a nationality carries with it the diplomatic protection of the country of nationality and is also often a legal or practical requirement for the exercise of fundamental rights.⁷⁸ This extends to citizenship to children of the bearer of the right, eligibility for government jobs, freedom to travel, ability to vote, greater flexibility such as free to work, study, and start a business.⁷⁹ Other benefits include the right to live within the

⁷³ The United Nations. Universal Declaration of Human Rights (UDHR) 1948 (Article 1)

⁷⁴ Manby B Citizenship in Africa, 3rd edn. Open Society Foundations, (2016) 34

⁷⁵ Solodoch O, Sommer U (2018) Explaining the birthright citizenship lottery: longitudinal and cross-national evidence for key determinants. Regul Gov 1–19

⁷⁶ De Groot GR, Vonk O (2016) International standards on nationality law. Wolf Legal Publishers, Oisterwijk

⁷⁷ De Groot GR, Vonk O (2012) Nationality, statelessness and ECHR's Article 8: comments on *Genovese v. Malta*. Eur J Migr Law 14:317–325

⁷⁸ De Groot GR (2014) Children, their right to a nationality and child statelessness. In: Edwards A, van Waas L (eds) Nationality and statelessness under international law. Cambridge University Press, Cambridge, pp 144–168

⁷⁹ [http://www.dha.gov.za/index.php/civic-services/citizenship.\(date](http://www.dha.gov.za/index.php/civic-services/citizenship.(date) of use 06-07-21)

territory of the bearer of the right to nationality and the right to a South African passport.⁸⁰ Nationality as a human right falls within the domestic jurisdiction of states. Similarly to the Universal Declaration of Human Rights, the covenant fails to clarify which state specifically bears the responsibility to provide nationality. Therefore, it may not be claimed that it is the obligation of the state of birth to do so.

The registration of children is usually a key element for the acquisition of nationality, thus the Committee on the Rights of the Child emphasised that states should make every necessary effort to register children after birth.⁸¹ Article 7(1) of the UNCRC and article 1 of the 1954 Convention provide that states have a sovereign right to determine the conditions for the acquisition and loss of nationality.⁸² Although states can determine the loss and acquisition of nationality states are limited by the international obligations undertaken concerning nationality including the enforcement of the requirement to eliminate the occurrence of statelessness.⁸³

Acquisition of nationality can occur on any of the following modes of acquisition: birth-right-based modes of acquisition, basic residence-based modes of acquisition, family relation-based modes of acquisition and affinity-based modes of acquisition.⁸⁴ However other modes of acquisition cater for persons with special achievements for

⁸⁰ Blitz BK, Lynch M , Statelessness and citizenship: A comparative study on the benefits of Nationality (2011) 89

⁸¹ A/HRC/27/22 Birth registration and the right of everyone to recognition everywhere as a person before the law. Report of the Office of the United Nations High Commissioner for Human Rights General Assembly 17 June 2014.(4)

⁸² UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>(date of use 08-07-21) and Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html>(Date of use 08-07-21)

⁸³ Hobden C , Shrinking South Africa: Hidden Agendas in South African Citizenship (2020) 37

⁸⁴ Acquisition and loss of nationality. policies and trends in 15 European states(200) 12-14 taken <https://www.ft.dk/samling/20051/almdel/ifu/bilag/81/261233.pdf>(Date of use 31-07-21) or see Basic residence-based modes of acquisition of nationality after birth taken <http://briguglio.asgi.it/immigrazione-e-asilo/2009/dicembre/natac-acquisiz-cittad.pdf>(Date of use 31-07-21)15-16

the country and for persons in the state's public service. In South Africa the acquisition of nationality varies. One can acquire South African nationality through naturalisation if one has held a permanent residence permit for at least five years if married to a South African or a minor under 21 years with a permanent residence.⁸⁵ Also, a person is a national by birth if they can be considered a national by descent and at the time of birth at least one parent was: in the service of the government, was employed by a person or group located in the Republic, or was in the service of an international organisation in which South Africa had membership. Under the 1995 law, a person born outside South Africa to a South African parent was a South African national by descent upon registration of the birth under South African law.⁸⁶ Following the 2010 Amendment such persons are now South African nationals by birth.⁸⁷

2.5 Relationship between nationality and a birth certificate.

Although a birth certificate does not usually serve as proof of nationality the importance of birth registration for the right to acquire a nationality is recognised by the inclusion of both rights within the same article of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁸⁸ This significance was reaffirmed by the African Committee of Experts on the Rights and Welfare of the Child in the Kenyan Nubian Children's Case, where the decision noted that "there is a strong and direct link between birth registration and

⁸⁵ Rhona K M Smith, Textbook on International Human Rights (3rd ed, 2007) 53.

⁸⁶ The General Comments of the treaty bodies may be found via
<<http://www2.ohchr.org/english/bodies/treaty/comments.htm>> (Date of use 07-11-21)

⁸⁷ South African Citizenship Amendment Act 17 of 2010. Section 2(2)(b)

⁸⁸ Convention on the Rights of the Child, Article 7; African Charter on the Rights and Welfare of the Child, Article 6.

nationality".⁸⁹ Birth registration is critical to establishing, in legal terms, the place of birth and parental affiliation, which in turn serves as documentary proof underpinning acquisition of the parents' nationality or the nationality of the state where the child is born.

In simple words a birth certificate is very important in the acquisition of nationality in that it serves as proof of relationship to parents and helps to establish the parents' nationality which in turn leads to conferral of nationality to the new born child.⁹⁰ It further establishes residency and provides legal identity of a child which are key elements to nationality.⁹¹ It is likely for a child who was born in a particular territory to acquire the nationality of that territory.⁹² Most children will acquire a nationality from one or both of their parents by descent because identity and relationship to parents is established.

The documentation of births is a practice widely held throughout human civilisation.⁹³ The actual record of birth is stored with a government agency.⁹⁴ That agency will issue certified copies or representations of the original birth record upon request, which can be used to apply for government benefits, such as passports.⁹⁵ The certification is signed and or sealed by the registrar or other custodian of birth

⁸⁹ Kenyan Nubian Children's Case, paragraph 42.

⁹⁰ Kenyan Nubian Children's Case, paragraph 42.

⁹¹ Mouravieff-Apostol E, The significance of birth registration (2018)18

⁹² History of the birth certificate: From inception to the future of electronic data History of the birth certificate: From inception to the ...<https://www.researchgate.net> › publication › 22180235102 Feb 2012 (Date of use 07-07-21)

⁹³ Pais M.S Birth registration right from the start- UNICEF ...<https://www.unicef-irc.org> › publications ›

⁹³ ILC, 'Report of the International Law Commission on the Work of its Sixty-six session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/69/10 ch IV 33

⁹⁴ Pais M.S Birth registration right from the start- UNICEF ...<https://www.unicef-irc.org> › publications › ILC, 'Report of the International Law Commission on the Work of its Sixty-six session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/69/10 ch IV 33

⁹⁵ Pais M.S Birth registration right from the start- UNICEF ...<https://www.unicef-irc.org> › publications › ILC, 'Report of the International Law Commission on the Work of its Sixty-six session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/69/10 ch IV 33

records, who is commissioned by the government.⁹⁶ Desmond Tutu in 2005 commented: “a birth certificate is a small paper but it actually establishes who you are and gives access to the rights and the privileges, and the obligations, of citizenship”.⁹⁷

The failure of authorities to accurately identify and register the child’s birth can mean that a particular states is unaware or don’t accept that a child born on their territory is their national. International law requires that states enact legal safeguards in their nationality laws to enable children who would otherwise be stateless to acquire the nationality of their country of birth.⁹⁸

The right of every child to a name and nationality, and the obligations of national governments to achieve this are contained the United Nations Convention on the Rights of the Child.⁹⁹ This is significant in that it shows that it must be a standard that after a child is given a name his or her identity is established. This must be followed by conferral of nationality and thereafter citizenship.¹⁰⁰ A birth certificate acts as a foundation in which all other rights are built on. Therefore the connection between a birth certificate is that after the issuing of a birth certificate it is predictable and expected that conferral of nationality must follow.

2.6 Relationship between nationality and statelessness.

The United Nations High Commissioner for Refugees (UNHCR) defines statelessness as “individuals who are not considered citizens or nationals under the

⁹⁶ Brumberg HL, History of the birth certificate(2019) 18

⁹⁷ Dodds JM Birth registration is a priority for child survival | Journal of human rights, 2010 (110)

⁹⁸ "United Nations Statistics Division: Civil registration systems". Unstats.un.org.(Date of use 07-07-21)

⁹⁹ Abay -ST Status and associated factors of birth registration (2020) 12

¹⁰⁰ Hemenway HB, Innovations in Birth Registration - The Human Dignity (2018) 11

operation of the laws of any country”.¹⁰¹ Statelessness and nationality have a connection in that a person without nationality and alternative nationality is considered stateless.¹⁰² The same can be said that a stateless individual has no nationality or alternative nationality. Therefore the effect of absence of nationality or alternative nationality is statelessness. Statelessness is considered to be a problem manufactured by the conduct of humans, which may result from a variety of different causes, including discrimination, State succession, conflicting nationality laws and burdensome administrative procedures.¹⁰³ Not possessing a nationality or alternative nationality and being stateless carries devastating consequences and, according to the UNHCR, and these include ‘being denied a legal identity when upon birth, access to education, health care and marriage opportunities during their lifetime and even the dignity of an official burial and a death certificate when they die.’¹⁰⁴

In the absence of birth registration there cannot be nationality and the effect is statelessness.¹⁰⁵ A birth certificate therefore in some cases is the foundation of nationality and in such a case cancels effect of being stateless.¹⁰⁶ A birth certificate is a key form of proof to confirm or acquire citizenship under a State’s domestic legislation because they contain key information to assert the child’s right to a nationality.¹⁰⁷ It can be said that there is a connection between birth registration,

¹⁰¹ UNHCR, Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012, HCR/GS/12/01.

¹⁰² Handbook on protection of stateless persons under the 1954 convention relating to the status of stateless persons Geneva, (2014) 21-22

¹⁰³ UNHCR ‘A Special Report: Ending Statelessness Within 10 Years’ (2014) 2.

¹⁰⁴ UNHCR ‘A Special Report: Ending Statelessness Within 10 Years’ (2014) 2.

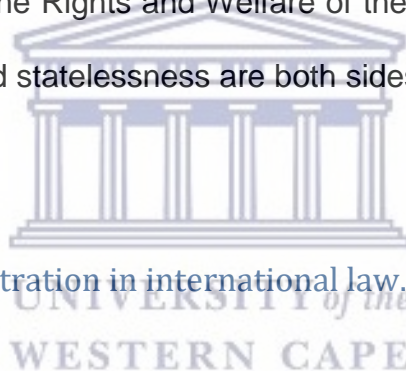
¹⁰⁵ The Constitution of the Republic of South Africa, 1996. Section 28(1)(a). Section 28 is in line with International obligation by CRC Article 7(1).

¹⁰⁶ Action 7 of the Global Action Plan calls on States to ‘ensure birth registration for the prevention of statelessness’. UNHCR Ending Statelessness within ten years.

¹⁰⁷ UNHCR, UNHCR Action to Address Statelessness: A Strategy Note (March 2010), p. 11f, at:

nationality and statelessness in that the presence of a birth certificate establishes nationality while its absence creates statelessness.

The right to a nationality and protection of stateless persons are directly connected that they are further reinforced by a variety of instruments, including the Universal Declaration of Rights (Article 15), the International Covenant on Civil and Political Rights (ICCPR) (Article 24), the Convention on the Elimination of all forms of Discrimination Against Women (Article 9) the Convention on the Nationality of Married Women; the Convention on the Elimination of all Forms of Racial Discrimination (Article 5), the Convention on the Rights of the Child (CRC, Article 7) and the African Charter on the Rights and Welfare of the Child (Article 6). This is an indication that nationality and statelessness are both sides of the same coin.



2.7 The right to birth registration in international law.

International human rights law unquestionably recognises a right to birth registration. This right is enshrined in a range of human rights treaties such as the ICCPR and CRC. While the right to birth registration has been clearly recognised, it is less clear whether such a right includes a right to a birth certificate.¹⁰⁸ Without a birth certificate the individual benefits flowing from birth registration are illusory.¹⁰⁹ The right to a birth certificate is an implicit part of the right to birth registration. Whilst registering every birth provides the State with valuable data about its population, it does little to protect the individual unless a birth certificate is also provided. It is the birth

<http://www.refworld.org/docid/4b9e0c3d2.html>(Date of use 08-08-21)

¹⁰⁸ Cappa C & Wardlaw.T Every child's birth right: inequities and trends in birth registration(2013) 22

¹⁰⁹ Todres J Birth Registration: An Essential First Step toward Ensuring the Rights of All Children.(2014) 6

certificate that is the gateway to the enjoyment of all human rights and privileges associated with nationality. It is the birth certificate that provides the substance to the right to birth registration. CRC recognises the right of the child to be registered at birth. Such as articles 7 and 8 and article 24 of the ICCPR. Rights in this area are also recognised in the CERD article 5, CEDAW article 9, ICPRMW article 29 and CRPD article 18.

Concerning the right to birth registration, the UDHR does not assist, as it contains no provision relating to this right.¹¹⁰ Some 10 years later after the promulgation of the UDHR, the 1959 UN Declaration on the Rights of the Child provided that ‘the child shall be entitled from his birth to a name and a nationality’, but did not expressly include a right to have his or her birth registered.¹¹¹ The right to birth registration is a distinct and separate right, whereby the State records and acknowledges the existence and legal personality of a child.¹¹² It was only during the drafting of the ICCPR, that the right to birth registration was added to the right to a name.¹¹³

The right to birth registration is enunciated in article 24(2) of the ICCPR. It states ‘every child shall be registered immediately after birth and shall have a name’. The text unfortunately does not guide the content of the right.¹¹⁴ Importantly, it is silent on whether the provision includes a right to a birth certificate.¹¹⁵ Some authors believe that the right to birth registration is inclusive of the right to a birth certificate.¹¹⁶ As a consequence it is thought that the inability to obtain a birth certificate leads to an

¹¹⁰ Brownlie I *Principles of Public International Law*, 7th ed. (2008) 19.

¹¹¹ United Nations declaration on the Rights of the Child, Ga Res. 1386 (xIV), 20 November 1959, UN doc. a/4354, annex, principle 3.

¹¹² United Nations Children’s Fund Implementation Handbook for the Convention on the Rights of The Child united Nations Children’s Fund (2002) 22

¹¹³ Human Rights Committee General Comment 17: Rights of the Child (see paragraphs 7, 8)

¹¹⁴ Van Waas L The children of irregular migrants: A stateless generation? (2012) 23

¹¹⁵ O’Halloran K Adoption law and human rights: international perspectives. (2018) 79

¹¹⁶ Rahman M Approaches of International Law for the Rohingya Refugees in Bangladesh. (2018)16

inability to obtain proof of identity documentation, which in turn creates a problem of legal identity.¹¹⁷ Without this essential documentation a person may not be recognised as a legal personality.¹¹⁸ This makes article 16 of the ICCPR also relevant. It states 'everyone shall have the right to recognition everywhere as a person before the law'. Therefore it will be without dignity if birth registration is done without issuing of a birth certificate.¹¹⁹

UNICEF is the main driving force in child birth registration and birth certificates.¹²⁰ This indicates that the right to birth registration and to a birth certificate are vital rights that have been given world-wide attention.¹²¹ UNICEF has worked with more than 85 countries, supporting programs to increase birth registrations.¹²² UNICEF estimates that these programs led to the registration of 22,991,704 births in 2011.¹²³ In many countries such as Colombia, Ghana and Thailand, UNICEF is promoting the modernisation and computerisation of systems for birth registration such as the introduction of mobile technology to reach out to the parents whose children were not born in hospitals.¹²⁴

The Human Rights Committee is of the view that birth registration is important to reduce the danger of abduction, trafficking children and other types of treatment incompatible with the enjoyment of the rights provided for in the CRC.¹²⁵ The CRC,

¹¹⁷ Bequele A & Mombasa: Universal birth registration: The challenge in Africa. (2005) 13

¹¹⁸ Dunning C Birth registration, legal identity, and the post-2015 Agenda. (2014) 42

¹¹⁹ Van Bueren G The international law on the rights of the child. (2009) 16

¹²⁰ UNICEF Strategic Information Section, Division of Policy and Planning The 'Rights' Start to Life: A statistical analysis of birth registration UNICEF New York (2012) 7.

¹²¹ UNICEF Innocenti Research Centre, Birth Registration: Right from the start, UNICEF Innocenti Research Centre, Florence, Italy, (2012) 2.

¹²² UNICEF Thematic Report 2011 Child Protection from Violence Exploitation and Abuse UNICEF (2012) 13.

¹²³ United Nations Office for the Coordination of Humanitarian Affairs, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, dated 11 February 2013

¹²⁴ Heap S & Cody C The universal birth registration campaign. (2013) 63

¹²⁵ Report of the Secretary-General on human rights and arbitrary deprivation of nationality – A/HRC/19/43

states that a child has the right from birth to a name, the right to acquire a nationality and to be cared for by his or her parents.¹²⁶ It further provides for State parties to ensure the implementation of these rights under their national law and their obligations under the relevant international instruments seeking to prevent statelessness.

In the context of birth registration, non-discrimination implies that States must ensure that access to registration is not undermined by discrimination of any kind including non-nationals, asylum seekers, refugees and stateless children.¹²⁷

UNHCR has furthermore made birth registration a global strategic priority.¹²⁸ The Framework for the Protection of Children, issued by UNHCR in 2012, also includes a specific objective to ensure girls and boys are issued birth certificates, in a non-discriminatory manner.¹²⁹ Birth registration is important for children for the purposes of protection such as protection against trafficking and some harmful practices, prosecution as an adult, detention with adults¹³⁰ and recruited for armed conflict.¹³¹

While it is possible, in times of emergency, for States to derogate or deviate from some provisions of the ICCPR, the powers of derogation are limited and subject to stringent conditions.¹³² In contrast to the ICCPR, the CRC has no derogation clause.

¹²⁶ The Convention on the Rights of the Child in article 7

¹²⁷ Petrozziello Aj Bringing the border to baby: birth registration as bordering practice for migrant women's children (2019) 46.

¹²⁸ Pland A K eetal Birth registration and children's rights: a complex story (2014) 63

¹²⁹ High Commissioner's Dialogue on Protection Challenges (12-13 December 2012) UNHCR in 2012 Available at > <http://www.globalhumanitarianplatform.org/doc00002628.doc> (accessed 10-02-20)

¹³⁰ Appr. S A Human Rights-Based Approach to education for all –UNICEF (2017) 29 https://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf (Date of use 11-04-20)

¹³¹ Van Bueren G The international law on the rights of the child. (2009) 16

¹³² Apland K eetal Birth registration and children's rights: a complex story. (2014) 61

This indicates that the right to birth registration and birth certificate are fundamental.¹³³

2.8 The right to birth registration in the African Region.

The African Children's Charter provides that every child shall be registered immediately after birth.¹³⁴ The right to birth registration must be universal, free and accessible and made immediately after the birth of a child.¹³⁵ The right to birth registration was rated as the most important foundation in any child's life.¹³⁶ Despite continental ratification enjoyed by the African Charter, the right to birth registration which makes a child a legal persona and marks the beginning for the realisation of other rights is still far from being universally achieved.¹³⁷ For the right to birth registration to be effective, the Committee holds that it must be universal, free and accessible and made immediately after the birth of a child.¹³⁸ The right to birth registration is for all the children, anywhere and anytime hence the African Charter in article 6 (2) uses the term -every child.¹³⁹ Article 6 is more progressive than CRC as it recognises three interlinked rights namely the right to a name article 6 (1)), the right to birth registration article 6 (2)) and the right to a nationality article 6 (3)).¹⁴⁰ It also provides for state obligations about the implementation of the right to a

¹³³ Mouravieff E The significance of birth registration in today's world. (2014) 34

¹³⁴ African Charter on the Rights and Welfare of the Child (ACRWC) adopted in 1990 by the OAU

¹³⁵ Cappa C & Wardlaw.T Every child's birth right: inequities and trends in birth registration(2013) 22

¹³⁶ Yamoussoukro Declaration of African ministers responsible for Civil Registration, at the Third Conference on 12 and 13 February 2015.

¹³⁷ Carino E , Made in America: How Birth Certificate Applications Infringe on the Right to Citizenship.(2019) 19

¹³⁸ general comment on article 6 of the African charter on the rights and welfare of the child ACERWC/GC/02(2014), adopted by the Committee at its twenty-third Ordinary Session. Available at ><https://www.refworld.org/pdfid/54db21734.pdf>(Date of use 09-08-21)

¹³⁹ African Charter on the Rights and Welfare of the Child (ACRWC) adopted in 1990 by the OAU

¹⁴⁰ Donnelly J International human rights. (2017) 72.

nationality article 6 (4).¹⁴¹ The Children's Charter originated because the member states of the AU believed that the CRC missed important socio-cultural and economic realities particular to Africa.¹⁴² It emphasises the need to include African cultural values and experiences when dealing with the rights of the child.¹⁴³

Birth registration must be afforded to all children without discrimination, as a result of a birth occurring on a state's territory. ¹⁴⁴ The universality of this right therefore means that no birth of a child should go unregistered irrespective of legal status or of that that of parents.

One of the main purposes of Article 6(4), of the African Children's Charter, is to prevent or reduce statelessness.¹⁴⁵ In its twenty-third Ordinary Session the Committee of Experts stated that: African States do not enjoy unfettered discretion in establishing rules for the conferral of their nationality, but must do so in a manner consistent with their international legal obligations".¹⁴⁶

Regional instruments are clear on the issues of birth registration and nationality. The Convention Governing the Specific Aspects of Refugee Problems in Africa is silent on birth registration specifically but article 4 speaks of non-discrimination based on nationality. The African Charter on Human and Peoples' Rights in article 17 provides that every individual has the right to education. This is related to birth registration and birth certificates in that no education can be realised without a birth certificate in most cases.¹⁴⁷ Other African regional instruments are the Protocol to the African Charter on Human and Peoples' Rights, in article 12 (1) (a) is against all forms of

¹⁴¹ De Schutter O International human rights law (2019) 97

¹⁴² Schroeder D Human rights and human dignity (2012) 13

¹⁴³ Anthony KI Igwebuike Philosophy and Human rights violation in Africa. (2018) 88

¹⁴⁴ International Convention on the Elimination of All Forms of Racial Discrimination article 5(d)iii

¹⁴⁵ Maftai J Some Aspects of Citizenship from the Perspective of International Law.(2016) 18

¹⁴⁶ Spiro P.J A New International Law of Citizenship.(2011) 19

¹⁴⁷ Rowe D Universal Human Rights from an African Social Contract. (2018) 56

discrimination and guarantees education and training equal to men and women. The African Youth Charter in article 23 (1) (b) favours education for girls equal to boys. Subsection (d) provides for universal education opportunities for the youth. All these mentioned instruments don't speak directly of the right to birth registration and birth certificate.¹⁴⁸ However they complement those rights.¹⁴⁹

2.9 The right to nationality in international law.

The ICCPR, along with the ICESCR, are the treaties intended to give legal effect to the rights enunciated in the UDHR.¹⁵⁰ These covenants give further content to the UDHR and create legally binding human rights obligations.¹⁵¹ Together these three instruments form what is known as the international Bill of Human Rights, represent the 'core of human rights protection in the world community', and are the most authoritative universal minimum standards of present international human rights law.¹⁵² ICCPR, UDHR and ICESCR help shed light when it comes to the right to nationality and the right to acquire nationality. The rules on how to obtain and lose nationality, the legal content of nationality and the effects are determined by the laws of each state.¹⁵³ UDHR provides that everyone has the right to a nationality and no one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.¹⁵⁴

¹⁴⁸ Ibhawoh B Human rights in Africa. (2018) 11

¹⁴⁹ Brett P Human Rights and the Judicialisation of African Politics (2018) 17

¹⁵⁰ The UDHR, or at least most of its elements have achieved customary international law status

¹⁵¹ Joseph S eetal *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary, 2nd ed.* (2004) 44

¹⁵² Rosenne S The perplexities of modern international law. (2003) 34

¹⁵³ Benny C Protecting children's nationality. (2019) 102

¹⁵⁴ The Universal Declaration of Human Rights was proclaimed by the United Nations General

The doctrine of international law in the field of acquiring nationality by birth draws its authority from the two principles of *jus sanguinis* and *jus soli*.¹⁵⁵ *Jus sanguinis* principle requires the acquisition by the child of his parents' citizenship regardless of his birthplace.¹⁵⁶ This principle follows from the principle of nationality and by its application it shall be ensured the unity of the state and its inhabitants, the citizenship being transmitted from parents to child, even if the individual was born in another country, thus the child becoming a member of the community to which they belonged and its ascendants.¹⁵⁷ According to the principle of *jus soli*, the child acquires the citizenship of the State in which he is born, regardless of the nationality of his parents.¹⁵⁸ This principle gives the State the power to grant nationality to individuals who are born on its territory.¹⁵⁹ By the notion of territory the following are inclusive: the soil, subsoil, air space, internal waters, territorial waters, and vessels or aircraft under its flag.¹⁶⁰ In the field of diplomatic and consular relations, the Optional Protocols concerning Acquisition of Nationality, 1961 and 1963 provide that members of the mission and members of the consular post not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.¹⁶¹

International law provides that the following legal acts can lead to the acquisition of nationality: marriage between two persons who have different nationalities; by adoption, the child may acquire citizenship of the adoptive parent, if he had not had

Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III).

¹⁵⁵ Jirka L Nationality and rationality. (2019) 116

¹⁵⁶ Strik MA Withdrawing nationality as a measure to combat terrorism. (2019) 102

¹⁵⁷ Hunter W. Undocumented Nationals: Between Statelessness and Citizenship. (2010) 134

¹⁵⁸ Nickerson AM Nationality versus humanity. (2008) 99

¹⁵⁹ Harpaz Y Citizenship 2.0: Dual Nationality as a Global Asset (2019) 68

¹⁶⁰ Pedroza L Citizenship beyond nationality. (2019) 81

¹⁶¹ Gerson G Nationality in the open society. (2019) 88

another nationality or citizenship of a foreign state;¹⁶² the recovery or reintegration, it can return to the old nationality if the former citizen repatriates¹⁶³ or if a married woman had lost nationality obtained through marriage to a foreigner, and later divorced; the effect of a prolonged stay in the territory of another State than their own;¹⁶⁴ as an option, in the case of transfer of territory from one state to another, where people living in the transferred territory, they have the right to choose to keep their nationality or to obtain the nationality of the new state.¹⁶⁵

To prevent and reduce the number of stateless cases, the states have adopted several documents in this matter with obligations: States Parties have an obligation not to withdraw nationality from any person, if by this action it would create statelessness.¹⁶⁶ Children born of parents without nationality shall acquire the nationality of the State in which the birth occurred.¹⁶⁷ A child born of unknown parents and whose place of birth is not known is considered as being born in the State in which the child was found.¹⁶⁸ Loss of any form of nationality cannot take effect unless the person acquires another nationality.¹⁶⁹ Any treaty under which a transfer of territory must regulate nationality of the inhabitants of the transferred territory must be done in a manner that does not lead to forfeiture of nationality.¹⁷⁰ Every stateless person has duties towards the country in which he lives, obeying its laws and measures to maintain public order.¹⁷¹ States should apply the same regime to all stateless persons, without discrimination on race, religion or country of

¹⁶² Marks S Human rights and root causes. (2011) 111

¹⁶³ McDougal MS eetal Human rights and world public order: the basic policies of an international law of human dignity. (2018) 26

¹⁶⁴ McAleese M Children as Rights Holders. (2019) 19

¹⁶⁵ Rosenne S The perplexities of modern international law. (2003) 34

¹⁶⁶ Breau S The responsibility to protect in international law: An emerging paradigm shift. (2016) 33

¹⁶⁷ Convention on the Reduction of Statelessness 1961, Article 1

¹⁶⁸ Convention on the Reduction of Statelessness 1961, Article 2(b)

¹⁶⁹ Convention on the Rights of the Child, Articles 2, 3, 7 and 8;

¹⁷⁰ Aragón V Statelessness and the Right to Nationality. (2012) 16

¹⁷¹ Forlati S Nationality as human right. (2013) 63

origin.¹⁷² Stateless persons shall enjoy the same freedom as nationals regarding freedom of religion and religious education of their children.¹⁷³

The right to nationality is a fundamental human right.¹⁷⁴ It implies the right of each individual to acquire change and retain a nationality.¹⁷⁵ International human rights law providing that the right of States to decide who their nationals are is not absolute and requires complying with human rights obligations concerning the granting and loss of nationality.¹⁷⁶ The Universal Declaration of Human Rights (UDHR) provides that everyone has the right to a nationality.¹⁷⁷ On the other hand the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides for the right to nationality and denounces discrimination against any particular nationality.¹⁷⁸ The International Covenant on Civil and Political Rights (ICCPR) provides that every child has the right to acquire a nationality.¹⁷⁹ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides that women and men are equal in acquiring nationality.¹⁸⁰ The Convention on the Nationality of Married Women (CNMW) protects the nationality of children born to foreign parents through their parents.¹⁸¹ The Convention on the Rights of Persons with Disabilities (CRPD) provides that disabled people have a right to a name and nationality.¹⁸² The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW) denounces

¹⁷² Edwards A Nationality and statelessness under international law. (2014) 14

¹⁷³ Fripp E Nationality and Statelessness in the International Law of Refugee Status. (2016) 17

¹⁷⁴ Strydom H international Law. (2016) 304

¹⁷⁵ Report of the Secretary-General on human rights and arbitrary deprivation of nationality – A/HRC/10/34

¹⁷⁶ Sauline B.F The Practical Guide To Humanitarian Law. (2002) 251-252

¹⁷⁷ The Universal Declaration of Human Rights (UDHR) Article 15 (i) and (ii)

¹⁷⁸ International Convention on the Elimination of All Forms of Racial Discrimination(ICERD) article 1(3) and 5(iii)

¹⁷⁹ International Covenant on Civil and Political Rights (ICCPR), Article 24

¹⁸⁰ The Convention on the Elimination of Forms of Discrimination against Women(CEDAW) Article 9

¹⁸¹ Convention on the Nationality of Married Women, 309 U.N.T.S. 65, entered into force Aug. 11, 1958. Articles 1, 2,and 3.

¹⁸² Convention on the Rights of Persons with Disabilities (CRPD) article 18(2)

discrimination on the grounds of nationality.¹⁸³ Both the CRC¹⁸⁴ and the ACRWC¹⁸⁵ provide children with the right to a nationality.

The 1954 Convention Relating to the status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are the two UN Conventions dedicated to protecting stateless persons and reducing statelessness respectively.¹⁸⁶ Of the two Conventions, the 1961 Convention is particularly important as it contains a strong safeguard against childhood statelessness.

The 1954 Convention's most significant contribution to international law is its definition of a "stateless person" as someone "who is not considered as a national by any state under operation of its law."¹⁸⁷ For those who qualify as stateless persons the convention provides important minimum standards of treatment. It requires that stateless persons have the same rights as citizens with respect to freedom of religion and education of their children. For a number of other rights, such as the right of association, the right to employment and to housing, it provides that stateless persons are to enjoy, at a minimum, the same treatment as other nationals.¹⁸⁸

The Convention on the Reduction of Statelessness was adopted on 30 August 1961 and entered into force on 13 December 1975.¹⁸⁹ It complements the 1954 Convention relating to the status of stateless persons. Together these two treaties form the foundation of the international legal framework to address statelessness, a

¹⁸³ Bainham A Children The Modern Law. (2005) 759

¹⁸⁴ Convention on the Rights of the Child (1989) 1577 UNTS 3 Article 7(1)

¹⁸⁵ African Charter on the Rights and Welfare of the Child (1990) (ACERWC) Article 6

¹⁸⁶ United Nations High Commissioner for Refugees 2014 Handbook on Protection of Stateless Persons [http://www.refworld.org/docid/53b676aa4.html\(date](http://www.refworld.org/docid/53b676aa4.html(date) of use 11-07-21)

¹⁸⁷ North West University The International Human Right to Nationality, the Prevention of Statelessness and the Protection of Stateless Individuals in the 21st Century (31 October-2 November 2017 Potchefstroom)

¹⁸⁸ Convention-relating-to-the-Status-of-Stateless-Persons 1954 Articles 17, 18, 21 and 26

¹⁸⁹ United Nations High Commissioner for Refugees 2010 Expert Meeting - The Concept of Stateless Persons under International Law ("Prato Conclusions") [http://www.refworld.org/docid/4ca1ae002.html\(Date](http://www.refworld.org/docid/4ca1ae002.html(Date) of use (11-07-21)

phenomenon which continues to adversely affect the lives of millions of people around the world.¹⁹⁰ The 1961 Convention is the leading international instruments that set the rules for the conferral and non-withdrawal of citizenship to prevent the cases of statelessness from arising. By setting out rules to limit the occurrence of stateless, the Convention gives effect to article 15 of the Universal Declaration of Human Rights which recognises that: “everyone has the right to nationality.”¹⁹¹

Underlying the 1961 Convention is the notion that while states marinating the right to elaborate the content of their nationality laws, they must do so in compliance with international norms relating to nationality, including the principle that statelessness should be avoided.¹⁹² By adopting the 1961 Convention safeguards that prevent statelessness, states contribute to the reduction of statelessness overtime. The Convention seeks to balance the rights of individuals with interests of states by setting out general rules for the prevention of statelessness.¹⁹³

According to the 1954 Convention what underlies the stateless person’s unprotected status and what renders him or her in need of international protection, is simply the absence of a nationality.¹⁹⁴ It is neither relevant how the individual came to be without nationality nor where the person subsequently finds him or herself. Once stateless and bar some limited exclusion clauses a person is entitled to the benefits of the 1954 Convention.

¹⁹⁰ United Nations High Commissioner for Refugees 2014 Handbook on Protection of Stateless Persons <http://www.refworld.org/docid/53b676aa4.html>(Date of use 11-07-21)

¹⁹¹ United Nations High Commissioner for Refugees 2015 I Am Here, I Belong: The Urgent Need to End Childhood Statelessness http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf(Date of use 11-07-21)

¹⁹² University of Cape Town 2018 Strengthening South African Academia in Preventing Statelessness and Protecting Stateless Persons in Southern Africa (8 May 2018 Cape Town) <http://sihma.org.za/events/strengthening-south-african-academia-in-preventing-statelessness-and-protecting-stateless-persons-in-southern-africa/> (Date of use 11-07-21)

¹⁹³ United Nations High Commissioner for Refugees 2011 Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1967 Protocol Relating to the Status of Refugees.

¹⁹⁴ Convention Relating to the Status of Stateless Persons (CRSP) 1954 Articles 1,3,6,and 12

These benefits include a set of civil, economic, social and cultural rights for which a minimum standard of treatment is guaranteed.¹⁹⁵ Significantly, although the 1954 Convention does not require state parties to grant their nationality to stateless persons, it does call on states to facilitate the naturalisation of stateless people, with a view to helping them to resolve their situation by acquiring a nationality as quickly and easily as possible.

The 1961 Convention sets out rules for the conferral and non-withdrawal of nationality where the person in question would be left stateless. By applying the safeguards elaborated in the 1961 Convention wherever a person would be left stateless, states can prevent new cases of statelessness from arising.¹⁹⁶ The 1961 Convention reduces statelessness in two ways. First prevention of statelessness leads to a reduction of statelessness over time. Secondly when bringing their domestic legislation into line with the safeguards detailed in the 1961 Convention, states are encouraged to use the opportunity to reduce statelessness.¹⁹⁷ For example states may apply newly introduced safeguards retroactively and accordingly to allow for acquisition of nationality by stateless people. Articles 1 to 4 concern the acquisition of nationality by children.¹⁹⁸ States shall grant their nationality to children who would otherwise be stateless and have ties with them through either birth in the territory or descent. Nationality shall either be granted at birth by operation of law or upon application.¹⁹⁹ The 1961 Convention permits states to make the conferral of

¹⁹⁵ Convention Relating to the Status of Stateless Persons (CRSP) 1954 Articles 1,3,6,and 12

¹⁹⁶ Assefa AG 2015 Realising the Right to Birth Registration to Prevent Statelessness in Africa: In the Context of the General Comment on Article 6 of the African Children's Charter
<https://africlaw.com/2014/12/15/realising-the-right-to-birth-registration-to-prevent-statelessness-in-africa-in-the-context-of-the-general-comment-on-article-6-of-the-african-childrens-charter>.

¹⁹⁷ Committee on the Rights of the Child General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child UN Doc CRC/GC/2003/5 (2003)

¹⁹⁸ Committee on the Rights of the Child General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child UN Doc CRC/GC/2003/5 (2003)

¹⁹⁹ The Convention on the Reduction of Statelessness 1961(CRS) 360 UNTS 117 Article 1-4

nationality subject to certain conditions such as habitual residence for a certain period of time. Article 2 requires states to grant nationality to foundlings.²⁰⁰

2.10 The right to nationality in the African Region.

The African Charter on the Rights and Welfare of the Child follows the UN Convention on the Rights of the Child (CRC) by providing in Article 6 for the right to acquire a nationality.²⁰¹ It incorporates the requirements in the 1961 UN Convention on the Reduction of Statelessness relating to stateless children,²⁰² by stating that children must acquire nationality wherever they are born if they are not granted nationality by any state.²⁰³

Articles 6(3) and (4) of the African Children's Charter reaffirms the established international principle set out in the Universal Declaration of Human Rights Article 15(1) that everyone has the right to a nationality.²⁰⁴ This is an indication that all state parties in their domestic laws should adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality upon birth.²⁰⁵ The African Children's Charter thus reaffirms the specific

²⁰⁰ The Convention on the Reduction of Statelessness 1961(CRS) 360 UNTS 117 Article 1-4

²⁰¹ Adegbola R.E Children's Rights in Africa: An appraisal of the African Committee of Experts on the Rights and Welfare of the Child. (2007) 9-12

²⁰² Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.(13)

²⁰³ UN Convention on the Reduction of Statelessness relating to stateless children 1961. Article 1(4)

²⁰⁴ Assefa A.G, Advancing Children's Rights in Africa: The Role of the African Children's Charter and its Monitoring Body. (2013) 67-68

²⁰⁵ General Comment No. 17 of the UN Human Rights Committee (1989); Article 24: Rights of the Child.

responsibility of the State where the child is born to confer its nationality upon the child, if that child has no other nationality.²⁰⁶

The implication of article 6 is that the right to a nationality has central importance for the recognition and respect for other rights: thus the prevention of statelessness, including the statelessness of children, is a fundamental principle of international human rights law.²⁰⁷ The Committee of Experts has holds that, "One of the main purposes of Article 6, in particular Article 6(4), of the African Children's Charter, is to prevent and reduce statelessness."²⁰⁸

The African Charter on the Rights and Welfare of the Child is far more progressive.²⁰⁹ Article 6 goes beyond the obligations in the CRC including maximum protection of nationality.²¹⁰ In May 2014, the African Committee of Experts condemned discrimination in rules relating to nationality, whether on the basis of sex, race, ethnic group or similar criteria.²¹¹ Even though the foundation to acquire nationality has been made,²¹² the refusal to grant nationality to children born to foreign parents by South Africa has left a question on the significance of regional instruments such as the African Charter on the Rights and Welfare of the Child especially on whether the provisions of ACRWC are derogatory or non-derogatory.

²⁰⁶ UNHCR Good practices in nationality laws for the prevention and reduction of statelessness. (2018)9

²⁰⁷ Hassmann .H & Roberts M The human right to citizenship: A slippery concept (2015) 10

²⁰⁸ General Comment no. 7 (2005) Committee on the Rights of the Child fortieth session. CRC/C/GC/7/Rev.1

²⁰⁹ Rights of African Children under the African Charter on the Rights and Welfare of the Child: the Addition to the Universal Protection of a Child. (2011) 26 and 42

²¹⁰ The African Charter on the Rights and Welfare of the Child, Article 6

²¹¹ African Committee of Experts on the Rights and Welfare of the Child and to Acquire a Nationality", 16 April 2014, ACERWC/GC/02 (2014)

²¹² The African Charter on the Rights and Welfare of the Child, Article 6

The African Charter on Human and Peoples' Rights does not contain an explicit provision on nationality. However, Article 5 of the Charter provides for the respect of the dignity in every human being and the recognition of his legal status and has been interpreted by the African Commission on Human and Peoples' Rights to include the right to a nationality.²¹³ In April 2013, the African Commission on Human and Peoples' Rights adopted a resolution that reaffirmed the right to a nationality as implied within Article 5 of the Charter.²¹⁴

The ACERWC embraces that the right to a nationality becomes of greater significance as a person approaches and reaches adulthood.²¹⁵ Ensuring that all children have a nationality from birth is not only in the best interests of the child and future adult, but also of States Parties to the Charter. In considering the significance of the wording of Article 6(3), a purposive reading and interpretation strongly suggests that, as much as possible, children should have a nationality beginning from birth.

The ACERWC through the Committee of experts encourages African States to facilitate the acquisition of nationality by children who were not born in their territory but who arrived there as children and have been resident there for a substantial portion of their childhood.²¹⁶ The Committee suggests that States parties to ensure that their nationality laws provide that children born on a ship or in an aircraft flagged

²¹³ A guide to the African human rights system, Pretoria university Press.(2016) 57.

²¹⁴ The African Commission on Human and People's Rights, 234: Resolution on the Right to Nationality, 23 April 2013, available at <https://www.refworld.org/docid/51adbcd24.html>(accessed 18-02-20)

²¹⁵ Gose M *The African Charter on the Rights and Welfare of the Child.* (2002) 94

²¹⁶ Owen D On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights(2018) 302

or registered in that State are deemed to have been born in the territory of that State.²¹⁷

In a historical context of nationality, the most common ground for discrimination relates to the gender of the parent.²¹⁸ Over the past two decades, many African jurisdictions have amended their laws to remove discrimination in the rights of men and women to transmit their nationality to a child, and the African Committee of Experts on the Rights and Welfare of the Child ACEWRC recommends that jurisdictions that still retain such provisions to do the same.²¹⁹ Such reforms should also remove discrimination based on the birth of a child in or out of wedlock.

The ACEWRC held that children-foundlings found abandoned in the territory of a State Party acquire the nationality of that State.²²⁰ It is important to ensure that children abandoned by their parents, or whose parents have died, or who are separated from their parents in case of war or natural disaster, also acquire a nationality. The ACEWRC recommends that foundlings acquire the nationality of the state where they were found.²²¹ African jurisdictions are encouraged to enact laws that cater to foundlings.

In particular contexts, the nationality of a child may be affected by a change in the status of his or her parents, for example in case of marriage, divorce, or change of nationality of a parent. The ACEWRC recommends that it is in the best interests of the child that, when his or her parent acquires a new nationality through marriage,

²¹⁷ African Committee of Experts on the Rights and Welfare of the Child and to Acquire a Nationality" 16 April 2014, ACERWC/GC/02 (2014)

²¹⁸ Gender discrimination and inequalities across regions UNICEF found. https://www.unicef.org/sowc07/docs/sowc07_panel.pdf (Date of use 09-08-21)

²¹⁹ Revised Background Note on Gender Equality, Nationality Laws and Statelessness, UNHCR 8 March 2013 <http://www.refworld.org/docid/4f59bdd92.html> (Date of use 09-08-21)

²²⁰ Guidelines on statelessness no. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness HCR/GS/12/04(2012). <https://www.refworld.org/pdfid/50d460c72.pdf> (Date of use 09-08-21)

²²¹ UN Convention on the Reduction of Statelessness relating to stateless children 1961. Article 2

naturalisation or similar procedure, the child also acquires that nationality. Where a parent loses or is deprived of nationality, that loss or deprivation should not affect the child and in no case may a child lose or deprived of his or her nationality if he or she would be left stateless.²²² In cases where a parent renounces his or her nationality, the State is under a general obligation to ensure that the child obtains another nationality.²²³ The obligation of States to ensure that another nationality is acquired is particularly important to avoid statelessness for that child.²²⁴

The ACRWC requires that State parties to take all necessary measures to ensure that appropriate remedies are available in all cases or allegations of violation of the rights to a name, to birth registration, to acquire a nationality.²²⁵ This must include the obligation to prevent statelessness.²²⁶ States parties particularly must establish administrative and judicial review mechanisms to enable individuals to appeal any decision denying them any of the rights enshrined in Article 6 of the African Children's Charter.²²⁷



2.11 Conclusion:

The right to nationality is the most basic of human rights. Internationally and regionally, it is set out under Article 7(1) of the UN Convention on the Rights of the Child, Article 6(3) of the ACRWC, as well as the ICCPR. In the same vein, the right to birth registration is enshrined in Article 7(1) of the UNCRC and the African Charter

²²² UN Convention on the Reduction of Statelessness relating to stateless children 1961. Article 3

²²³ UN Convention on the Reduction of Statelessness 1961, Article 1

²²⁴ Aragón V Statelessness and the Right to Nationality. (2012) 16

²²⁵ Mouravieff E The significance of birth registration in today's world. (2014) 34

²²⁶ Apland K eetal Birth registration and children's rights: a complex story. (2014) 61

²²⁷ Heap S & Cody C The universal birth registration campaign. (2013) 63

on the Rights and Welfare of the Child in Article 6(1).²²⁸ Children without nationality attain the age of majority to face serious consequences such as unable to marry or register the births of their children if ever they return to their countries of origin, thereby perpetuating the cycle of statelessness.²²⁹ The right to nationality of children born to foreign parents is indeed a basic right supported by international and regional instruments.²³⁰ It is unfortunate that individuals affected face insurmountable difficulties to prove their identities and regularise their presence in South Africa.²³¹



²²⁸ Van Bueren G The international law on the rights of the child. (2009) 16

²²⁹ Van Waas L The children of irregular migrants: A stateless generation? (2012) 23

²³⁰ Bequele A & Mombasa: Universal birth registration: The challenge in Africa. (2005) 13

²³¹ Ackermann M Unaccompanied and Separated Children in South Africa: is Return the Only Option? (2017) 982

CHAPTER 3: THE LEGISLATIVE FRAMEWORK RELATING TO NATIONALITY AND BIRTH REGISTRATION IN SOUTH AFRICA.

3.1 Introduction.

The previous chapter dealt with aspects of international law addressing the right to nationality of every child. Closely linked to this right is the right to a birth certificate. This was achieved through exploration of international treaties and regional treaties that have articles specifically addressing the right to a nationality and birth certificate. Chapter three focuses on South African law dealing with the right to nationality. The Constitution of South Africa and relevant legislation to the right to nationality are focus areas to ascertain procedures to follow in acquisition of nationality.



3.2. Implications of civil registration in South Africa.

Civil registration is defined as: “ *the continuous-permanent, compulsory, universal recording of the occurrence and characteristics of vital events pertaining to the population, as provided through decree or regulation in accordance with the legal requirements in each country, with full respect of rules regulating the protection and privacy of individual information.*”²³² Every child has the right to a nationality as bestowed by civil registration in South Africa.²³³ This means the state must record all the events in an individual’s life that could affect their legal status, such as birth, marriage, nationality or death. This must be done in line with the laws of the country.²³⁴ There is also a need to respect the privacy of this

²³² Handbook on Civil Registration and Vital Statistics Systems United Nations Statistics Division. (2017) 8

²³³ The constitution of South Africa sections 3, 7, 10, 20 and 28 (1) (a)

²³⁴ Hassmann .H & Roberts M The human right to citizenship: A slippery concept (2015) 10

information and protect it.²³⁵ Undocumented migrants²³⁶ are affected most as giving birth without a legal status to reside in South Africa works unfavourably to non-South Africans for example in the case of *Centre for Child Law v Minister of Basic Education* undocumented non-South African children were refused opportunity to register in Eastern Cape schools without valid documents.²³⁷

3.3 Historical background to Nationality law in South Africa

Rules regulating nationality in South Africa have evolved from simple to complex legal processes.²³⁸ Before 1949, those born in South Africa had a right to nationality, no matter what their parents' status was.²³⁹ Proof of the place and date of their birth was required to support claim of citizenship.²⁴⁰ Those born between 1949 and June 1961 were required to prove their father's status at the time of their birth for example whether the father was a South African citizen or had an identity book showing him to be a permanent resident.²⁴¹ Those born after June 1961, qualified for nationality if both parents were citizens. Proof of parent's Identity Documents was required to support the claim of nationality.²⁴² The Aliens Control Act of 1991 was based on a 1913 Act that excluded blacks from South African nationality and was amended in

²³⁵ Report on birth registration-OHCHR www.refworld.org/pdfid/52b2e2ebd4.pdf(Date of use 09-08-21)

²³⁶ 'Undocumented foreign migrant children' in this mini-thesis, include in this definition children of 'illegal aliens', asylum seekers, immigrants, and accompanied and unaccompanied children.

²³⁷ *Centre for child law and others v Minister of Basic Education* (ZAECGHC) (2019) 126.

²³⁸ Barchiesi F Precarious liberation: Workers, the state, and contested social citizenship in post-apartheid South Africa(2011) 34

²³⁹ Seekings J The origins of social citizenship in pre-apartheid South Africa (2000) 12

²⁴⁰ Martens J Citizenship, Civilisation and the creation of South Africa's immortality Act, 1927 – South African Historical Journal, (2007)14

²⁴¹ South Africa : a journal od ID Case Study available at <http://documents.albankaldawli.org/curated/ar/315081558706143827/pdf/South-Africa-ID-Case-Study.pdf>(Date of use 23-04-20)

²⁴² Jenkins M Government of South Africa. 2012. The status of civil registration and vital statistics in South Africa. Pretoria, South Africa.(2012) 62

1930 and 1937 to exclude Jews.²⁴³ With such influx of people into South Africa it is not surprising that civil registration and its implication towards the right to nationality was never reformed by the new democratic dispensation. It perpetuated apartheid nature with attitudes of discriminating migrants who wished to settle permanently in South Africa.

3.4 The current situation in South Africa.

The current situation on the right to nationality is guided by the 1996 Constitution.²⁴⁴

The question of what South African laws exist around birth registration for children born to foreign parents can be answered by looking at the constitution and statutes. Children's right to nationality is protected in the constitution, for example the Bill of Rights support nationality to every child born in South Africa.²⁴⁵ Section 28 of the Constitution of South Africa states that: "every child has the right to a name and a nationality from birth".²⁴⁶ While this provision does not stipulate that every child has a right to a South African nationality, it should be interpreted in light of South Africa's obligations under Article 7 CRC, which includes an absolute protection against childhood statelessness.²⁴⁷ These rights can only be brought to life through cooperation by South Africa through willingness to grant nationality to stateless children born to non-South African parents or foundlings. Section 28 (1) (a) does not say: 'only children born to South African parents have a right to nationality'. Also it

²⁴³ Aurelia S & Loren B. Landau *Contemporary Migration to South Africa* (2011) 109

²⁴⁴ Department of Home Affairs. 2017. Discussion paper on the repositioning of the Department of Home Affairs. Staatskoerant 19 May 2017. Pretoria, South Africa. [URL as of 18 April 2018: <http://www.dha.gov.za/dharepositioningprogramme.pdf>](Date of use 09-08-21)

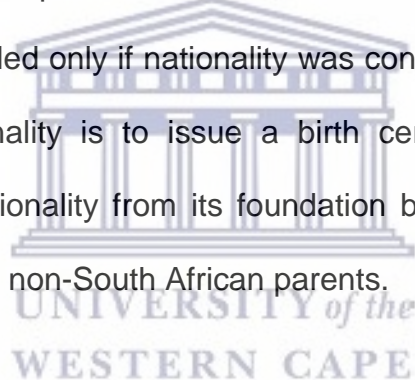
²⁴⁵ Keightley R, *The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law* (2017)16

²⁴⁶ Manby B *Citizenship Law in Africa A Comparative Study* (2016) 58

²⁴⁷ Sandberg K *Children's Right to Protection under the CRC*. (2018) 15

does not say: 'children born to non-South African parents must not be denied the right to nationality'. Section 28 explicitly confers the right to a name and nationality to every child who is stateless. The phrase 'every child' appeals universal and does not discriminate.²⁴⁸ The Constitution does not deny the right to nationality to stateless children born to non-South African parents. It actually promotes it by recognising its existence and importance in line with international and regional instruments.²⁴⁹ Section 28 of the Constitution outlines rights to which children are entitled, including rights to a name and nationality.²⁵⁰

Section 3 of the Constitution provides that South African citizenship is based on equality.²⁵¹ This can be fulfilled only if nationality was conferred to an individual. The foundation to confer nationality is to issue a birth certificate.²⁵² DHA's practice undermines the right to nationality from its foundation by refusing to issue a birth certificate to children born to non-South African parents.



Section 20 of the Constitution provides that: 'No citizen may be deprived of citizenship' and the implication is that DHA must look into the issue of acquisition of nationality seriously and assist children of non-South African parents who are stateless or at risk of becoming stateless.²⁵³ Every child born in South Africa and registered in terms of the Births and Deaths Registration Act has a right to a name and nationality as is provided in section 28 of the Constitution. DHA's practice is inconsistent with the Constitution where it falls short on assisting children of non-

²⁴⁸ Bentle K.A Can there be any universal children's rights? (2005) 12

²⁴⁹ The Constitution of South Africa 1996 Section 39 subsections (1), (2) and (3)

²⁵⁰ The Constitution of South Africa Act 108 of 1996-Section 28.

²⁵¹ The Constitution of South Africa Act 108 of 1996.

²⁵² Ziemele I Article 7: the right to birth registration, name and nationality and the right to know and be cared for by parents. (2007) 44

²⁵³ The Constitution of South Africa Act 108 of 1996

South Africans who are born in the Republic and have neither nationality nor alternative nationality.

3.5 South African Citizenship Act.

The current position on acquisition of nationality in South Africa is governed by the 1995 South African Citizenship Act, as amended in 2004, 2007 and 2010. The South African Constitution is the supreme law of the land, and as such all nationality laws, in theory and application, need to respect the rights it enshrines.²⁵⁴ As a result, both the SACA and the Constitution need to be considered in understanding the reality of the right to nationality, as well as its possible future developments.²⁵⁵ The South African Citizenship Act, as amended by the South African Citizenship Amendment Act, No. 17 of 2010 translates, and operationalises, the Constitution's provisions²⁵⁶. Expanding on nationality in South Africa it says it is obtained by birth, descent or naturalisation.²⁵⁷

At birth, South African nationality law distinguishes between nationality by birth and nationality by descent.²⁵⁸ In the 1995 Act, this distinction indicated the various modes of acquisition available to those born within the country's territory by birth and those born outside of the territory by descent.²⁵⁹ The current law reflects a change brought about by the 2010 Amendment Act 17 of 2010. The new provision, in section 2(2) (b) succinctly states that any person 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

²⁵⁴ The Constitution of the Republic of South Africa Act 108 of 1996. Section 2.

²⁵⁵ Hobden C Report on citizenship law: South Africa. (2018) 6

²⁵⁶ The South African Citizenship Act, 1995 Act No. 88 of 2005.

²⁵⁷ South African Citizenship Amendment Act, 2010 Act No. 17 of 2010.

²⁵⁸ South African Citizenship Act of 2010 section 2 (2)

²⁵⁹ South African Citizenship Act of 2010 section 2 (3)

South African national by birth.²⁶⁰ Nationality by descent is now only applicable to persons adopted by a South African citizen as provided by section 2(3). In all cases it is required that the birth be registered in terms of the Birth and Death Registration Act 51 of 1992:

In recent years, amendments to the SACA have significantly restricted the acquisition of nationality by persons born to non-South Africans on South African soil.²⁶¹ The original legislation, SACA 1995 held that all who are born within the country to at least one parent who is a legal resident or citizen, and who is registered at birth according to the BDRA, is entitled to South African nationality by birth.²⁶² This precludes nationality being acquired by those whose parents are not lawfully admitted to the republic.²⁶³ In order to acquire nationality, a child had to be born to at least one parent who is legally permitted to be resident in South Africa.²⁶⁴ In fact, the SACA, according to some legal scholars was stricter than the practice allowed:²⁶⁵ Section 2(2) (b) states that no person shall be a South African citizen under subsection (1) b if at the time of his or her birth, one of his or her parents had not been lawfully admitted to the Republic for permanent residence therein, and his or her other parent was not a South African citizen.²⁶⁶ Legal scholars argue that this

²⁶⁰ Masondo & Sipho (2010). 'Dual Citizenship Clamp' in Timeslive. Published online 20th September 2010. <https://www.timeslive.co.za/news/south-africa/2010-09-19-dual-citizenship-clamp>.(accessed 16-06-20)

²⁶¹ South African Citizenship Act of 1995 section 2(2) (b)

²⁶² Raylene & Keightley 'The Child's Right to a Nationality and the Acquisition of Citizenship in South African Law', South African Journal on Human Rights. (1998) .411-429

²⁶³ South African Citizenship Act of 1995 ssection 2(1) (b) and section 2(2)(b).

²⁶⁴ Lawyers for Human Rights (2015). 'A State of Statelessness' Published online 17th February 2015. <http://www.lhr.org.za/news/2015/statestatelessness>.(Date of use 09-08-21)

²⁶⁵ Masondo & Sipho (2010). 'Dual Citizenship Clamp' in Timeslive. Published online 20th September 2010. <https://www.timeslive.co.za/news/south-africa/2010-09-19-dual-citizenship-clamp/>(Date of use 09-07-21)

²⁶⁶ Evans & Jenni 'Settlement gives stateless children in SA hope' in News24. Published online 6th September 2016. <https://www.news24.com/SouthAfrica/News/settlement-gives-stateless-children-in-sahope-20160906>.(Date of use 09-07-21)

required either two parents with permanent residence or at least one parent with South African citizenship.

The 2010 amendment restricts acquisition of nationality by birth for persons born in South Africa to non-citizen but permanent resident parents, only upon reaching the age of majority, if they have lived in the Republic from the date of their birth.²⁶⁷ Under the current citizenship regime, children of permanent residents are therefore not citizens, which can have some consequences for their access to education and healthcare.²⁶⁸ In 2016 Lawyers for Human Rights (LHR) challenged the DHA interpretation that this clause did not hold retrospectively and so only applied to children born after 2013. In the *Ali* case the court found that the clause ought to apply irrespective of whether they were born before or after 1 January 2013.²⁶⁹

One exception, known as the statelessness exception, to these requirements is that nationality can be acquired by individuals born in South Africa who do not have the nationality or nationality of any other country, or has no right to such nationality so long as the birth is registered according to the BDRA.²⁷⁰ This is in line with the Constitutional guarantee that every child the right to a nationality from birth.²⁷¹ Children who acquire nationality through this channel have a nationality by birth.²⁷²

These two forms of acquisition illustrate a *jus soli* element to acquisition of South African nationality, children of non-citizen permanent residents upon majority, as well as stateless children, are entitled to nationality by virtue of having been born on

²⁶⁷ South African Citizenship Act Section 2(2) (b)

²⁶⁸ Klaaren & Jonathan. 'Constitutional Citizenship in South Africa', International Journal of Constitutional Law 94(8) (2010) 94 -110.

²⁶⁹ Mbiyozo AN Statelessness in Southern Africa: Time to end it, not promote it (2019) 21

²⁷⁰ South African Citizenship Act 17 2010 2(2) (b)

²⁷¹ Vrancken P & Marx F Birth, marriage and death at sea in South African law (2015) 116

²⁷² BDRA Regulation 3(e) and (Regulation 3(f))

South African territory.²⁷³ These forms of acquisition are however exceptions to the norm of acquisition presented in section 2(2) (b), which is acquisition by virtue of having at least one parent with South African nationality.²⁷⁴ In all cases, registration of birth in terms of the BDRA is required.²⁷⁵ While on the surface this requirement appears to be easily met, it should be noted that current regulations of the BDRA require parents to register the birth within 30 days or else pay a fee for late registration, and to be able to produce a certified copy of a South African identification document or for foreign parents, of a valid passport and visa or permit to be in the country.²⁷⁶ For those living in severe poverty in South Africa, this can be a restrictive burden.²⁷⁷ Those who are entitled to nationality, but have not acquired an identification document, are likely to not register the births of their children, thus delaying and complicating their acquisition of nationality.²⁷⁸ Parents who are illegally in the country will also fail to register their children, thus severely curtailing the applicability of the statelessness exception.²⁷⁹

In a step toward a more inclusive nationality, the SACA now also allows children of non-permanent residents to acquire nationality upon reaching majority, if they have lived in the Republic from birth to majority, and their birth was registered in terms of the BDRA section 4(3).²⁸⁰ This only applies to individuals whose parents were legally in the country, given that evidence of a valid permit or visa is required to register the birth.²⁸¹ This provision goes beyond the statelessness exception, which

²⁷³ Vrancken P & Marx F Birth, marriage and death at sea in South African law (2015) 116

²⁷⁴ Giese S & Smith L Rapid appraisal of home affairs policy and practice affecting children in South Africa (2007) 62

²⁷⁵ BDRA Regulation 3(e) and (Regulation 3(f)

²⁷⁶ Giese S & Smith L Rapid appraisal of home affairs policy and practice affecting children in South Africa (2007) 62

²⁷⁷ Waghid Y.Y. Compassion, citizenship and education in South Africa. (2004) 50-56)

²⁷⁸ Sattar. A Absolute and Conditional Application of Jus Sanguinis(2012)131-132

²⁷⁹ South African Citizenship Act 17 of 2010 section 3(a).

²⁸⁰ South African Citizenship Act 17 of 2010 section 3

²⁸¹ Matshakaile T.N Access to Justice for Non-Citizens: A Constitutional Analysis (2014) 40

grants nationality by birth to children without access to any other nationality.²⁸² Upon reaching majority, children of non-permanent resident, non-citizens can acquire nationality through naturalisation, even if they have entitlement to another nationality.²⁸³

SACA allows for the statelessness exception DHA has not included any guidance on this in the Regulations, thus making it unclear how such a child may go about acquiring nationality through the exemption.²⁸⁴ Simply put, if the regulations have not created a form or procedure for the application, it becomes de facto impossible to make the application, without the help of a third-party organisation such as Lawyers for Human Rights (LHR), and frequently, court action.²⁸⁵ The Department of Home Affairs recently settled one such case and agreed to both grant nationality by birth to the stateless child of Cuban parents and to add regulations to section 2(2) within 18 months to enable stateless children to acquire nationality as allowed through the Act.²⁸⁶ This settlement was agreed upon in September 2016, and according to LHR, the child has yet to be granted nationality by the Department over a year later.²⁸⁷ The regulations with regards to the statelessness exemption are due to be added by early 2018.²⁸⁸

²⁸² Davis DM 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience.' in *International Journal of Constitutional Law*. Vol 1 (2).(2003) 181-195.

²⁸³ Hobden C Report on citizenship law: South Africa. (2018) 6

²⁸⁴ *Thusi v Minister of Home Affairs and Others 2010 (7802/09) (87) ZAKZPHC*

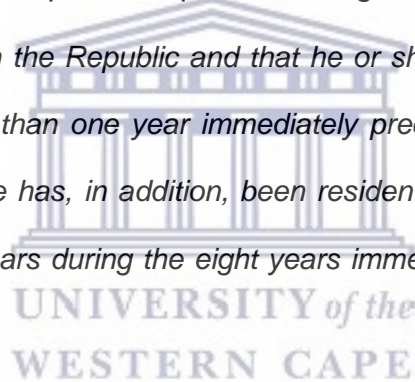
²⁸⁵ Evans & Jenni 'Settlement gives stateless children in SA hope' in News24. Published online 6th September 2016.. <https://www.news24.com/SouthAfrica/News/settlement-gives-stateless-children-in-sahope-20160906> (Date of use 09-08-21)

²⁸⁶ Lawyers for Human Rights (2017). 'Press statement: States Ask South Africa To Give Rights To The Stateless' Published online 18th May 2017. <http://www.lhr.org.za/news/2017/press-statement-states-ask-south-africa-give-rightsstateless>.(Date of use 09-08-21)

²⁸⁷ Nyamnjoh FB insiders and outsiders: Citizenship and xenophobia in contemporary Southern Africa. (2012) 14

²⁸⁸ Waghid Y Compassion, Citizenship and Education in South Africa. (2012) 46

Acquisition of nationality can also happen through naturalisation.²⁸⁹ The main requirements of naturalisation have remained largely the same as initially set out in the SACA.²⁹⁰ However subsequent amendments have resulted in several important changes for example: change in the age of majority; residence requirements; the naturalisation of children; ministerial powers and children of non-citizens.²⁹¹ First, for naturalisation as an individual one has to be of the age of majority which in South Africa is 18. This clause has remained the same, but the age of majority has changed from twenty one to eighteen.²⁹² Second, there has been a significant change in the residence requirements for naturalisation.²⁹³ This point to a tightening of nationality laws.²⁹⁴ Original post-independence legislation required that *“a person had been ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than one year immediately preceding the date of his or her application, and that he or she has, in addition, been resident in the Republic for a further period of not less than four years during the eight years immediately preceding the date of his or her application”*.²⁹⁵



On acquisition of nationality through naturalisation SACA requires a continuous period of ‘not less than five years immediately precede the date’ of application.²⁹⁶ There is some lack of clarity on this restriction however. The regulations attached to this SACA, as amended in 2010, as well as the Department of Home Affairs public

²⁸⁹ Todres J, Birth Registration: An Essential First Step toward Ensuring the Rights of All Children.(2014) 6

²⁹⁰ Dr Cwele S White Paper on Home Affairs, (2019) 34

²⁹¹ South African Citizenship Act 17 of 2010 section 5(a).

²⁹² The Children’s Act No. 38 of 2005) section 17.

²⁹³ Palmary I For Better Implementation of Migrant Children’s Rights in South Africa(2009) 45

²⁹⁴ Jenkins M, Government of South Africa. 2012. The status of civil registration and vital statistics in South Africa. Pretoria, South Africa.(2012) 62

²⁹⁵ South African Citizenship Act 88 of 1995 (SACA) section 5(1) (c).

²⁹⁶ South African Citizenship Act 88 of 1995 section 5(1)(c)

information, explicitly require ten years of residence²⁹⁷ as well as no absence longer than 90 days in any year during the five years preceding application.²⁹⁸ This appears stricter and one interpretation that may account for this seeming difference is that the SACA could be interpreted to require five years of 'ordinary residence' as a permanent resident.²⁹⁹ Given that it ordinarily takes five years of residence to acquire permanent residence,³⁰⁰ this would result in the norm being a ten year residence requirement. Even so, both Acts allow for the Minister's discretion in reducing this residence requirement in granting permanent residence³⁰¹ and naturalisation.³⁰² It is unclear; therefore, what might be the case for an individual who achieved a fast-tracked permanent residence due to exceptional skills or another of the many exceptions listed in section 27 who then applies for naturalisation after five years of residence as a permanent resident.³⁰³

Individuals seeking naturalisation through marriage also face increased residency requirements under if they wish to acquire nationality.³⁰⁴ In terms of section 26 of the Immigration Act, permanent residence through spousal routes requires five years of marriage or residence.³⁰⁵ Acquisition of South African nationality can be achieved through Ministerial discretion as under 'exceptional circumstances' the Minister may grant a certificate of naturalisation to an applicant who does not meet the residency

²⁹⁷ Department of Home Affairs Regulation 3(2)(a)

²⁹⁸ Department of Home Affairs Regulation 3(2)(b).

²⁹⁹ Reed & Tessa 'Home Affairs flouts Citizenship Act' in Tourism Update. Published online 27th January 2017. <http://www.tourismupdate.co.za/article/118167/Home-Affairs-flouts-Citizenship-Act> (Date of use 09-06-21)

³⁰⁰ Immigration Act 13 of 2002 Section 25

³⁰¹ Immigration Act of 2002 Section 27.

³⁰² South African Citizenship Act 88 of 1995 (SACA) section 9

³⁰³ Proudlock P. South Africa's progress in realising children's rights.(2014) 28

³⁰⁴ McKaiser, Eusebius (2017). 'Gupta Citizenship Tale full of holes' in Mail and Guardian. Published online 23rd June 2017. <https://mg.co.za/article/2017-06-23-00-gupta-citizenship-tale-full-of-holes>.(Date of use 09-08-21)

³⁰⁵ Feller.E, Nationality and Statelessness A Handbook for Parliamentarians.(2005) 83

requirements.³⁰⁶ The only limitation is that the Minister is required to table the names of those who have been granted citizenship through this channel at Parliament each year, within 14 days of the opening of parliament.³⁰⁷

SACA also allow for acquisition of nationality on children of non-permanent residents upon reaching majority, if they have lived in the Republic from birth to majority, and their birth was registered in terms of the BDRA section 4(3).³⁰⁸ This only applies to individuals whose parents were legally in the country, given that evidence of a valid permit or visa is required to register the birth.³⁰⁹

3.6 The Births and Deaths Registration Act of 1992 (BDRA)

The BDRA of 1992 provides for the birth registration of all children born within South African borders, whether they are born to South African or non-South African parents.³¹⁰ Under this Act, children born in South Africa who do not qualify for nationality are entitled to a birth certificate under the BDRA.³¹¹ However, they are issued with a birth certificate that does not include an identity number and the child is not entered into the National Population Register.³¹² In South Africa an identity number is very important.³¹³ The individual with whom it is affiliated is identified as a South African national.³¹⁴ A birth certificate without an identity number leads to

³⁰⁶ SACA 2010 amendment (No. 17 of 2010 section 5(9)(a)

³⁰⁷ South African Citizenship Act 88 of 1995 (SACA) section 5(9)(b).

³⁰⁸ Horne KA, Navigating Nationality: The rights to birth registration and nationality in refugee magnet states. (2014) 94

³⁰⁹ Sattar. A, Absolute and Conditional Application of Jus Sanguinis(2012)131-132

³¹⁰ Births and deaths registration act, 51 of 1992

³¹¹ Hobden.C , Report on Citizenship Law South Africa. (2018) 7

³¹² Hobden.C , Report on Citizenship Law South Africa. (2018) 8

³¹³ Van der Waldt G & Prinsloo B Perspectives on National Identity: The Case of Emerging Intelligentsia in South Africa. (2019) 22

³¹⁴ Breckenridge K The Book of Life: The South African Population Register and the Invention of Racial Descent, 1950–1980. (2014)14

questions years later when a child is a major and applies for an identity card.³¹⁵ A similar example is where Kenyan birth certificates carry a caveat that 'possession of a birth certificate does not constitute proof of nationality',³¹⁶ whereas in South Africa DHA resorted in either issuing a document known as a notice of birth or earlier than this issued a birth certificate without an identity number.³¹⁷

According to the Regulations on the Registration of Births and Deaths, a non-South African citizen is a 'person who holds a valid temporary residence visa contemplated in sections 11 to 23 of the Immigration Act.'³¹⁸ It happens that a person visiting South Africa can give birth while in the Republic.³¹⁹ If this happens the DHA issues a document known as a confirmation of birth.³²⁰

The Immigration Act provides that: "the holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen except the right to vote."³²¹ However DHA maintains that permanent residence permit holders are foreigners and as such children born from permanent residence permit holders are not issued birth certificates with an identity number.³²² This is against section 25(1) that, 'the holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen'.³²³ Although permanent residents have to stay for some years in South Africa before applying for citizenship the position of their children is different. There

³¹⁵ Nikeeta Sutton. Statelessness and the rights of Children in Kenya and South Africa: A Human Rights Perspective.(2018) 64

³¹⁶ IHRDA and OSJI 'Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Kenyan Nubian Minors v Kenya – Submissions on admissibility' (2009) 7

³¹⁷ Sattar. A, Absolute and Conditional Application of Jus Sanguinis(2012)131-132

³¹⁸ Klaaren J Post-apartheid in South Africa –From migrants to citizens. (2000) 14

³¹⁹ Palmary I, Report to UNICEF for better implementation of migrant children's rights in South Africa. (2009) 36-37

³²⁰ The Constitution of South Africa Act 108 of 1996. Section 28

³²¹ The Immigration Act provides that: 13 of 2002 as amended in 2004 provides in section 25(1):

³²² CRC Concluding observations on the second periodic report of South Africa CRC/C/ZAF/CO/2. [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/CRC_C_ZAF_CO_2_25463_E.pdf\(Date of use 07-08-21\)](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/CRC_C_ZAF_CO_2_25463_E.pdf(Date of use 07-08-21))

³²³ The Immigration Act 13 of 2002

are chances that children of permanent resident holders will be stateless in future as it may be difficult to secure nationality either in South Africa or where their parents came from. Their position is like they are born in a neutral territory where if they have to go back where their parents originated to claim nationality it will have to be done with production of reliable evidence. Already in South Africa, there will be barriers as it would have been documented that their parents are foreigners.

3.7 The Children's Act.

The Children's Act provides that all organs of state, must respect, protect and promote the rights of children.³²⁴ This includes the DHA to respect, protect and promote the right to nationality of children born to non-South African parents if there is reasonable ground that they are stateless or at risk of becoming stateless. Furthermore section 9 provides that: "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."³²⁵ Children born in exceptional circumstances where it is beyond reasonable doubt that they are stateless should be able to acquire nationality. The judiciary's interpretation of the best interests of the child as being of paramount importance has been demonstrated in so many cases³²⁶ involving children in South Africa. A purposive and progressive approach has always been favoured.³²⁷ For example a progressive approach must consider the present

³²⁴ The Child Act 2005 section 8 (2)

³²⁵ Children's Act NO. 38 OF 2005 as amended by Children's Amendment Act, No. 41 of 2007 and Child Justice Act, No. 75 of 2008

³²⁶ *Fraser v Children's Court*, Pretoria North and others 1997 (2) SA 261 (CC); *Naude and another v Fraser* 1998 (4) SA 539 (SCA).

³²⁷ *V v V*, 1998 (1) SA 169 (C).

circumstances of the stateless child and seek affirmative action speedily to avoid serious harm that maybe caused by refusal to grant nationality.

The Children's Act promotes the best interests of the child as the paramount consideration for administrative and judicial decisions involving children subject to proceedings.³²⁸ This is because the child's right to participate in decision-making about his or her life has become a cardinal feature of the modern children's rights approach as evidenced in the provisions of article 12 of the CRC.³²⁹ The Children's Act is in line with .Section 28(2) of the Constitution, article 3(1) of the CRC, article 4 of the African Charter on the Rights and Welfare of the Child, and articles 16(1) (d) and (f) of CEDAW as all enshrine the best interests of the child standard as paramount or primary consideration in all matters concerning children.³³⁰ Some legal scholars argue that the principle of the best interests of the child is one of the four pillars of the CRC together with non-discrimination, survival and development and child participation.³³¹ Article 3(1) of the CRC provides that in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.³³² The wording in CRC is parallel to section 9 of the Children's Act.

The Children's Act highlights the significance of the right to nationality in that children have the right to human dignity, to life, to freedom and security of the person, the right to housing, health care, food, water and social security, education and so

³²⁸ *French v French* 1971 (4) SA 298 (W)

³²⁹ Cronjie South African Family Law (2007) 158.

³³⁰ Conradie H. Are we Failing to Deliver the best Interest of the Child? Crime Research in South Africa Volume 5 (2003) 17

³³¹ The United Nations Convention on the Rights of the Child (UNCRC) article 2

³³² The United Nations Convention on the Rights of the Child (UNCRC) article 6

forth.³³³ To establish what is in the best interests of the stateless child or those at risk of becoming stateless in South Africa section 9 and court precedents can be considered. The recent Children's Act provides in section 9 that the child's best interests is of paramount importance in all matters concerning the care, protection and well-being of a child.³³⁴

3.8 The Refugee's Act.

The Refugees Act provides that refugees enjoy the full legal protection of the Bill of Rights and the Constitution as a whole, with exception of the right to vote and the right to form a political party.³³⁵ It was confirmed by the court that all foreigners inside the country are entitled to all of the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.³³⁶ Children born to non-South African parents therefore must not be deprived of the right to nationality in circumstances where they are stateless or at risk of becoming stateless. It is a birth certificate that builds a strong base to claim nationality as long as is not a kind of birth certificate that its stated explicitly that the holder of such document cannot claim nationality upon becoming a major, since it shows that an individual is attached to the land of his birth hence the law has provision that nationality can be built on ones place of birth.³³⁷ It was held by the court that there should be zero discrimination between documented foreigners and undocumented migrants who have entered the

³³³ The United Nations Convention on the Rights of the Child (UNCRC) article 12.

³³⁴ The United Nations Convention on the Rights of the Child (UNCRC) Article 3(1)

³³⁵ The Refugees Act section 27 (c)

³³⁶ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*.

³³⁷ Willie N & Mfubu P No Future for our Children: Challenges faced by foreign minors living in South Africa- African Human Mobility Review. (2016) 16-28

country illegally as they all are protected by the Bill of Rights.³³⁸ The right to dignity is especially important in the context of refugee law.³³⁹ Children born to non-South African parents must be assessed thoroughly to ascertain and confirm their nationality. This will help in the acquisition of nationality in cases where they don't have any nationality. This helps in preventing statelessness.

International law on the right to education provides that refugees must receive the same basic education as nationals.³⁴⁰ Access to education for refugees, asylum seekers and migrants is an advantage to everyone as in South Africa.³⁴¹ According to the Bill of Rights everyone has the right to a basic education, including adult basic education.³⁴² Furthermore SASA provides that it is compulsory for every parent to ensure that every learner attends school from the age of seven years to the age of fifteen years or the ninth grade, whichever comes first.³⁴³ SASA further provides that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.³⁴⁴ This is formidable evidence that the right to nationality is crucial in every person's life as all other rights are built upon the right to nationality.³⁴⁵ If the right to nationality is clarified in a person's life it becomes easy for a person to access education and work towards a meaningful social-economic life. ³⁴⁶ This demonstrates the significance of the right to nationality concerning birth certificate registration to children born to non-South African parents. The loss of nationality has a domino effect. The child cannot access education as schools refuse

³³⁸ *Lawyers for Human Rights and Other v Minister of Home Affairs and others* 2004 (4) SA 125 (CC).

³³⁹ The universal declaration of human rights(UDHR) in Article 1, in Article 22 and 23(3)

³⁴⁰ Convention Relating to the Status of Refugees 1951 (UNHRC) article 22

³⁴¹ Ramjathan K the rights of refugees and migrant learner (2010)135

³⁴² Constitution's Bill of Rights, in Section 29: '(1)

³⁴³ South African Schools Act and regulations. Section 3(1)

³⁴⁴ South African Schools Act section 5 (1)

³⁴⁵ Nikeeta Sutton. Statelessness and the rights of Children in Kenya and South Africa: A Human Rights Perspective.(2018) 64

³⁴⁶ Beiter. KD The right to education by international law: Including a systematic analysis of article 13 of the International Covenant on Economic, Social and Cultural Rights.(2016) 14

to enrol such children on the grounds that the child has no documents and therefore not compatible with South African system that require an identity document in performing legal transactions and contracts.

3.9 Administrative challenges faced by DHA.

The administrative mechanism of DHA is littered with allegations of corruption, which has led to a negative reputation.³⁴⁷ The allegations range from bribing DHA officials by foreign nationals to acquire a South African identity document or to appear in the system as married to a South African national.³⁴⁸ Whether some of these negative observations about DHA's administrative mechanism are derived from conspiracy theories, the effect is that DHA experienced criticism in the manner applications for acquisition of nationality have been handled.

In practice, resources limit the DHA from effectively carrying out this mandate.³⁴⁹ However the very existence of these laws has in practice meant that non-citizens, especially undocumented migrants, fear to approach formal establishments for any assistance whatsoever.³⁵⁰ Research has shown that government officials and civilians from across the South African society and professions who are empowered to restrict access to services and rights overstep the bounds of the law in order to exclude foreign nationals.³⁵¹ This discriminatory practice creates an effect that non-

³⁴⁷ SAHRC Report (1999) 24. See also Darshan Vigneswaran, Tesfalem Araia, Colin Hoag and Xolani Tshabalala "Criminality or Monopoly? Informal Immigration Enforcement in South Africa" (2010) 21

³⁴⁸ Asylum at a price. How corruption impacts those seeking legal protection in South Africa <https://www.corruptionwatch.org.za/wp-content/uploads/2016/12/Project-Lokisa-Digital-FINALRRU-Logo-2Dec2016.pdf> (Date of use 08-07-21)

³⁴⁹ Hiropoulos A migration and detention in South Africa (2017)18

³⁵⁰ Kavuro A Protection challenges facing Rwandan refugees in South Africa. (2015)15

³⁵¹ Vigneswaran et al Journal of Southern African Studies (2010) 47

south Africans will shy away from formal systems of access to justice and service providers. Some service providers are disinclined to assist non-citizens without valid identity documents for fear of falling foul of the law.³⁵²

DHA's administrative machinery is further tainted by the insensitivity of officials to the plight of non-citizens and their lack of knowledge on how best to assist them.³⁵³ In South Africa, xenophobia is deeply rooted and these feelings pervade throughout the State machinery including DHA, the police, legal system and judiciary.³⁵⁴ The resultant effect is the manifestation of stringent immigration policies or lack of protection for migrants.³⁵⁵ DHA has been the subject of research which shows that they view undocumented migrants mostly as being involved in crime.³⁵⁶ These views flow directly from the general xenophobic attitudes that they hold.³⁵⁷ The downside of holding such preconceived views about migrants is that they become pervasive against all non-citizens regardless of their legal status in the country.³⁵⁸ This affects professionalism, the selection process on who should acquire documents or not, efficiency, respect for the rule of law and the quality of service delivery.³⁵⁹ This leads to increases in incidents of corruption, DHA officials' criminality and violation of people's constitutional and human rights.³⁶⁰

³⁵² Immigration Act s 42

³⁵³ Makandwa T - Giving birth in a foreign land: maternal health-care experiences among Zimbabwean Migrant women living in Johannesburg, South Africa.(2014) 26

³⁵⁴ Nyandoro M .Implications for policy discourse: The influx of Zimbabwean migrants into South Africa.(2016) 21

³⁵⁵ Landau LB Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee Policy Journal of refugee studies (2006) 41

³⁵⁶ Lawyers for Human Rights Situation Report Refoulement of Undocumented Asylum Seekers at South African Ports of Entry With a Particular Focus on the Situation of Zimbabweans at Beitbridge (2011) available online <http://www.lhr.org.za>(accessed 12 March 2020)

³⁵⁷ Kerr P Xenophobic Violence and Struggle Discourse in South Africa (2019) 22

³⁵⁸ Tella O Migration, xenophobia and new racism in post-apartheid South Africa (2016) 192

³⁵⁹ Nikeeta Sutton. Statelessness and the rights of Children in Kenya and South Africa: A Human Rights Perspective.(2018) 64

³⁶⁰ Nikeeta Sutton. Statelessness and the rights of Children in Kenya and South Africa: A Human Rights Perspective.(2018) 64

Administrative mechanism at DHA is tainted by officials who perform their functions with already pre-conceived ideas.³⁶¹ Generally border posts are staffed by immigration officials whose task is to administer the provisions of the Immigration Act on behalf of the Minister of Home Affairs.³⁶² They tend to view all arrivals at the ports of entry through the lens of immigration control as opposed to a human rights lens, which mandates that all entrants into the country should have a valid travel document.³⁶³ Most undocumented foreign nationals are seen as abusing the asylum system because they are, in the eyes of the DHA, economic migrants who destroyed their own economies in their own countries avoiding the more rigorous immigration system.³⁶⁴ It is for this reason that immigration officers at the ports of entry refuse to issue them with permits under section 23 of the Immigration Act. It becomes immaterial therefore that one is indeed a genuine asylum seeker as they are all painted with the same brush.³⁶⁵ If suspicion is intense on the ground, it is reasonable understandable why administrators at DHA avoid granting nationality to children born to foreign parents.

For foreigners DHA's administrative mechanism is a monster with iron teeth. Generally non-citizens do not assert their rights for fear of retribution from powerful DHA officials.³⁶⁶ They possess no political voice and thus cannot guarantee themselves legal protection or how can one bite the hand that can give him

³⁶¹ Harris, B Xenophobia: a new pathology for a new South Africa? (2002) 42

³⁶² Crush, J South Africa: policy in the face of xenophobia. (2008)17

³⁶³ Brewster H.C Seeing Like a Magical State Discretion: (De)Stabilization, and the Development of Street-Level Systems of Meaning at the South African Immigration Bureaucracy (2009) 26.

³⁶⁴ Lawyers for Human Rights Situation Report Refoulement of Undocumented Asylum Seekers at South African Ports of Entry With a Particular Focus on the Situation of Zimbabweans at Beitbridge (2011)12 available online <http://www.lhr.org.za>(Date of use 23-03-20)

³⁶⁵ *Bula and others v Minister of Home Affairs and others* Paras 64 - 67, 70, 71 – 74. / *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) Para 28, where the court said, "Potential asylum seekers and refugees ... are entitled to the assistance of the Department's officials and need show no more than that they are persons who might qualify as refugees or asylum seekers." There is no need therefore for the applicants to show that they will qualify for asylum.

³⁶⁶ Weissbrodt D The Human Rights of Non-Citizens (2009)3

identity.³⁶⁷ The resultant effect is a lack of means to challenge infringement of their rights. In most cases, non-citizens are new to the country and may be vulnerable and poor without support systems, family, friends or acquaintances in South Africa.³⁶⁸ Therefore non-citizens have a very remote chance of challenging a violation of their rights, mostly because they do not have the “resources, knowledge, power or will to institute appropriate proceedings.”³⁶⁹ Indeed it is common sense that DHA is and won't be prepared to grant nationality to children born to foreign parents whether now or in the near future. Other burdens in the administrative mechanism at DHA include the system has problems of backlogs.³⁷⁰ DHA share the load of processing documents with immigration practitioners.³⁷¹ While immigration officers try their best to alleviate the problem of congestion, DHA fails to process the documents due to backlog problems.³⁷² Delays in the visa application process are experienced. There are challenges where people change their gender and want to get married.³⁷³ DHA has imposed stricter rules on foreign applicants who want to marry citing that such transactions are motivated by fraudulent intentions. The challenge is that those foreign nationals who do it genuinely have to suffer as they should be subjected to various processes in vetting.

There are destructive errors in administration done by DHA. In some cases when DHA home affairs issuing asylum document to someone from DRC but write his

³⁶⁷ Pillay D Relative deprivation, social instability and cultures of entitlement(2008) 3

³⁶⁸ Vigneswaran D Migration control, documentation, and state transformation (2011) 19

³⁶⁹ Landau LB Migration Urbanisation and sustainable livelihoods in South Africa (2005) 24

³⁷⁰ Vandeyar. S Educational and socio-cultural experiences of immigrant students in South African schools(2010) 33

³⁷¹ Vandeyar S Youthscapes: The politics of belonging for “Makwerekwere” youth in South African schools. (2013) 44

³⁷² Alfaro V.T 'Getting angry with honest people': The illicit market for immigrant 'papers' in Cape Town, South Africa (2017) 17

³⁷³ Umezurike SA Perceptions of African immigrants in Pretoria on service delivery in the Department of Home Affairs (2012) 62

nationality as Sudanese.³⁷⁴ To issue an identity document with incorrect details is easy, but to rectify it takes forever.³⁷⁵ The effect it causes is that the holder is in possession of a fraudulent identity document as result even banks might not be prepared to open an account for such a person with wrong details entered in his identity document. DHA also has a tendency of issuing out permits pending granting of asylum, in the long run refusing to grant asylum then call for arrest and deportation of the applicants.³⁷⁶ This extends to expired permits.³⁷⁷

Whenever an administrative procedure allows for discretion and unpredictable system in granting nationality, applicants for citizenship cannot be considered nationals until their applications have been completed and approved and the citizenship of that State is granted in accordance with the law.

4.0 (i) The best interest principle and case law.

The South African Constitution was influenced by the CRC³⁷⁸, it is important to explore how the concept of best interests³⁷⁹ has developed in South African courts and how it can assist in the acquisition of nationality on stateless children born to non-South African parents. Children are dependent on others, their parents and families, or the state when all these fail to care and provide protection their lives are significantly affected.³⁸⁰

³⁷⁴ Mabindisa V, Impact of staff turnover on organizational effectiveness and employee performance at the DHA (2014) 35

³⁷⁵ Macharavanda P.I The leadership challenge in the Immigration Division of the Department of Home Affairs(2016) 10

³⁷⁶ *Minister of home affairs v Rahim and Others* 2016 (3) SA 218 (CC) BCLR 780

³⁷⁷ *Mustafa Aman Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA)

³⁷⁸ A Skelton and P Proudlock "Interpretation, objects, application and implementation of the Act" in CJ Davel and AM Skelton Commentary on the Children's Act 2nd edition 2013-01-11.

³⁷⁹ The Children's Act of 2005. Section 7

³⁸⁰ Skelton A Child Justice in South Africa: Application of International Instruments in the Constitutional Court. (2018) 54

A child's best interests are of paramount importance in every matter concerning the child.³⁸¹ CRC provides only that a child's best interest shall be a *primary consideration*.³⁸² The ACRWC has a slightly higher standard of the *primary consideration*.³⁸³ General Comment 14 articulates quite neatly how best interest should be viewed as a threefold concept: “*First, as a substantive right, namely the child's right to have his or her best interests considered. Secondly as an interpretive principle, to be applied in determining whether a legal provision is the most favourable for a child or children. Thirdly, as a rule of procedure, requiring that decision-making processes about a child or a group of children must include a consideration of the impact of the decision on them.*”³⁸⁴

The development of a best interests jurisprudence in South Africa has shed light on how the best interest maybe help solve challenges on acquisition of nationality by stateless children or children without alternative nationality in South Africa.³⁸⁵ The very first case of the Constitutional Court dealing with children's rights was Williams’s case.³⁸⁶ This case abolished juvenile corporal punishment as a sentence. The court was asked by counsel to consider children's best interests in addition to other rights violations. The court based its decision on a violation of cruel, inhuman and degrading treatment ³⁸⁷ A few years later, the Court had to consider corporal punishment in private religious schools, in the *Christian Education case*.³⁸⁸ In deciding that the legal ban on corporal punishment was a reasonable and justifiable limitation on the parents' right to religious freedom, the court considered best

³⁸¹ Constitution of the Republic of South Africa, 1996 section 28(2):

³⁸² United Nation’s Convention on the Rights of the Child.(UNCRC) Article 3(1) provides that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

³⁸³ African Charter on the Rights and Welfare of the Child (ACRWC) Article 4

³⁸⁴ CRC/C/GC/14, par 6. available at: <https://www.refworld.org/docid/51a84b5e4.html>(Date of use 03-09-20).

³⁸⁵ Sloth-Nielsen J Children's rights jurisprudence in South Africa—a 20 year retrospective. (2019) 34

³⁸⁶ *S v Williams and Others* 1995 (3) SA 632 (CC)

³⁸⁷ The interim Constitution Section 11 (2)

³⁸⁸ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC)

interests, but again focused on children's right to dignity³⁸⁹ and to freedom and security of the person.³⁹⁰

In these early cases, the Court applied the other rights in the Constitution, and interestingly, the rights focussed on by the Court are rights that are not included in section 28, the children's rights clause but elsewhere in the Bill of Rights, showing that, from the outset, the Court applied all the rights in the Bill of Rights to children. Inference can be made therefore that stateless children born to non-South Africans can also acquire South African nationality if the same pattern of arriving at decisions by courts is followed. As the above cases demonstrate, Courts have shown that the best interest principle can be applied by supporting it with other provisions included in the Bill of Rights.

The *S v M*³⁹¹ case is recognised as a landmark case,³⁹² because it was in this case that the Constitutional Court comprehensively set out its approach to best interests. Justice Sachs pointed out that the very expansiveness of the paramountcy principle appears to promise everything but deliver little in particular.³⁹³ Justice Sachs went on to say that: *"it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. The determination of best interests will depend on the circumstances of each case, and this is not a weakness, but strength. A truly child-centred approach requires an in-depth consideration of the needs and rights of the particular child in the "precise real-life situation" he or she is in. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child"*.³⁹⁴ The dicta of Judge

³⁸⁹Constitution of the Republic of South Africa, 1996 Section 10

³⁹⁰ Constitution of the Republic of South Africa, 1996Section 12

³⁹¹ *S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) (hereafter S v M).*

³⁹² Tobin S Melbourne University Law Review (2009) 579.

³⁹³ Tobin (2009) 33(2) Melbourne University Law Review 579.

³⁹⁴ This idea was first articulated in *Minister for Welfare and Population Development v Fitzpatrick and Others (CCT08/00) [2000] ZACC 6; 2000 (7) BCLR 713; 2000 (3) SA 422 (CC)*, and the Court has re-stated this position subsequent to *S v M* in the judgment of *AD and Another v DW and Others*

Sachs can be imputed to imply that circumstances are unique and each of cases dealing with applications of nationality by stateless children in South Africa must be judged on their own merits. To apply a pre-determined formula for the acquisition of nationality is detrimental to the well-being of the child affected.³⁹⁵ It is therefore in the best interest for the stateless child in South Africa born to non-South African parents to acquire nationality through careful application of other rights to compliment the best principle consideration of each case.

The best interest principle, read with the right to nationality, requires that the interests of children who stand to be affected receive due consideration.³⁹⁶ It does not necessitate overriding all other considerations.³⁹⁷ Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned."³⁹⁸ It is fundamentally irrational to expect stateless children born to non-South Africans not to have the capacity to acquire nationality and make choices about their socio-economic life.

Something is literally of paramount importance when it is more important than anything else or of supreme importance.³⁹⁹ Theoretically formulated, the application of section 28(2) would mean that other competing interests provided for by rights, competencies, powers and functions will have to be disregarded to the extent that they are incompatible with due recognition being given to the best interests of the

(CCT48/07) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) para 55, and in *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477(CC); 2009(6)SA 632 (CC); 2009 (11) BCLR 1105(CC).

³⁹⁵ Daly A *The Children's Autonomy Principle and the Best Interest of the Child.* (2017) 33

³⁹⁶ Nevondwe L & Odeku K *Reflection on the Principle of Best Interests of the Child: An Analysis of Parental Responsibilities in Custodial Disputes in the South African law.*(2016) 76

³⁹⁷ Skelton A *Too much of a good thing? Best interests of the child in South African jurisprudence* (2019) 13

³⁹⁸ *S v M* 2008 (3) SA 232 (CC) para 42.

³⁹⁹ Archard D *Children: Rights and childhood* (2014) 42

child.⁴⁰⁰ A sensible and proper balancing and weighing of competing rights and interests should be made and section 28(2) is obviously limited to what is possible and realistic in a given situation.⁴⁰¹ The paramount position of a child's best interests must be assured by application of existing legal principles that favour a decision advantageous to the child. It is probably correct to interpret existing law to allow for the paramount importance of a child's interests to be given effect.⁴⁰²

It was in the *S v M* case that Judge Sachs issued his warning that: "children's best interests could become so ubiquitous that it would lose its strength and that if the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2)".⁴⁰³ King J in the *McCall* case laid down a comprehensive checklist of thirteen factors which decision makers could consider when trying to reach an outcome that would be in the best interests of the child.⁴⁰⁴

The child's best interest principle in section 7 of the Children's Act is significant for the right to nationality and the preservation of humanity.⁴⁰⁵ It means that the child's

⁴⁰⁰ *Western Cape Minister of Education v Governing Body of Mikro Primary School Case No (SCA) 140/2005* The decision attracted wide attention on giving priority to the best interest principle. The Mikro Primary School was an Afrikaans medium public school in Kuilsriver close to another primary public school, which provided education in Afrikaans and English on a parallel basis. The governing body of Mikro had been resisting requests by the Western Cape Education Department to change the language policy of the school so as to convert it into a parallel medium school. The application succeeded and the court interdicted the head of education from compelling the school or its principal to admit learners other than in compliance with the school's language policy. The court further interdicted the education department from instructing or permitting officials of the department to unlawfully interfere with the government or the professional management of the school and ordered that the 21 learners who had been admitted to the school be placed at another suitable school or schools.

⁴⁰¹ Jancic OC *The Rights of the Child in a Changing World* (2016) 34

⁴⁰² *Centre for Child Law v Minister of Home Affairs 2005 6 SA 50 (T)* where the court directed departments and other participants to remedy their conduct in dealing with unaccompanied foreign children.

⁴⁰³ *Nandutu and Others v Minister of Home Affairs and Others 2019 (5) SA 325 (CC) Para 25*

⁴⁰⁴ *McCall v McCall 1994 (3) SA 201(C)*.

⁴⁰⁵ The Children's Act 38 of 2005 section 7

interests are more important than anything else, but not that everything else is unimportant.⁴⁰⁶

Section 28 of the Constitution and section 7 of the Children's Act both have a connection with Article 8 of the CRC which requires that a child's identity including nationality and family relations are preserved.⁴⁰⁷ Preservation and acquisition of nationality or alternative nationality serves as a foundational element.⁴⁰⁸ The effect of the best interest principle puts a child without nationality or alternative nationality as a priority.⁴⁰⁹ The circumstances require that speedy action should be taken to restore the lost nationality.⁴¹⁰

In the *Nandutu* case it was held that although section 28(2) of the Constitution provided that a child's best interests are paramount, jurisprudence provides that the rights of the child do not supersede other rights as rights can be limited.⁴¹¹ While rights can be limited in cases of acquisition of nationality or alternative nationality the best interest principle must be given a priority.⁴¹²

In the *MWPD* case it was held that the scope of application of the best interest principle cannot be restricted to the ambit of fundamental rights included in section 28(1) of the Constitution⁴¹³ If so, the correct solution would probably be that acquisition of nationality or alternative nationality must be accepted to the fullest extent possible. This must put South Africa or any State party as an active role

⁴⁰⁶ Johnson f in the best interests of the child. (2011) 66

⁴⁰⁷ Convention on the Rights of the Child 20 November 1989 Article 8

⁴⁰⁸ In its General Comment No. 5 on general measures of implementation, the CRC Committee Tackles this issue: "Every State should consider how it can ensure compliance with Article 3 (1) and do so in a way which further promotes the visible integration of children in policy-making and sensitivity to their rights.

⁴⁰⁹ UN Convention on the Rights of a Person with Disabilities 2006 Article 7

⁴¹⁰ *Nandutu and Others v Minister of Home Affairs and Others* 2019 (5) SA 325 (CC) para 26

⁴¹¹ *Nandutu and Others v Minister of Home Affairs and Others* 2019 (5) SA 325 (CC)

⁴¹² CRC/C/GC/14 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration Article 3(1) page 7

⁴¹³ *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) para 17.

player specifically as a defender of the right to acquisition of nationality than behaving as a prosecutor of the child without nationality or alternative nationality.

The phrase: 'every matter concerning the child',⁴¹⁴ accommodates a wide interpretation.⁴¹⁵ It is expected that the interests of a child without nationality or alternative nationality be accommodated as well. The words 'every matter' amounts to a general standard for the protection of children's right to nationality or alternative nationality.⁴¹⁶ If the words 'every matter' were ignored a child without nationality or alternative nationality would not be able to legally challenge the DHA because it has authority to prevent him or her from utilising the very little opportunity he or she has to acquire nationality.

In judicial decisions the best interest principle must be interpreted in line with Article 2 of the CRC.⁴¹⁷ In the now famous dictum of Sachs J: *"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them"*.⁴¹⁸ Sachs' dicta will be beneficial if the non-South African child's case is approached vigorously with the best interest principle applied to help the stateless child acquire nationality. It may widen the scope of application.

In 12 November 2018, in the *DPB* case an order was sought declaring that *DPB* born on 26 April 2011, was a South African citizen by birth, and that he should be issued

⁴¹⁴ The Constitution of the Republic of South Africa, 1996 Section 28(2)

⁴¹⁵ Buck T International Child Law (2014) 89.

⁴¹⁶ CRC/C/GC/14 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration Article 3(1) page 10

⁴¹⁷ Convention of the Rights of the Child Article 2: "the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind."

⁴¹⁸ *S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) Para 23.*

with an unabridged electronic birth certificate in terms of section 9 of the BDRA.⁴¹⁹ Similarly in the *Mulowayi* case Allie J confirmed the interpretation of section 2(2) as⁴²⁰ pre-amendment, at paragraph 21 of her judgment. In that *Mulowayi*'s eldest child was in fact a citizen by birth.⁴²¹ Both parents had been granted permanent residence at the time of their eldest son's birth in April 2011. These two cases show a different way of arriving at a court order through the analysis and application of relevant statutes regulating citizenship on who is or not a South African national. The best interest principle was not applied in these two cases though a favourable order was made that acknowledged the nationality of the applicants. It can be argued however that the verdict was at the best interest of the children who brought their applications in court.

In the case of *DGLR*, a child born to Cuban parents submitted an application for the acquisition of South African nationality.⁴²² Cuban government does not permit its citizens to remain outside Cuba for longer than 12 months.⁴²³ The mother overstayed in South Africa and her citizenship was withdrawn. The Cuban government refused to extend citizenship to their child because of the parents' actions. The child was therefore considered stateless, provided no other country granted nationality.⁴²⁴ In order to acquire nationality for their child the family invoked section 2(2) of the Citizenship Act. DHA rejected the application and denied this child a nationality.⁴²⁵ The DHA refused it on the basis that Cuba ought to have granted nationality to the

⁴¹⁹ *FB, HB, FB obo D P B V The Minister of Home Affairs 2018 (5) 11659/2018 (WC)*

⁴²⁰ The Citizenship Act Section 2 (2)

⁴²¹ *FK Mulowayi and Others v Minister of Home Affairs and Others 2018 (5) 13550/2017*

⁴²² *DGLR v the Minister of Home Affairs (GPJHC) (unreported) case number 38429/13 of 3 July 2014.*

⁴²³ Hobden C Hidden Agendas in South African Citizenship Practice (2019) 3

⁴²⁴ *Minister of Home Affairs v DGLR, Appeal Case No 1051/2015*

⁴²⁵ This is similar to Gaddiel, a child who was born in South Africa without a nationality and DHA refused him nationality.. *Mulowayi v Minister of Home Affairs (2019) ZACC.*

child.⁴²⁶ DHA suggested that the child should be granted permanent residence, but permanent residence is not an answer to the question of what nationality was Danell?⁴²⁷ The Court's intervention was sought on the basis that the child has a right to nationality in terms of the Constitution. After a long battle the Court ordered the DHA to issue citizenship to the child.⁴²⁸

Fortunately for Danell, the mandate of Article 3 (1) of the CRC that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration",⁴²⁹ was fulfilled.

In the MK case a foundling had no identification documents and had been placed in the care of a social worker.⁴³⁰ The child was two years old and there was no trace of the parents and no documentation to prove where the child had been born.⁴³¹ The only information available was that MK had been taken care of by a Portuguese-speaking woman prior to his removal.⁴³² The social worker in whose care tried to have him documented by the DHA but was unsuccessful.⁴³³ The child remained undocumented until the age of 16. This child did not have nationality of any state or alternative nationality.

The Children's Act makes reference to foundlings and recognises them as being "in need of care".⁴³⁴ The state has a duty toward a child in need of care and section 12

⁴²⁶ <https://www.bbc.com/news/world-africa-37286815>(Date of use 03-09-21)

⁴²⁷ *Minister of Home Affairs v DGLR, Appeal Case No 1051/2015*

⁴²⁸ Hobden C Hidden Agendas in South African Citizenship Practice (2019) 3

⁴²⁹ Convention on the Rights of the Child 20 November 1989 Article 3

⁴³⁰ *S v MK (65/2012) [2012] ZAGPJHC 113 (2012) SACR 533*

⁴³¹ *Blackie D exploring child abandonment in south Africa (2013) 65*

⁴³² Sherr L Emotional Distress, resilience and adaptability (2017) 67

⁴³³ Khan F Exploring childhood statelessness in South Africa (2020) 87

⁴³⁴ The Children's Act of 2005 section 4, 194

of the BDRA allows for the registration of an abandoned child.⁴³⁵ The South African government could have offered relief in terms of section 2(2) of the Citizenship Act by providing citizenship. It is apparent that there are a number of options in law to protect such a child,⁴³⁶ but none are extended to foundlings.

The court was approached to seek remedy based on the section 2(2) of the Citizenship Act.⁴³⁷ Furthermore the application sought a certificate of naturalisation in terms of section 5(4) of the Citizenship Act.⁴³⁸ In case the application became unsuccessful in court provision was made for an alternative remedy to appeal to the Minister to exercise her discretion to grant the child permanent residence. The court declined to grant the child citizenship.⁴³⁹ Thereafter the Minister exercised her discretion in terms of section 31(2) (b) of the Immigration Act and granted him permanent residence.⁴⁴⁰

There is a suspicion that should the best interest principle be applied vigorously in courts, in matters of acquisition of nationality the numbers of stateless children being granted South African nationality might escalate.⁴⁴¹ This is because in court cases involving South African children the best interest principle has shown that children are a priority and decisions are made on their favour.⁴⁴²

⁴³⁵ Births and Deaths Registration(BDRA) section 12

⁴³⁶ The Child Protection Act 2003 sections 25-30

⁴³⁷ South African Citizenship Act, 1995 (Act 88 of 1995) section 2(2)

⁴³⁸ South African Citizenship Act, 1995 (Act 88 of 1995) section 5(4)

⁴³⁹ The Immigration Act, 2002 (Act 13 of 2002) section 27

⁴⁴⁰ The Immigration Act section 31(2)(b)

⁴⁴¹ Heaton J South African Family law 3ed (2010) 165.

⁴⁴² S v M (Centre for Child Law as Amicus Curiae) [2007] ZACC 18; 2008 (3) SA 232 (CC) at paragraph [12]

4.0 (ii) The Right to Nationality and case law.

Several cases have been brought to the South African Courts on behalf of children without nationality or alternative nationality whom the DHA have attempted often successfully to silence by depriving them of nationality or by otherwise violating their rights on grounds of alleged nationality deprivation.

From 1995 until 6 September 2016, the section allowing otherwise stateless children or a child without an alternative nationality born in South Africa to obtain South African nationality had been wholly defunct.⁴⁴³ Although international treaties protect the right to nationality as a human right time and space have shown that an unimplemented international law compliant provision⁴⁴⁴ is of no use to children without nationality or alternative nationality in need of protection.⁴⁴⁵ An Act is made accessible through the provision of an application form in the regulations to the Act however for 20 years the DHA continued rendering its services without regulations implementing section (2)2 of SACA to facilitate the acquisition of nationality on children born without nationality or alternative nationality in South African.⁴⁴⁶

The Supreme Court of Appeal ordered the DHA to make regulations that enable children born to non-South African parents who do not have nationality or alternative nationality to acquire South African nationality.⁴⁴⁷ The regulation was to be

⁴⁴³ South African Citizen Act (SACA 2010) sections 2(2) and 4(3)

⁴⁴⁴ United Nations Convention on the Rights of the Child, 20 November 1989. Article 7(1) United Nation Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>(Date of use 08-07-21)

⁴⁴⁵ The World's Stateless Children An interview with Prof. Benyam Dawit Mezmur, Chairperson of the United Nations Committee on the Rights of the Child. Conducted in December 2016, by Maria Jose Recalde Vela (2017) 130-139.

⁴⁴⁶ Aird S, Harnett H and Shah P Stateless Children: Youth Who Are Without Citizenship (Youth Advocate Program International Washington DC 2002)

⁴⁴⁷ Mulowayi v Minister of Home Affairs [2019] ZACC 1 <http://www.saflii.org/za/cases/ZACC/2019/1.pdf>(Date Of use 10-07-21)

promulgated within 18 months of the order and once available make it possible for every child born to non-South African parents without nationality or alternative nationality to apply in the DHA for nationality without the help of an attorney. In the case of Daniella the court ordered that she must be registered as South African national within a month.⁴⁴⁸

It is impossible to tell how many children in South Africa are born without nationality or alternative nationality because most of them are undocumented.⁴⁴⁹ Studies have shown that approximately 109 children in child and youth care centres in the Western Cape, only 17 are at high risk of statelessness, while 89 may be at medium risk of statelessness.⁴⁵⁰ Although limited to those in the care system, this number gives an indication as to the number of children who would potentially qualify for nationality in South Africa because of the Court's verdict.⁴⁵¹

In the *Gaddiel case*, Gaddiel, a child born in South Africa was without nationality or alternative nationality. He was stateless.⁴⁵² The South Africa's Citizenship Act, grants nationality to a person who has no nationality of any other country or has no right to such nationality and who has been registered in accordance with the Birth and death Registration Act.⁴⁵³ However there were no regulations to implement Section 2(2) of the SACA, therefore Gaddiel could not acquire South African

⁴⁴⁸ DGLR and Another v Minister of Home Affairs and Others, Case No. 38429/13, North Gauteng High Court. Lawyers for Human Rights Press Release, July 2014, available at <http://www.lhr.org.za/news/2014/press-release-high-court-recognises-childstateless-and-declares-her-be-sa-citizen>(date of use 10-07-21)

⁴⁴⁹ Statelessness and Nationality in South Africa taken 210309Presentation_by_LHR_on_Statelessness.pdf(Date of use 31-07-21)

⁴⁵⁰ Aird S, Harnett H and Shah P Stateless Children: Youth Who Are Without Citizenship (Youth Advocate Program International Washington DC 2002)

⁴⁵¹ <https://www.statelessness.eu/updates/blog/south-african-courts-confirm-right-nationality-stateless-child-20-year-old-legal>.(Date of use 31-07-21)

⁴⁵² UNHCR, Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, 20 February 2012, HCR/GS/12/01.

⁴⁵³ The Births and Deaths Registration Act provides the processes for the birth registration of all children born within South Africa.

nationality. The only option Gaddiel followed was litigation where he asked the court for a remedy of regulations to implement section 2(2) of SACA. In terms of SACA section 4(3), a person born in South Africa to parents who are not South African and who have not been granted permanent residence qualifies for citizenship upon majority, if such person has lived in South Africa from the time of their birth up until the time of majority. However this was going to take a long time before Gaddiel acquire South African nationality.

The lack of an application process under the statelessness provisions of the Citizenship Act had already been raised in an earlier case, *Minister of Home Affairs v DGLR*.⁴⁵⁴ Despite the decision in *DGLR*, the DHA took no steps to remedy the omission.

The Gaddiel case demonstrates the challenges so many children born to foreign parents without nationality or alternative nationality face navigating complex administrative processes just to get access to the acquisition of nationality.⁴⁵⁵ The Gaddiel case illustrated the lack of administrative process and administrative justice that allows children without nationality or alternative nationality to acquire nationality. Gaddiel should be able to rely on South Africa Citizen Act⁴⁵⁶ and international law compliant provisions⁴⁵⁷ to acquire South African nationality yet the process by which he could do that has not been put in place.

The Constitutional Court ruled that children born in South Africa to non-South African parents qualify for South African nationality in terms of Section 2 of the South African

⁴⁵⁴ South African Citizenship Amendment Act 17 of 2010 (SACA) Section 4(3)

⁴⁵⁵ Sloth-Nielsen J and Mezmur BD "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context" 2007 AHRLJ 330-353.

⁴⁵⁶ South African Citizen Act 2010 Section (2) (2)

⁴⁵⁷ Convention on the Rights of the Child 20 November 1989. Article &(1) Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>(Date of use 08-07-21)

Citizenship Act.⁴⁵⁸ That is, if a child is born in South Africa to Non-South African parents who have not been admitted as permanent residents, the child qualifies to apply for South African citizenship upon becoming a major if the birth was registered and if the child resided all his life in South Africa, irrespective of the date of the child's birth and have not accepted the nationality of another country.⁴⁵⁹

In the Ali case the lack of regulations was the subject of successful litigation against the DHA.⁴⁶⁰ This prevented children born to foreign parents to acquire nationality. Section 4(3) of the Citizenship Act provided for a pathway to citizenship by naturalisation of children born in South Africa to parents who are neither South African citizens nor permanent residents at the time of the child's birth.⁴⁶¹ In the Ali case the court ruled that the stipulation that children must wait until they reach 18-years before they can apply for citizenship was arbitrary, disproportionate and contrary to the principle of the best interests of the child.⁴⁶²

However, the DHA failed to promulgate regulations providing the practical and administrative steps as well as appropriate forms which citizenship applicants could use in order to give effect to section 4(3). The draft regulations have not been finalised but if passed in their current form they would be inconsistent with South Africa's Constitution as well as the principle Act. The courts have done their best to consider international law instruments, the Constitution of the Republic and other relevant statutory instruments protecting children's rights. However all that effort has

⁴⁵⁸ South African Citizenship Amendment Act 17 of 2010 (SACA) Section 2

⁴⁵⁹ Lawyers for Human Rights Childhood Statelessness in South Africa (2016) available at <http://www.lhr.org.za/publications/childhood-statelessness-south-africa> (Date of use 07-10-21).

⁴⁶⁰ *Minister of Home Affairs v Ali and Others (1289/17) [2018] ZASCA 169* available at <http://www.saflii.org/za/cases/ZASCA/2018/169.html>. (date of use 07-10-21)

⁴⁶¹ *Minister of Home Affairs v Ali and Others (1289/17) [2018] ZASCA 169* available at <http://www.saflii.org/za/cases/ZASCA/2018/169.html>. (date of use 07-10-21) par 24

⁴⁶² *Minister of Home Affairs v Ali and Others (1289/17) [2018] ZASCA 169* available at <http://www.saflii.org/za/cases/ZASCA/2018/169.html>. (date of use 07-10-21) par 24.

been offset by the DHA's application of laws of acquisition of nationality on children born to non-South African parents.

4.1 Conclusion

The South African constitution and statutes such as the Child Act, the Births and Deaths Registration Act (BDRA) and the refugees Act has progressive provisions that if implemented as they are they can alleviate the plight of children born to non-South Africans. The problem of statelessness and the risk of becoming stateless can therefore be averted. However from human experience it has been noted that there is a nature of help if extended to the needy can in the process destroy the helper by both sinking the helper and one in need. Therefore while South Africa can help as many children born to non-South Africans as possible by issuing birth certificates and protecting their right to nationality, that will backfire causing problems that might be complicated to solve. In the process the DHA has faced administrative challenges that show in nature that organs of the state in South Africa no longer have the capacity to fully address the challenge of nationality of children born to foreign parents with regard to birth registration.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.2. Conclusion

In this thesis it has been established that South Africa has an obligation to implement international and regional laws. However this has a tendency of creating a conflict between national laws of South Africa and international and regional obligations. At times this leads to violation of the right to nationality of children born to non-South African parents who are without alternative nationalities yet qualify for nationality in South Africa. In establishing these important aspects, this thesis proceeded to the main purpose of determining whether the national laws of South Africa violate the international and regional human rights instruments that it is party to. Thereafter this thesis proceeded to determine how best South Africa can play an active role in applying international and regional human rights instruments to cater for children born to non-South African parents in acquiring the right to nationality.


Thus, it has been established that while certain laws have been enacted to enable children born to foreign parents in South Africa, acquire South African nationality,⁴⁶³ denial of granting nationality to children born to non-South African parents is a violation of international and regional instruments.⁴⁶⁴ Such an omission forces children born to non-South African parents, who have no nationality elsewhere to be stateless or be at risk of becoming stateless. The aforesaid omissions further include the lack of guidelines to govern the administrative component of DHA when implementing the right to acquire a nationality in South Africa. Action must be taken

⁴⁶³ Births and Death Registration Act (BDRA)

⁴⁶⁴ African Charter on the Rights and Welfare of the Child (ACRWC) Article 6 and The United Nations Convention on the Rights of the Child (UNCRC) Article 7.

in order to promote the effective identification and selection of children without nationality for the purposes of granting them nationality as advocated by the guidelines of international instruments, regional instruments and the South Africa Constitution. The lack of adequate guidelines in implementing the right to acquire nationality by a child born to foreign parents allows the opportunity for statelessness to thrive. Thus, it is submitted that South Africa needs to establish an identification system such as mapping in order to protect children without nationality, bringing its nationality laws, such as the Citizenship Act,⁴⁶⁵ in line with its obligations in international law.⁴⁶⁶

4.3. Recommendations

The logo of the University of the Western Cape, featuring a classical building facade with columns and a pediment, with the text 'UNIVERSITY of the WESTERN CAPE' below it.

A number of recommendations are suggested based on the findings in this mini-thesis. These recommendations entail the amendment of domestic legislation and guiding principles incorporated in law for the implementation. In order to provide a logical flow of the said recommendations, it will be divided into the obligations South Africa has in terms of Article 4 of the CRC namely, to take all appropriate legislative, administrative and other measures in the implementation of rights in the CRC.

4.4. Legislative measures

The most important recommendations provided for by both the CRC Committee and the African Commission on Human and People's Right is that South Africa ratifies

⁴⁶⁵ South African Citizenship Act (SACA) section 2(2)

⁴⁶⁶ Convention on the Rights of the Child (UNCRC) CRC. Article 7 and 8

the 1954 and 1961 Conventions relating to statelessness. This will facilitate all other recommendations possible and capable of being achieved. These two conventions provide a wide range of protection of stateless children and preventative mechanisms that put children born to foreign parents at risk of being stateless. The ratification will provide South Africa with the foundation to amend its laws accordingly in order to eradicate childhood discrimination on the right to nationality of children born to foreign parents. Articles 1 to 4 principally concern the acquisition of nationality by children. States shall grant their nationality to children who would otherwise be stateless and have ties with them through either birth in the territory or descent. As a result, where children are born in the territory but acquire the nationality of a foreign parent, there is no obligation to grant nationality. Nationality shall either be granted at birth, by operation of law, or upon application. The 1961 Convention permits States to make the conferral of nationality subject to certain conditions, such as habitual residence for a certain period of time. Under Article 2, States shall grant nationality to foundlings that are children found on the territory.

Where it is accepted that the South African Citizen Act effectively protects nationality however South Africa should enact full legal safeguards in nationality law to address all situations in which children may be born stateless in South Africa. Where partial safeguards are in place, these should be strengthened to prevent statelessness in all cases; and fully implemented in practice to guarantee the child's right to a nationality. Making a child's status dependent on a parent is therefore less than desirable, particularly when the child has no other option of a legal status.

Importantly, permanent residence does not give the child rights to a passport, limiting the child's right to freedom of movement and, should the parents choose, or be forced to leave, South Africa they would have to leave Daniella behind becoming an

illegal immigrant. While in the case of Daniella this was corrected there are still other children born to foreign parents who are in the same or similar circumstances like Daniella. Unfortunately their situation still continues up to now.

It is recommended that legislation should be enacted codifying and promoting children as subject of human rights. Regulations must also be enacted that enforces human rights to ensure that children are beneficiaries and are protected. This will prevent children born to non-South African parents to be viewed as objects of charity.

It has been noted that section 2 of SACA addresses the problem of nationality quite effectively. However it is recommended that although section 2 is a solution to problems arising from lack of nationality to children born to non-South African parents' regulations must be enacted to implement section. This will lead to effectively addressing of problems caused by lack of nationality. Particularly sub-section 2 is of great significance as it stipulates that: any person born in the Republic and who is not a South African citizen by virtue of the provisions of section 2 sub-section 1 shall be a South African citizen by birth, if he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and his or her birth is registered in the Republic in accordance with the BDRA of 1992.⁴⁶⁷ Should the regulations be enacted and implemented this will be a great breakthrough for children born to non-South African parents in South Africa who do not have nationality or alternative nationality. Certainly statelessness will be prevented.

⁴⁶⁷ Births and Deaths Registration Act No. 51 of 1992 (BDRA)

It is recommended that there should be “shared burden of proof” about proving nationality for example where DHA alleges that any child applying for acquisition of nationality is not eligible must provide accurate reasons for such a decision. On the other hand human rights groups such as PASSOP⁴⁶⁸ and Lawyers for Human Rights (LHR) must also do an independent investigation to establish if the decision by DHA was given after adequate due diligence and consider legal action as necessary.

It is further recommended that in order for the nationality laws of South Africa to be in line with its obligations under international human rights law, regulations 3, 4, and 5 of the BDRA must be amended in order to facilitate the ability of parents to register their children at birth whether it's a single father where the mother is undocumented, unwilling or unavailable. This would bring the BDRA in line with the CRC Committee's recommendation that states should guarantee that all children born on the territory be registered at birth regardless of their parents' citizenship status and country of origin. For example section 8 of BDRA governs notice of birth of children born to non-South African. It provides in the following subsections that: (c) a certified copy of a valid passport and visa or permit of the mother or father, or both parents, of the child, as the case may be; (d) where applicable, a certified copy of the valid identity document or passport and visa or permit of the next-of-kin or legal guardian and (f) where applicable, a certified copy of the death certificate of any deceased parent of the child. Section 8 should be amended because it makes it difficult for parents who don't have valid documents to register their children.

Section 8 (c); (d) and (f) must be amended in such a manner to cater for registration of children born to non-South African parents even in circumstances where parents

⁴⁶⁸ People Against Suffering, Oppression and Poverty (PASSOP) is a community-based, grass roots non-profit organisation devoted to fighting for the rights of asylum seekers, refugees and immigrants in Cape Town, South Africa.

don not possess valid identity documents.⁴⁶⁹ There is need for legislation that protects children than the one that is applied in a retributive manner on children for the unfortunate circumstances parents find themselves in. The stated amendments will allow a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires as well, regulations to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Since there is a connection between a birth certificate and acquisition of nationality it is of great importance for children born to foreign parents be registered at birth and issued a birth certificate. It is a birth certificate that will prove the child's identity, birth place and shall there be a need for a particular child who has no nationality or alternative nationality to seek to obtain nationality section 2 of SACA can be implemented. The child can then acquire nationality on the grounds that he or she was born in South Africa.

It is further recommended that section 12 of the BDRA should be amended to facilitate the acquisition of nationality for all children without alternative nationality who are abandoned or orphaned and not registered, amending the existing provision which only provides registration of infants under the age of eight. This means that section 12 would apply to all children whose parentage is unknown. This would be in line with South Africa's obligations not only in terms of its current provision under

⁴⁶⁹ Births and Deaths Registration Act Section 8 (c); (d)

section 2(2) of the Citizenship Act but in line with the Committee's interpretation of Article 7 of the CRC as well as article 6(4) of the ACRWC.

4.5 Administrative measures.

Immediate, free and universal access to birth registration must be guaranteed for all children irrespective of the status of their parents in line with international law. All children should be issued with a birth certificate establishing their legal identity and family links upon registration irrespective of their or their parents' legal status or documentation.

It is recommended that the Minister of Home Affairs should formulate a regulation which will provide guidance and facilitate documentation that would make it possible for children born to foreign parents without nationality to apply and obtain citizenship. This would alleviate the delay in obtaining nationality and prevent discriminatory practices by government officials at DHA. Consequently, there is a need to accept that the issue of children born to non-South African parents is reality and facilitating their documentation will help alleviate problems associated with vulnerability and future exploitation.

It is recommended that South Africa DHA make use of mobile documentation units. These can provide advice on acquisition of nationality can reduce statelessness. These have produced good results in Sri Lanka in 2003.⁴⁷⁰ It does not hurt to try mobile documentation clinics.⁴⁷¹ If they produced results in Sri Lanka they might in South Africa and other countries facing the similar problem.

⁴⁷⁰ Sri Lanka – statelessness following migration and State succession.
<https://www.refworld.org/pdfid/54e75a244.pdf>. (Date of use 09-07-21)

⁴⁷¹ Addressing situations of statelessness UNHCR Global Appeal 2009 Update. Found at

4.6 Other measures.

The CRC and ACRWC Committees have recommended that South Africa seek technical assistance from the Office of the United Nations High Commissioner for Refugees, UNICEF and other international human rights organisations for the implementation of recommendations made by the UN Committees.

It is recommended that civic society continue to place the importance of strategic litigation at the top of its human rights agenda and place more emphasis on developing foundations with its key aim of preventing statelessness amongst children and adults. The LHR is one of the national human rights institutions that play a pivotal role in safeguarding the right to nationality on children born to foreign parents in South Africa. While the NRF plays a fundamental role in assisting children without nationality, the South African government needs to invest a greater portion of its national agenda in creating and supporting more branches such as the NRF. These national institutions create a path in which children born to foreign parents without nationality can be assisted and supported in acquiring the right to nationality in South Africa.

It is recommended that South Africa must take note of exceptional circumstances where children born to foreign parents find themselves unable to identify their own parents. In such circumstances South Africa must grant children without alternative nationality, nationality. Furthermore it has been observed from human experience that births occur where the mother refuses to identify the father in extreme circumstances, for example in cases of incest or when the father has raped the mother. While mothers could, arguably, be legally required to name the father, it

<https://www.unhcr.org/en-ie/4922d4370.pdf>. (Date of access 11-07-21)

would be difficult to enforce this and conflict could be raised between the mother's rights and the child's rights.

It is recommended that South Africa must consider the latest advances in technology that have been used to produce babies. It has been noted that technological advances in science have affected the human family dramatically.⁴⁷² Methods of fertilisation have been created such as in vitro-fertilisation, surrogate mothers and the use of sperm donors.⁴⁷³ In South Africa some of these children born to foreign parents are products of scientific methods.⁴⁷⁴ Scientific methods have brought a revolution in the family.⁴⁷⁵ Children do not choose where they want to be born.⁴⁷⁶ They do not choose their parents. Therefore if it has been established that children without alternative nationality exist and it is recommended that South Africa must help such children who find themselves clueless of their background and parents.



It is further recommended that South Africa mediate some cases with a state party where the use of arbitrary power led to the loss of nationality of an individual or group of individuals. For example in the case of *Dow v Attorney General in Botswana* was prejudiced by the discriminatory effect of the law given that her children were aliens though born in her native country.⁴⁷⁷ This is a classic case where a party state chooses to alienate its own citizens from the right to nationality given the destructive effects it has on the children separated from their parents. In such case South Africa

⁴⁷² Dyer JS Assisted reproductive technology in South Africa. (2012) 10

⁴⁷³ Van Nierkerk C Assisted reproductive technologies and the right to reproduce under South African Law. (2017) 11-20

⁴⁷⁴ Dyer J.S Assisted reproductive technology in South Africa. First results.(2020) 14-30

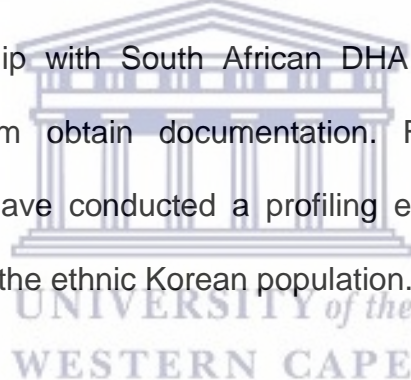
⁴⁷⁵ South African registry for assisted reproductive technology 2015 report.
<https://sasreg.co.za/downloads/SARA-2015-Report.pdf>(Date of use 11-07-21)

⁴⁷⁶ International Covenant on Civil and Political Rights (ICCPR) (1966) art 17(1) states that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

⁴⁷⁷ *Unity Dow vs. Attorney General*

must not bear the weight alone. Mediation must be used to assist such individuals to claim their right to nationality in the jurisdiction they are connected to.

Statelessness may occur or be perpetuated where nationality procedures are complex or costly, or where relevant information cannot be obtained. UNHCR's legal aid and information programmes are critical components of its response to such situations. Therefore it is recommended that South Africa work closely with the office of UNHCR's NGO partner for assistance to conduct a profiling exercise to identify stateless children born to non-South African parents or those at risk of becoming stateless. The purpose is for the identification of children at risk of statelessness to allow UNHCR in partnership with South African DHA to prevent statelessness, especially by helping them obtain documentation. For example, in Ukraine, UNHCR's NGO partners, have conducted a profiling exercise in 2007 to identify stateless individuals among the ethnic Korean population.

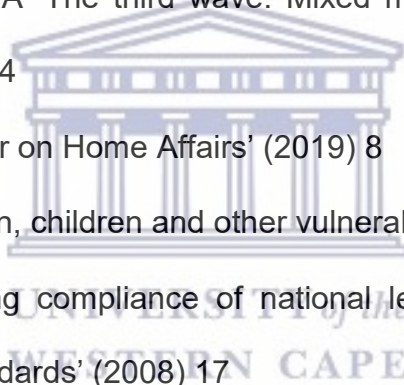


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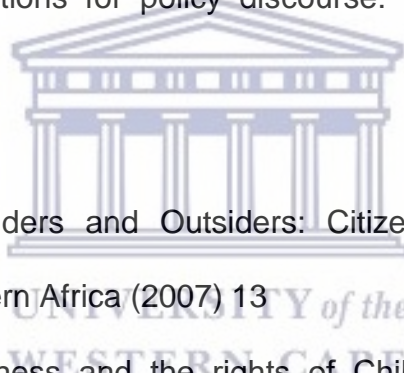
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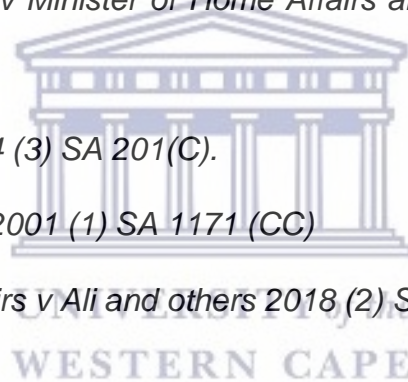
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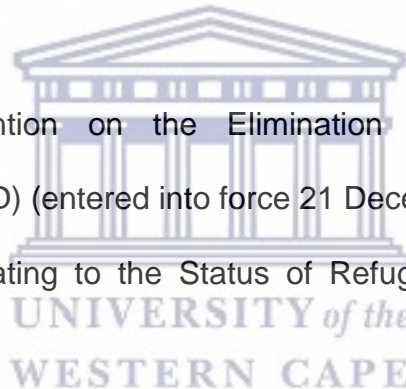
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