

**ENDING CHILDHOOD STATELESSNESS BY 2024: A CONSIDERATION OF
SOUTH AFRICA'S LAWS AND POLICIES IN LIGHT OF THE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES #IBELONG CAMPAIGN.**

Submitted in partial fulfilment of the requirement of the degree LLM (Human Rights
Law)

By

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DEDICATION

To the children that are in a state of unrest, may your hearts find peace and belonging on the African soil beneath your feet.

List of Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
AU	African Union
BDRA	Births and Deaths Registration Act
BELA	Basic Education Laws Amendment Bill
ACPHR	African Commission on Human and People's Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CRVS	Civil registration and Vital Statistics Systems
CYCC	Child and Youth Care Centre
COVID-19	Coronavirus Disease of 2019
DHA	Department of Home Affairs
ECOSOC	UN Economic and Social Council
ICCPR	International Covenant on Civil and Political Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers
ISI	Institute on Statelessness and Inclusion
ISS	Institute for Security Studies
ILC	International Law Commission
ICJ	International Court of Justice
LHR	Lawyers for Human Rights
NAP	National Action Plan
NGO	Non-Government Organisation
OAU	Organisation of African Unity
PAJA	Promotion of Administrative Justice Act
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SADC	Southern African Development Community
SASSA	South African Security Agency
SCA	Supreme Court of Appeal
SCRA	Standing Committee for Refugee Affairs
UCT	University of Cape Town

UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UN	United Nations
UNICEF	UN International Children's Emergency Fund
UNGA	UN General Assembly
UNHCR	United Nations High Commissioner for Refugees

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Chapter 1 – Introduction and Background to Statelessness

Statelessness is a growing phenomenon worldwide and particularly on the continent of Africa,¹ and is described to be an indivisible problem because persons that are stateless continue to live hidden and unnoticed.² The issue of Statelessness affects children globally and has a detrimental and lifelong impact on their lives. Stateless children do not hold a nationality and as a result they are faced with difficulties in gaining access to internationally acknowledged human rights standards and practices.³ Thus, there are several human rights implications for children that do not hold a nationality and a lifetime of hardship. A nationality is important, because it is the legal connection between an individual and a state.⁴ Without holding a nationality, stateless children do not enjoy basic rights that are conferred to citizens, which may include certain types of healthcare and educational opportunities.⁵ In South Africa for example, parents are faced with hurdles when it comes to enrolling their children into schools, due to a lack of documentation. Thus, navigating through the school system as a stateless child often results in delays when starting school or progressing from primary to high school, which places a stateless child a few years behind their peers because they are unable to confirm their nationality.⁶ Thereafter, stateless children who subsequently become majors are also unable to register to tertiary institutions without holding a valid legal status. In terms of accessing healthcare in South Africa, the Coronavirus Disease of 2019 (Covid-19) pandemic exposed the hardships faced by stateless children and adults in terms of being tested for the COVID-19 virus and

¹ Chapman C and Marconnet N, 'Statelessness of Migrant Children in South Africa and the Impact and Opportunity for Social Workers' SIHMA (2022) available at: <https://sihma.org.za/Blog-on-the-move/stateless-of-migrant-children-in-south-africa-and-the-impact-and-opportunity-for-social-workers> (accessed 3 March 2023).

² Kingston L.N, 'A Forgotten Human Rights Crisis': Statelessness and Issue (Non)Emergence. Hum Rights Rev (2013) 79 available at <https://doi.org/10.1007/s12142-013-0264-4> [accessed 7 May 2023].

³ The UN Refugee Agency, 'Ending Statelessness' (accessed 10 March 2023) available at: <https://www.unhcr.org/africa/about-unhcr/who-we-protect/stateless-people/ending-statelessness>

⁴ Mbiyozo AN, 'Statelessness in Southern Africa: Time to end it, not promote it' Institute for Security Studies (2020) Available at: <https://journals.co.za/doi/abs/10.10520/EJC-1ff4d63d7a>

⁵ Open Society Justice Initiative, 'Children's Right to a Nationality' (2023) available at: www.justiceinitiative.org/publications/fact-sheet-childrens-right-nationality [accessed 6 May 2023].

⁶ The UN Refugee Agency, 'The Urgent Need to End Childhood Statelessness' Division of International Protection (2015) 8 available at: https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf

accessing vaccinations. The Covid-19 pandemic thus shed light on the difficulty faced by persons without a nationality in that stateless persons feared approaching healthcare facilities for medical treatment when they contracted the virus or for vaccinations, because they would be putting themselves at a risk of being detained due to a lack of legal identity.⁷ Stateless children thus run the risk of being excluded from national immunisation plans, despite the Constitutional guarantees to basic healthcare.

1.1 The Number of Stateless Persons Globally

On the one hand, in 2022 the United Nations High Commissioner for Refugees (UNHCR) reported that there are around 10 million stateless persons globally.⁸ On the other hand, the Institute on Statelessness and Inclusion (ISS) published that there are around 15 million persons globally that are stateless.⁹ Thus, it is not possible to put an exact number on the stateless population, but it is acceptable to approximate that the number of stateless persons runs into the millions.¹⁰ The problem with data capturing, is that stateless persons are predominantly undocumented and unaccounted for within their place of residence. It is extremely difficult and often impossible to know the exact number of individuals impacted, because in South Africa there is an absence of an established system to capture data on the issue.¹¹ It was estimated by the UNHCR in 2016 that there are in or around 10 000 stateless persons living in South Africa.¹² However the number of stateless persons, including children, has potentially increased significantly over the last few years due to South Africa's statutory frameworks that give rise to and perpetuates childhood statelessness.

⁷ Neluvhalani, VSJ, 'Statelessness and COVID-19 in South Africa' South African Public Law (2022) 6 available at <https://doi.org/10.25159/2522-6800/10244> [accessed 9 April 2023].

⁸ United Nations High Commissioner for Refugees (UNHCR) 'Refugee data finder' (2023) available at <https://www.unhcr.org/refugee-statistics/> [accessed 17 May 2023].

⁹ Institute on Statelessness and Inclusion (ISI) 'Statelessness in numbers: 2020 An overview and analysis of global statistics' (2020), available at https://files.institutesi.org/ISI_statistics_analysis_2020.pdf

¹⁰ United Nations High Commissioner for Refugees (UNHCR) 'Refugee data finder' (2023) available at <https://www.unhcr.org/refugee-statistics/>

¹¹ Statelessness in Southern Africa: Time to end it, not promote it op cit note 4 at 3.

see also Mbiyozo AN, 'ISS Statelessness: An Old Problem with New Threats (2019) Available at <https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats>.

¹² UNHCR 'South Africa: Operation Context' available at <https://www.unhcr.org/ibelong/south-africa-joint-strategy/>

Consequently, due to the millions of persons in the world being stateless, this is an indication of the international community's failure to protect the most vulnerable members of society, in this case, children. Children who do not hold a nationality have no official link to any state, and consequently these children have little to no protection and cannot access several rights in the state in which they reside.¹³ In the majority of cases, it is the indigent and marginalised children that are not registered at birth, which obstructs them from gaining access to resources and opportunities, such as education that can improve their lives.¹⁴ Thus, the deprivation of rights can be viewed as a violation of fundamental human rights that are contained in several International Human Rights Instruments, to which South Africa is a state party to.¹⁵

1.2 The Category of Children that are Vulnerable to Statelessness

The groups that are most at risk of statelessness in most countries, including South Africa, are children born to migrants and refugees.¹⁶ According to the report on the *World's Stateless Children*, migrant children are 'more prone to falling victim to a conflict of nationality laws, at greater risk of having their birth go unregistered, and [are] often surprisingly beyond reach of the very safeguards designed to protect children in their situation from statelessness.'¹⁷ Children of foreign nationals who are raised in a particular country, because their parents' fled due to persecution or conflict, but whose country of birth do not recognise them as citizens are also at risk of statelessness.¹⁸ Furthermore, unaccompanied foreign children, foundlings,

¹³ Mezmur B & Fawole, 'Special Issue on Statelessness in Africa' - African Human Mobility Review (2022) 5 available at <http://sihma.org.za/journal> accessed on 28 January 2023.

¹⁴ Forsingdal AB, Hubbard D & Corluca A, 'Birth registration and Statelessness in the Member States of the Southern African Development Community' Regional Bureau of UNHCR in Southern Africa (2022) 3 available at <https://data.unhcr.org/en/documents/details/97772>

¹⁵ I Goris, J Harrington and S Köhn, 'No legal identity. Few rights. Hidden from society. Forgotten' Forced Migration Review (2010) available at: <https://www.refworld.org/docid/4c6cefb02.html> [accessed 19 May 2023]

¹⁶ JP George, R Elphick, K Ramjathan-Keogh & J van Garderen, 'Statelessness and Nationality in South Africa' (2013) 8 available at <https://citizenshiprightsafrika.org/wp-content/uploads/2013/03/LHR-Statelessness-and-Nationality-in-South-Africa-2013.pdf> [accessed 6 March 2023]

¹⁷ L van Waas & A de Chickera (eds) 'The World's Stateless Children' Institute on Statelessness and Inclusion (2017) 205-206 available at <http://children.worldsstateless.org/assets/files/worlds-stateless-full-report.pdf> [accessed 3 February 2023]

¹⁸ Lungu S, 'A study on Statelessness and Risks of Statelessness in Malawi' United Nations Malawi (2023) 19 available at <https://malawi.un.org/en/224261-study-statelessness-and-risks-statelessness-malawi> [accessed 02 April 2023]

abandoned children, orphaned children, street children, trafficked children and children of single fathers are also at a particular risk of being stateless, as well as nomadic and border populations.¹⁹

This research paper has identified that the children of refugees, asylum seekers and migrants in South Africa are vulnerable and at a particular risk of statelessness, despite South Africa being a party to the 1951 Convention Relating to Status of Refugees (1951 Refugee Convention), its 1967 Protocol Relating to the Status of Refugees (1967 Protocol), as well as the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention). Refugee and asylum seekers are not the only two types of migrants. The migrant community includes but is not limited to trafficked and smuggled victims, and unaccompanied or separated children.²⁰ There has been an increase in the number of children that enter South Africa alone and without a parent or that have been abandoned in South Africa by their parents.²¹ In accordance with the UN International Children's Emergency Fund (UNICEF) South Africa has the largest number of migrant children, with approximately 642 000 migrant children that currently reside in South Africa.²²

The country has a liberal asylum policy; the South Africa Refugees Act of 1998 incorporates all the basic principles of refugee and asylum-seeker protection, including freedom of movement, the right to work and access basic social services. However, in January 2020, South Africa implemented amendments and regulations, and the restrictive interpretation of the legislation has left a critical gap in the refugee protection. In February 2023, the Western Cape High Court²³ declared sections²⁴ of the Refugees Act²⁵ to be unconstitutional, because asylum seekers who do not renew

¹⁹The Urgent Need to End Childhood Statelessness op cit note 6 at 8.

²⁰ Kruger H, 'The Invisible Children – Protecting the Right to Birth Registration In South Africa' *Journal for Juridical Science* (2022) 59 available at https://www.researchgate.net/publication/366015381_The_invisible_children_Protecting_the_right_to_birth_registration_in_South_Africa [accessed on 7 May 2023].

²¹ Ibid at 60.

²² Ibid.

²³ *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* (5441/20) [2023] ZAWCHC 28; [2023] 2 All SA 256 (WCC); 2023 (4) SA 249 (WCC) [accessed on 13 February 2023]

²⁴ Section 22(12) & 22(13) and Regulation 9 and Form 3 of the Refugee Regulations

²⁵ 130 of 1998

their permits within one month of the expiry date are considered to have abandoned their asylum applications. The Judge ruled that the sections were not in the best interest of affected children because they would be undocumented. The judgment has not yet been confirmed by the Constitutional Court. The amendments to the Refugee Act²⁶ thus create barriers for refugee and asylum seekers in terms of accessing their right to valid documentation.²⁷ Consequently, this causes a ripple effect, in that the children of refugee and asylum seekers are negatively impacted, because their births cannot be registered if their parents are undocumented, and this will render them stateless.²⁸ Stateless persons often end up relying on the Refugee law protections in South Africa, due to absence of stateless laws that protect them, because South Africa does not have specific legislation that governs the problem of childhood statelessness.

1.3 Impact of Statelessness on the Rights of Children: In Terms of Access to Education, Healthcare and Social Grants in South Africa

Statelessness further impacts other socio-economic rights, such as housing in that a stateless person cannot own property, they are unable to find employment, they cannot receive social grants and the like. Additionally, civil and political rights are further impacted, because a stateless person's freedom of movement and freedom from arbitrary arrest and detention are severally compromised and they are excluded from participating in politics within the country where they reside.²⁹ Statelessness has a psychological impact and raises stress, as well as impacts on one's choices and opportunities in life.³⁰ Stateless persons are likely to suffer from poverty and relations

²⁶ 130 of 1998

²⁷ LB Landau & R Amit, 'Wither Policy? Southern African Perspectives on Understanding Law, 'Refugee' Policy and Protection' *Journal of Refugee Studies* (2014) 540 available at <https://doi.org/10.1093/jrs/feu005> [accessed 9 May 2023]

²⁸ L van Waas 'The Children of Irregular Migrants: A Stateless Generation?' *Netherlands Quarterly of Human Rights* (2007) 437 available at <https://doi.org/10.1177/016934410702500303> [accessed on 5 April 2023]

²⁹ Arnold R, 'What is the Statelessness?' *The UN Refugee Agency* (available at <https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness2pager-ENG.pdf>) accessed 9 March 2023.

³⁰ Warri A Ajwang' & Chikadzi V. 'Statelessness, Trauma and Mental Well-being: Implication for Practice, Research and Advocacy' *African Human Mobility Review* (2022) available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2410-79722022000300002&lng=en&tlng=en [accessed 5 June 2023].

amongst family and community members can be destroyed.³¹ Stateless persons, specifically stateless children are part of the most vulnerable in the world, because they are prevented from living normally and are subjected to discrimination and exploitation which is often passed down from one generation to another. Consequently, stateless children are deprived of a childhood and lack a sense of belonging and security that comes with holding a nationality.

In South Africa, the courts have been proactive in terms of allowing undocumented children access to education, healthcare and social grants, thus they have been able to address the normative gaps.³² Although these children may be granted access to essential services without holding valid documentation, in the long term it is not ideal, because these children remain without birth certificates and legal documentation. When the government authorities overlook providing legal documentation to foreign children, they in turn fail to safeguard children's rights.³³ Therefore, when considering the best interest of the child, the government authorities should note the link between the principle of the best interest of the child and durable solutions. Children must be provided with security and stability throughout their childhood and into their adulthood, to prevent them from becoming stateless. The following sections will examine how the courts have responded to providing access to foreign children who do not hold valid documentation, in terms of education, social security grants and healthcare.

1.3.1 The Right to Education

Prior to the *Centre for Child Law & Others / Minister of Basic Education and Others* case³⁴ (*Phakamisa judgment*) children were prevented from admission to schools

³¹ The New Humanitarian, 'An Ambitious Plan to End Statelessness' (2014) available at <https://www.thenewhumanitarian.org/analysis/2014/11/07/ambitious-plan-end-statelessness> [accessed 9 April 2023].

³² Muller L, 'The Law is Not Enough: Realising the Child's Right to a Nationality in South Africa' *The Statelessness & Citizenship Review*, 4(2) (2022) 271 available at: <https://statelessnessandcitizenshipreview.com/index.php/journal/article/view/369> [accessed 6 March 2023]

³³ Willie N & Mfubu P, 'No Future for our Children: Challenges faced by foreign minors living in South Africa' *African Human Mobility Review* (2016) 440 available at <https://sihma.org.za/journals/Willie-Mfubu.pdf> [accessed 5 May 2023].

³⁴ *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZACGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019), and the Constitutional Court Order (CCT19/19), dated 15 February 2019.

without a birth certificate and proof of application to legalise their stay was a requirement for migrant children. In the *Phakamisa* case, the court declared that the admission policy was unconstitutional and a violation of the child's right to education, dignity and equality. In this case, the court re-iterated that section 29³⁵ was for everyone: the section is unqualified, unconditional and applies to everyone not 'everyone upon the production of a birth certificate or provided they are in the country legally.'³⁶ Consequently, and in implementing the judgment, on the 10th of February 2022 Circular No.1 of 2020 was signed and communicated to all public schools in South Africa. The circular applies to undocumented learners and states that children without birth certificates and identification documents must not be denied admission in situations where they are not capable of providing legal documentation in South Africa.³⁷ However, if the child is unable to provide valid documentation, then an affidavit in lieu of the birth certificate must be submitted. Currently, and in terms of Section 5 of the South African Schools Act³⁸, and the Admission Policy for Ordinary Public Schools³⁹, children may not be barred from public schools in the event that they are not in possession an of an identity document.

However, there have been reports whereby the judgment is not implemented and undocumented children are denied admission into public schools. The non-implementation can be due to schools being unaware of the judgment as well as underlying xenophobia and prejudices.⁴⁰ Currently, a major concern is the Basic Education Laws Amendment Bill ('BELA')⁴¹, introducing 'required documents' for South Africa citizens and migrant children. BELA is unclear on whether undocumented

³⁵ Constitution of the Republic of South Africa, 1996

³⁶ D Daas, K Ramjathan-Keogh & Fatima Khan 'The socio-economic rights of refugees and asylum seekers in South Africa' in F Khan and T Schreier (eds) *Refugee Law in South Africa* (2014) 221.

³⁷ Western Cape Education Department, 'Admission of Undocumented South African or Foreign Learners (2022) available at wcedonline.westerncape.gov.za/circular/circular21/Circular0053-2021.pdf (accessed on 12 May 2022).

³⁸ 84 of 1996

³⁹ National Education Policy Act, 1996 (Act No. 27 of 1996) Admission Policy for Ordinary Public Schools. *Government Gazette* 19377, Notice 2432 (19 October 1998). As amended in 2006.

⁴⁰ Parliamentary Monitoring Group, 'Department of Basic Education on School Readiness for 2022: with Deputy Minister' (2021) available at <https://pmg.org.za/committee-meeting/34064/> (accessed on 8 June 2023).

⁴¹Parliament of the Republic of South Africa, 'Basic Education Laws Amendment Bill (2022) available at <https://www.education.gov.za/Portals/0/Documents/Legislation/Bills/BELA%20Bill/BELA%20Bill.pdf?ver=2021-12-07-204143-617> (accessed on 5 May 2023).

learners will be admitted into public schools irrespective of their legal status. One of the requirements is that a birth certificate will have to be presented within three years of admission.⁴² Furthermore, BELA criminalises parents who are unwilling to cooperate.⁴³

The Western Cape and Gauteng Education Department currently makes use of an online application system for school admissions, which was introduced by the National Department of Basic Education. The application requires an identity number of both the parents and the child, and without completion of this 'compulsory' section, the application cannot be submitted.⁴⁴ Therefore, for children without an identity number, they are unable to be registered in school. Parents are forced to approach the school in person and complete a form, and by this time many of the schools are already full. The parents have to then approach the Provincial Education Department for placement into a school, which can be a school that is a far distance from the child's residence.⁴⁵

1.3.2 The Right to Social Security Grants

In terms of accessing social grants, section 13(1) of the Regulations to the Social Assistance Act⁴⁶ contains an exception to the birth certificate and identity document requirement for social security grants, which are available to citizens, permanent residence and refugees. The grants include but are not limited to the Care Dependency Grants and Foster Care Grants.⁴⁷ In the absence of the caregiver not having an identity number and the child not having a birth certificate, an affidavit must

⁴² Ibid.

⁴³ Cloete R, 'New School Laws Criminalise Parents For Not Submitting Documents' (2022) available at <https://www.skillsportal.co.za/content/new-school-laws-criminalise-parents-not-submitting-documents> [accessed 6 July 2023].

⁴⁴ Department of Basic Education, Information for Parents and Guardians on enrolling your child at school <https://www.education.gov.za/Parents/Childregistration/tabid/407/Default.aspx> (accessed on 28 May 2022)

⁴⁵ SAHRC, 'Access to a Basic Education for Undocumented Learners in South Africa' (September 2019) available at <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> [accessed on 27 May 2023].

⁴⁶ 13 of 2004.

⁴⁷ Social Assistance Act 13 Of 2004: Regulations relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance (*Government Gazette 31356*) 22 August 2008. As amended up to April 2012.

be submitted and accepted by the officials of South African Security Agency (SASSA) to give effect to the child's constitutional right.⁴⁸ In December 2022, there were 50 000 children who did not have a birth certificates that were receiving grants. However, the Childrens Institute at the University of Cape Town estimated that in 2017 there were around 500 000 children who never had their births registered, but this number has increased in 2023 as a result of the national lockdown.⁴⁹ However, there are still numerous children without birth certificates that are prevented from accessing social grants.⁵⁰ Therefore irrespective of this amendment, a lack of legal identity still causes barriers to accessing social grants, specifically for children that are orphaned, abandoned or separated as well as refugee children, and children of unmarried fathers who are unable to register their children.⁵¹

1.3.3 The Right to Healthcare

Section 27(g) of the Refugees Act⁵² states that refugees are granted the same basic health services as citizens of South African. The Constitutional Court ruled that the word '*everyone*' in section 27(1) of the Constitution includes foreign nationals that reside in South Africa.⁵³ Moreover, section 28 of the Constitution states that all children are entitled to basic healthcare and are not required to provide documentation.⁵⁴ However, despite the constitutional right to healthcare services, in practice stateless children face many barriers in terms of receiving medical treatment.⁵⁵ Therefore, the Gauteng High Court recently held that all pregnant and

⁴⁸ Section 27(1)(c) states that everyone has the right to have access to social security, including, appropriate social assistance if they are unable to support themselves or their dependants.

⁴⁹ Legal Resources Centre, 'Social Grants for Children Without Birth Certificates and Caregivers Without Identity Documents' (2023) available at [social-grants-booklet-April-2023.pdf \[accessed 4 May 2023\]](#)

⁵⁰ South Africa Social Security Agency & UNICEF, 'Preventing Exclusion from the Child Support Grant: A Study of Exclusion Errors in Accessing CSG Benefits (2013) *Pretoria*: UNICEF South Africa.

⁵¹ Martin P, Lane A, Ngobane C & Voko B, 'A Rapid Review of the Implementation of the Regulation 11(1) to the Social Assistance Act, 2004 (2013) Cape Town: Alliance for Children's Entitlement to Social Security; SASSA & UNICEF.

⁵² 130 of 1998

⁵³ *Khosa and Other v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) SA 505 (CC).

⁵⁴ Section 28 (1) (c) of the South African Constitution.

⁵⁵ Manicom, L, Moyo, S, Mudarikwa, M and Roos, E, 'Submission to The Special Rapporteur At The Office Of The Un High Commissioner For Human Rights' Legal Resource Centre and Scalabrini Centre (2018) para 5.1.2. available at <https://scalabrini.org.za/wp-content/uploads/2019/05/Scalabrini-Centre-of-Cape-Town-submission-OCHR-Statelessness-Minority-Issues-23-May-2018.pdf> [accessed 5 June 2023].

lactating woman, as well as children below the age of 6, have the right to access free health at any public health facility, regardless of their nationality and legal status, but this judgment is not applicable to all Provinces within South Africa.⁵⁶ The 1954 United Nations Convention Relating to the Status of Stateless Persons (1954 Convention) makes provision for the definition of a stateless person. Furthermore, the 1961 Convention on the Reduction of Statelessness (1961 Convention) includes provisions for states to include in their domestic laws that prevent statelessness and provide for everyone's right to a nationality.

2. Laws that Govern Statelessness

In terms of these International Conventions relating to statelessness, the universal definition of a stateless person is contained in article 1(1) of the 1954 Convention and is defined as a '*person who is not considered as a national by any state under the operation of its law*'.⁵⁷ In accordance with this definition, the stateless person does not have citizenship.⁵⁸ The 1961 Convention is aimed at avoiding and reducing statelessness over a period of time. State parties to the 1961 Convention are required to establish safety mechanisms within their nationality laws and policies that inhibit statelessness at birth and later stages in life. The 1961 Convention thus broadens the scope of the 1954 Convention. These safeguards are particularly important because states have different approaches on how they attribute nationality, such as *jus soli* (by birth on the territory), *jus sanguinis* (by descent/parentage) and *jus domicile* (period of residence and proof of allegiance) or a combination, and these doctrines may also lead to statelessness. In South Africa, a combination of *jus soli* and *jus sanguinis* is applied.⁵⁹ The possibility of loss, renunciation or deprivation of nationality may also result in statelessness. Deplorably, both the 1954 and 1961 Conventions have a very

⁵⁶ *Section 27 And Others Vs MEC For Health, Gauteng And Others* Case No 19304 22 Court Order Default Judgment 14 April 2023 Sutherland DJP.

⁵⁷ United Nations Convention Relating to the Status of Stateless Persons 1954, Article 1.

⁵⁸ Warrria A, 'Stateless Transnational Migrant Children in South Africa: Implications and Opportunities for Social Work Intervention' AHMR African Human Mobilty Review - Volume 6 (2020) available at <http://sihma.org.za/journals/01%2520Stateless%2520Transnational%2520Migrant%2520Children%2520in%2520South%2520Africa.pdf> [accessed 4 March 2023].

⁵⁹ Imam PA & Kpodar K, 'Citizenship and Growth -Inclusive Citizenship Laws Tend to Foster Economic Development' International Monetary Fund (2019) 44 available at [https://www.imf.org/external/pubs/ft/fandd/2019/03/pdf/citizenship-and-economic-development-imam.pdf [accessed 25 April 2023].

low ratification rate, and to date South Africa has not ratified either one of the Statelessness Conventions.

However, the general right to a nationality is provided for in terms of Article 15 of the Universal Declaration of Human Rights (UDHR).⁶⁰ African leaders have pursued to address the deficient provision on nationality through the African Charter on the Rights and Welfare of the Child (Article 6) and the and the Protocol to the African Charter on the Rights of Women in Africa (ACRWC). The ACRWC particularly contains the child's right to a nationality,⁶¹ which provides an added degree of protection. The international and regional frameworks set the minimum benchmark for the attainment of the essential right to a nationality. South Africa, as a state party to these treaties, thus has an obligation to implement safeguards within its national laws to prevent statelessness and provide protection and rights to stateless populations. However, there are gaps within the domestic laws of South Africa which bolsters the issue of statelessness because there are no domestic laws that deal with identification of stateless persons, nor any specific laws that provide protection to statelessness persons and children.

3. Causes of Statelessness

There are wide-ranging reasons that contribute to persons becoming stateless. The main cause of statelessness is attributed to gaps in laws and practices within states, in that there are inadequate legal safeguards that prevent statelessness. Majority of countries within the African continent, including South Africa, do not have adequate safeguards in their nationality legislation that grant nationality to children born in their territory who would otherwise be stateless.⁶² Additionally, little to no provisions are found in domestic laws for foundlings, abandoned children, street children and

⁶⁰ UN Universal Declaration of Human Rights (1948) available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

⁶¹ Article 6(3) of the African Charter on the Rights and Welfare of the Child (available at https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf).

⁶² Manby B, 'Citizenship Law in Africa: A Comparative Study' Open Society Foundations (2016) 8 available at <https://www.africanminds.co.za/citizenship-law-in-africa-a-comparative-study-3rd-edition/> [accessed on 6 February 2023].

trafficked children.⁶³ The causes of statelessness can further include, but are not limited to long term forced displacement and migration, discriminatory gender laws that do not allow woman to pass their nationality to their children on the same grounds as men, discrimination on the grounds of race, ethnicity or religion, no provisions for nomadic and cross-border populations, deficient dual nationality laws, the denial of access to naturalisation, provisions with regards to state succession, and a lack of access to nationality documentation, and abusive withdrawal of citizenship.⁶⁴

In South Africa, a main cause of statelessness, is the insufficiency of birth registration.⁶⁵ Although birth registration does not grant automatic citizenship, it is vital for the issuing of an identity document which relies on proof of birth.⁶⁶ Without a birth certificate, one cannot claim a nationality. The African Committee of Experts on the Rights and Welfare of the Child has observed in its General Comment on Article 6 on the ACRWC that “*the right to birth registration is one of the rights that consistently appears not to be fully implemented by States parties.*”⁶⁷ South Africa has ratified the ACRWC and are thus not fulfilling their obligations under Article 6 of the ACRWC. Furthermore, the United Nations Development Programme (UNDP) has stated that in the Southern African Development Community (“SADC”), more than half of the children are unregistered at the age of five years old.⁶⁸ SADC is a Regional Economic Community that consist of 16 Member States: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic Tanzania, Zambia and Zimbabwe.⁶⁹

⁶³ ‘A Handbook: Rights and Realities of Forcibly displaced Children and Youth in South Africa’ Lawyers for Human Rights (2023) available at <https://www.lhr.org.za/lhr-resources/a-handbook-the-rights-realities-of-forcibly-displaced-children-youth-in-south-africa/#> [accessed on 6 February 2023].

⁶⁴ Manby for Open Society Foundations op. cit. 8 at 13-20.

⁶⁵ Mbiyozo A, ‘The Role of Colonialism in Creating and Perpetuating Statelessness in Southern Africa’ African Human Mobility Research (2023) 80 available at <https://www.ajol.info/index.php/ahmr/article/view/241569/228392> [accessed 3 May 2023].

⁶⁶ Ibid.

⁶⁷ African Committee of Experts on the Rights and Welfare of the Child (ACERWC) ‘General comment on Article 6 on the rights and welfare of the child’ (2014), available at <https://data2.unhcr.org/en/documents/download/62899>

⁶⁸ The Role of Colonialism in Creating and Perpetuating Statelessness in Southern Africa op cit note 65 at 81.

⁶⁹ Member States The Southern African Development Community (2022) available at <https://www.sadc.int/member-states> [accessed 20 March 2023].

On the one hand, in some instances, birth certificates are issued after months and not immediately at birth. On the other hand, the registration of birth entails administrative barriers and costs which are not available to all parents.⁷⁰ In South Africa, the Birth and Deaths Registration Act (BDRA) requires that a child must be registered within 30 days of the child's birth.⁷¹ Furthermore, the parents of the newborn child must provide an identity document to have the birth registered. Therefore, the registration of a child's birth is dependent on the legal status of the parent. This is particularly an issue, because asylum seekers in South Africa face several hurdles in terms of accessing Refugee Reception Offices (RRO's) and this leads to undocumented parents or parents with expired permits.⁷² As a result, if the parents are stateless, undocumented or a holder of an expired permit they are barred from making an application for a birth certificate.⁷³ Consequently, this creates an elevated risk of statelessness because parents may die before without having their children registered. Statelessness not only impacts children on the move who may have lost their birth certificate or has been separated from their family, but also impacts children born within South Africa. Moreover, the Citizenship Act of 1995 also contains discriminatory provisions, and the Immigration Act of 2004 does not provide a legal immigration status to unaccompanied migrant children who are not able to be returned to their home countries. Childhood statelessness is thus a situation that requires domestic, regional and international co-operation and intervention.

4. UNHCR's Role in Ending Statelessness

The UNHCR has been mandated to prevent statelessness. The UN General Assembly in 1974 provisionally assigned the UNHCR as the body to determine and assess statelessness and provide assistance in representing stateless claims to state officials.⁷⁴ Prior to 1974 there was no official body that was responsible for overseeing

⁷⁰ The Role of Colonialism in Creating and Perpetuating Statelessness in Southern Africa op cit note 65 at 81.

⁷¹ Births and Deaths Registration Act 51 of 1992, as amended, S9(1).

⁷² F Khan and M Lee 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers' (2018) 4 African Human Mobility Review 1209.

⁷³ The Invisible Children – Protecting the Right to Birth Registration In South Africa op cit 20 at 57-58.

⁷⁴ M Manly and S Persaud, 'No legal identity. Few rights. Hidden from society. Forgotten. Stateless' Forced Migration Review (2009) available at <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR32/FMR32.pdf> [accessed 9 April 2023]

and advocating for the ratification and implementation of the 1954 and 1961 Conventions, notwithstanding that these Conventions make provision for the legal recognition of stateless persons.⁷⁵ One of the main critiques of this, is that the UNHCR's main purpose is to assist refugees and thus, it is apparent that stateless persons are not offered the same assistance as refugees.⁷⁶ The 1954 and 1961 Conventions do not contain any provisions that officially places UNHCR as the body in charge of the role of preventing and reducing statelessness. Article 11 of the 1961 Convention⁷⁷ only states that: "*the Contracting States shall promote the establishment within the framework of the United Nations ... of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority*".

On the 4th of November 2014, the UNHCR introduced a 10-year campaign, the #IBelong campaign, which is aimed at eradicating statelessness globally by 2024. The UNHCR is fulfilling its mandate by working together with governments from the SADC region, civil society UN agencies and international organisations to ensure that policies and practices are brought in line with the Global Action Plan to End Statelessness and guarantee everyone's right to a nationality. The objective of the Global Action Plan to End Statelessness is aimed at resolving major statelessness situations and preventing new cases from evolving.⁷⁸ Furthermore, the Global Action Plan contains ten actions to be taken by states to end statelessness in ten years. Out of the ten actions to end statelessness, this research paper will focus on the following five actions, although all ten actions are crucial and important to end childhood statelessness.

1. Ensure that no child is born stateless.
2. Accede to the UN Statelessness Conventions.

⁷⁵ The United Nations High Commissioner for Refugees, 'The State of the World's Refugees 1997- A Humanitarian Agenda- Chapter 6 – Statelessness and Citizenship' (1997) available at <https://www.unhcr.org/publications/state-worlds-refugees-1997-humanitarian-agenda> [accessed 19 March 2023]

⁷⁶ Lambert H & Foster M, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come?' International Journal of Refugee Law Special Issue (2016) 565 available at <https://doi.org/10.1093/ijrl/eew044> [accessed 13 April 2023].

⁷⁷ 1961 Convention on the Reduction of Statelessness.

⁷⁸ The UN Refugee Agency, 'Global Action Plan to End Statelessness 2014–2024' (2014) available at <https://www.unhcr.org/ru/wp-content/uploads/sites/73/2019/09/End-Statelessness-GlobalActionPlan-2019-Final-web.pdf> [accessed on 21 February 2023].

3. Ensure birth registration for the prevention of statelessness.
4. Issue nationality documentation to those with entitlement to it.
5. Grant protection status to stateless migrants and facilitate their naturalization.

5. Research Aims

In terms of the UNHCR #Ibelong campaign to end childhood statelessness by 2024, countries are urged to realize the Actions by developing and implementing National Action Plans (“NAP”) which lays out approaches to fulfil the various Actions, as well as propose country-level goals and achievements, and further influences the development of law. The UNHCR has suggested that these NAP’s be drafted in consultation and with the participation of UNHCR, other UN bodies and regional bodies where appropriate, national government (Ministers, Parliament etc), civil society and Non-Government Organisation’s (NGO’s) as well as stateless persons. Every two years the UNHCR reports on the progress fulfilled under the Global Action Plan. There is one more year left for the UNHCR to reach its goal as this year marks the 9th anniversary of the #Ibelong campaign. While there has been progress in the past nine years, there is still a need for continued efforts to end stateless, because currently, there is an alarming amount of stateless and migrant children that are at risk of statelessness in South Africa.⁷⁹ The UNHCR has encouraged governments within Southern Africa, to adopt a NAP at either ministerial or presidential level, to resolve the existing cases of statelessness, inhibit new cases from arising and provide safeguards to stateless persons in South Africa, in accordance with the universal best practices on the eradication of statelessness.⁸⁰ To date, South Africa has not adopted a NAP to eradicate statelessness. In addition, it is unclear whether South African law and practices comply with the five actions identified above. These actions are pivotal to the eradication of childhood statelessness, because as established in 1.3, statelessness has a devastating impact on children. Therefore, this dissertation is concerned with the following:

⁷⁹ The Invisible Children – Protecting the Right to Birth Registration In South Africa op cit note 20 at 59.

⁸⁰ The United Nations High Commissioner for Refugees, ‘Southern African Development Community: Road Map on the Eradication of Statelessness 2022-2024’ (2022) available at <https://citizenshiprightsafrika.org/southern-african-development-community-road-map-on-the-eradication-of-statelessness-2022-2024/> [accessed 26 March 2023].

1. Given the commitments made by South Africa to end statelessness by 2024, has South Africa in the past ten years:
 - a. Undertaken law reform to address the gaps in laws and practices to prevent childhood statelessness in terms of the five identified actions?
 - b. Regressed in terms of its domestic laws and practices with respect to these five actions, consequently perpetuating childhood statelessness?

5.1 Structure of the Research

It has been established that South Africa does not have a NAP which provides guidance to the executive and legislatures duty to draft and implement legislation that eradicates statelessness in the country. Childhood statelessness is an issue in South Africa, but it is unclear whether South Africa has done enough to eradicate the issue. Therefore, in addressing the two questions above, this research paper will carefully examine South Africa's domestic laws and practices, and whether the current statutory framework is sufficient to ensure that no child is born stateless, or whether the laws and practices have regressed and are perpetuating childhood statelessness in terms of the five actions of the Global Action Plan. The five identified actions require an analysis of laws and practices at both an international and domestic level, specifically those which relate to the granting of nationality and the provision of birth registration.

Chapter 2 will look at the international and regional instruments to which South Africa is a state party to, to determine if South Africa is fulfilling its obligations in terms of domestic laws to end statelessness and will also look at the importance of acceding to the UN Statelessness Conventions. The legal definition of a stateless person will be explored, the concepts of *de facto* and *de jure* statelessness will be introduced, the importance of nationality will also be looked at, as well as whether there is a link between birth registration and statelessness. Chapter 3 will examine South Africa's international and regional obligations in terms of birth registration, as well the domestic civil registration legislation relating to birth registration and whether South Africa's domestic laws are ensuring birth registration for the prevention of childhood statelessness. The chapter will also look at whether the Department of Home Affairs (DHA) actions in the implementation of refugee law is perpetuating childhood statelessness, because often parents are faced with several barriers in accessing valid

documentation which is a requirement for birth registration. Chapter 4 will examine the citizenship laws of South Africa and whether South Africa is issuing nationality documentation to migrant children and whether South Africa's citizenship laws make provision for the granting of protection status to stateless migrants and facilitates their naturalization. In South Africa, citizenship can only be acquired if the birth of the child was registered, and the person has a birth certificate. Thus, by assisting parents to be documented, it in turn assists children in acquiring nationality in South Africa. Thereafter, Chapter 5 will make provision for recommendations to end childhood statelessness, as well as an overall conclusion on whether South Africa's laws and policies give effect to the goal of ending childhood statelessness, or whether there is a need for a NAP that guides the reform of the laws and policies.

5.2 Methodology

This research methodology utilised by this thesis is strictly based on desktop research, with a focus on an analysis of primary sources, including the two Statelessness Conventions and other international, regional and domestic legislation of South Africa that protect stateless children. Additionally, this research study uses a number of secondary sources based on the research of UNHCR, academics and NGO's that focus on stateless children. South Africa's Domestic Laws will be reviewed in order to assess the protection of stateless children and whether they will achieve the objective of ending childhood statelessness by 2024. Furthermore, the research study will also make use of the knowledge of the practical implications obtained by the writer while working as a refugee attorney for six years at the University of Cape Town (UCT) Refugee Rights Unit.

5.3 Limitations of the Research Paper

This research paper is limited in that it is based purely on an analysis of international, regional and domestic legal frameworks, as well as a number of secondary sources. Therefore, all the information and data are founded on the research of other well-known scholars who have written on the topic of childhood statelessness and other NGO's that provide assistance to stateless persons and children. The research study

is therefore not based on empirical research, such as consultations or questionnaires. In South Africa, the DHA does not provide official statistics on stateless children. Consequently, the study is based on the information that is provided by the UNHCR and other national and international organisations, such as Lawyers for Human Rights (LHR), the Institute on Statelessness and Inclusion (ISI), the Institute for Security Studies (ISS), and Amnesty International, but is not limited thereto.

5. Conclusion

Both the 1954 and 1961 Conventions perform the imperative function of establishing standards and practices related to preventing statelessness. Nevertheless, both Conventions have their shortfalls, specifically in terms of establishing criteria and processes for determining stateless status determination procedures and is not widely ratified and implemented by states.⁸¹ Thereby, the issue of childhood statelessness is not a top priority for many states and even the international community.⁸² Although there is international and regional frameworks that aim to protect stateless children, states are reluctant to ratify these Conventions and implement domestic legislation that provides recognition and rights to stateless children. Essentially, it is the responsibility of Sate's to grant nationality to stateless children.

Furthermore, one of the main reasons for the millions of children that are at risk of statelessness in South Africa, is because of the flawed civil registration system, which results in a lack of birth registration, as well as the implementation of refugee law by government officials, because this leaves parents undocumented and in turn unable to register the birth of their children.⁸³ It has been noted that not all undocumented children are stateless, however in the absence of birth registration, children are at an elevated risk of ending up stateless, because a birth certificate serves as proof of where the person was born. Additionally, children are at risk of statelessness in instances of displacement and abandonment. The number of children that are unregistered will continue to rise if South Africa does not swiftly prioritise statelessness by ratifying the 1954 and 1961 Stateless Conventions and implementing domestic

⁸¹ Statelessness in Southern Africa: Time to end it, not promote it op cit note 4 at 6.

⁸² Statelessness as a Human Rights Issue: A Concept Whose Time Has Come?' op cit note 76 at 570.

⁸³ Birth registration and Statelessness in the Member States of the Southern African Development Community op cit note 14 at 10.

legislation that safeguards stateless children and those that are at risk of statelessness.

There are issues in verifying one's affiliation to a particular state because of a lack of documentation, such as a birth certificate or identity document.⁸⁴ Statelessness not only affects the child's rights to access services, but also has severe consequences on a child's social and mental well-being because they do not have a sense of belonging.⁸⁵ Within the SADC region there is insufficient statistics on stateless populations because they are not accounted for in the National Population Registers, and this includes South Africa. If South Africa does not take the necessary proactive steps to curtail or end statelessness, then the issue of childhood statelessness will continue to rise. There is a need to work together as a society to identify the gaps within domestic legislation, policies and practices and for the government to remedy those defects. The legislation, policies and practices must be in line with the Global Action Plan to End Statelessness, so that all persons hold a nationality and live a normal life, instead of living stateless and in the shadows of a country in which they were born and lived their entire lives.

⁸⁴ Arnold R, 'What is the Statelessness?' The UN Refugee Agency (available at <https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness2pager-ENG.pdf>) accessed 9 March 2023.

⁸⁵ Ibid.

Chapter 2 – International, Regional and Domestic Framework Relating to Statelessness

2.1 Introduction

As mentioned previously, and in accordance with UNICEF, there are more than 642 000 displaced and migrant children that are presently living in South Africa. As a result, South Africa has the largest population of child migrants on the entire African continent.⁸⁶ Every year, more and more children are born stateless and thus there is a need to address childhood statelessness, because this will essentially reduce statelessness in general. Globally, many of the states, including several of the SADC states have not ratified the two most important international doctrines that govern statelessness, namely the 1954 Convention on Status of Stateless Persons and the Convention on the Reduction of Statelessness of 1961. This chapter will examine the international, regional and domestic framework and whether South Africa is fulfilling its obligations in terms of granting children with a nationality.

There is an urgency to end childhood statelessness because the impact thereof is significant. The former UNICEF Executive Director has stated that:

‘Every child has a right to a legal identity, to birth registration and a nationality. But a quarter born today - almost 100,000 babies - may never have an official birth certificate or qualify for a passport. If your parents are stateless, from a persecuted or marginalized community, or simply if you live in a poor remote region, you may never be given an identity or birth certificate. You may even be denied citizenship or have your citizenship stripped from you. This lack of formal recognition by any state means you may be denied health care, education and other government services. Later in life, the lack of official identification can mean you enter into marriage, dangerous work, or get conscripted into the armed forces before the legal age. As an unregistered or ‘stateless’ child, you are invisible to the authorities - it’s as if you never existed (...)

⁸⁶ United Nations Childrens Fund, ‘New project to Improve Protection and Wellbeing of Children on the Move - European Union and UNICEF South Africa Support the Department of Social Development to Improve Child Protection Services for Some of the Country’s Most Excluded Children’ (2020) available at <https://www.unicef.org/southafrica/press-releases/new-project-improve-protection-and-wellbeing-children-move> [accessed 13 March 2023].

UNICEF urges Member States to fulfil their responsibilities to protect everyone under the age of 18 in line with the Convention on the Rights of the Child (CRC)'.

Therefore, it is important for South Africa to take the necessary steps of acceding to the Statelessness Conventions, and to ensure that no child is born stateless.

2.2 History of the International Framework

The issue of Statelessness is not a new challenge, but one that has been around for several decades and can be traced back to a period which precedes the Second World War. After the atrocities that took place during the Second World War, the United Nations (UN) responded by establishing a set of human rights which applies to all human beings, irrespective of the persons nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or any other status.⁸⁷ On the 10th of December 1948, the Universal Declaration of Human Rights (UDHR) was adopted. Article 15 of the UDHR protects the general right to a nationality.⁸⁸ Even though the UDHR in itself is not a legally binding instrument, it has been described as the cornerstone of international human rights law, because it has laid the foundation for the drafting of binding international human rights conventions, regional and domestic legislation, as well as constitutional provisions. Together, these instruments form a comprehensive system which aims to restrict the powers of states, in relation to nationality decisions if they cause statelessness and most importantly, assists in decreasing and preventing statelessness.⁸⁹

Additionally, the Holocaust which took place from 1933 to 1945, whereby six million Jews were killed by the Nazi German regime, resulted in a number of post-war refugees that found themselves in other countries, as well as a number of persons that

⁸⁷ United Nations, 'The Foundation of International Human Rights Law' available at [The Foundation of International Human Rights Law | United Nations](#) [accessed on 09 May 2023].

⁸⁸ UN Universal Declaration of Human Rights (1948).

⁸⁹ M Manly and S Persaud, 'No legal identity. Few rights. Hidden from society. Forgotten. Stateless' Forced Migration Review (2009) 5 available at <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR32/FMR32.pdf> [accessed 9 April 2023].

were stateless.⁹⁰ Therefore, in 1949 the UN Economic and Social Council (ECOSOC) created an Ad Hoc Committee that was tasked with drafting a convention that would be applicable to the international protection of refugee and stateless persons.⁹¹ In 1951, the Plenipotentiaries Conference was held, and the objective of this meeting was to consider both the topics of refugee and stateless persons.⁹² Initially, provisions that addressed statelessness were to be included in the 1951 Refugee Convention. However, due to the urgency of the significant number of refugees at the time, the 1951 Refugee Convention was adopted without any provisions relating to statelessness.⁹³ It was only in 1954 that the Statelessness Convention was adopted, and thereafter the 1961 Statelessness Convention was adopted.⁹⁴ In spite of the UDHR which recognises the ‘the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world’, as well as the two Conventions that provide protection to stateless persons, the issue of childhood statelessness has continued for decades to impact children globally.⁹⁵ However, due to UNHCR’s Global Action Plan to eradicate statelessness by 2024, several SADC states have ratified both the Statelessness Conventions and reformed their nationality laws, which is a step in the right direction.

⁹⁰ S Martin ‘Forced Migration, the Refugee Regime and the Responsibility to Protect’ *Global Responsibility to Protect* (2010) vol 2 45 available at https://brill.com/view/journals/gr2p/2/1/article-p38_4.xml [accessed 6 July 2023].

⁹¹ M Achiron, C Batchelor & P Leclerc ‘Nationality and Statelessness: A Handbook for Parliamentarians’ *Inter-Parliamentary Union* (2005) 9 available at http://archive.ipu.org/PDF/publications/nationality_en.pdf [accessed 16 March 2023]

⁹² Ibid.

⁹³ No legal identity. Few rights. Hidden from society. Forgotten op cit note 15 at 5.

⁹⁴ *Nationality and Statelessness: A Handbook for Parliamentarians* op cit note 91 at 10.

⁹⁵ MO Rosenblat, M Khanna et al, ‘Good Practices in Nationality Laws for the Prevention and Reduction of Statelessness: Handbook for Parliamentarians No. 29 (2018) available at <https://www.ipu.org/resources/publications/handbooks/2018-11/good-practices-in-nationality-laws-prevention-and-reduction-statelessness> [accessed 9 March 2023].

2.2.1 The 1954 Convention on the Status of Stateless Persons (1954 Convention)

Article 1(1) of the 1954 Convention makes provision for the definition of a stateless person as follows: 'For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.' In terms of the UNHCR Guidelines on Statelessness, the term 'law' within the definition does not only include legislation, but also 'ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.'⁹⁶ The 1954 Convention does not allow for any reservations to Article 1(1) and consequently, the definition is binding on all States that are Parties to the treaty. Moreover, the International Law Commission (ILC) has established that the definition in Article 1(1) forms part of customary international law.⁹⁷ As a result of this, states that have not ratified the Convention, are still bound due to customary international law. The 1954 Convention was drafted to guarantee that stateless persons are granted the minimum protection of human rights. This Convention provides stateless persons with internationally recognized legal status, and also makes provision for the minimum standards of treatment with regards to a number of rights, which include but are not limited to housing, education and employment.⁹⁸

The most important rights guaranteed to stateless persons in terms of the 1954 Convention, are the right to an identity, travel documents and assistance with administrative procedures.⁹⁹ These rights are crucial to enable stateless persons with freedom of movement and to be able to travel abroad. In return, stateless persons have a duty to respect and to adhere to the laws of the host state. States are barred from discriminating on the basis of race, religion or country of origin.¹⁰⁰ The intention of the 1954 Convention is to ensure that stateless persons are granted a nationality

⁹⁶ 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' (2012) HCR/GS/12/01 (Guidelines on Statelessness No 1).

⁹⁷ International Law Commission, 'Draft Articles on Diplomatic Protection with Commentaries' (2006) 49 available at <https://www.refworld.org/docid/525e7929d.html> [accessed 22 May 2023].

⁹⁸ Weis P, 'The Convention Relating to the Status of Stateless Persons' *The International and Comparative Law Quarterly* (1961) 6 available at <http://www.jstor.org/stable/756490> [Accessed 7 July 2023].

⁹⁹ 1954 Convention Relating to the Status of Stateless Persons (available at: <https://www.ohchr.org/sites/default/files/stateless.pdf>) 28 [accessed 6 April 2023].

¹⁰⁰ Weis P, 'The Convention Relating to the Status of Stateless Persons' op cit note 98 at 6.

within a swift period, thus decreasing or eliminating statelessness. States are required to establish the procedure and manner in determining whether a person fits the definition of a stateless person. However, the weakness of the 1954 Convention, is that it does not propose the manner in which states should deal with the determination of stateless persons.¹⁰¹

2.2.2 The 1961 Convention on the Reduction of Statelessness (1961 Convention)

The 1961 Convention came into effect to provide solutions that were not provided for in the 1954 Convention in terms of statelessness.¹⁰² The objective of the 1961 Convention is for the prevention of statelessness at a global level by laying out a framework that guarantees the right of every person to a nationality. States are required to implement safeguards within their nationality laws that prevent statelessness at birth and at a later stage in life.¹⁰³ The foundational principle of the Convention is that persons should not be rendered stateless by operation of the nationality laws of the states. A fundamental provision that the Convention provides for, is that children are to acquire the nationality of the country in which they are born if they do not acquire any other nationality.¹⁰⁴ Furthermore, the 1961 Convention states that a 'foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.'¹⁰⁵ The Convention thus provides the state party with a duty in terms of acquisition of nationality by birth or descent, loss of nationality through operation of law or renunciation and deprivation of nationality if it

¹⁰¹ 1954 Convention Relating to the Status of Stateless Persons (available at: <https://www.ohchr.org/sites/default/files/stateless.pdf>) 28 [accessed 6 April 2023].

¹⁰² Khan F, 'Exploring Childhood Statelessness in South Africa' PER / PELJ (2020)23 available at: <http://www.scielo.org.za/pdf/pej/v23n1/13.pdf> [accessed 3 February 2023].

¹⁰³ Van Waas Laura, 'The UN Statelessness Conventions' in *Nationality and Statelessness in International Law* Cambridge University Press (2014) 64-67 available at <https://www.cambridge.org/core/books/nationality-and-statelessness-under-international-law/un-statelessness-conventions/06D6DAC25656EB3FFF798E52ECB30C54> [accessed 6 May 2023].

¹⁰⁴ Articles 1 to 3 of the 1961 Convention on the Reduction of Statelessness available at https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf.

¹⁰⁵ Article 2 of the 1961 Convention on the Reduction of Statelessness available at https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf.

would result in a person being rendered stateless, subject to limitations.¹⁰⁶ The weakness of the Convention is the lack of guidance in determining when the Convention is applicable, such as in identifying when a person is ‘*otherwise stateless*’, and the emphasis on safeguards against statelessness that impose on the freedom of states to regulate nationality. Furthermore, the 1961 Convention provides circumstances in which a state can deprive one of their nationality, despite the fact that this would leave the person stateless.

Deplorably, both Conventions have a very low ratification rate.¹⁰⁷ According to UNHCR, in November 2014 when the statelessness campaign was launched, there were only 83 states that had ratified the 1954 Convention, and 61 states that that ratified the 1961 Convention. Within SADC, the states that are parties to both the 1954 and 1961 Conventions, are Angola, Mozambique, Eswatini and Lesotho. The parties to only the 1954 Convention are Botswana, Malawi, Zambia and Zimbabwe. However, Comoros, Congo, DRC, Madagascar, Mauritius, Namibia, Seychelles and South Africa, are not parties to both Conventions.¹⁰⁸

2.3 Pledges by SADC and South Africa in Particular

In 2011, the UNHCR held a ministerial meeting to honour the 60th anniversary of the 1951 Convention and the 50th anniversary of the 1961 Convention.¹⁰⁹ At this event, Zambia pledged to accede to the 1961 Convention, whereas South Africa and Tanzania made a pledge to accede to both the 1954 Convention and the 1961 Convention.¹¹⁰ The only country that has signed and ratified both the 1954 Convention and the 1961 Convention is the Republic of Angola.¹¹¹ Furthermore, in December

¹⁰⁶ 1961 Convention on the Reduction of Statelessness available at https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf.

¹⁰⁷ Exploring Childhood Statelessness in South Africa op cit note 102 at 19.

¹⁰⁸ UN High Commissioner for Refugees (UNHCR), States Party to the Statelessness Conventions - as of 25 March 2022, 25 March 2022, available at: <https://www.refworld.org/docid/623d8ec74.html> [accessed 22 April 2023].

¹⁰⁹ UN High Commissioner for Refugees (UNHCR), Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011’ (2012) available at: <https://www.refworld.org/docid/50aca6112.html> [accessed 1 May 2023]

¹¹⁰ Ibid.

¹¹¹ United Nations South Africa, ‘Addressing Statelessness in Southern Africa’ (2021) available at <https://southafrica.un.org/en/156766-addressing-statelessness-southern-africa> [accessed 9 May 2023].

2019, UNHCR hosted the Global Refugee Forum where several states made pledges.¹¹² South Africa pledged to promote civil registration across the SADC region to ensure that regional citizens are appropriately documented to eliminate the possibility of statelessness in the region.¹¹³ Many South African citizens were not registered at birth during the apartheid regime, thus the government decided to issue late birth registration as an attempt to eradicate statelessness. Data collection studies on stateless populations is important, because it will allow states to be better equipped to deal with stateless persons and curb the problem. South Africa undertook to include questions in its population census.¹¹⁴ However, South Africa has not yet ratified either of the stateless conventions and has not yet included questions on statelessness in its 2022 population census.

2.4 De Jure and De Facto Statelessness

It is crucial to note that children can either be *de jure* or *de facto* stateless. On the one hand, individuals that fit within the definition of Article 1(1) of the 1954 Convention are occasionally described as '*de jure*' (legally) stateless persons. Nevertheless, this phrase is not used in the Convention itself. On the other hand, there are many persons who have not been deprived of nationality, but who are unable to prove their nationality.¹¹⁵ These persons may then be referred to as '*de facto*' stateless. Thus, they are stateless in practice, and not in law or are unable to acquire protection from the state of which they are citizens.¹¹⁶ As a result, persons who are *de facto* stateless are in the same situation as a person who is *de jure* stateless, because effectively they cannot turn to any state for protection, and while they legally hold a nationality, they

¹¹² Southern African Development Community' Regional Bureau of UNHCR in Southern Africa (2022) 3 available at <https://data.unhcr.org/en/documents/details/97772>

¹¹³ Birth registration and Statelessness in the Member States of the Southern African Development Community op cit note 14 at 12.

¹¹⁴ United Nations in South Africa, 'Addressing Statelessness in Southern Africa' (2021) available at: <https://southafrica.un.org/en/156766-addressing-statelessness-southern-africa> [accessed 6 March 2023].

¹¹⁵ Bucha S and Gichuhi M, 'Chapter 6 A Tale on Belonging in Africa: An analysis of the African Approach to Statelessness' in 'Exploring African Approaches to International Law: Essays in Honour of Kéba Mbaye' Pretoria University Law Press (2022) 192-193 available at https://www.pulp.up.ac.za/edocman/edited_collections/exploring_african_approaches/2022%20KM%20chapter%206.pdf [accessed 9 July 2023].

¹¹⁶ I Goris, J Harrington and S Köhn, 'Statelessness: What It Is and Why It Matters' Open Society Justice Initiative (2009) available at <https://www.justiceinitiative.org/voices/statelessness-what-it-and-why-it-matters> [accessed 9 May 2023]

cannot acquire any benefits and protection from holding such nationality.¹¹⁷ The term *de facto* statelessness is not contained in any international treaty and thus there is no approved definition.¹¹⁸ Therefore, it is of utmost importance that those who qualify as ‘stateless persons’ in terms of Article 1(1) of the 1954 Convention are formally recognised as such and not incorrectly addressed as *de facto* stateless persons, because this would result in the failure to receive the protection guaranteed under the 1954 Convention.¹¹⁹ Both the 1954 Statelessness Convention and the 1961 Convention, touches on the concern of *de facto* statelessness and makes a non-binding recommendation that *de facto* stateless persons should be granted the same treatment, where possible, as a *de jure* stateless person in order for them to be afforded the same treatment that the 1954 and 1961 Convention provides to stateless persons.¹²⁰

It has been argued that differentiating between *de jure* and *de facto* stateless persons is prejudicial because on the one hand, it creates a hierarchy of protection, in that *de jure* stateless persons are protected by the 1954 Convention, and other *de jure* stateless persons that reside illegally within a country, to some extent are also protected under the 1954 Convention.¹²¹ On the other hand, *de facto* stateless persons do not receive any protection and benefits from the 1954 Convention, unless they are recognised as refugees.¹²² Therefore, *de facto* stateless persons are left in a vulnerable position because there are clear gaps within international law when it comes to providing protection to *de facto* stateless persons and there has been little to no progress in terms of implementing laws that protect *de facto* stateless persons.

¹¹⁷ Batchelor CA, ‘Statelessness and the Problem of Resolving Nationality Status’ *International Journal of Refugee Law* (1998) 156&173 available at <https://doi.org/10.1093/ijrl/10.1-2.156> [accessed 6 May 2023] & Robinson N, ‘Convention Relating to the Status of Stateless Persons: Its History and Interpretation’ *Institute of Jewish Affairs* (1995) para 3. 73 available at <https://www.unhcr.org/media/convention-relating-status-stateless-persons-its-history-and-interpretation-commentary> [accessed 6 April 2023].

¹¹⁸ Childhood Statelessness in South Africa op cit note 102 at 6.

¹¹⁹ UN High Commissioner for Refugees (UNHCR), ‘Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness’ (2022) available at: <https://www.refworld.org/docid/54e75a244.html> [accessed 22 October 2023]

¹²⁰ Statelessness and the Problem of Resolving Nationality Status op cit note 117 at 156.

¹²¹ Chickera DG, ‘Chapter 2 Critiquing the Categorisation of the Stateless’ *The Equal Rights Trust* (July 2010) pg. 53 available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> [accessed 16 April 2023].

¹²² *Ibid.*

2.5 International Framework Relating to the Right to Nationality

Furthermore, the right to a nationality and protection of stateless persons can further be found in core international treaties. South Africa has ratified all of the following treaties and thus there is an obligation on the state to protect the right to a nationality. The right to a nationality is included in the Universal Declaration of Human Rights (UDHR)¹²³ under Article 15 which states that '[e]veryone has the right to a nationality'. Furthermore, Article 24 of the International Covenant on Civil and Political Rights (ICCPR)¹²⁴ provides that every child has the right to be registered immediately after birth and the right to a nationality. This provision is reiterated by Article 7 of the Convention on the Rights of the Child (CRC).¹²⁵ Additionally, Article 9 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)¹²⁶ states that woman must be granted the same rights as men when it comes to transferring their nationality to their children. The Convention on the Nationality of Married Women safeguards against the deprivation of nationality when it comes to discrimination based on gender.¹²⁷ Additionally, the Convention on the Elimination of all Forms of Racial Discrimination (CERD)¹²⁸ under Article 5 calls on states to 'guarantee racial equality in the enjoyment of the right to nationality'. Lastly, Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)¹²⁹ guarantees children of migrant workers the right to a nationality.

2.5.1 Regional Framework

In Africa, the African Charter on Human and People's Rights (African Charter)¹³⁰ does not make clear provision for the right to a nationality, but it makes provision for

¹²³ Adopted 10 December 1948.

¹²⁴ (Adopted 16 December 1966, entered into force 23 March 1976).

¹²⁵ (Adopted 20 November 1989, entered into force 2 September 1990).

¹²⁶ (Adopted 18 December 1979, entered into force 3 September 1981).

¹²⁷ (Adopted 29 January 1957, entered into force 11 August 1958).

¹²⁸ (Adopted 29 January 1957, entered into force 11 August 1958).

¹²⁹ (Adopted 18 December 1990, entered into force 1 July 2003).

¹³⁰ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter).

procedural rights in circumstances where critical rights are violated. However, Article 5 of the African Charter makes provision for the right to the 'recognition of one's legal status.'¹³¹ African leaders have therefore pursued to address the deficient provision on nationality through the African Charter on the Rights and Welfare of the Child (African Children's Charter). Article 6 of the African Children's Charter was adopted in 1990 by the African Union (AU).¹³² Article 6 provides for the right to be registered immediately after birth,¹³³ that every child has the right to a nationality and that States have the responsibility to ensure that children born within their territory, who are not granted the nationality of another State, acquire nationality.¹³⁴

Furthermore, Article 6(3) of the Protocol to the African Charter on the Rights of Women in Africa (Protocol on the Rights of Women)¹³⁵ particularly contains the child's right to a nationality.¹³⁶ The Protocol on the Rights of Woman 'guarantees both men and women's rights to acquire the nationality of their partner and transmit it to their children.'¹³⁷ Therefore, the Protocol on the Rights of Woman reinforces that African women have the right to gain a nationality and to acquire the nationality of their husband and supplements the degree of protection.¹³⁸ These actions bolster the determination of African governments to ensure that African children have access to the right to nationality.¹³⁹ In 2011, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) made a ground-breaking judgement when the Kenyan government's refusal to grant citizenship to children of Nubian descent was challenged and it was argued that this denial resulted in the gross violation of their human rights and a violation of Article 6 of the African Children's Charter. Since independence,

¹³¹ Article 5 of the African Charter.

¹³² African Charter on the Rights and Welfare of the Child available at https://au.int/sites/default/files/treaties/36804-treatyafrican_charter_on_rights_welfare_of_the_child.pdf

¹³³ Article 6(2) of the African Charter on the Rights and Welfare of the Child.

¹³⁴ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999 CAB/LEG/24.9/49 (African Children's Charter).

¹³⁵ Ibid.

¹³⁶ Article 6(3) of the African Charter on the Rights and Welfare of the Child.

¹³⁷ Adjolohoun S, 'Introductory Note to African Commission on Human and Peoples' Rights Resolution 234 on the Right to Nationality' International Legal Materials (2014) 413 available at <https://www.jstor.org/stable/10.5305/intelegamate.53.2.0413> [accessed 25 March 2023].

¹³⁸ Article 6(g) of the Protocol on the Rights of Women in Africa, available at http://www.achpr.org/files/instruments/womenprotocol/achpr_instr_proto_women_eng.pdf [accessed on 26 February 2023].

¹³⁹ Muller L, 'Legal Identity For All – Ending Statelessness in SADC' Southern Africa Litigation Centre (2014) available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf> [accessed 29 June 2023].

Nubian communities had become stateless and Nubian children were deprived of the right to nationality and the documentation that enabled access to education and health care. The ACERWC found that this discrimination was in violation of 'African human rights standards' and it used a human-rights approach to address the discrimination caused by statelessness.¹⁴⁰ Even though Kenya is not a country within Southern Africa, this is an important judgment because it affects the Southern African regions too.

Furthermore, within a Southern African context, in the case of *Modise v. Botswana*,¹⁴¹ the African Commission on Human and Peoples' Rights held that Article 5 of the African Charter finds application in matters where the government deprived persons of their nationality, which results in them being stateless.¹⁴² The Commission reinforced this decision in the case of *Amnesty International v. Zambia*.¹⁴³ Moreover, The Republic of Botswana's Court of Appeal presided over a milestone judgment in the *Unity Dow* case. In this case, the court approved a woman's right to pass on her citizenship to her children and spouse.¹⁴⁴ Therefore, the African Union provides significant precedent setting cases and policies in terms of statelessness and nationality.¹⁴⁵

2.5.2 South Africa's Domestic Framework

The Constitution of the Republic of South Africa,¹⁴⁶ is the supreme law of the land and section 28(1)(a) states that every child 'has the right to a name and nationality from birth'.¹⁴⁷ This constitutional provision can be seen as a safeguard against statelessness. Furthermore, the piece of legislation that governs nationality in South

¹⁴⁰ African Committee of Experts on the Rights and Welfare of the Child, Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (OBO *Children of Nubian Descent in Kenya*) v Kenya Communication number 002/Com/002/2009 of 22 March 2011.

¹⁴¹ *Communication 97/93 (2000)* para 91 Available at: <https://www.refworld.org/cases,ACHPR,52ea58d04.html>

¹⁴² *Modise v. Botswana Communication 97/93 (2000)* para 91 Available at:

<https://www.refworld.org/cases,ACHPR,52ea58d04.html>

¹⁴³ *Amnesty International v. Zambia Communication No. 212/98 (2000)* para 50 [available at <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1999/1>].

¹⁴⁴ *The Attorney General of the Republic of Botswana v Unity Dow* (1995) [available at <https://www.elaw.org/content/botswana-attorney-general-v-dow-appeal-court-1994-6-bclr-1-locus-standi>].

¹⁴⁵ Citizenship Law in Africa: A Comparative Study op cit note 62 at 11.

¹⁴⁶ 1996.

¹⁴⁷ s 28(1)(a) of the Constitution, 1996.

Africa, is the South African Citizenship Act,¹⁴⁸ which came into effect in 1995. It has since been amended.¹⁴⁹ The intended purpose of the Citizenship Act, is to make provision 'for the acquisition, loss and resumption of South African citizenship; and for matters incidental thereto.'¹⁵⁰ Section 2 of the Citizenship Act¹⁵¹ makes provision for the Acquisition of citizenship in South Africa, which may be acquired either by birth, by descent or by naturalisation, and states that a person 'who is born in or outside of the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.'¹⁵²

Furthermore, citizenship by place of birth can be acquired in one of three ways. Firstly, section 2(2)¹⁵³ states that persons who are born in South Africa, to parents who are non-South African, and who has not acquired the nationality of any other country nor has any right to nationality in that country, shall be granted citizenship in South Africa.¹⁵⁴ However, despite section 2(2) granting citizenship to children that are born stateless, in practice this is not a possibility, because there are no regulations to this effect, and the Act provides no guidance on determining whether a child is stateless.¹⁵⁵ Secondly, section 2(3) states that persons who are born in South Africa to parents who were granted permanent residence, would be eligible for citizenship at birth on condition that the person has lived in South Africa from the date of their birth until reaching the age of majority.¹⁵⁶ Thirdly, section 4(3) states that a child born in South Africa to parents who are not South African citizens and who have not been granted permanent residence, qualifies to apply for citizenship upon reaching the age of majority. However, this section is again problematic, because the child can only apply for citizenship once they turn 18 and the birth must be registered. Thus, the child will remain statelessness until the age of 18 and the application for citizenship is subject

¹⁴⁸ 88 of 1995.

¹⁴⁹ South African Citizenship Amendment Act 17 of 2010.

¹⁵⁰ South African Citizenship Act 88 of 1995.

¹⁵¹ 88 of 1995.

¹⁵² Section 2(b) of the South African Citizenship Act 88 of 1995.

¹⁵³ South African Citizenship Act 88 of 1995.

¹⁵⁴ Section 2(2)(b) of the South African Citizenship Act 88 of 1995.

¹⁵⁵ Lawyers for Human Rights & the Institute on Statelessness and Inclusion, 'Childhood Statelessness in South Africa' (2016) 2 available at https://www.lhr.org.za/archive/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf [accessed 20 April 2023].

¹⁵⁶ Section 2(3) of the South African Citizenship Act 88 of 1985

to the Ministers discretion, therefore there is no guarantee that the child will be granted citizenship.¹⁵⁷ Nevertheless, in terms of all three of the methods of acquiring citizenship by birth, the condition is that the birth must be registered in accordance with the provisions of the BDRA.¹⁵⁸ Therefore, the importance of birth registration is highlighted, because without having the birth registered, a persons will not qualify to apply for citizenship, and will be unable to access and identity card nor a passport to travel. ¹⁵⁹

In South Africa, the Refugees Act 130 of 1998, is the piece of legislation that affords asylum seekers and refugees with extensive rights in South Africa, which is inclusive of the of the rights contained in the Bill of Rights.¹⁶⁰ Section 27(c) of the Refugee Amendment Act¹⁶¹ entitles a refugee to apply for permanent residence after ten years of continuous residence in South Africa from the date that the person was formally recognised as a refugee in terms of section 24 of the Refugees Act.¹⁶² The Refugee Amendment Act which came in to effect in January 2020, lengthened the amount of time that a refugee has been resident in South Africa, before being eligible to apply for permanent residence from five years to ten years. Moreover, the purpose of the Immigration Act¹⁶³ in South Africa, is to control the entry of foreign nationals coming into South Africa. The Immigration Act¹⁶⁴ makes provision for naturalisation to take place. Once a person has been granted certification by the Standing Committee for Refugee Affairs, they then make an application for a permanent residence permit. After the person has held the permanent residence permit for a period of five years, they would then qualify to apply for naturalisation. Additionally, section 31 provides for 'exemptions' and provides the Minister of Home Affairs with the power to grant permanent residence to foreign nationals who applied to the Minister 'when special circumstances exist which would justify such decision'.¹⁶⁵ An example of this, is that former Angolan refugees provided the Minister of Home Affairs with documentation

¹⁵⁷ Childhood Statelessness in South Africa op cit note 155 at 3.

¹⁵⁸ No 51 of 1992.

¹⁵⁹BDRA S5, 9 & 10.

¹⁶⁰ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

¹⁶¹ 130 of 1998

¹⁶² Ibid.

¹⁶³ 13 of 2002

¹⁶⁴ Ibid.

¹⁶⁵ S31(2) of the Immigration Act 13 of 2002.

proving their socio-economic integration into South Africa. In July 2017, the Minister issued a favourable outcome and granted permanent residence to more than 1 000 Angolan applicants, who no longer had refugee claims due to the civil war ending.¹⁶⁶

2.6 The Importance of Nationality

Holding a nationality is essential, because it sets duties and responsibilities that persons have to fulfil when living within a particular state and it also establishes the rights and benefits that persons are entitled to.¹⁶⁷ It is often not possible to access many other rights, such as healthcare, education and social grants, without holding a nationality.¹⁶⁸ These duties and rights that derive from holding a nationality is different in each country.¹⁶⁹ Moreover, nationality is generally deemed as an absolute right of all human beings.¹⁷⁰ In terms of international law, the terms 'nationality and 'citizenship' are used as synonyms and can also be used interchangeably to define a legal relationship between an individual and a state. However, the term 'nationality' is usually utilised in international treaties and policies. Although international law does not provide a clear definition of the term nationality, a consistent definition of nationality can be found in the regional law of Europe.¹⁷¹

In terms of the European Convention on Nationality, nationality is defined as the legal bond between a person and a state and excludes the persons ethnic origin.¹⁷² In the

¹⁶⁶ Scalabrini Centre of Cape Town, 'A Mixture of Relief and Fear as Angolan Former Refugees are Issued New Permits' (2018) available at <https://citizenshiprightsafrika.org/south-africa-a-mixture-of-relief-and-fear-as-angolan-former-refugees-are-issued-new-permits/> [accessed 6 May 2023].

¹⁶⁷ Bhabha J 'From Citizen to Migrant: The Scope of Child Statelessness in the Twenty First Century' MIT Press Scholarship Online (2013). Available at <https://doi.org/10.7551/mitpress/9780262015271.003.0001> (accessed 14 April 2023).

¹⁶⁸ Bhabha J, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?' Human Rights Quarterly 31(2) (2009) available at DOI: 10.1353/hrq.0.0072 (accessed 6 June 2023).

¹⁶⁹ Edwards A, 'The meaning of nationality in international law in an era of human rights: Procedural and substantive aspects' in Nationality and Statelessness under International Law (2014) 64 available at <https://www.cambridge.org/core/books/nationality-and-statelessness-under-international-law/meaning-of-nationality-in-international-law> [accessed 30 March 2023].

¹⁷⁰ Bucha S and Gichuhi M, 'A tale on belonging in Africa: An analysis of the African approach to statelessness' (2022) available at https://www.pulp.up.ac.za/edocman/edited_collections/exploring_african_approaches/2022%20KM%20chapter%206.pdf [accessed 10 March 2023].

¹⁷¹ Owen D, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' Netherlands International Law Review (2018) 300 available at <https://link.springer.com/article/10.1007/s40802-018-0116-7> [accessed 29 May 2023].

¹⁷² Article 2 of The European Convention on Nationality 6 November 1997 (ETS No. 166, entered into force on 1 March 2000).

International Court of Justice (ICJ) the notion of nationality was broadened in the case of *Liechtenstein v Guatemala*, and the court advised that 'nationality is not only a legal bond, but one which has as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'¹⁷³

International law does not dictate the method in which a state should afford its citizens a nationality. Although states have a duty to implement nationality laws at the domestic level, the right to nationality in itself has been conferred on each and every individual at an international level. Consequently, each state sets out in their respective nationality laws, the criteria on who shall qualify as nationals, and this is done through the country's constitution and statutory laws and policies.¹⁷⁴ Even though a state has the freedoms to implement its own nationality laws, these freedoms are limited by international law in two ways. Firstly, individuals should have the right to acquire, change and retain their nationality.¹⁷⁵ Secondly, once the state has granted nationality to an individual, the said nationality cannot be arbitrarily taken away.¹⁷⁶ Therefore, while states retain the right to develop their own nationality laws, it must be done in such a manner that complies with international standards, and specifically the domestic law should be aligned to the notion that statelessness should be prevented and protections should be enacted for groups of persons that are risk of statelessness. A concern is that even though there is a right to hold a nationality, there is no duty on a state to grant nationality. International law provides recommendations on what states should preclude from enacting in their nationality laws, but international law does not provide any guidance on what states should take into account when developing and

¹⁷³ Nottebohm Case (*Liechtenstein v Guatemala*); Second Phase, International Court of Justice (ICJ), 6 April 1955, ICJ Reports 1955, p.4; General List, No 18 available at: <http://www.refworld.org/cases,ICJ,3ae6b7248.html> [accessed 22 March 2023].

¹⁷⁴ Britannica - The Editors of Encyclopaedia, 'Nationality' Encyclopedia Britannica (2023) available at <https://www.britannica.com/topic/nationality-international-law> [Accessed 16 April 2023].

¹⁷⁵ UN Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General' (19 December 2011) A/HRC/19/43, available at: <https://www.refworld.org/docid/4f181ef92.html> [accessed 22 March 2023].

¹⁷⁵ Biju RK, 'Childhood Statelessness: Critiquing International Norms and Enforcement Strategies' *Brawijaya Law Journal* (2021) 8 available at <https://doi.org/10.21776/ub.blj.2021.008.01.07> [accessed 9 May 2023].

¹⁷⁶ UN Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General' (19 December 2011) A/HRC/19/43, available at: <https://www.refworld.org/docid/4f181ef92.html> [accessed 22 March 2023].

implementing nationality laws and as a result there are still states that have gaps in their nationality laws, including South Africa.¹⁷⁷

2.6.1 Foreign Nationals and Nationality

Migrants that are undocumented form part of a group of persons that reside in a particular country without holding the correct legal documentation in terms of the immigration laws of the country.¹⁷⁸ Consequently, undocumented persons and their children experience a wide range of issues within the host country.¹⁷⁹ One such issue is that parents who do not hold a valid legal identity, are unable to register the birth of the child, which leaves children invisible and unable to establish a link to the state in which they were born or a link to their parents.¹⁸⁰ Countries such as Angola and South Africa contain constitutional provisions that relate to attaining nationality. However, in practice attaining a nationality is not always guaranteed. According to the Migration Data Portal, the reason for migration to countries within Southern Africa, is because of work opportunities, political crisis that leads to persons being persecuted as well as climate change that leads to disasters.¹⁸¹ Countries such as Botswana, Zambia and South Africa that have mining sectors, are attractive to labourers, as well as Angola that is rich in oil. Southern Africa has an estimated population of 363.2 million people, and it is estimated that there by mid-year of 2020 there are approximately 6.4 million migrants in the region.¹⁸²

2.6.2 Types of Nationality

Nationality at birth can be attributed to persons three different ways: *jus sanguinis*, *jus soli* and *jus domicile*. States are at liberty to implement the nationality model that

¹⁷⁷ Biju RK, 'Childhood Statelessness: Critiquing International Norms and Enforcement Strategies' Brawijaya Law Journal (2021) 8 available at <https://doi.org/10.21776/ub.blj.2021.008.01.07> [accessed 9 May 2023].

¹⁷⁸ The Children of Irregular Migrants: A Stateless Generation? Op cit note 28 at 440.

¹⁷⁹ Citizenship Act, s 4(3).

¹⁸⁰ The Children of Irregular Migrants: A Stateless Generation? Op cit 28 at 440.

¹⁸¹ Migration Data Portal 'Migration Data in the Southern African Development Community (SADC)' (2023) available at <https://migrationdataportal.org/regional-data-overview/southern-africa>, accessed on 06 June 2023.

¹⁸² Migration Data Portal 'Migration Data in the Southern African Development Community (SADC)' (2023) available at <https://migrationdataportal.org/regional-data-overview/southern-africa>, accessed on 06 June 2023.

they want to use, however, states are limited by their international duties, in that they have to ensure that a child is provided with a nationality if they would otherwise be stateless.¹⁸³ *Jus sanguinis* is the method based on descent or parentage, and thus in order to establish a link to particular state, one has to prove their lineage.¹⁸⁴ Accordingly, the nationality of the parents are considered at the time of birth.¹⁸⁵ The problem with nationality by means of *jus sanguinis* is that children of migrants would be hindered from acquiring nationality in the state that they were born, because they would be unable to prove a bloodline lineage. Therefore, states should avoid granting nationality by way of *jus sanguinis* because it places migrant children at a great risk of statelessness.

Jus soli is the second method of acquiring nationality and this is when a child is born on the territory of the state. This method is preferred because it permits children to gain the nationality of the country in which they were born.¹⁸⁶ As mentioned previously, Southern Africa applies a combination of both *jus sanguinis* and *jus soli*.¹⁸⁷ This is especially problematic because if there are no protections contained in the domestic laws of countries, then it can result in persons ending up stateless. *Jus domicile* or naturalisation is the last way of acquiring a nationality and it is when a person has been resident within the country for a certain period of time. Thus, it is when there is a development of a relationship with a state over some time.¹⁸⁸ Persons that are either born in the country or who have been resident within the country for a certain number of years, are provided with the possibility that they could potentially gain a nationality. Naturalisation can take place in different ways, such as marriage, adopting children, attainment of domicile, or being employed as a government official.¹⁸⁹ Naturalisation is therefore a good method of conferring nationality, but the state has a discretion on

¹⁸³ Article 6 of the ACRWC.

¹⁸⁴ Van Waas L, 'Nationality Matters: Statelessness Under International Law' *International Journal of Cooperative Information Systems* (2008) 33 available at https://www.researchgate.net/publication/254797325_Nationality_matters_Statelessness_under_international_law [accessed 18 April 2023].

¹⁸⁵ The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects op cit note 169 at 144.

¹⁸⁶ Katelyn A Horne 'Navigating Nationality: The Rights to Birth Registration and Nationality in Refugee Magnet States' *Columbia Journal of Transnational Law* (2014) 139 [accessed 6 March 2023].

¹⁸⁷ Citizenship and Growth -Inclusive Citizenship Laws Tend to Foster Economic Development op cit note 59 at 44.

¹⁸⁸ Nationality Matters: Statelessness Under International Law op cit note 184 at 172.

¹⁸⁹ Ibid.

whether they will grant nationality on the basis on *jus domicile*. Due to this discretionary power, the protection against statelessness is somewhat curtailed.

Majority of the Southern African countries allow for naturalisation in their domestic laws, but in a number of cases, the procedures are lengthy and expensive. Although, one has to remember that the right to a nationality does not guarantee the right to have one's naturalisation facilitated.¹⁹⁰ The commonality between the different modes of acquiring nationality is that a link to the State has to be established, either through a bloodline or a connection to the territory.¹⁹¹ In order to curtail the number of stateless children within Southern Africa, governments should adjust their domestic laws to aligning it with the *jus soli* modality, which would make it possible for children that are born in the country, to acquire the nationality of that state.

2.7 What is Birth Registration and what is the link between Birth Registration and Statelessness?

Birth Registration plays a critical role in the life of children. 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'.¹⁹² By not being in possession of a birth certificate, children are faced with barriers in accessing their rights, they may also be outsiders in their own country and feel a sense of not belonging. These children then grow up and become adults that are marginalised and face discrimination.¹⁹³ Children without a birth certificate are at a heightened risk of statelessness, and the UNHCR is of the

¹⁹⁰ Ibid at 173.

¹⁹¹ The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects op cit note 169 at 16.

¹⁹² United Nations New York, 'Principles and Recommendations for a Vital Statistics System' Department of Economic and Social Affairs, (2014) (Revision 3) available at: <http://unstats.un.org/unsd/demographic/standmeth/principles/M19Rev3en.pdf> [accessed 09 March 2023].

¹⁹³ Chauke T & Mothapo T 'Ending Childhood Statelessness and Dismantling Barriers to Birth Registration in South Africa' African Legal Information Institute (2021) available at <https://africa.africanlii.org/article/20211104/ending-childhood-statelessness-and-dismantling-barriers-birth-registration-south> [accessed 20 February 2023].

viewpoint that birth registration lowers the risk of statelessness.¹⁹⁴ By being in possession of a birth certificate, it aids to establish entitlement to a nationality and is often a requirement for acquiring documentation that proves nationality.¹⁹⁵ However, internationally there is no agreement in terms of the importance of birth registration. The reason for the disagreement, is because birth registration itself does not guarantee or lead to nationality. This viewpoint has been endorsed by the African Committee on the Rights and Welfare of the Child. Nationality is obtained through the nationality laws of a state, and states have a discretion on how they want nationality to be granted to persons.¹⁹⁶ In South Africa's domestic legislation, the issuance of a birth certificate to the child is dependent on the legal status of the parent. Parents that are undocumented are unable to register the birth of their children. It is thus apparent that birth registration helps to prevent statelessness, because it establishes a legal record of where the child was born and who the parents are. These components of information are vital because it provides the possibility of attaining a nationality.¹⁹⁷ The domestic birth registration framework is considered in greater detail in Chapter 3 below.

2.8 Conclusion

Migrant children, including refugee children, may become stateless due to the implementation and operation of laws and policies. Despite the efforts and developments that have taken place to end childhood statelessness, there are still thousands of migrant and refugee children that need the protection of the South African government. In order to fully promote, protect and fulfill the rights of children, South Africa has a duty to ensure that children are documented. It is vital that South Africa signs and ratifies the 1954 Convention, and the 1961 Convention, despite both Conventions having their own shortfalls. One of the reasons that South Africa may have resisted ratifying the Statelessness Conventions, can be due to the government

¹⁹⁴The UN Refugee Agency, 'Ensuring Birth Registration for the Prevention of Statelessness: Good Practices Paper' (2017) 3 available at <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2017/11/Good-Practices-Paper-on-Ensuring-Birth-Registration-for-the-Prevention-of-Statelessness.pdf> [accessed on 28 April 2023].

¹⁹⁵ United Nations New York, 'Principles and Recommendations for a Vital Statistics System' Department of Economic and Social Affairs, (2014) (Revision 3) available at: <http://unstats.un.org/unsd/demographic/standmeth/principles/M19Rev3en.pdf> [accessed 09 March 2023].

¹⁹⁶ A Tale on Belonging in Africa: An analysis of the African Approach to Statelessness op cit note 115 at 193.

¹⁹⁷ Citizenship Law in Africa: A Comparative Study op cit note 62 at 45.

enforcing their sovereign right to draft and implement their own laws on nationality. In the event that South Africa does ratify both Statelessness Conventions, then South Africa will then have to align their domestic legislation to ensure that no child is born stateless. In terms of the current domestic laws, it has been seen that without a birth certificate, nationality in terms of the Citizenship Act¹⁹⁸ cannot be acquired. Furthermore, children are dependent on their parents to have their birth registered and for the realization of their essential needs. Therefore, South Africa is perpetuating childhood statelessness by not fulfilling its duties of granting nationality in terms of the Constitution and international and regional obligations.

¹⁹⁸ 88 of 1995.

Chapter 3 – Birth Registration in South Africa in terms of Law, Policy, and Practice

3.1 Introduction

Birth Registration is the process in which the birth of the child is recorded by the DHA in South Africa, in accordance with the BDRA.¹⁹⁹ Children that are born to foreign nationals, particularly refugee and asylum seekers, are faced with barriers to birth registration, because the 2014 Regulations makes birth registration dependant on the legal status of the parent. If the parent is undocumented or in possession of an expired refugee or asylum permit, then birth registration is denied to such parents. Therefore, the child's right to name, identity and nationality is violated by the provisions contained in the Regulations.²⁰⁰ The document which is referred to as a 'birth certificate' is provided as proof of registration. Birth Registration is a vital human right which allows children to access their rights to nationality, to an identity document and accessing services, as well as protects them from becoming stateless. In terms of South Africa's domestic laws, birth registration is required in order to qualify to make an application for citizenship. This Chapter will examine South Africa's domestic civil registration legislation relating to birth registration and whether the laws are ensuring birth registration of children born to foreign parents, for the prevention of childhood statelessness.

3.2 Birth Registration

Action 7 of the UNHCR Global Action Plan to End Statelessness provides that states should ensure birth registration for the prevention of statelessness.²⁰¹ In terms of South African domestic law, the DHA does not provide a birth certificate to children that are born to asylum seeking parents who are undocumented, recognised refugee and asylum seekers that are in possession of expired permits, unmarried refugee and

¹⁹⁹ 51 of 1992.

²⁰⁰ The Invisible Children – Protecting the Right to Birth Registration In South Africa op cit note 20 at 60.

²⁰¹ Global Action Plan to end Statelessness 2014-2024 available at <https://www.unhcr.org/ibelong/global-action-plan-2014-2024> [accessed on 20 April 2023] 4.

asylum seeker fathers who are in possession of valid permits and stateless persons.²⁰² South Africa has seen an increase of persons seeking asylum in the last several decades, who fled either due to persecution or events seriously disrupting the public order.²⁰³ Additionally, due to South Africa being an economic hub, there are high volumes of migrants that arrive from other African countries, some seeking employment and some for education purposes.²⁰⁴ It is from such circumstances that children are born in South Africa to non-citizen parents. In the last few years, the immigration, refugee laws and policies of South Africa have become much more restrictive.²⁰⁵

The government took a decision to issue foreign children with a 'notice of birth', as opposed to a birth certificate.²⁰⁶ The decision stems from the concern by the government that undocumented individuals place a strain on the country's resources.²⁰⁷ However, South Africa's decision not to register the birth and issue a birth certificate is a direct conflict of international law and is largely disapproved for placing children at an elevated risk of statelessness. There are a wide range of legal and administrative obstacles when it comes to birth registration, which perpetuates statelessness for children born to foreign parents.

3.2.1 International Law and South Africa's Duty as a State Party

In terms of international law, the rights to birth registration is incontrovertibly prioritised. South Africa has signed and ratified several international conventions and is thus duty-bound to ensure that its international obligations are fulfilled. The CRC in terms of Article 7,²⁰⁸ and the ICCPR in terms of Article 24,²⁰⁹ both state that a child must

²⁰² Scalabrini Centre of Cape Town, 'Birth Registration in South Africa' (2019) available at <https://www.scalabrini.org.za/birth-registration/> [accessed on 2 April 2022].

²⁰³ Section 3 of the Refugees Act 130 of 1998.

²⁰⁴ Statelessness in Southern Africa: Time to end it, not promote it op cit note 4 at 10.

²⁰⁵ Mbiyozo AN, 'Aligning South Africa's migration policies with its African vision' Institute for Security Studies (2018) available at <https://issafrica.org/research/policy-brief/aligning-south-africas-migration-policies-with-its-african-vision> [accessed on 22 May 2023].

²⁰⁶ Sekyere EO & Willis A, 'Undocumented Migrants – The Myths, Realities, and What We Know and Don't Know' Daily Maverick South Africa (2022) available at <https://www.dailymaverick.co.za/article/2022-03-23-undocumented-migrants-the-myths-realities-and-what-we-know-and-dont-know/> [accessed 20 April 2023].

²⁰⁷ Ibid.

²⁰⁸ 1989.

²⁰⁹ 1966.

immediately be registered after birth and that child has the right to a name. Additionally, The African Charter²¹⁰ in terms of Article 6 reiterates every child's right to a nationality and the right to immediately be registered after birth. Moreover, the African Charter goes further and provides that states have a duty to ensure that any child that is born within their territory and who are not granted the nationality of any other state, acquire nationality. Additionally, the following Conventions acknowledge the right to birth registration: the Convention on the Elimination of All Forms of Racial Discrimination²¹¹, the Convention on the Elimination of All Forms of Discrimination Against Women²¹², the International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families,²¹³ and the Convention on the Rights of Persons with Disabilities.²¹⁴ South Africa has signed and ratified all of the abovementioned Conventions, and by failing to provide undocumented parents with birth certificates for their children, South Africa is in turn falling short of its international obligations, and placing children at a serious risk of statelessness.

3.2.2 Birth Registration Framework and Challenges Emanating Directly from the Birth and Deaths Registration Act of South Africa

Birth Registration in South Africa is governed by the BDRA²¹⁵ and children are registered under this Act. However, the Constitution as the supreme law of the land speaks about children, Section 28(1)(a) stipulates that 'every child has the right to a name and nationality from birth.'²¹⁶ This provision is clear that the right extends to 'every child', and thus migrant and refugee children should not be excluded from the right to an identity, because their parents cannot produce valid documentation.²¹⁷ Section 28(2)²¹⁸ goes further and provides that the best interest of the child is of

²¹⁰ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999).

²¹¹ 1969 – Article 5.

²¹² 1979 - Article 9.

²¹³ Entered into force 1 July 2003 - Article 29.

²¹⁴ Entered into force 3 May 2008 - Article 18.

²¹⁵ 51 of 1992.

²¹⁶ Constitution of the Republic of South Africa, 1996.

²¹⁷ Lutchman S & Fortuin R, 'The Right of Children Born to Undocumented Migrants to Have Their Best Interests Given Paramount Importance: Re-imagining the South African Birth Registration Process' ACTA Juridica Journal (2023) 228 [accessed 29 September 2023].

²¹⁸ The Constitution of South Africa Act 108 of 1996.

utmost importance in any matter where the child is of concern. Despite the constitutional right to a nationality and best interest, the BDRA was amended and in 2014 new regulations came into existence. The Regulations set out the procedures that must be adhered to when applying for the registration of the child's birth in South Africa. These regulations are extremely prejudicial and harmful to children, because the child's right to an identity and nationality is dependent on whether the mother has legal status in South Africa.²¹⁹ In instances where the mother of the child is undocumented, the DHA does not allow birth registration to take place and will not issue a birth certificate for the child despite the father having a valid permit.²²⁰

Section 9 of the BDRA stipulates that the birth of a child must be registered within 30 days and this can be done by either one of the parents. However, if the mother, father or both the parents of the child are without valid documentation, then the birth registration cannot take place.²²¹ Therefore, if the parents are undocumented asylum seekers who have not yet had access to a RRO or is in possession of an expired permit, then children born to these parent's, will not registered under the BDRA. This provision is thus conditional on the on parents' legal status, which is detrimental to the child because they can potentially end up stateless as a result of not having any birth record. Furthermore, the BDRA contains processes relating to late birth registration, in circumstances where the birth of the child was not registered within the 30-day time period.²²² The process is however cumbersome, because it requires parents to pay an administrative fee and there are extensive evidentiary prerequisites. Late birth registration can only take place in accordance with the BDRA, for children that are born to refugee parents', parents' that permanent residence and citizens of South Africa.²²³ Consequently, children of foreign nationals which includes asylum seekers, are not able to benefit from late birth registration, because the child's birth cannot be registered after the 30-day period has lapsed.²²⁴ This can be viewed as a cut-off date, once the 30-day time period has passed, for persons that are not citizens, refugees or

²¹⁹ Regulation 8(3) of the Births and Death Registration Act, 51 of 1992.

²²⁰ K Southwick & M Lynch, 'Nationality Rights for All: A Progress Report and Global Survey on Statelessness' Refugees International (2009) 35 available at <https://www.refworld.org/docid/49be193f2.html> [accessed 23 May 2023].

²²¹ Births and Deaths Registration Regulations in GN 128 GG 37373 of 26 February 2014 Reg 4 & 8.

²²² BDRA s 9(1) & (3A).

²²³ Births and Deaths Registration Regulations reg 4, 5, 6, & 7.

²²⁴ Births and Deaths Registration Regulations reg 8.

permanent residence. As a result of the legislature not mentioning asylum seekers under this provision, a legislative gap is created, which causes a conflict in the laws and policies and discriminates against asylum seeking parents.²²⁵

The Regulations to the BDRA stipulates that children who are born to parents that are foreign nationals with valid documentation, be issued with a birth certificate but the birth certificate does not contain an identity number.²²⁶ As a consequence, children of non-nationals are not recorded into the National Population Register, which is important for children to apply for citizenship at a later stage. In terms of s4(3) of the Citizenship Act²²⁷ children of non-nationals can make an application for citizenship, on condition that they are 18 years at the time of the application, provide proof that they have lived in South Africa since the time of birth, and the birth must be captured under the BDRA. The Supreme Court of Appeal (SCA) in the case of *Minister of Home Affairs v Ali*²²⁸ highlighted the importance of having the birth of the child registered. In the absence of birth registration, the child will not have a birth certificate and in turn they will be barred from applying for citizenship, an identity document and a passport.²²⁹

Moreover, the BDRA makes a distinction between children that are born to married parents, as well as children that are born to unmarried parents.²³⁰ Regulation 12(1) speaks to the birth registration of a child that is born out of matrimony. In terms of this Regulation, a child that is born to unmarried parents, must be registered by the mother of the child or by both the mother and the father.²³¹ This provision blatantly prejudiced the father of the child, because unmarried fathers were excluded from registering the birth of the child which affected children. Consequently, in July 2015 this provision was challenged before the Grahamstown High Court.²³² The court made a finding that Regulation 12 was unconstitutional and made a ruling that the phrasing be amended, to enable the father to register the birth, in circumstances where the mother of the child

²²⁵ The Invisible Children – Protecting the Right to Birth Registration In South Africa op cit note 20 at 71.

²²⁶ Regulation 8(5) of the Births and Death Registration Act, 51 of 1992.

²²⁷ 88 of 1995.

²²⁸ *Minister of Home Affairs v Ali* [2018] ZASCA 169.

²²⁹ BDRA S5,9 &10.

²³⁰ BDRA s 10.

²³¹ Ibid.

²³² *N and Others v Director General: Department of Home Affairs and Another* (4996 /2016) [2018] ZAECGHC 90; [2018] 3 All SA 802 (ECG) (27 June 2018).

is not present.²³³ This intervention was required, because both the Regulation's and law did not make any provision on the process to be followed in the event that the mother of the child is absent. As a result of the pronouncement of constitutional invalidity, the Constitutional Court was called upon to decide on section 9 of the BDRA. The Constitutional Court confirmed the High Court's decision and ruled that the section can be read to mean that the registration of the child's last name can be made by *either* (emphasis) the father or the mother, regardless of the marital status of the child's parents.²³⁴ This is a well-received judgment, because mothers and fathers are now given the same duties with respect to the child's birth registration. However, in practice unmarried fathers are still prevented from registering the birth of their children. DHA officials demand the fathers to provide DNA paternity tests at their own expense. These paternity tests cost between R1 500.00 up to R4 500,00 which is unaffordable to many fathers and as a result, children remain undocumented.²³⁵

However, despite advancements being made by the Constitutional Court, the DHA published the Draft Regulations on the Registration of Birth and Deaths in October 2018. These Regulations indicate a regress in South Africa's laws, despite the Constitutional victory of the *Naki*²³⁶ judgment. The 2018 Draft Regulations eliminates the prospect of foreign children from being granted a birth certificate. As an alternative, the Draft Regulations states that children of permanent residence, refugees and foreign nationals with valid documentation, including asylum seekers, must be granted a 'confirmation of birth'. This confirmation is seen as a certificate and merely confirms that the child was born in the Republic. Parents are then expected to approach their embassy in order to have the birth of the child registered and entered into the national population register of the parents' county of origin.²³⁷ As can be seen again, undocumented parents are excluded from registering their child. The Draft Regulation therefore clearly errs, in that refugee and asylum seekers cannot approach their

²³³ Ibid.

²³⁴ *Centre for Child Law v Director General: Department of Home Affairs and Others* (CCT 101/20) [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC)

²³⁵ Ozah K. Muller L, Malematja S, 'Submissions on Various Developments in the Laws Related to Birth Registration as a Result of Four Recent Judgments' Centre for Child Law (2023) available at https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2023/04/CCL_Submission-to-parliamentary-portfolio-committees-re-Birth-Registration-Law-changes_14-Feb-2023-1.pdf [accessed 20 February 2023].

²³⁶ *N and Others* supra note 232 para 3.

²³⁷ Draft Registration Regulations, regulations 1, 7 and 8.

Embassy, because it is viewed as voluntary re-availment²³⁸ and DHA can withdraw the persons refugee or asylum permit on this ground.²³⁹ Detrimentally, asylum seekers and refugees will be left with no option but to disregard birth registration, or be forced to return to their country of origin, where they may be subjected to persecution or where their safety, lives or freedom may be at risk.

The 2014 Regulations provide stringent requirements in terms of birth registration within the 30-day period, as well as late birth registration. Additionally, the BDRA and its Regulations require that foreign nationals must have be in possession of a valid permit in South Africa to register the birth of their children.²⁴⁰ The question of constitutionality pertaining to fathers that were not married who had to have a paternity test conducted at their own expense was contested, and declared unconstitutional.²⁴¹ In the same breath, there are other provisions of the Regulations that should be disputed. On the one hand, there is discrimination between parents that are permanent residents and holders of a section 24 refugee status document and on the other hand, parents that are holders of temporary residence documents, asylum seekers that are on a section 22 documents and parents that are new applicants who have not yet applied for asylum and are thus undocumented.²⁴² Refugees in South Africa are faced with many issues in terms of birth registration, because of the requirement that requires the parents valid permit, or the mother of the child is not issued with a notice of birth at the hospital, because she cannot produce a refugee status document. A National Action Plan is vital, because in order to achieve the goal of ensuring that no cases statelessness occurs by 2024 due to lack of birth registration, states are encouraged to register all births. However, South Africa does not have a

²³⁸ In terms of the UNHCR Handbook on procedures and criteria to determine refugee status under the 1951 Convention, hereafter called the Handbook, section 121 provides that: "(...) If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, **be presumed that he intends** to avail himself of the protection of the country of his nationality. The Standing Committee for Refugee Affairs interprets this section to mean that if any refugee or asylum seeker approaches their Embassy for any documents, it is viewed as re-availment.

²³⁹ Refugees Act 130 of 1998, Section 5.

²⁴⁰ Proudlock P, 'South Africa's Progress in Realising Children's Rights: A Law Review' Cape Town: Children's Institute, University of Cape Town & Save the Children South Africa (2014) p11 available at <https://ci.uct.ac.za/law-reform-childrens-act-research-and-submissions/south-africas-progress-realising-childrens-rights> [accessed 9 May 2023].

²⁴¹ *Centre for Child Law v Director General: Department of Home Affairs and Others* (CCT 101/20) [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC).

²⁴² South Africa's Progress in Realising Children's Rights op cit note 240 at 25.

system that captures all the births that take place in its territory, regardless of the parent's legal status in the country.²⁴³

In terms of not registering the birth of children born to foreign nationals, South Africa is falling short of its international obligations and is in contravention of Section 9(3) of the Constitution,²⁴⁴ in that it unjustly discriminates on the bases of ethnicity, social origin and birth. In addition, there is an infringement of section 10 of the Constitution²⁴⁵ in that the right to dignity is disregarded. Moreover, both section 28(1)(a) and section 28(2) of the Constitution²⁴⁶ is violated, because the child's right to a name and nationality and for their best interest to be paramount, is compromised. Additionally, in practice, birth registration is also denied to refugee and asylum seeker parents' with valid documentation, and this is due to factors such as a deficiency in training of officials at DHA, xenophobic and bias attitudes of officials, and the misconception that South African citizenship will be guaranteed to a child that has been issued with a birth certificate.²⁴⁷ Therefore, it is not only children born of undocumented parents, but also children born to documented parents that are barred by the DHA officials from registering the birth of the child.²⁴⁸

The denial of birth registration also affects foundlings, orphaned and children that are abandoned in South Africa by their parents. Furthermore, the BDRA, permits social workers to register the birth of foundlings and children that have been abandoned. In accordance with Child Welfare South Africa (the largest child protection non-profit organisation in South Africa²⁴⁹), each year there are 2 000 children who are abandoned by their parents.²⁵⁰ In the section of the form that requires the parents' details, it will not be filled out if the information is unknown. The registration of birth can be amended later on, in circumstances where the parents' details are identified. Although the law protects foundlings and abandoned children, the implementation of

²⁴³ Global Action Plan to end Statelessness 2014-2024, available at <https://www.unhcr.org/ibelong/global-action-plan-2014-2024> [accessed on 20 April 2022] 4.

²⁴⁴ Constitution of the Republic of South Africa, 1996.

²⁴⁵ Constitution of the Republic of South Africa, 1996.

²⁴⁶ Constitution of the Republic of South Africa, 1996.

²⁴⁷ Statelessness and Nationality in South Africa' op cit note 16 at 32.

²⁴⁸ Statelessness and Nationality in South Africa op cit note 16 at 32.

²⁴⁹ Child Welfare South Africa, 'About Us' available at <https://childwelfare.org.za/what-we-do/> [accessed 29 July 2023].

²⁵⁰ Statelessness and Nationality in South Africa op cite note 16 at 14.

the legislation has received widespread critique, because in practice there are several children that have not been registered and who thus remain undocumented in South Africa. Therefore, a National Action Plan is required to stipulate the procedures for the birth registration of abandoned minor children, as well as documentary requisites and guidelines on how to deal with information that is absent on the notice of birth. Furthermore, it should not be a requirement for a fee to be charged for the birth to be registered. Additionally, social workers and other officials from the various governmental departments, should be exempt from queuing with the general public. They should be given direct access to submit applications for birth registration of foundling's and abandoned children.²⁵¹

In terms of Section 6 of the BDRA, provision is made for the reconstruction of lost, destroyed or damaged birth records. There are several ways in which documentation can be lost or damaged, some being damaged in natural disasters and moving addresses. The process to have the birth certificate re-issued, is that an application has to be submitted to the DHA. However, the issue is that foreign children were issued with handwritten birth certificates and are thus not entered in to the National Population Register and cannot be re-issued with a copy of the birth certificate, unless the counter-book is found – the parents are expected to remember the exact day that they approached DHA to register the birth, because it requires the official to go into the archives and allocate the physical book and find the registration details. In many instances, this task is impossible, as records are destroyed and thus children cannot be re-issued with their birth certificates which places them at risk of statelessness.²⁵² Thus, there is a need to digitalise all birth certificates, in order for re-issuance to take place in the event that the birth certificate is lost.

²⁵¹ Birth registration and Statelessness in the Member States of the Southern African Development Community op cit note 14 at 32.

²⁵² Scalabrini Centre of Cape Town, 'Birth Registration in South Africa' (2019) available at <https://www.scalabrini.org.za/birth-registration/> [accessed on 2 April 2022].

3.3 Additional Challenges Impacting Birth Registration in South Africa - the Effect of COVID-19 on Birth Registration

The COVID-19 pandemic has had a severe impact on birth registration services due to the reduction in availability and access to the DHA. The government of South Africa implemented a national lockdown whereby persons were restricted in their movement and had to stay where they were. During the level 5 lockdown period, there were only limited services that were available by the DHA, and this included the issuing of identity documents and death certificates. In South Africa, all birth registration came to a standstill when the national lockdown began in March 2020. In or around May 2020, there was a resumption of birth registration services, however there was only 30% capacity in terms of staff.²⁵³ In accordance with the Children's Institute at the University of Cape Town, there are approximately 20 000 children that are born each week in South Africa. As a result of birth registration not taking place for two months, the number of unregistered children was in or around 100 000. The lesson that can be learnt from South Africa is that the government should make sure that civil registration is classified as an essential service and that vulnerable groups have access to documentation, to prevent children from becoming stateless.²⁵⁴

3.3.1 The Challenges of a Centralised and Decentralised Systems

Centralisation and decentralisation are two forms of systems, that are utilised by governments. On the one hand, a centralised system means that the authority in terms of decisions and planning is left exclusively to the officials in superior positions. On the other hand, decentralisation means that the authority is distributed from the higher-levels of management to the lower-levels of management. Thus, it is the distribution of powers across all the management levels.²⁵⁵ Centralisation commonly operates at

²⁵³ Zuzile M, 'Lockdown Leaves Thousands of Newborns Without Birth Certificates' TimesLive (2020) available at <https://www.timeslive.co.za/news/south-africa/2020-05-15-lockdown-leaves-thousands-of-newborns-without-birth-certificates/> [accessed 20 March 2023].

²⁵⁴ UNHCR, 'The Impact of COVID-19 on Stateless Populations: Policy Recommendations and Good Practices' (2020) 3 available at <https://www.refworld.org/docid/5eb2a72f4.html> [accessed on 7 May 2023].

²⁵⁵ Surbhi S, 'Difference Between Centralization and Decentralization' (2023) available at <https://keydifferences.com/difference-between-centralization-and-decentralization.html> [accessed 6 May 2023].

the national level, by way of a governmental department, and in South Africa, it is the DHA that is tasked with civil registration. Decentralised systems are operational at different levels, such as a provincial level, and every Province oversees its own birth registration process, or registration of births can be facilitated through local departments, such as health facilities.²⁵⁶

Both systems have their own advantages and disadvantages. The advantage of a centralised system is that it ensures consistency because of its centrality and thus it creates uniformity amongst officials.²⁵⁷ However, the downside of centralisation is that because the bulk of all matters are dealt with by the head offices, it can lead to several delays and can cause backlogs in the system.²⁵⁸ Decentralised systems are advantageous, because of their availability to the general public.²⁵⁹ The negative side of a decentralised system is that due to the system operating on various levels, it can lead to inconsistency amongst the diverse outposts, and thus the service delivery can be different amongst the different institutions.²⁶⁰ In order for the system to function optimally, the government has to make sure that the line of communication between the health facilities is effective for there to be fair and uniform services in terms of birth registration.²⁶¹ In the event that officials provide efficient services, then the right to birth registration will be fulfilled.

In South Africa, a centralised structure is utilised in term of civil registration²⁶² and the DHA is the administrative body that is responsible for these functions.²⁶³

²⁵⁶ The Children of Irregular Migrants: A Stateless Generation? Op cit 28 at 440.

²⁵⁶ Arnold R, 'What is the Statelessness?' The UN Refugee Agency (available at <https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness2pager-ENG.pdf>) accessed 9 March 2023.

²⁵⁷ Logrillo V, 'Technical Report on the Organizational Structure for Civil Registration and Vital Statistics Systems' International Institute for Vital Records and Statistics (1997) 1- 6 available at https://unstats.un.org/unsd/demographic/CRVS/IIVRS%20papers/IIVRS_paper69.pdf [accessed on 14 May 2023].

²⁵⁸ Ibid.

²⁵⁹ African Union & UNICEF, 'Call to Action for Free and Universal Birth Registration Across Africa' (2021), available at <https://www.unicef.org/wca/stories/call-action-free-and-universal-birth-registration-across-africa> [accessed on 11 May 2023].

²⁶⁰ Technical Report on the Organizational Structure for Civil Registration and Vital Statistics Systems op cit note 257 at 5.

²⁶¹ Ibid.

²⁶² UNICEF, 'CRVS - Birth, Marriage and Death Registration in South Africa' (2017) available at <https://data.unicef.org/crvs/southafrica/> [accessed on 8 May 2023].

²⁶³ Ibid.

Consequently, there is no consistency in terms of birth registration coverage between rural areas and that of urban areas.²⁶⁴ Children living in rural areas, including refugee and asylum seeker children, find it difficult to access places where they can register the birth of their children. There are various reasons, which include lower standards of service delivery by DHA, and increased levels of poverty which makes it difficult to travel long distances to DHA offices.²⁶⁵ Consequently, this leads to late birth registration, which is not ideal, because it involves additional supporting documents, and this may warrant numerous trips to the DHA offices. Furthermore, it requires fees and persons in rural areas are unlikely able to pay such fees.²⁶⁶ Moreover, mothers in rural areas give birth at home instead of a health facility. As a result of home births, the parents are unable to produce a notice of birth which is issued by the health facility. This document is required for birth registration. There are some DHA facilities that allow alternative methods of proof, but this practice is inconsistent amongst the DHA offices and parents are not assisted if they cannot present the notice of birth from a hospital.²⁶⁷ Consequently, there is unequal access to birth registration for rural and urban residents, which leads the abandonment of the birth registration procedure by parents.

Nevertheless, South Africa's government together with the assistance of UNICEF has taken the step to improved accessibility of birth and death registration by way of decentralising the facilities for registration. Thus, hospitals in South Africa usually register the birth of the child, and this is done by a Home Affairs Birth Register Officer.²⁶⁸ However, in South Africa, Civil Registries depend on manual birth notifications, whereas countries such as Namibia and Mozambique have digitalised

²⁶⁴ United Nations Department of Economic and Social Affairs Statistics Division 'Status of Civil Registration and Vital Statistics in the SADC Region Technical Report' (2010) 18 available at <https://unstats.un.org/unsd/demographic/CRVS/Technical%20report%20SADC%20final%20v2.pdf> [accessed on 14 May 2023].

²⁶⁵ The Invisible Children – Protecting the Right to Birth Registration In South Africa op cit 20 at 3.

²⁶⁶ United Nations Department of Economic and Social Affairs Statistics Division 'Status of Civil Registration and Vital Statistics in the SADC Region Technical Report' (2010) at 50, available at <https://unstats.un.org/unsd/demographic/CRVS/Technical%20report%20SADC%20final%20v2.pdf> [accessed on 14 May 2023].

²⁶⁷ The Invisible Children – Protecting the Right to Birth Registration In South Africa op cit note 20 at 3.

²⁶⁸ United Nations Children's Fund, 'New project to Improve Protection and Wellbeing of Children on the Move European Union and UNICEF South Africa Support the Department of Social Development to Improve Child Protection Services for Some of the Country's Most Excluded Children' (2020) available at <https://www.unicef.org/southafrica/press-releases/new-project-improve-protection-and-wellbeing-children-move> [accessed 13 March 2023].

the process and the authorities are notified electronically on all births that take place in hospitals. The issue in South Africa, is that in practice, refugee, asylum seekers as well as other migrants are barred from accessing birth registration, because the authorities at the health facility refuses to provide the notification of birth if the parents cannot afford to pay the hospital bill. Despite there being a directive issued to all public healthcare facilities, which states that refugee and asylum seekers with or without a permit who approach public healthcare facilities, must be assessed in terms of the 'means' test.²⁶⁹ More recently, the Gauteng High Court held that all pregnant and lactating woman, as well as children below the age of 6, have the right to access free health at any public health facility, regardless of their nationality and legal status.²⁷⁰

3.3.2 The Challenge of Parents being Undocumented in South Africa - Application for Asylum

The right to seek asylum in any country, is dependent on having access to apply for refugee status in the country of asylum.²⁷¹ In South Africa, the Refugees Act²⁷² allows any person to seek asylum, provided that the person must report to a RRO within a period of five days from the date of entering the Republic and must apply in person for asylum, at any one of the RRO's.²⁷³ An application for asylum is supposed to be a simple procedure, however, there has been complications in terms of the implementation of the provisions of the Refugees Act.²⁷⁴ Furthermore, there are several hurdles in terms of the new requirements which are contained in the amendments that were effected, and these amendments came into effect from the 1st of January 2020. An example of one of the hurdles is the five-day requirement. Prior to the amendments to the Refugees Act,²⁷⁵ asylum seekers were required to report to the RRO within ten days of entry into the Republic, however this has changed to five

²⁶⁹ Mr. F.G Miller: The Chief Financial officer of the National Department of Health (19 September 2007); (as accessed at passop.co.za/wp-content/uploads/2012/07/revenue-directive_refugee-and-asylum-seekers-with-or-without-permit.pdf) [accessed on 27 May 2022].

²⁷⁰ *Section 27 And Others Vs MEC For Health, Gauteng And Others* Case No 19304 22 Court Order Default Judgment 14 April 2023 Sutherland DJP.

²⁷¹ Article 14 of the Universal Declaration of Human Rights.

²⁷² 130 of 1998.

²⁷³ Refugees Act Section 21(a) and (b).

²⁷⁴ 130 of 1998.

²⁷⁵ 130 of 1998.

days, which is an unreasonable amount of time because there are many obstacles in terms of accessing the RRO's in South Africa, specifically due to the COVID-19 pandemic which resulted in the national closure of all RRO's around South Africa.

In terms of s21(1)(a) of the Refugees Act²⁷⁶, which provides that '[u]pon reporting to the Refugee Reception Office within five days of entry into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers.' Therefore, the Refugees Act²⁷⁷ compels the South African government to receive asylum seekers, and this obligation stems from the word 'must' which is contained in s21(1)(a).²⁷⁸ Furthermore, s23 of the Immigration Act²⁷⁹ reinforced the obligation of the government to receive asylum seekers, by providing the asylum seeker with an 'asylum transit visa' to ensure that persons are not subjected to detention and deportation at the borders of South Africa. However, several asylum seekers are not able to produce an asylum transit visa, because they do not enter South Africa through an official border post, and consequently they will not be able to fulfil this requirement and may even be barred from making an application for asylum due to this.

3.3.3 Access to Refugee Reception Offices and how Parents are left Without Valid Permits

The most significant barrier in terms of access, is the closure of the RRO's in major cities around South Africa since 2011. Previously, there were seven RRO's within five of the provinces in South Africa, where asylum seekers could make an application for asylum. These RRO's were based in Johannesburg, Pretoria, Port Elizabeth (now Gqeberha), Cape Town, Durban and Musina. In May 2011 the Johannesburg RRO was closed by the DHA. Soon thereafter, in November 2011 the Port Elizabeth RRO was closed. In 2012 the DHA decided to close the Cape Town RRO to new applicants for asylum. The decision to close the various RRO's was challenged in several cases. Despite the 2015 SCA judgment of *Minister of Home Affairs v Somali Association of*

²⁷⁶ 130 of 1998.

²⁷⁷ 130 of 1998.

²⁷⁸ of the Refugees Act 130 of 1998.

²⁷⁹ 13 of 2002.

South Africa²⁸⁰ whereby the DHA was ordered to restore the Gqeberha RRO by 1 July 2015, the Gqeberha Office was only re-opened four years later on the 19th of October 2019.²⁸¹

Furthermore, on 29 September 2017 the Supreme Court of Appeal in the *Minister of Home Affairs & Others v Scalabrini Centre* ²⁸² case, ordered the Cape Town RRO to reopen and become fully functional by the end of March 2018. Despite this order, the Cape Town RRO remained closed to new applicants until May 2023. In both these cases, the DHA failed to hold proper consultations with the Standing Committee for Refugee Affairs (SCRA), which was a blatant disregard of the Promotion of Administrative Justice Act (PAJA) in terms of procedural irregularity.²⁸³ Therefore, due to the unlawful closures, new applicants for asylum who find themselves in Johannesburg or Cape Town, have to travel to either Durban, Pretoria, Gqeberha or the Musina RRO in order to process their application for asylum. Thus, new asylum seekers are severally impacted in terms of lodging their applications for asylum, and a substantial number of persons remain undocumented in South Africa.

3.3.4 Impact of the COVID-19 Pandemic on RROs

Due to COVID-19, the RRO's were closed and continued to offer limited services to refugees and asylum seekers. In May 2022, the DHA had initiated an online procedure to request an appointment date at one of the RRO's that accept new applications for asylum.²⁸⁴ However, due to there being only five RRO's around South Africa that attend to new applicants for asylum, there were major backlogs and delays, and asylum seekers were being given appointment dates outside of 2023.²⁸⁵ At the end of June 2023, the DHA decided to no longer provide online appointments dates, thus the

²⁸⁰ 2015 (3) SA 545 (SCA).

²⁸¹ Department of Home Affairs, 'Statement by Minister Malusi Gigaba: Re-opening of Port Elizabeth Refugee Reception Office' (2019) available at <https://www.gov.za/speeches/statement-minister-home-affairs-19-oct-2018-0000> [accessed on 27 March 2023].

²⁸² *Cape Town & Others* [2013] ZASCA 134.

²⁸³ Act 3 of 2000.

²⁸⁴ UNHCR, 'DHA announces additional services at RRO's' (2021) available at <https://help.unhcr.org/southafrica/2021/10/02/dha-announces-reopening-of-services/> [accessed 6 May 2023].

²⁸⁵ Washinyira T, 'Refugees Who Arrived After Lockdown Have No Way to Apply for Asylum' GroundUp (2021) available at <https://www.groundup.org.za/article/refugees-who-arrived-after-march-2020-risk-arrest-and-deportation/> [accessed 26 May 2023].

request for asylum now has to be made in person. There is a schedule on which days certain nationalities will be assisted. For example, Congolese new applicants are assisted on a Monday and Tuesday and Somalians are assisted on a Thursday and Friday.²⁸⁶ This has resulted in large crowds outside the RRO's as well as new applicants sleeping outside the RRO. Therefore, children born to refugee and asylum seeker parents, who are not yet holders of lawful permits in South Africa, face birth registration difficulties.²⁸⁷ The problem is further exacerbated by the delays in the appeal system when the claim is rejected by the Refugee Status Determination Officers (RSDO), as well as corruption and mismanagement at the DHA.²⁸⁸ The effect of the dysfunctional asylum system is that a large amount of asylum seekers, that do not hold lawful status, or whose permits have lapsed, are not able to register their children's birth.²⁸⁹

3.4 Conclusion

There are several reasons why parents do not hold valid documents in South Africa, some of the reasons are because of harsh immigration requirements and the RRO's in South Africa, where asylum seekers lodge their claim, are inaccessible and do not function properly. The refusal of the government to register the birth of children that are born to parents without valid permits, is unfounded, unconstitutional and prejudices the rights of the child, specifically the child's best interest. Children of refugees, asylum seekers and migrant children are issued with birth certificate's that do not contain an identity number and are not captured in the National Population Register, whereas the children of South African citizens are issued with birth certificate's that contain identity numbers.

²⁸⁶ Department of Home Affairs, 'Nationality Days For Asylum Seekers at Refugee Reception Centres' (2023) [accessed 24 October 2023] available to DHA stakeholders via email communication on 20 October 2023.

²⁸⁷ South Africa's Progress in Realising Children's Rights: A Law Review op cit note 240 at 11.

²⁸⁸ Chauke T & Mothapo T 'Ending Childhood Statelessness and Dismantling Barriers to Birth Registration in South Africa' African Legal Information Institute (2021) available at <https://africa.africanlii.org/article/20211104/ending-childhood-statelessness-and-dismantling-barriers-birth-registration-south> [accessed 20 February 2023].

²⁸⁹ South Africa's Progress in Realising Children's Rights: A Law Review op cit note 240 at 17.

South Africa's birth registration process has taken steps in the right direction, however, the 2014 Regulations have demonstrated a regress in that South Africa is falling short of its international and national law duties, as it is placing children at a severe risk of statelessness. In 2018, the government proposed new regulations to the BDRA. One would assume that these Regulations would make the registration process less restrictive for foreign national children to have their birth registered, taking in to account the *Naki* judgement. However, the new Regulations suggest that birth registration of foreign nationals, which include refugee and asylum seekers, should be removed its entirety. There is no justification for the amendments and there is no legitimate purpose for excluding children of foreign nationals. This in effect creates an arbitrary differentiation between children born to citizens of South Africa, and children born to foreign nationals. Therefore, there is an urgent need for a National Action Plan which protects the birth registration of children born to non-nationals, otherwise South Africa's domestic laws will be creating an entire generation of stateless children as opposed to eradicating statelessness by 2024.

Chapter 4 – The Laws Relating to Citizenship in South Africa

4.1 Introduction

As holders of identity documents and passports, we take it for granted that we can open a bank account, apply and be admitted to a university, acquire a library card, receive a social security grant, get married, access healthcare facility and register our child's birth. However, this is a dream for many young adults that are born to migrant, asylum seeker and refugee parents, because without holding an identity document, it causes individuals to be excluded from obtaining any one of the above listed rights. South Africa is amongst some of the SADC countries that have domesticated their international obligations, but they are inaccessible to young adults if they are not accompanied by Regulations to the laws. One of the identified five actions of this research in terms of UNHCR's Global Action Plan, requires South Africa to issue nationality documentation to those with entitlement and to grant protection status to stateless migrants and facilitate their naturalization. This chapter will examine South Africa's domestic laws and whether they have progressed and provide sufficient protections to migrant children or whether they have regressed and are denying nationality to vulnerable children, thus failing in their regional and international obligations and creating stateless populations.

South Africa conforms to the *jus sanguinis* policy and as a result, children that are born to at least one parent, irrespective whether it is the mother or father, who is a citizen of South Africa, then by virtue of birth the child will be a South African national. Therefore, the child will acquire South African citizenship automatically by operation of law.²⁹⁰ However, because South Africa does not conform to the principle of *jus soli*, nationality is not automatic for children that are born to foreign nationals. An application has to be made by the individual to the DHA, if the individual meets the requirements for the granting of nationality.

²⁹⁰ Nationality Matters: Statelessness Under International Law op cit note 184 at 33.

4.2 The Legal Framework in South Africa on Acquiring Citizenship

As noted previously, South Africa does not have a stateless determination procedure to identify stateless persons or those that are at risk of statelessness. However, there are several pieces of legislation that provide protection to those that are stateless or at risk of statelessness and makes provision for the attainment of South African citizenship.²⁹¹ The provisions include the granting of nationality in the event that there is doubt, ministerial exemptions where the applicant can show ‘special circumstances’ for permanent residence to be granted, approaching the court to appeal citizenship decisions, late birth registration procedures are taken into account and administrative decisions that affect nationality and enabling documents can be taken on judicial review.

In South Africa, the Citizenship Act²⁹² regulates the acquisition of citizenship and makes provision for several avenues to gaining citizenship either by birth, by parentage or in terms of naturalisation. The Citizenship Act was amended in 2010 and came into effect on the 1st of January 2013. When a child reaches the age of majority, there is an urgency to hold a nationality, and to acquire an identity document. The identity document is vital to exercise one's social, economic and political rights and to better one's life. The Constitution²⁹³ protects the right of all children to a nationality from the time of birth. However, Section 2(2) of the Citizenship Act²⁹⁴ goes further and states that children who are born stateless in South Africa, are entitled to citizenship by birth, if the birth was registered in terms of South African law. This provision thereby incorporates Article 6 of the CRC. In terms of the amendments to the Citizenship Act in order to access the right to nationality, the birth must be registered in terms of the BDRA.²⁹⁵ Without birth registration, children are not entitled to claim citizenship in South Africa. Therefore, the vital role of birth registration is again highlighted, because

²⁹¹ George JP, Elphick R (edited by Ramjathan-Keogh & Muller L) ‘Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner’s Guide’ Pretoria University Law Press (2014) pg20 available at https://www.citizenshiprightsafrika.org/wp-content/uploads/2016/05/LHR_PractitionersGuide-Statelessness_2014.pdf [accessed 9 March 2023].

²⁹² 88 of 1995

²⁹³ Section 28(a) of the Constitution of the Republic, 1996.

²⁹⁴ 88 of 1995.

²⁹⁵ 51 of 1992.

a child cannot access their right to citizenship in terms of the Citizenship Act²⁹⁶ if birth registration does not take place.

4.2.1 Citizenship by Birth

Section 2 of the Citizenship Act²⁹⁷ is an important provision because it is the primary means of obtaining a nationality in South Africa by birth. For children that are born in South Africa, to one parent who is a citizen, then citizenship at birth will be attached to that child, irrespective of whether the parent is the mother or father and whether the child is born to married or unmarried parents.²⁹⁸ The same is applicable for children that are born outside of South Africa to citizens, and children that are born in South Africa and who do not have access to another nationality.²⁹⁹ Additionally, non-national children that are adopted by citizens of South Africa, are granted citizenship by descent in accordance with Section 3 of the Citizenship Act.³⁰⁰ The Citizenship Act also provides for naturalisation to individuals that have resided in South Africa for a specified period of time, as well as other requirements.³⁰¹

4.2.2 Citizenship for Children Born to Foreign National Parents – By Parentage

Section 2(3) of the Citizenship Act³⁰² allows children born in South Africa to parents who are holders of permanent residence permits, to make an application for citizenship. The child will only qualify to make the application for citizenship, if they are 18 years or older, they were born in South Africa and they have a birth certificate issued by the DHA.³⁰³ Prior to the amendments, children born to parents that are permanent residence, were automatically granted citizenship by birth. The regression with the amendments to section 2(3) of the Citizenship Act is that children remain stateless until they reach the age of majority.

²⁹⁶ 88 of 1995.

²⁹⁷ 88 of 1995.

²⁹⁸ Chapter 2 of the Citizenship Act 88 of 1995.

²⁹⁹ Section 2(2) of the Citizenship Act 88 of 1995.

³⁰⁰ Section 3 of the Citizenship Act 88 of 1995.

³⁰¹ Section 5 of the Citizenship Act 88 of 1995.

³⁰² 88 of 1995.

³⁰³ Section 2 (3) (a) & (b) of the South African Citizenship Amendment Act, 2010.

4.2.3 Citizenship by Naturalisation

The progress in terms of the amendments to the Citizenship Act, is that citizenship is a possibility for persons that are born in South Africa to non-citizen parents. The parents can either be holders of refugee or asylum seeker permits, on an immigration permit, or even with an immigration status that is irregular. Section 4(3) of the Citizenship Act³⁰⁴ states that children that are born to foreign national parents, can make an application for citizenship, on condition that they are 18 years old, can establish through proof, such as report cards from school, that they have lived in South Africa since birth and must provide a birth certificate that has been duly recorded in South Africa. Whilst this was a step in the right direction by the legislature, the actual implementation of the amendment was not a smooth process and required litigation in order to give effect to s4(3) of the Citizenship Act.

Once this amendment came into effect, there were five young adults that attempted to make an application for citizenship. The DHA did not accept the applications, because they interpreted the section to only be available to children that were born after January 2013, when the amendment came into effect.³⁰⁵ The interpretation was challenged, and the Western Cape High Court found that the Act should apply retrospectively to children that are born in South Africa to foreign national parents.³⁰⁶ In the Supreme Court of Appeal case of *Minister of Home Affairs v Ali*³⁰⁷ the right contained in section 4(3) of the Citizenship Act³⁰⁸ was confirmed. All of the births of the young adults in this matter were registered under the BDRA, and they all had a birth certificate that was issued by the DHA. The legal representatives of the Respondents argued that the young adults must be allowed to make an application.

³⁰⁴ 88 of 199.

³⁰⁵ Section 4(3) of the South African Citizenship Amendment Act 17 of 2010.

³⁰⁶ Legal Resources Centre 'Court Rules Citizenship Act Applies Retrospectively to Children Born in South Africa to Foreign Parents' (2017) available at: <https://lrc.org.za/press-release-court-rules-citizenship-act-applies-retrospectively-to-children-born-in-south-africa-to-foreign-parents/#:~:text=In%20the%20Western%20Cape%20High%20Court%20today%2C%2007,2010%20Amendment%2C%20which%20came%20into%20effect%20in%202013.> [accessed 17 May 2023].

³⁰⁷ *Minister of Home Affairs v Ali* [2018] ZASCA 169.

³⁰⁸ 88 of 1995.

The SCA rejected DHA's interpretation and instructed DHA to draft and implement regulations for s4(3) applications. In August 2020, draft regulations were published by DHA for comment. The significance of this case is wide reaching, because it allows children that have lived in South Africa all their lives, and who do not have any ties to their parents' country of origin, to obtain citizenship and integrate into South Africa. This case went all the way to the Constitutional Court, and in 2020 the applicants were able to receive citizenship in terms of s4(3). Holding a nationality is an important gateway to accessing right in South Africa, as well as a safety net against xenophobia.

However, on the 12th of June 2023, the Minister of Home Affairs promulgated the Section (4)(3) citizenship application Regulations.³⁰⁹ Despite the progress in the legislation that allows children born in South Africa to foreign parent's the right to make an application for citizenship, the regulations in my opinion are a step backwards because the documentary requirements are *ultra vires* and not aligned to the *Ali judgment*.³¹⁰ The Regulations include documentary requirements that are not required by the law and will take 12 months to finalise an application.³¹¹ Moreover, there is no clarity on whether these Regulations will apply retrospectively to already pending citizenship applications. The South African government disregarded the well-thought-out submissions that they received from civil society organisations regarding the requirements.³¹²

4.2.4 Children that are at Risk of Statelessness

The Citizenship Act, specifically section 2(2)³¹³ contains a provision for children that are at risk of statelessness. These are children that do not hold the nationality of any other country. To acquire South African citizenship, the person must not have citizenship in any other country and the birth must be registered in terms of the

³⁰⁹ Department of Home Affairs, 'South African Citizenship Act, 1995 Amendment Regulations on the South African Citizenship Act, 1995' (2023) available at https://www.gov.za/sites/default/files/gcis_document/202306/48777gon3535.pdf [accessed 13 June 2023].

³¹⁰ *Minister of Home Affairs v Ali* [2018] ZASCA 169.

³¹¹ Reg 3(b) - Department of Home Affairs, 'South African Citizenship Act, 1995 Amendment Regulations on the South African Citizenship Act, 1995' (2023) available at https://www.gov.za/sites/default/files/gcis_document/202306/48777gon3535.pdf [accessed 13 June 2023].

³¹² Scalabrini Centre of Cape Town, 'Our Submissions on Citizenship Act Draft Regulations' (2020) available at <https://www.scalabrini.org.za/our-submissions-on-citizenship-act-draft-regulations/> [accessed 05 June 2023].

³¹³ 88 of 1995.

BDRA.³¹⁴ As with s4(3), birth registration is a prerequisite to qualify for citizenship in terms of this section. The *DGLR v Minister of Home Affairs*³¹⁵ case, involved an 8-year-old child who was born stateless in South Africa. The Pretoria High Court pronounced that by virtue of birth, the child is a South African citizen, and the Department must provide the child with a birth certificate, as well as an identity document. The Minister of Home Affairs undertook to draft regulations within an 18-month period that gives effect to Section 2(2), in order for children that are stateless to apply for citizenship. However, because no regulations have been passed and the 18 months lapsed in 2018, it is not possible for stateless children to make this application, because there is no application form and guidelines on the procedures to be followed. The DHA was concerned that this section would open a floodgate of citizenship applications.³¹⁶ However, DHA fails to understand that the very purpose of section 2(2) is to protect the most vulnerable children in South Africa by providing them access to acquire legal status, because it is impossible for children that are stateless to leave the country.

More recently, on the 27 of February 2023, there was an order by the High Court in Gauteng³¹⁷ for the DHA to grant citizenship and implement regulations in order to prevent statelessness. In this case, Mr Tebego Khoza (Mr Khoza) was born and raised in South Africa since birth. His mother did not register his birth at DHA and she died when Mr. Khoza was around the age of 6, and he was abandoned by his father. His parents were alleged to be from the Kingdom of Eswatini. He lived at a Child and Youth Care Centre (CYCC) and when Mr. Khoza turned 16, the social worker assisting him tried to register his birth, but DHA denied birth registration and the Kingdom of Eswatini refused Swati citizenship. Therefore, Mr Khoza was indeed stateless because his parents did not register his birth. Mr Khoza attempted for 10 years to have his birth registered, but there was constant denial by the DHA. Additionally, s2(2) of

³¹⁴ Section 2(2) of the South African Citizenship Amendment Act 17 of 2010.

³¹⁵ *DGLR v Minister of Home Affairs* (GPJHC) unreported case number 38429/13 of 3 July 2014.

³¹⁶ Lawyers for Human Rights, 'Stateless No More – A Win for Stateless Children in South Africa' (2016) available at <https://citizenshiprightsafrika.org/stateless-no-more-a-win-for-stateless-children-in-south-africa/> [accessed 30 May 2023].

³¹⁷ *Khoza v Minister of Home Affairs and Another* [2023] ZAGPPHC 1275; 6700/2022; [2023] 2 All SA 489 (GP) (27 February 2023).

the Citizenship Act could not be relied upon, because DHA erred in implementing regulations that gives effect to the existing protection against statelessness.

The court held that the DHA's refusal to provide assistance to Mr Khoza was unreasonable, specifically because Mr Khoza made every effort to fulfil DHA's prerequisites and provided the necessary information to the DHA officials. The Court held that: 'The Department's mandate is not to pose as a barrier to recognition of citizenship especially not with frivolous and contrived disputes.'³¹⁸. This judgement was ground-breaking, because it was the very first time that a South African court made a ruling on the burden of proof that is applicable to cases of statelessness. The court ruled that in stateless determination procedures, the burden of proof should be shared by the status determination officer and the stateless individual and that a low standard of proof should be used to determine whether a person is stateless. This is in line with UNHCR's guidelines on determining statelessness.³¹⁹

4.2.5 Ministerial Exemptions

Section 31(2)((b) of the Immigration Act³²⁰ is important for unaccompanied or separated children, as well as individual's who do not qualify for asylum or any other migration visa in South Africa. Section 31(2)(b)³²¹ states that: 'the Minister of Home Affairs may: grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may— (i) exclude one or more identified foreigners from such categories; and (ii) for good cause, withdraw such right from a foreigner or category of foreigners.' Therefore, unaccompanied or separated children can apply for permanent residence under 'special circumstances'. The law provides unaccompanied and separated children with the opportunity to be granted a

³¹⁸ *Khoza v Minister of Home Affairs and Another* supra note 318 para 80.

³¹⁹ Lawyers For Human Rights, 'Gauteng High Court Orders Home Affairs to Grant Nationality, and Make Regulations to Avoid Statelessness' (2023) available at <https://citizenshiprightsafrika.org/gauteng-high-court-orders-home-affairs-to-grant-nationality-and-make-regulations-to-avoid-statelessness/> [accessed 16 May 2023].

³²⁰ 13 of 2002.

³²¹ Immigration Act 13 of 2002.

nationality and the benefit of this section is that it does not require the applicant to be in possession of a passport.

However, as with section 2(2) and S4(3) of the Citizenship Act³²² there are issues with implementation of making an application for a ministerial exemption. One of the concerns is that there is no definition and no guidelines as to what constitutes as 'special circumstances', and thus discretionary power is granted to the Minister of Home Affairs. The argument that the vulnerability of unaccompanied and separated children, due to the lack of them acquiring any other legal status, should qualify as a 'special circumstance'. A further shortcoming of this section is that a legal representative is required, because in the event that the application has been rejected by the Minister of Home Affairs, then the next step would be to take the matter on judicial review to the High Court.³²³ Furthermore, these applications can take up to several years to be finalised, and in some instances, the applicant may never receive a response from the Minister of Home Affairs.

4.3 Barriers to Accessing Nationality

The Citizenship Act contains several barriers in accessing nationality in South Africa, one such barrier being that birth registration is a prerequisite for acquiring citizenship. Furthermore, section (2) of the Citizenship Act³²⁴ contains vital protection against statelessness for children that are born stateless, but there are no accompanying Regulations which set out the implementation procedures of these provisions making these safeguards inaccessible. Additionally, in accordance with section (6) to (8) of the Citizenship Act³²⁵ provision is made for the loss, repudiation and withdrawal of citizenship and consequently, these individuals are at a great risk of statelessness. Section 10 of the Citizenship Act permits for the withdrawals of a child's nationality, in the event that the parent is deprived of their nationality. This provision conflicts with

³²² 88 of 1995.

³²³ *Mayongo v Refugee Appeal Board* 2007 ZAGPHC 17. See also *Ahmed v Minister of Home Affairs* 2019 (1) SA 1 (CC) and *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC).

³²⁴ 88 of 1995.

³²⁵ 88 of 1995.

the Constitution³²⁶ as well as best interest of the child principle, in that the child would be at a heightened risk of statelessness. Moreover, the Citizenship Act is silent when it comes to unaccompanied or separated children that are born outside of South Africa. The obstacles that are faced with birth registration, become obstacles in accessing citizenship in South Africa.³²⁷

4.3.1 Discretionary and Non-Discretionary Applications

In instances where an individual is required to submit an application for citizenship, then the said application may either be of a discretionary or non-discretionary nature.³²⁸ On the one hand, a discretionary citizenship application by naturalisation, is when the Minister of Home Affairs has the authority to reject an applicant for various reasons, such as a criminal record, absence of good moral character, the inability to speak one of the eleven official South African languages and many other reasons.³²⁹ Discretionary application are thus problematic in the sense that the person making the application would have been born in South Africa to foreign national parents and if the application for citizenship is rejected by the Minister of Home Affairs, then the person could potentially end up stateless. Specifically in instances where the person was abandoned by their parents, or the parents have subsequently died, and they were never joined under the parents file and never legally documented in South Africa with a permit. Thus, they would be unable to claim citizenship in any other country. On the other hand, a non-discretionary application for citizenship is when the administrative personnel who are responsible for intake of the application, have no authority to decline the application.³³⁰ Therefore, the only the administrative processes must be followed for the applicant to be granted the appropriate nationality. An example is that an individual who is born in South Africa to parents who hold permanent residence, has a birth certificate issued by the Department of Home Affairs, has reached the age

³²⁶ Constitution of the Republic of South Africa, 1996

³²⁷ Monono, D, 'People's Right to a Nationality and the Eradication of Statelessness in Africa' *The Statelessness & Citizenship Review* (2021) available at <https://statelessnessandcitizenshipreview.com/index.php/journal/article/view/207> [accessed 19 May 2023].

³²⁸ Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide op cit note 291 at 20.

³²⁹ Section 5 of the South African Citizenship Act 88 of 1995.

³³⁰ Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide op cit note 291 at 20.

of majority and has lived in South Africa all their life, is eligible for citizenship. Once all these requirements are met, then the administrative process to be granted citizenship is non-discretionary.³³¹

4.3.2 Supreme Court of Appeal Ruling on the Automatic loss of South African Citizenship challenging the Ministers Discretionary Powers

On the 14th of June 2023, the Supreme Court of Appeal made a ruling on S6(1)(a) of the South African Citizenship Act³³² that led South African nationals who acquired citizenship in another country to automatically lose their citizenship in South Africa. S6(1)(a) of the South African Citizenship Act³³³ was challenged by the Democratic Alliance on behalf of the South Africans who had lost their citizenship. The SCA³³⁴ found that this provision within the Act was arbitrary, irrational, unconstitutional and consequently struck it down. The argument set out by the applicants was that there are several South African nationals that reside outside of the country and who were affected by the provision because they were deprived of their citizenship without any prior notice. The Ministers legal representative argued that the Act allowed nationals to make an application to the Minister of Home Affairs if they intended to retain their South African nationality. On the argument of discretionary power by the minister, it was ruled that – ‘this merely underscores the arbitrariness and irrationality of the section. It gives the minister untrammelled discretion...³³⁵ it reposes in the minister a vague and undefined discretionary power in relation to the retention of a fundamental right, inextricably linked to other fundamental rights (such as the right to vote and stand for public office) and the right to enter and remain in South Africa and the right to freedom of trade, occupation and profession.’³³⁶ The SCA thus emphasised the importance of nationality and recognised dual citizenship. This ruling is of significance because there are parents who acquire citizenship abroad, but who leave their children behind in South Africa, thus the children do not acquire the nationality of the other country. The

³³¹ Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner’s Guide op cit note 291 at 11.

³³² 88 of 1995.

³³³ 88 of 1995.

³³⁴ *Democratic Alliance v Minister of Home Affairs and Another* (67/2022) [2023] ZASCA 97 (13 June 2023).

³³⁵ *Democratic Alliance v Minister of Home Affairs and Another* supra note 334 para 26.

³³⁶ *Democratic Alliance v Minister of Home Affairs and Another* supra note 334 para 31.

Act would then deprive the children too of their citizenship based on the parents' loss of nationality in South Africa and this would result in the children becoming stateless.

4.4 Minor Children in the Asylum System

According to the DHA, minor children are not allowed to make their own application for asylum in South Africa. However, in instances where it appears that the child may have a claim for asylum, then the child must be brought by the social worker before a Children's Court, and the Court can then make an order for a minor child to be assisted in making an independent application for asylum.³³⁷ An example of instances where a child may have their own claim for asylum, is where they have faced persecution due to forced marriage of young girls by their own family and even parents, as well as forced recruitment as child soldiers. Nevertheless, Refugee Status Determination Officers are reluctant to allow children to lodge their own asylum claims and they consider children as dependants of an adult. These children are then granted asylum in terms of s3(c) of the Refugees Act.³³⁸ In accordance with international law, there is no minimum age restriction to seek asylum.³³⁹

The denial of independent asylum claims by minors, is prejudicial for children because when the child reaches the age of 18 years, they are no longer considered as a dependent as defined by the Refugees Act.³⁴⁰ The child/children are removed from the parents file and have to make a new application for asylum. The issue with the termination of dependency status is that young adults often end up undocumented because their initial claims were age related and can no longer be relied upon or they cannot remember the details on why they fled, because they came to South Africa at a very young age. The practice by DHA of removing dependents from the parents' file, is highly detrimental to the child, because it creates instability in the young adult's life and does not offer any long term solutions. In several instances, the child does not have their birth certificates from their country of origin, and this increases the risk of statelessness because they may find it difficult to prove their right to citizenship.

³³⁷ No Future for our Children: Challenges faced by foreign minors living in South Africa op cit note 33 at 440.

³³⁸ Refugees Act 130 of 1998.

³³⁹ No Future for our Children: Challenges faced by foreign minors living in South Africa op cit note 33 at 441.

³⁴⁰ 130 of 1998.

4.5 Is Identity Blocking in South Africa leading persons to Statelessness?

The Constitution provides a safeguard against deprivation of citizenship and states that citizens of the Republic, may not be deprived of their nationality.³⁴¹ However, section 10 of the Citizenship Act³⁴² is in contravention of the Constitution, because it deprives citizenship of children. In circumstances where the parent of a minor child ceases to be a citizenship of South Africa, then the Minister of Home Affairs may make an order that the minor child of such a parent, who was born outside of South Africa, shall also cease to be a citizen.

The Identification Act³⁴³ deals with persons whose Identity Documents have been blocked, seized or destroyed. In terms of S19(4), the Director-General ('DG') can request a person to return their identity document for revocation. The DG is thus granted unrestricted power to cancel the identity document of persons who he believes are not permanent residence or citizens. A major concern in terms of this section is that there are no Regulations that set out the standard of proof to be utilised by the DG.³⁴⁴ This has caused situations where officials from the DHA have blocked IDs because they suspect that the ID was illegally obtained. Therefore, persons are stripped of their citizenship, and not only do they lose their legal identity, but are also barred from exercising their rights, which includes registering the birth of their children. In accordance with public records in 2020, there are approximately over 800 000 people that are impacted by the DHA practice of Identity blocking.³⁴⁵

Furthermore, in terms of the Identification Act³⁴⁶, the DHA is not required to provide prior notice before marking or blocking a person's identity document and are not given

³⁴¹ Section 20 of the Constitution of the Republic of South Africa.

³⁴² 88 of 1995.

³⁴³ 68 of 1997.

³⁴⁴ Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide op cit note 291 at 39.

³⁴⁵ Hawker D, 'Lawyers for Human Rights in Legal Battle with Home Affairs Over 10-year Limbo Identity Document Case' Daily Maverick (2023) available at <https://www.dailymaverick.co.za/article/2023-02-26-lawyers-for-human-rights-in-legal-battle-with-home-affairs-over-10-year-limbo-identity-document-case/> [accessed 3 May 2023].

³⁴⁶ 68 of 1997.

the opportunity to submit representations. In March 2023, Lawyers for Human Rights launched litigation against the Department, for the court to issue an order that Home Affairs follows a fair procedure in that persons are provided with prior notice that their identity document has been 'marked' and is being investigated, written reasons for the decision of blocking the identity document and an opportunity to appeal the decision. The practice by the DHA strips persons of their dignity and their fundamental rights contained in the Constitutions and leads persons to becoming stateless as the Act does not contain any safeguards against statelessness, which essentially affects the children of such parents whose identity documents have been blocked, as they too will potentially end up stateless.

4.6 Conclusion

Without holding a legal identity, children face a number of barriers to accessing their rights, such as the right to healthcare, education, social assistance as well as numerous other rights. In South Africa, if the child's birth is not registered, it is not possible to claim a nationality. The courts have played a significant role in ensuring that provisions contained in domestic laws are interpreted in accordance with constitutional and international standards and given effect. Therefore, when strategic litigation is instituted, the gaps in existing laws domestic laws can be resolved. South African domestic law provides protection to children that would otherwise be stateless, by allowing them to acquire South African citizenship. Several of the sections were previously unavailable to children. However, the courts have ordered the DHA to draft important Regulations which give effect to the provisions, but to date, these orders have not been carried out, making the sections inaccessible to stateless children and children that are at risk of statelessness. The government recently issued Regulations relating to S4(3)³⁴⁷ but these Regulations in my opinion are unconstitutional and ultra vires and not in line with the *Ali* judgement.³⁴⁸ Thus, the Regulations will have to be challenged before the South African courts.

³⁴⁷ of the Citizenship Act 88 of 1995.

³⁴⁸ *Minister of Home Affairs v Ali* [2018] ZASCA 169.

Chapter 5 – Conclusion and Recommendations

5.1 Introduction

In this thesis South Africa's domestic legislation was measured against five of the ten actions in the Global Action Plan to end statelessness: Ensure that no child is born stateless, accede to the UN Statelessness Conventions, ensure birth registration for the prevention of statelessness, issue nationality documentation to those with entitlement to it and grant protection status to stateless migrants and facilitate their naturalization. This research paper was concerned with whether South Africa has undertaken law reform to address the gaps in laws and practices to prevent childhood statelessness in terms of the five identified actions above or whether South Africa regressed in terms of its domestic laws and practices with respect to these five actions, consequently perpetuating childhood statelessness. The objective of the Global Action Plan is to resolve existing cases of statelessness and to inhibit new cases of statelessness from arising. In order to successfully eliminate statelessness in South Africa, the domestic legislation should use the ten actions as a guideline. The five actions identified by this thesis are applicable to the South African context.

5.2 Conclusion – Action 1 – Ensure that No Child is Born Stateless.

It has been established that South Africa does not have a NAP which provides a guidance to the executive and legislatures duty to draft and implement legislation that eradicates statelessness in the country, which ensures that no child is born stateless. However, there is a need for South Africa to draft and implement a NAP, because childhood statelessness is still prevalent due to gaps in the national laws, procedural barriers, the lack of implementation of court orders by the DHA and a deficiency in the domestic laws to identify and protect stateless children. This research paper identified that the majority of stateless children or children that are vulnerable and at a particular risk of statelessness in South Africa comprises of children of migrants, asylum seekers and refugees that are fleeing their countries, with or without their parents, due to

persecution or a civil war³⁴⁹. As there is one more year left in terms of the UNHCR 10-year #IBelong campaign to end statelessness, there is an urgency to work together as a society to identify the gaps within domestic legislation, policies and practices and for the government to remedy these defects.

5.3 Conclusion - Action 2 - Accede to the UN Statelessness Conventions

Both the 1954 and 1961 Conventions perform the imperative function of establishing standards and practices related to preventing statelessness. Nevertheless, both Conventions have their shortfalls, specifically in terms of establishing criteria and processes for determining stateless status determination procedures. Both Conventions have a very low ratification rate. Within the SADC States only Comoros, Congo, DRC, Madagascar, Mauritius, Namibia, Seychelles and South Africa are not parties to both Conventions.³⁵⁰ Despite South Africa pledging in 2011 to accede to both the 1954 Convention and the 1961 Convention. It is vital that South Africa signs and ratifies the 1954 Convention, and the 1961 Convention to eradicate statelessness. The reason for the importance will be discussed in more detail below in terms of the recommendations.

5.4 Conclusion – Action 3 – Ensure Birth Registration for the Prevention of Statelessness

South Africa's domestic legislation at first glance affords non-national children birth registration, as well as the right to acquire citizenship. However, despite these rights, and upon close inspection, the legislation and practices contain various gaps, which leaves children stateless or at risk of statelessness. Childhood statelessness is still a major concern in South Africa, and is not prioritised by the government, despite the detrimental impact that statelessness has on children. The situation is exacerbated by

³⁴⁹ Mbiyoz, A 'Statelessness: an old problem with new threats' Daily Maverick (2019) available at <https://www.dailymaverick.co.za/article/2019-11-13-statelessness-an-old-problem-with-new-threats/> (accessed on 08 June 2023)

³⁵⁰ UN High Commissioner for Refugees (UNHCR), 'States Party to the Statelessness Conventions - as of 25 March 2022, 25 March 2022' (2022) available at: <https://www.refworld.org/docid/623d8ec74.html> [accessed 25 October 2023]

the denial of access to RRO's³⁵¹, which leaves asylum seeker parents undocumented, and consequently they are not able to register the birth of their children because valid documentation is a prerequisite for birth registration in terms of the BDRA. Prior to 2014, foreign national children were granted a birth certificate, but these birth certificates were hand-written and not entered into the National Population Register.³⁵² If the hand-written birth certificate is lost or destroyed, it is an extremely complex task to replace the birth certificate and often children are left with no birth certificate and end up stateless. Thus, there is no official birth record and the only function of the handwritten birth certificate, is to have the child joined as a dependant under the parent's refugee permit. The child will acquire the nationality of the parent, but in actuality there are no benefits that ensue from this nationality.³⁵³ They would also not be able to claim a nationality in South Africa. In 2018 the legislature introduced amendments the BDRA, and in terms of these proposed amendments, children would merely be issued with 'birth confirmation' as opposed to a birth certificate for children born to foreign national parents. These amendments are extremely prejudicial to children and would lead to the creation of an entire stateless generation should they be passed and come into effect.

5.5 Conclusion - Issue Nationality Documentation to those with entitlement to it and Grant Protection Status to Stateless Migrants and Facilitate Their Naturalization.

As noted in Chapter 4, South Africa does not conform to the principle of *jus soli*, as a result nationality is not automatic for children that are born to foreign nationals. An application has to be made by the individual to the DHA, if the individual meets the requirements for the granting of nationality. As a signatory to international and regional Conventions, specifically the CRC, the South African government has an obligation to provide protection to stateless children and children that are at risk of statelessness, by providing them with the right to acquire a nationality. In South Africa, if the child's

³⁵¹ Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers op cit note 72 at 4.

³⁵² Scalabrini Centre of Cape Town, 'Birth Registration in South Africa' (2019) available at <https://www.scalabrini.org.za/birth-registration/> [accessed on 2 April 2022].

³⁵³ 'Exploring Childhood Statelessness in South Africa' op cit note 102 at 16.

birth is not registered, it is not possible to claim a nationality and without a nationality and legal identity, individuals are deprived of fundamental human rights. The South Africa judiciary was seen to play a vital role in terms of passing judgments on issues relating to childhood statelessness. Examples of such rulings include the *Ali* case³⁵⁴ and the *DGLR* case³⁵⁵ whereby the court ruled in favour of the applicants and permitted them to attain South African citizenship. Notwithstanding these judgements, the DHA neglects to adhere thereto, and to institute accompanying Regulations, thereby making the implementation of protective legislative provisions inaccessible to stateless children and denying them nationality documentation and their right to naturalisation.

5.6 Recommendations

5.6.1 Ratifying the Statelessness Conventions

The South African government has not ratified the 1954 and 1961 Statelessness Conventions, despite making a pledge in 2011 that they would accede to both of these Conventions. Consequently, there is no stateless determination procedures, leaving thousands of children in a vulnerable position as they cannot access their rights without a legal identity, thus disregarding the best interest of the child principle. Many children are therefore forced to rely on the current legislation, but it is clear from the four chapters above that the implementation of the legislative frameworks denies protection to the most vulnerable children. It is recommended that South Africa signs and ratifies both the 1954 and 1961 Conventions and implements subsequent domestic laws that are in line with the international duties contained in both these statelessness conventions.

It is crucial to determine whether a child is stateless, because it allows the child to access their essential human rights and prevents them from abuses.³⁵⁶ The asylum system in South Africa does not allow children to make their own applications for

³⁵⁴ *Minister of Home Affairs v Ali* [2018] ZASCA 169

³⁵⁵ *DGLR v Minister of Home Affairs* supra note 315 para 20.

³⁵⁶ UN High Commissioner for Refugees (UNHCR) 'Statelessness determination procedures, Identifying and protecting stateless persons' (2014) available at: <https://www.refworld.org/docid/5412a7be4.html> [accessed 2 June 2023].

asylum and thus they have to rely on their parents' asylum claims. The 1954 Convention guarantees the minimum standard of human rights and thus it is important to determine whether a child is indeed stateless, to allow them to access their basic rights.³⁵⁷ The 1961 Convention makes provision for children that would be 'otherwise stateless.'³⁵⁸ The ratification of the 1961 Convention thereby places an obligation on South Africa to amend the BDRA and provide birth registration as a means to acquire a nationality for children that would be 'otherwise stateless'.

The domestic statelessness protection measures should include procedures that facilitate naturalisation of children that are identified as stateless. Additionally, by becoming a state party to the two statelessness conventions, it will improve the quantitative and qualitative data on stateless children, because there is a lack of data on the number of stateless children in South Africa and thus children will not be forced to live under the radar.

5.6.2 Universal Birth Registration

In South Africa, many children are at risk of statelessness, because the state does not incorporate universal birth registration. It was noted that birth registration and citizenship are interrelated in South Africa, because to qualify for citizenship the individual must produce a birth certificate in terms of the requirements. There are various limitations contained in the BDRA, and one such limitation, is that undocumented parents are disqualified from registering the birth of their children. Thus, it is recommended that South Africa embraces a policy of universal birth registration, because in this manner, the parents' documentation will not have to be relied upon to register the child's birth. Thus, the right to birth registration and nationality are ones which are granted to the child, without the parent's documentation status having any effect thereon.³⁵⁹ By enacting universal birth registration, South

³⁵⁷ UNHCR, 'Expert Meeting- Statelessness Determination Procedures and the Status of Stateless Persons: Summary Conclusions' (2010) 2 available at <https://www.unhcr.org/media/expert-meeting-statelessness-determination-procedures-and-status-stateless-persons-summary> [accessed 6 June 2023].

³⁵⁸ Article 1 of the 1961 Convention.

³⁵⁹ R Elphick, 'Towards Universal Birth Registration in South Africa' A Briefing Paper Drafted by Lawyers for Human Rights' Lawyers for Human Rights (2011) 7 available at https://lhr.org.za/archive/sites/lhr.org.za/files/briefing_paper_towards_universal_birth_registration.pdf [accessed 16 June 2023].

Africa will acknowledge the vulnerability of children, more specifically children of non-citizens, abandoned and orphaned children, as well as unaccompanied and separated migrant children. Moreover, universal birth registration will make sure that all children born within South Africa have a legal mechanism to gain a nationality.³⁶⁰ In order to practically implement universal birth registration, it is recommended that South Africa implements information and communication technologies (ICT) into their civil registration systems, which will strengthen the right to birth registration.³⁶¹

5.6.3 Ensure that Children are Not Excluded from Accessing Services due to a Lack of Documentation

It is of utmost importance that the government, legislature, courts and officials at the various state Departments acknowledge that the most vulnerable children are the ones without a birth certificate. It has been seen that when it comes to the child's right to education, healthcare and social grants, that there are regulations and policies that provide for the exceptions to laws that require a birth certificate for accessing essential services.³⁶² However, as noted in Chapter 1, officials often disregard such exceptions or are sometimes unaware that such exceptions exist, unless there is an intervention by management or a non-profit organisations. Therefore, it is recommended that officials who provide essential services to children, are properly trained on the laws and policies' in order to ensure that parents' of children without birth certificates are assisted in accessing their rights and not refused and turned away by the officials.³⁶³

5.6.4 Improve Access to the Asylum System

As reviewed above, the asylum system in South Africa is not adequately implementing the provisions of the Refugees Act³⁶⁴ and thus is failing to provide the necessary protections to those that it was intended to safeguard. This leaves parents without valid asylum and refugee permits, which has a cascading effect on children because

³⁶⁰ Towards Universal Birth Registration in South Africa op cit note 359 at 7.

³⁶¹ Harbitz M & Gregson K, 'Towards Universal Birth Registration: A Systematic Approach to the Application of ICT' Inter-American Development Bank (2015) 32 available at <https://publications.iadb.org/en/toward-universal-birth-registration-systemic-approach-application-ict> [accessed 9 June 2023].

³⁶² Proudlock P, 'South Africa's Progress in Realising Children's Rights: A Law Review op cit note 240 at 34.

³⁶³ Social Assistance Act 13 of 2004.

³⁶⁴ 130 of 1998.

their birth cannot be registered and they cannot claim a nationality, causing them to become stateless or at risk of statelessness. In terms of the asylum system, one of the requirements for dependants to be joined under the parents file in terms of the standard operation procedures (SOP) issued on 1 June 2019, to gain a refugee or asylum permit, is that a birth certificate is required, and in the absence thereof, a DNA test.³⁶⁵ Therefore, if the birth is unregistered and the parent cannot afford to pay the fees of the DNA test, the child remains without any documentation.

It is recommended that South Africa makes various changes in the application and functioning of refugee law in South Africa and take active measures to ensure that all asylum seekers and refugees are provided with the necessary documentation. Additionally, the processing of new applicants seeking asylum in South Africa must be adjudicated in a timeous manner and in accordance with the Refugee Act.³⁶⁶ This can be done, by re-opening the RRO in Johannesburg. As mentioned previously, the Cape Town RRO only fully re-opened on the 1st of May 2023 after failing to re-open for twelve years. Due to South Africa having such a high rejection rate of asylum applications, there is an urgent need for the UNHCR to provide training to Refugee Status Determination Officers, to make sure that the asylum process is conducted in such a manner that accords to the provisions contained in the Constitution, the Refugees Act and PAJA.

South Africa has a number of refugees that flee from Somalia for example, where there is a continued disturbance of the public order as a result of the collapse of the government and invasion by the militia rebel group referred to as Al-Shabaab.³⁶⁷ Therefore, in an attempt to alleviate the pressure on the asylum system, it is suggested that South Africa utilises section 35 of the Refugees Act which states that The Minister of Home Affairs may, if he or she considers that any group or category of persons qualify for refugee status as is contemplated in section 3, by notice in the Gazette, declare such group or category of persons to be refugees either unconditionally or

³⁶⁵ Department of Home Affairs, 'Standard Operating Procedure: Refugee Family Unification – Reviewed by: Standing Committee For Refugee Affairs (2019) 4.

³⁶⁶ 130 of 1998.

³⁶⁷ UN High Commissioner for Refugees (UNHCR), 'UNHCR Position on Returns to Southern and Central Somalia (Update I)' (2016) 4-5 available at: <https://www.refworld.org/docid/573de9fe4.html> [accessed 4 September 2023].

subject to such conditions as the Minister may impose in conformity with the Constitution and international law and may revoke any such declaration by notice in the Gazette. By invoking this provision, refugees that are fleeing their countries due to a civil war will automatically gain refugee status and may assist with the backlog in the asylum system that was caused due to the national closure of the RRO's during COVID-19 for a period of two years.

5.6.5 Implementation of the *Jus Soli* Principle

Furthermore, states that provide nationality on the basis of the *jus soli* principle (of the soil), offer children the greatest protection against statelessness, because citizenship is automatically granted to any child born within the state, irrespective of the nationality of the parents'.³⁶⁸ Within the SADC region, Mozambique is the only state that makes provision for *jus soli*, and grants children born of stateless parents, a nationality.³⁶⁹ Thus, it is recommended that South Africa considers implementing the *jus soli* principle, because this would lead to a decrease of statelessness children, as children would be issued with birth certificates.

5.6.6 Removal of Late Birth Registration Fees

One of the major barriers to birth registration in the SADC states is the fee requirement for late birth registration, as well as the burdensome documentation requirement of parents having valid permits to register their child's birth.³⁷⁰ The CRC has been signed by all SADC states.³⁷¹ Thus, they are bound by Article 7 of the CRC which makes

³⁶⁸ Manby B, 'Statelessness in Southern Africa' Commissioned by the United Nations High Commissioner for Refugees (UNHCR) for a Regional Conference on Statelessness in Southern Africa (2011) 14 available at https://citizenshiprightsafrika.org/wpcontent/uploads/2016/04/UNHCR_Statelessness_SouthernAfrica_2011.pdf [accessed 6 May 2023].

³⁶⁹ UNHCR, 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Mozambique (2010) available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session10/MZ/UNHCR_UNHigh_Commissioner_for_Refugees_eng.pdf [accessed on 27 May 2022].

³⁷⁰ UNHCR, 'Ensuring Birth Registration for the Prevention of Statelessness: Good Practices Paper' (2017) 3 available at <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2017/11/Good-Practices-Paper-on-Ensuring-Birth-Registration-for-the-Prevention-of-Statelessness.pdf> [accessed 15 June 2023].

³⁷¹ Tax SL 'Statement by the Executive Secretary of SADC on the Occasion of World Day Against Child Labour' Southern African Development Community (2018) available at <https://www.sadc.int/latest-news/statement-executive-secretary-sadc-occasion-world-day-against-child-labour> [accessed on 22 May 2022].

provision for the right to birth registration and nationality. However, SADC states are lacking in upholding international law, as they do not provide birth certificates to undocumented parents and create onerous requirements for late birth registration.³⁷² It is recommended that South Africa waives the late registration fee and the accompanying Regulations that require proof of payment of the fee should be removed in its entirety. The process should also be made simpler for parents. Additionally, the DHA requires that two separate forms are completed by the parents, providing reasons for why late birth registration is taking place. It should only be necessary to complete one form that states the reasons for why the birth is being registered late.

5.6.7 Special Dispensation for Children

It is recommended that where the child is unable to acquire a legal status in South Africa, then s31(2)(b) of the Immigration Act³⁷³ be invoked and made accessible to undocumented migrant children. This section would allow children to apply for permits, which would be a durable solution, because a permanent solution would follow for the minors concerned. In South Africa, there must be a switch from short term solutions that allow children to access their basic rights without valid documentation, to more durable solutions for migrant and refugee children, such as permanent residence status. If this shift does not take place, the government of South Africa will be causing harm to migrant and refugee children, because they will either end up stateless or at risk of statelessness.

5.6.8 Awareness Campaigns by DHA

This thesis has emphasised the importance of birth registration. Therefore, it is beneficial to have community outreach and engagement platforms to also inform parents on the crucial role that a birth certificate plays in conferring and confirming citizenship, as well as educate parents or future parents on the birth registration processes and requirements. NGO's, such as Lawyers for Human Rights, the Scalabrini Centre and the Centre for Applied Legal Studies have been proactive in raising awareness on birth registration. However, it is recommended that the DHA follows suit

³⁷² The World's Stateless Children op cit note 17 at 206.

³⁷³ 13 of 2002.

and sets out to raise awareness by distributing infographic material and posters. The infographic pamphlet should highlight the importance of birth registration and should also include the requirements and compulsory documents required to register the child's birth whether its timeous or late birth registration. For example, in the case of unmarried fathers who want to register their child's birth, the DHA requires a specific set of documentation, and many unmarried fathers are not aware of the requirements. These materials should be distributed to the Department of Social Development offices, the DHA offices, hospitals and schools. The DHA should also make the application forms and pro forma affidavits available at their offices, which will make the process of birth registration a smoother and similar process for parents.

5.7 Conclusion

It is concluded from the above Chapters, that although South Africa has developed comprehensive legal frameworks relating to the protection of migrant and refugee children, there are a number of gaps, specifically with regards to the implementation aspect of the legal framework and court orders. One of the most alarming issues that has been seen consistently through this thesis, is the absence of legal documentation for children that are born to foreign national parents. The lack of documentation severely impacts on the child's protection, because without valid documentation the consequences are dire as children are exposed to emotional, psychological, physical and sexual abuse, trafficking, child-labour, the risk of detention etc.

Being undocumented South Africa remains a huge problem and is the root cause of childhood statelessness. Where the right to documentation of foreign children does exist, it is unable to be materialised due to the lack of Regulations, which leaves officials at the DHA unaware of what their duties are in terms of providing documentation to foreign children. It is concluded that South Africa's laws have regressed and are falling short of international Conventions, specifically the CRC, because South Africa is not prioritising the protection of foreign children as it prevents children from accessing documentation and in turn disregarding the best interest of the child principle. South Africa is failing to understand the consequences of the impact that the lack of documentation will have on the child's future. The South African

government must consider durable solutions for foreign children who cannot return to any other country in an effort to resolve existing cases of statelessness and prevent future cases of statelessness by 2024. Some of the protective laws against statelessness do exist, but they are not being implemented by the DHA accordingly.

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