Centre for Child Law submissions

On the

White Paper on Citizenship, Immigration and Refugee protection: Towards a complete overhaul of the migration system in South Africa

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CENTRE FOR CHILD LAW

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1 Introduction

The Centre for Child Law ("CCL / the Centre")[1] acknowledges and welcome the invitation by the Department of Home Affairs to comment on the White Paper on Citizenship, Immigration and Refugee protection: Towards a complete overhaul of the migration system in South Africa.

We, along with other child rights organisations, have long been calling on the Department of Home Affairs (the Department/DHA) to improve the current laws relating to birth registration, immigration status, and citizenship for children (mainly through the adoption of functional regulations). The courts have also declared multiple regulations unconstitutional and expressed the need for the Department to review and supplement its regulations in order to give children access to birth registration and identity rights. Furthermore, various international treaty and legal platforms have called for better regulation of these matters to ensure children have access to rights.

The time is indeed ripe for changes to the legal framework. Sadly, this White Paper does not address the needs and concerns of children. Instead of taking progressive steps towards better rights access for children, the paper seeks to regress and worsen the already dire situation of children in South Africa in this regard. Not once does the White Paper refer to children's rights, their best interests, nor their survival and development. It makes no provision for child specific action.

The Centre, and other organisations like us, receive countless complaints from children and their families about the Department's failure to provide for their identity rights. We sincerely hope that the Department will use this opportunity to really listen to children and act in line with the Constitution. This will require the Department to rethink its stance through a child-rights lens, which is what the Constitution requires of them.

The Centre has put together these submissions to provide insight on how the Department can adjust its White Paper to give effect to its Constitutional and international law duties.

2 About the Centre for Child Law

The Centre for Child Law, is a child rights organisation registered with the Legal Practice Council as a law clinic in terms of the Legal Practice Act. It is situated and operates at the

[1] For the purpose of this submissions **"CCL / the Centre"** means the Centre for Child Law and will be used interchangeably throughout the submissions where necessary.

University of Pretoria, Faculty of Law. The CCL contribute towards the establishment and promotion of the best interests of children in South Africa, through research, advocacy, litigation and education

The Centre's lawyers are qualified legal specialists, dedicated to the constitutional rights of children and to bring the voice of the child to decision-makers such as the Department. We provide legal service to individual children and their parents/caregivers and therefore understand the issues which affect them.

We have engaged in research, litigation and advocacy on children's rights to identity, birth registration and citizenship. Our submissions are informed by our findings on these, including the need to comply with court orders and international obligation pertaining to children's rights. The CCL wish to put on record that our views are not aimed at promoting or supporting irregular migration, however that where children find themselves being considered irregular migrants- the obligations to protect their rights should be the starting point for our country.

3 Important general principles

Before we address what, we believe are the 5 key areas of intervention, we believe we need to set out 3 core principles which have been overlooked in the White Paper.

3.1 A constitutional foundation

Section 2 of the Constitution of the Republic of South Africa, 1996, provides that:

> The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[2]

The Constitution is foundational to all laws, policies, and actions of the State. The White Paper must, therefore, align with the founding provisions of the constitution, and it must not regress to a lower standard.

Under section 1 it is provided that:

> The Republic of South Africa is one, sovereign, democratic state founded upon the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms.[3]

[2] See section 2 of the Constitution of the Republic of South Africa, 1996.
[3] Section 1 of the Constitution.

The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The Constitution enshrines children's rights, in particular the right to a name and a nationality from birth,[4] as well as the right to have their best interests considered paramount in all matters affecting the child[5]. There is no doubt that the White Paper significantly affects children, and yet no mention is made of their interests. In contrast, the White Paper adopts approaches which actively disenfranchise and harm them. The Department must have regard for the vulnerability of children. The nature of the right to a name and nationality is a gateway right to other socio-economic rights such as education, health care, basic nutrition and social services. It is thus important that the White Paper centres the children's interests in this regard.

3.2 An unscientific approach

The White Paper is replete with anecdotes of misuse of the system. However, nowhere does it provide data and research to support the broad and sweeping statements of the behaviour of migrants. The writers sweep most migrants under one carpet without differentiating between those who migrate irregularly and those who are law abiding migrants and genuine refugees. The result is a deeply unscientific Paper which does not provide a proper basis for the significant changes it proposes. The Department acts on "anecdata". This kind of approach is unacceptable in an open and transparent society based on accountability, responsiveness, and openness. The paper makes assumptions and fails to indicate how these are supported. This approach, will in our view, significantly affect the legislative amendments that are to flow from this White Paper and may result in amendments that do not pass constitutional muster.

3.3 Alignment with international law

South Africa has duties and responsibilities under international law, in terms of treaties and conventions which it is party to. Notably, South Africa is party to the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. South Africa is obliged to conduct itself and its laws in line with these international obligations.

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4 Section 28(1)(a) of the Constitution.
5 Section 28(2) of the Constitution.

South Africa's obligations under international law include the duty to prevent statelessness, to preserve the identity of every child, and to ensure that every child within its territory acquires a nationality. South Africa further has obligations under international law to ensure that every child within its territory has access to education and health care, amongst other rights.

The White Paper proposes a regression in its level of human rights compliance. South Africa bears the international law duty to progressively realise human rights. This is the principle of non-regression in international human rights law, which is central to states' implementation of the obligation of progressive realisation of economic and social rights (Article 2(1), ICESCR). It prohibits states from taking “deliberately retrogressive measures”. This White Paper is a deliberate retrogressive measure.

4 Key definitions

The CCL proposes the inclusion of these key terms in the White Paper to ensure that there is no confusion:

- ***An Irregular migrant*:** is a person who is not a citizen, and who does not have the required authorisation from the government to remain in its territory. An irregular migrant, may have an expired visa, permit or passport, or they may have no passport at all.
- ***Asylum seeker:*** refers to a migrant who has fled persecution, violence, war or conflict in their country of origin or citizenship and has crossed an international border to seek protection in another country.
- ***Birth registration:*** is the permanent and official record of a child's birth by the government of the country where the child was born. A birth certificate is subsequently issued to the child’s parent/caregiver, which reflects their name, date and place of birth, and the details of their parents
- ***Citizenship and nationality:*** have the same meaning and can be used interchangeably. In South Africa we use the word citizenship. Citizenship is the legal bond between an individual and the state. It is based on a person’s “genuine links” to a state.
- ***Stateless person:*** Article 1(1) of the 1954 Convention defines a "stateless person" as a person who is not considered to the as a national by any State under the operation of its law

- ***Undocumented persons:*** have no government issued proof of identity (documentation), such as a birth certificate, and identity card or a passport. Citizens, non-citizens, and stateless persons can all be undocumented.

5 Specific themes addressed in the White Paper

Our submissions are structured in a thematic manner, starting with setting out some of our clients' lived experiences in trying to secure identity rights. These case studies illustrate the systemic challenges and thus support our call for a different approach to these issues in the White Paper.

5.1 Citizenship

THE MBZ SIBLINGS (3): STATELESS

The MBZ siblings (children) were born in South Africa to a mother who was a non-South African national and the identity of their father is unknown. The three siblings were born in 2002, 2006 and 2009 respectfully. Their mother never registered their births and unfortunately, she passed away leaving the children orphaned. The children were very young and hardly have a recollection of her or her background. They were declared to be children in need of care and protection where they moved home to home until in 2017 where they met their foster mother and a Children's Court order was granted for the children to be taken care of by her.

The Department was approached to assist the children with their documentation with no success for many years to date. The children with the assistance of their foster mother even approached Lawyers for Human Rights to assist, also little to no success due to DHA not willing to assist. Social workers got involved to undertake investigations to determine the nationality of the children so that if possible they may be reunited with any of their extended family members. Their mother was alleged to be a Mozambican citizen. Therefore, advertisements were initiated both in South Africa and Mozambique with no one coming forward. After the interview with the Mozambique embassy it was declared that the status of their mother cannot be determined and thus the children were stateless and did not belong to Mozambique. The children were left at the mercy of social workers, lawyers, foster mother, DHA and the Courts to assist them with acquiring nationality as they belonged to no country.

Orders were made by the Children's Court to assist the children, which the Department ignored for years. Even with legal opinions by LHR that the children were stateless in terms of section 2(2) of the South Africa Citizenship Act, the Department still refused to assist. The children remain undocumented and stateless to this day. Applications for section 2(2) and 4(3) were made on their behalf by Centre for Child

Law, however we faced challenges as the Department refuses to accept the applications particularly section 2(2) without written reasons and only made the argument that the application were made prematurely as two of the children were under 18. The only application which was accepted after many backs and forth was a section 4(3) by naturalisation as the eldest sibling is now over 18. We await to hear the outcome of his application as we also continue to ensure that the application for the other two younger siblings is accepted.

5.1.1 General principles

Citizenship is a fundamental human right recognised in both international and domestic law. This right is highlighted in Article 15 of the Universal Declaration of Human Rights, Article 7 of the United Nation Convention on the Rights of the Child as well as section 20 of the Constitution.

Citizenship is a matter of magnificent importance, closely related to the right to human dignity. The African Committee on Human and Peoples' Rights, as well as the African Court have both framed the right to a nationality as fundamental to dignity.

Article 5 of the African Charter on Human and People's Rights provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status."

The Constitutional Court in *Chisuse*[6] summarized the crucial nature of citizenship as follows:

> Citizenship and equality of citizenship is therefore a matter of considerable importance in South Africa, particularly bearing in mind the abhorrent history of citizenship deprivation suffered by many in South Africa over the last hundred and more years. Citizenship is not just a legal status. It goes to the core of a person's identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person's citizenship status affects their private and family life, their choices as to where they can call home, start jobs, enroll in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.

6 *Chisuse v Minister of Home Affairs* (2020) *ZACC 20* para 28.

It was held in the International Court of Justice in the *Nottebohm*[7] case that "Nationality is a legal bond having as its bases a social fact of attachment, a genuine connection of existence, interests and sentiments."

The above principles, particularly the concept of a genuine connection (or a genuine link) between a person and a state, provides the reasoning for the granting of citizenship other than through blood (*jus sanguinis*). In the days before humans migrated with the speed and ease made possible by airplanes today, states assumed that genuine links to a state was mainly formed through blood relation. Children grew up and lived where their parents did, and their parents were from the same place and tribe. It made sense to attribute citizenship based on the citizenship of a parent, because it could be assumed that they would live and have allegiance, and links to the same state. However, today things are very different. People are born in places where their parents do not have citizenship, or have parents with different citizenship.

Children grow up in places where neither they, nor their families have citizenship. Children are abandoned and orphaned where their families never lived. So, modern citizenship has become more complicated than before. Humans form links beyond the blood. We can no longer limit citizenship links to blood. This is why states have evolved their laws to recognise the genuine links that children from with the country where they are born and live until they are 18 years old. The child forms social relationships which support his survival and development, speaks the language and lives on the land.

5.1.2 Legal framework

Section 4(3) of the South African Citizenship Act, 1995 (SACA) recognises the reality that a child may find themselves in. In order to give effect to the right to the dignity of that child, the Citizenship Act gives him the option to naturalise and choose South Africa, to become a citizen. Section 2(2) similarly protects the dignity of the child who is stateless. Where a child is born stateless in South Africa, the SACA gives effect to her right to human dignity by ensuring that she acquires a nationality. It is the very minimum a human can expect from a State in life.

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[7] The 1995 *Nottebhom* case where the International Court of Justice held that "[a]ccording to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties" (*Nottebohm, Liechtenstein v Guatemala*, Preliminary Objection (Second phase), Judgment, [1955] ICJ Rep 4, ICGJ 185 (ICJ 1955), 6th April 1955, International Court of Justice [ICJ]).

Children are particularly vulnerable where it comes to citizenship. They are at the mercy of the decisions of adults. They cannot decide where to be born, whether their parents migrate, or whether their parents ensure that they are documented. Children should not be disadvantaged for these factors over which they have no control. The SACA, through section 4(3) and 2(2) give effect to these principles and protect the child and their future.

The Courts in both *Khoza v Minister of Home Affairs and Another*[8] and *Minister of Home Affairs v DGLR*[9] have interpreted section 2(2) of the SACA to ensure that children who are born in South Africa to parents who are not citizens and/or nationality cannot be determined, and who would otherwise be stateless, must not be deprived of citizenship. The *DGLR* case however, was the first to address the interpretation and implementation of section 2(2). The Court directed Department to draft and publish regulations for the purpose of the application on behalf of the children by the informant. To date there are no regulations and applications are still submitted through an affidavit until such regulations are drafted.

In the case of *Minister of Home v Jose*[10] the court held that the applications for citizenship by naturalisation in terms of section 4(3) are non-discretionary, and once an applicant satisfies the four requirements, they qualify for South African citizenship.[11]

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[8] *Khoza v Minister of Home Affairs and Another* [2023] ZAGPPHC 140; 6700/2022; [2023] 2 All SA 489 (GP) (27 February 2023), the High Court held ordering the Department of Home Affairs (DHA) to register the applicant's birth in terms of the Birth and Deaths Registration Act, to declare the applicant a South African citizen in terms of the Citizenship Act, and to accept and adjudicate applications for citizenship made on behalf of stateless children under Section 2(2) of the Citizenship Act on affidavit. The court also issued a finding that DHA's failure to comply with previous court orders directing it to promulgate regulations that give effect to certain provisions in the Citizenship Act "amounts to contempt of court"; See LHR Press statement available at https://www.lhr.org.za/lhr-news/press-statement-gauteng-high-court-orders-home-affairs-to-grant-nationality-and-make-regulations-to-avoid-statelessness/.

[9] *Minister of Home Affairs v DGLR (2016) (Case No: 1051/2015 SCA)* where the Court confirmed that children who would otherwise be stateless, and are born in South Africa are entitled to citizenship.

[10] *Minister of Home Affairs v Jose (2020) ZASCA 152 SCA:* This is a case of two brothers who were born in South Africa. The parents of these children where citizens of Angola who fled Angola in 1995 and sought asylum in South Africa. The two siblings were born in 1996 and 1997 respectfully - had their birth registered, and live in SA their whole lives and have never been to Angola. The family was granted refugee status from 1997 until 1997, when their status was withdrawn due to the "Angolan cessation". The Department of Home Affairs as a result refused to receive or grant their citizenship by naturalisation because it had not yet made the regulations that guided the application process. The High Court held that the DHA must immediately the siblings' citizenship as they met the four requirements of section 4(3) of SACA. This decision was confirmed by the SCA and reaffirmed that applications for citizenship by naturalisation under section 4(3) are non-discretionary.

[11] The requirements for section 4(3) are (1) born in South Africa; (2) parents are not South African citizens nor permanent residents in South Africa at the time if the child's birth; (3) birth registration and birth certificate; or; (4) the child has lived in South Africa from date of birth to the date of turning 18 years old.

5.1.3 Recommendations of the United Nations Committee on the Rights of the Child

The Committee on the CRC has made clear that article 7 of the CRC requires states to grant nationality to all children born on their territory if they would otherwise be stateless[12]; this is regardless of:

- The parents' legal status, including residence status
- The parents' sex, race, religion or ethnicity, social origin or status
- The parents' past opinions or activities
- The child's belonging to a minority group

The Committee further gives particular consideration to the guiding principles that inform the implementation of the rights of children in the CRC:

- **Article 2:** the right to non-discrimination – every child has the right to acquire a nationality regardless of gender, ethnicity or other status.
- **Article 3:** the best interests of the child – in all action concerning children, including legislative and administrative decisions in the context of nationality, the best interests of the child shall be a primary consideration.
- **Article 6:** the right to life, survival and development – every child has an inherent right to life, and state parties shall ensure the survival and development of the child to the maximum extent possible.
- **Article 12:** the right to respect the view of the child – a child has the right to be heard and have due weight afforded to those views based on age and maturity.

As already highlighted in the principles discussed in the beginning of this section and the recommendation of the Committee, it is clear that the interpretation of ensuring the right to citizenship of a child is an effective way of preventing childhood statelessness.

5.1.4 Recommendation of the Committee of Experts on the African Charter on the Rights and Welfare of the Child and General Comment no 2 on Article 6 of the ACRWC

The Committee of Experts has held in relation to nationality that "one of the main purposes of Article 6, in particular Article 6(4) of the African Children's Charter, is to prevent and/or reduce

[12] L Muller "The Child's Rights to a Nationality and childhood statelessness" A toolkit for Child Rights Actors at page 4-5 available at https://files.institutesi.org/Childhood_Statelessness_CRC_Toolkit.pdf.

statelessness."[13] It is critical as noted by the Committee that the right to nationality to be recognised as children so that it does not affect them into adulthood where they are at risk of statelessness.

The Committee in the significant case of the *Kenyan Nubian Children* which dealt with the interpretation of the African Children's' Charter relating to statelessness held that it[14]:

> [...] cannot overemphasise the overall negative impact of statelessness on children. While it is always no fault of their own, stateless children often inherit an uncertain future. For instance, they might fail to benefit from protections and constitutional rights granted by the State. These include difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country. Statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health care, and access to education. In sum, being stateless as a child is generally an antithesis to the best interests of children.

The Committee highlights the importance of the best interests of the child as pertaining to Article 4[15] of the ACRWC and note that as much as possible children should have nationality beginning from birth.

5.1.5 Practicality

Consequently, the CCL wishes to highlight to the Department the continuous challenges that our section 2(2) of SACA clients continue to face at some DHA offices where the officials refuse to accept their applications, without providing written reasons. The CCL and social workers who refer their cases to us to assist them with the drafting of the application have been told different views at different DHA offices. In other instances, we are informed that the child must turn 18 first before they can submit the application and that they do not qualify for the section 2(2) of SACA as yet.

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[13] See African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, 16 April 2014, ACERWC/GC/02 (2014), available at: https://www.refworld.org/docid/54db21734.html [accessed 29 January 2024].

[14] As above https://www.refworld.org/docid/54db21734.html [accessed 29 January 2024].

[15] Article 4 of the African Charter on the Rights and Welfare of the Child provides that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".

There is no clarity also as at the citizenship section of DHA as we are told that they only accept section 4(3) of SACA applications and section 2(2) SACA applications must be submitted at the birth registration section. However, when we submit there (birth registration services) we are still told that the applications are not ripe and can only be submitted once the child is 18 and that is by naturalisation.

We are greatly concerned about this trend that continue to negatively affect the rights of children to citizenship. What we thought was a victory in the current *Khoza* case seems to have not have materialized as DHA continues to ignore court orders even when the Court directed the Department to accept the application through affidavits. Many of our clients have either not received any feedback where we managed to submit the application or are still prevented from to submitting even after many years. This has led to their access to services applicable to all children being limited.

The Department suggests in the White Paper the intention to repeal the SACA and one of the sections that it seems to focus on is section 4(3) and other sections in the Act relating to citizenship by naturalisation. The justification seems to suggest that the current law is weak and an easy pathway to citizenship for refugees and migrants which necessitate the more stringent criteria for granting citizenship. This position will further place many children at risk of statelessness and to never be granted nationality the moment they turn 18 belonging to no country. In the case of *Minister of Home v Jose*[16] the court held that the applications for citizenship by naturalisation in terms of section 4(3) are non-discretionary, and once an applicant satisfies the four requirements, they qualify for South African citizenship.[17]

The applications which the CCL submit to DHA on behalf of our clients mostly concern children who are orphans or abandoned, and/or who were born to parents who are stateless.

[16] *Minister of Home Affairs v Jose (2020) ZASCA 152 SCA:* This is a case of two brothers who were born in South Africa. The parents of these children where citizens of Angola who fled Angola in 1995 and sought asylum in South Africa. The two siblings were born in 1996 and 1997 respectfully - had their birth registered, and live in SA their whole lives and have never been to Angola. The family was granted refugee status from 1997 until 1997, when their status was withdrawn due to the "Angolan cessation". The Department of Home Affairs as a result refused to receive or grant their citizenship by naturalisation because it had not yet made the regulations that guided the application process. The High Court held that the DHA must immediately the siblings' citizenship as they met the four requirements of section 4(3) of SACA. This decision was confirmed by the SCA and reaffirmed that applications for citizenship by naturalisation under section 4(3) are non-discretionary.

[17] The requirements for section 4(3) are (1) born in South Africa; (2) parents are not South African citizens nor permanent residents in South Africa at the time if the child's birth; (3) birth registration and birth certificate; or; (4) the child has lived in South Africa from date of birth to the date of turning 18 years old.

The regulations which provided for a form to be filled for this application have been withdrawn by the Department, which means that the applications are still submitted on affidavits.

Some of our clients as is the case with section 2(2) of SACA applications have been sent from pillar to post where their applications have been refused even when all the requirements are met and all possible measures have been exhausted.

We have written letters asking for clarity and concern to the Department on this issue and we have not received any communication. One of our clients who has now turned 18 is stateless, and to this date DHA refuses to accept his application for section 4(3) of SACA which was sent in 2022. This has become a trend in many of our cases and this shows that instead of the Department dealing with the internal maladministration at their office, which can be addressed through the promulgation of the regulation, they only see fit to further deprive children (who are now adults) their right to citizenship.

Should the Department regress in its application of section 2(2) and 4(3) of SACA, they regress in their duty to children and deprive children of their right to dignity. Particularly those children who are orphaned and abandoned in South Africa, benefit greatly from these provisions, which enable to them to have the same rights and opportunities as other children.

We recommend that the Department reconsider its decision as it seems that the dire implication on the rights of children are not considered in this respect. This is because the proposal goes against findings of the SA courts pertaining to the protection of children's constitutional rights. We further recommend a more child friendly process at DHA which has a focal person that specifically focuses on citizenship issue involving children.

5.2 Birth registration

5.2.1 Overview

One of the fundamental rights which *every* child is entitled to is the right to a name and nationality at birth[18]. This right is enshrined in the Constitution of the Republic of South Africa, 1996, and also echoed in both regional and international law[19]. Interpretation of the law in so far as this right is concerned presupposes that when a child is born in any country their birth

[18] See section 28(1) (a) of the Constitution of the Republic of South Africa, 1996.
[19] The African Charter on the Welfare and Rights of the Child at article 6; United Nations on the Convention and Rights of the Child at article 7.

should be immediately registered. In South Africa the birth of a child is registered with the Department of Home Affairs ("DHA or Department") within a specified period[20], and the child must be issued with a birth certificate in terms of the Birth and Death Registration Act (BDRA) read together with the provisions of the SACA.

5.2.2 The Department's position

Whereas section 28(1)(a) of the Constitution is clear that every child has the right to a name and nationality at birth. We are concerned at how the Department is of the view that the wording and meaning of "every child" is *"stretched too wide"*[21] in relation to birth registration of children due to the nationality of parent(s). The Department's allegations contradict the Constitution and existing jurisprudence highlighting the importance of section 28[22]. It further creates potential confusion in practice which may lead to discrimination in the documentation of children whether born to parents who are South African citizens or not.

5.2.3 Birth registration, legal framework and barriers

There is a barrier affecting unmarried fathers' ability to give notice and register the birth of their children, in cases where the biological mother(s) is unable to do so. This gender discrimination has left many children in South Africa without their birth being registered and/or they are issued with birth certificates with no citizenship. This is despite the court judgement of the *Centre for Child Law v Director-General, Department of Home Affairs and Another*[23] where the Court declared section 10 of the BDRA unconstitutional to the extent that it discriminated and barred unmarried fathers from registering the birth of their children.

UNMARRIED FATHERS: ***Centre for Child Law v Director-General, Department of Home Affairs and Another***

The Constitutional Court handed down a judgement which declared section 10 of the Birth and Death Registration Act to be unconstitutional to the extent that it did not make provision for unmarried fathers

[20] Department of Home Affairs: "Standard Operating Procedure: Registration of Birth Process" (2021) which provides that children should be registered within 30 days and below 15 years old to be issued with a birth certificate.

[21] See para 69 of the White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the migration system in South Africa (hereinafter "White Paper") at page 45.

[22] See *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA (CC); 2007 (12) BCLR 1312 (2) SACR 539 (CC) (26 September 2007).

[23] 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) (22 September 2021).

to register the birth of their children. This is when the mother is deceased, absconded, is undocumented herself or cannot be located.

The Constitutional Court held that section 10, therefore, discriminates against both the children and their unmarried fathers, and infringes their dignity. The Constitutional Court further stated in paragraph 57:

> **"For all these reasons** Constitutional**, it is clear that section 10 constitutes unfair discrimination against unmarried fathers based on sex, gender and marital status. Furthermore, this discrimination cannot be justified when considering the egregious impact, it has on (i) an unmarried father's dignity; (ii) the manner in which it compromises his relationship with his newly born child; and (iii) the way it entrenches sexist and gendered stereotypes about the parental role of fathers' vis à vis mothers. In any event, no justification was proffered for the discrimination by the respondents. In the result, the invalidity of section 10 must follow…"**

This judgement found that unmarried fathers may now be able to register the birth of their children and amended section 10 of the BRDA to give effect to that. Despite the Court's ruling, the DHA has not yet implemented the judgement and still creates a burdensome bureaucratic process and economically inaccessible requirements for fathers to register their children by requiring them to undergo DNA testing to prove parentage which most of these fathers cannot afford as they are expensive.

The challenge to birth registration still persists as the CCL continues to receive hundreds of queries every year where children's births are not registered in instance where the unmarried father is the one giving notice and the nationality of the mother is different from the father. Section 2(1)(b) of the SACA however states that:

> [*Any] person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth*

The above section practically means that if one of the parent(s) is a South African citizen then the birth of such child should be registered to have his or her status officially confirmed as a citizen[24]. Before section 10 of the BRDA was declared unconstitutional, birth registration could only be effected along the matrilineal line and nationality therefore could only be granted along the matrilineal line provided that the biological mother is a South African citizen. The position

[24] See also the *Chisuse v Minister of Home Affairs* (2020) *ZACC 20* where the Court confirms that children born to a South African citizen(s) outside of South Africa are South African citizens.

has been challenged and changed as already stated above to eliminate gender discrimination in recognition of the fact that birth registration is the right of the child and can be effected by either or both parents. However, unmarried fathers where the biological mother is undocumented, deceased or has abandoned the family, continuously have their paternity questioned where they are asked to submit themselves and their children for paternity testing to prove parentage before the birth of that child can be registered.[25]

5.2.4 Inability to afford DNA tests

Queries by parents, social workers and Children's Court inquiries have proved time and time again that many unmarried fathers and/or caregivers are unable to afford the high costs of DNA tests. Those who are able to afford DNA tests are still sent from pillar to post at some DHA offices across the country where they are often refused to be issued with referral letters in terms of the "DHA Circular No.5 of 2014 on DNA testing for birth registration". Another challenge is in relation to unmarried fathers who can afford the DNA test, is when they approach private laboratories and when they submit those results to DHA they are still not assisted accordingly to register the births of their children as DHA only accepts DNA results from the laboratories included in the circular.[26] Consequently, there seem to be no standard procedure for all DHA offices and each office operates differently. This proves administrative and systematic problems from DHA side which continue to leave many children's birth unregistered and not issued with an official birth certificate, placing them at risk of statelessness should something happen to their parents or legal guardians.

5.2.4.1 Alternative proof of parentage: section 26 of the Children's Act

The Children's Act 38 of 2005 permits a man, who is not married to the mother of the child who claims to be the child's biological father to apply to the Children's Court for an order confirming his paternity of the child, in instances where the mother: (i) refuses to consent to

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[25] The DHA Circular No. 5 of 2014 on DNA Testing for birth registration provides that (1) for the birth registration of children born to unmarried parents:

- If both parents are South African citizens, NO DNA is required; or
- If one parent is a non-South African citizen, no DNA test is required if the birth is registered within 30-days of the birth of the child unless an official of the department has "reasonable suspicion" regarding the paternity of the child.

[26] In 2021 the Department issued a circular addressed to Head Office, Provincial Office, as well as the Regional and District Offices called ***Circular No: 14 of 2021: Inclusion of Private Institutions to Conduct DNA (Paternity) Tests.***

such amendment, (ii) is incompetent to give consent due to mental illness; (iii) cannot be located; or (iv) is deceased.[27]

The court can then engage in an inquiry and grant an order that the applicant is the child's biological father, if it appears on a balance of probabilities that this is so.[28] The applicant must be able to rely on this Children's Court order to apply for the child's birth certificate.

Frankly speaking, South Africa is a very unequal country with a high unemployment rate. As such, many parents are unable to pay for DNA tests at the laboratories that DHA lists in their circulars, the average cost of a DNA test in this regard is upwards of R1600. Excluding the costs of transporting people from their rural and isolated communities to the provincial capitals where most of the National Health Laboratories and mainstream Laboratories are found.

Families who can afford to conduct the tests usually do so with the intent to get the birth registration over and done with as quickly as possible. In many poorer families and communities, parents are forced to keep their children undocumented, which undermines the child's constitutionally recognized rights to access to education, health, social services and housing, among others.

We are of the view that the Department must accommodate the realities that people experience in South Africa given the hard-financial circumstances that many find themselves in. Deciding, whether to conduct DNA tests or to starve, is an untenable and inhumane position to put people in.

We recommend that DHA accept Children's Court Orders in terms of section 26 of the Children's Act, granting paternity in favour of the applicant father. This must be accepted as conclusive proof of paternity from the court and so used to register the child's birth.

If the Department insists on a paternity test in a specific case, they should pay the costs of the test in cases of poverty. The Department could easily use the same means test and income threshold used by SASSA for the Child Support Grant to determine whether a particular family qualifies.

5.2.5 Administrative justice

[27] Children's Act 38 of 2005, section 26; see also *Naki* case.
[28] Section 45(1)(c) of the Children's Act.

To our dismay even court orders are often ignored and no written reasons given to clients for the refusal to register the births of children whether within a specified period or late registration of birth (LRB).

5.2.5.1 Legal framework

The Constitution imposes a duty on the state to give effect to everyone's right to "lawful, reasonable and procedurally fair administrative action".[29] A crucial aspect of administrative justice is everyone's right to receive written reasons for any adverse decision taken by an administrator.[30]

The Constitution further requires the adoption of national legislation to give effect to administrative justice. The state carries the duty to give effect to administrative justice rights and to promote an efficient administration.[31] The primordial function of section 33 of the Constitution is to regulate the conduct of the public administration, [32] and in so doing establishing good governance, a culture of accountability, transparency in the exercise of public power and administration.

The Department of Home Affairs, as a state organ serves as the "administrator" for purposes of the Promotion of Administrative Justice Act 3 of 2000, ('PAJA'). A 'decision',[33] for purposes of PAJA refers to both an express decision and failure to make a decision. An administrator will be seen to have failed to make a decision if the administrator fails to make a decision within the prescribed period.

Failure to make a decision also occurs in instances where no time period is prescribed, where no decision is made within a reasonable period of time. The courts have given greater certainty as to what constitutes a 'reasonable time' in a number of cases. The courts have held that three (3) months was a reasonable period of time within which to render an express decision.[34]With

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29 Section 33(1) and 33(2)(b) of the Constitution.

30 Section 33(2) of the Constitution.

31 *Ibid*, section 33.

32 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1(CC) para 32.

33 The term, 'decision' is defined extensively in section 1 of the Promotion of Administrative Justice Act of 2000. Administrative action/decision, refers to a decision made by an administrator. A bureaucratic decision, made by a public servant exercising executive authority, or by a tribunal.

34 *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Division and Another* SELD Case No: 2127/00. Three months was considered to be a reasonable time for the MEC to make a decision regarding an application for a disability grant in terms of the Social Assistance Act. *Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases* 2005 (6) SA 229 (SE) deal with four cases where the applicants applied for disability grants in terms of the Social Assistance Act. The applicants

specific reference to DHA, *Ruyobeza & Another v Minister of Home Affairs & Others,*[35] three months was considered to be an unreasonable delay, in the absence of an explanation, for taking a decision.

The DHA has always had the obligation to provide written reasons for adverse decisions. However, from our experience we note that DHA never provides written reasons. Such reasons should be provided also in cases where the Department refuses to allow a person to lodge an application, and not only when an application is rejected.

5.2.5.2 Obligations of the DHA

There is an obligation on the Department of Home Affairs as an organ of state to adopt and implement administrative justice measures in their functioning. In that premise, a three-pronged approach is recommended in 'The PAJA Mainstreaming Guide for Organs of State'.[36] PAJA must be integrated into the procedures undertaken (i) before the decision is made, (ii) at the making of the decision and (iii) after the decision is made.

We recommend that DHA must actualize their constitutional and statuary obligation to ensure administrative justice by adopting the PAJA Mainstreaming Guide for Organs of State,[37] in the following manner:

- Considerations <u>before</u> the decision is made:
    a. Decision must be based on an empowering statutory provision;
    b. The relevant administrator is permitted in law to make that decision or to delegate its authority.
    c. Notice must be sent to the person informing them of an impending adverse decision, and the reasons therefore;
    d. The person must be given a reasonable opportunity to present further information.
- Consideration when <u>making a decision:</u>

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all received stamped receipts. The parties were told that the applications would take 3 months to process and complete. After the three-month period ended, each of the parties inquired with the department to no avail. The applicants then contacted attorneys who put the department on terms. The same 3 month period is further iterated in other cases against state organs.

[35] 2003(1) SA 619(C).

[36] Department of Justice and Constitutional Development, 'The PAJA Mainstreaming Guide for Organs of State' available at https://www.justice.gov.za/paja/docs/2015-PAJA-MainstreamingGuideA4.pdf (accessed on 24 January 2024).

[37] Department of Justice and Constitutional Development, 'The PAJA Mainstreaming Guide for Organs of State' available at https://www.justice.gov.za/paja/docs/2015-PAJA-MainstreamingGuideA4.pdf (accessed on 24 January 2024).

e. When the adverse decision is taken, written reasons must be provided, in a language understood by the applicant.

- After the decision is made:

f. The applicant must be informed of the decision;

g. The applicant must be informed of their right to have the decision appealed and if necessary judicially reviewed.

5.2.6 Birth registration for children born to non-South African citizens and/or refugee or asylum seeker

Section 2 of the BDRA applies to every child born alive in South Africa. It further applies to a child whether outside of the Republic, *"including person who are not South African citizens…"* read with regulation 8 of the Act, provides for the birth registration process of a child born to parents who are non-South African citizens. Birth registration does not necessarily confer nationality upon the child, but constitute an important link between the individual and State, and thereby serves to prevent statelessness. In practice, a child whose parents are non-nationals is issued with an unabridged birth certificate (handwritten) which records the birth in the Republic but not included in the National Population Registry. This unabridged birth certificate does not have the official identity number linking the child to a nationality. In 2017, however, one of the recommendations of Colloquium on Unaccompanied and Separated Migrant Children (USMC) on the handwritten birth certificates was:

- Birth certificates for foreign children should be computer-generated, and create database[38]

In addition to the above, when the CCL attended the Regional Child Rights Conference 2023 in Botswana[39], which was attended by all the SADC countries, one of the recommendations that was made by the neighbouring countries was for the computerized system of the unabridged birth certificates. The reason for this was that it would make thing easier for them to assist with the birth registration through the embassy and also for the country to keep a clear

[38] Department of Social Development and Home Affairs "Recommendation of Colloquium on Unaccompanied and Separated Migrant Children" which took place on 17-19 October 2017 ay Holiday INN – Boksburg.

[39] The Conference took place from 26 November 2023 – 1 December 2023, and the goal was to reflect and discuss the progress made in promoting all rights for all children and appreciate existing challenges and gaps to inform the regional child rights advocacy agenda.

database of children who are born in South Africa whose parents are non-nationals so as to avoid challenges in children remaining undocumented.

It was further recommended that there should be a capacity building between the Home Affairs departments in SADC to further come up with solution and implementation strategies. This can be read together with the recommendations of the African Committee of Experts on the Rights and Welfare of the Child in terms of General Comment 6 which provides that for the universality of birth registration of "every child"[40]. This is a position which the CCL supports particularly patterning to our submissions in this White Paper.

5.2.6.1 The Department's views on asylum seekers and citizenship

In so far as asylum seekers are concerned, the CCL notes with great concern the view of the Department at paragraph 50 of the White Paper where it states that[41]:

> *"A disturbing trend has emerged in South Africa which asylum is regarded as a permanent solution and an easy path to citizenship"*

Section 2 Refugees Act of 1998, read with regulation 7 of the BDRA provides for the process of birth registration for children born to refugee or asylum seeker. As such the view of the Department that as highlighted above, is simply not true as the process is not easy at all and submissions to be made by other sister organisations such as Lawyers for Human Rights who are experts in Refugee law will elaborate more on this. The CCL however, wishes to note that there are cases where some children who are refugees whether born in the Republic or not, have been abandoned by or separated from their parents. It thus begs the questions as to whether the Department is still of the view that there are no other alternatives available to such children in acquiring citizenship through are means such as section 31(2)(b) application[42], is there no exception in these circumstances. We leave this to the Department to consider.

The African Committee of Experts on the ACRWC in General Comment no.2 on Article 6 is of the view that:

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[40] See para 50, 64, 65 and 66 of the General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child. At para 65 the Committee "observes that children in undocumented status are very vulnerable for at least two reasons. On the one hand, their parents or caregivers are likely to remain hidden due to fear of being arrested if the administrative authority discovers their irregular migration status. On the other hand, they run the risk of being registered under forged identity details by their parents or caregivers". The Committees holds that "universal birth registration under Article 6(2) of the African Children's Charter also means that children in undocumented migration status must be registered without discrimination…"

[41] See the White Paper (2023) at page 37.

[42] The section 31(2)(b) application is discussed later in the submissions.

> "[R]egistration of birth of refugee children, children born to IDPs, internally displaced children or children who have been separated from their parents or guardians due to persecution or armed conflict, and children born to asylum seeker is one such special measure. As refugees, IDPs and asylum seekers have been forced to leave their homes, often in a rush, they may have left behind most of their belongings and personal identification documents, or the documents may have been destroyed in the process. The Committee is of the view that denying the right to birth registration to children belonging to that category is an act of discrimination against those children and constitutes a violation of their right to non-discrimination embodied in Article 3 of the African Children's Charter and in other international human rights instruments".

When such view is held by the Department we simply remind you of the above so as to not violate the rights of children in so far as birth registration is concerned

We recommend that there should be a child rights consistent approach which begins with the legislation, followed by a child friendly system in place and officials who are sensitized to work with children to avoid subjecting children to discrimination. We further recommend that the Department speeds the process towards a digital system of birth certificate for children born to non-South African nationals so as to allow access in case of loss or damage to the physical copy.

5.3 Unaccompanied and separated migrant children (USMC)

Unaccompanied migrant children are children who arrive in South Africa alone and have been separated from both their parents or legal guardian and any adult relatives. Whereas separated migrant children are children who arrive in South Africa in the company of an adult relative but has been separated from their parents or legal guardian. Once in the Republic these children are vulnerable and might be at risk of possible exploitation. The means of getting into the Republic differs from child to child. However, the Children's Act 38 of 2005 (as amended) provides that all children in South Africa whether documented or not must be assisted like any other child in the Republic. This is made evident by section 150 (1) (j)[43] of the Act as amended which provides that a child is in need of care and protection if the child "is an unaccompanied migrant from another country".

[43] Section 150(1) (j) of the Children's Amendment Act 17 of 2022.

The Department of Social Development (DSD) plays a very critical role in the assessment of and statutory intervention relating to USMC in terms of the Children's Act. Once a case of an USMC has been reported such a child will either be removed without a court order if the child is in immediate danger in terms of section 152 of the Children's Act. The removal may also be with a court order in terms of section 151 of the Children's Act if the child is not in immediate danger and can remain where they are until the investigation takes place. The Children's Court will determine whether the child is in need of care and protection and will provide an order for the child's placement.[44] However, the order granted does not confer immigration status.

There are existing Guidelines which outlines the roles and responsibilities of every stakeholders, including DHA on how to assist USMC.[45] One of those responsibilities is the one relating to documentation options. It is evident from research[46] that most of the USMC are undocumented and do not have official papers to be in the country, and this is due to different circumstances that brought them to the country. In 2017 the recommendation of the Colloquium on Unaccompanied and Separated Migrant Children hosted by DHA and DSD, and additional to the recommendation to assist USMC with the birth registration was that:

- DHA should design a special dispensation for children who have no option for nationality (stateless and not born in South Africa) in terms of section 31(2)(b) of the Immigration Act.
- The Minister of Home Affairs to consider delegating power to the DG to decide on immigration applications for USMC to prevent bottle necks. Also consider relaxed conditions for USMC applying for status such as waiving of fees and medical aid requirements
- DIRCO to facilitate the determination of citizenship of USMC with other countries.

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[44] The orders to be made are section 156 order for when a child is in need of care and protection, section 157 order aimed at securing stability in the child's life, section 158 order which is a placement of the child at a child and youth care centre.

[45] Department of Social Development "Guidelines on Unaccompanied and Separated Migrant Children (USMC) in South Africa and South African Children in Distress in other countries".

[46] See Scalabrini "Basic Assessment Guide for Social Workers working with children on the move" available at https://www.scalabrini.org.za/wp-content/uploads/2023/07/Scalabrini-briefer_Basic-assessment-guide-for-social-workers_WEB.pdf; Tal Schreier 2011 "Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in the Western Cape: Lessons Learned at the University of Cape Town Refugee Rights Unit" available at https://www.jstor.org/stable/48648633; van de Burg "Legal Protection of undocumented foreign migrant children in South Africa: Reality or myth?" available at https://www.saflii.org/za/journals/LDD/2006/12.pdf

It must be noted that one of the other options is of the USMC to submit an asylum claim if they meet the requirement of section 3(a) and (b) of the Refugees Act.[47] The child must thus as per the mandate be referred to DSD for a Children's Court enquiry and be issued with an asylum seeker visa with the assistance of DSD social worker or any other person/informant appointed by the Court. However, it must be noted that USMC are facing barriers when trying to apply for asylum without a parent.

Orphaned Refugee minor child: DVN

Devine is one of the many children who find themselves migrating to other countries due to unforeseen circumstances beyond one's control. In this situation Devine's mother fled her home country the Democratic Republic of Congo (DRC), taking Divine with to South Africa in fear of their lives. Unfortunately, her mother died after a short illness at a hospital to which she was repatriated back to DRC for burial purposes. However, there are document to confirm this information. Devine thus, remains orphaned in South Africa alone. She has no identity document and her wish is to remain in South Africa and continue studying which may not be fulfilled until her stay is legal and she is fully documented.

The DRC embassy was approached by the social workers to assist the child; however, they did not assist. They insist on the child going to DRC to get a birth certificate and passport before they can intervene. This is all impossible as Devine's mother fled with her to South Africa from DRC fearing for their lives. She is an orphan, who cannot make an application for citizenship or a birth certificate as she was not born in the Republic. She, however, has an option to make an alternative application for a section 31(2)(b) which is the last and only available option. This will enable her to further her studies and have her stay and status in the country regularized and avoid ending up stateless.

[47] Section 3 provides that: Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

(a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or

USMC do not qualify for citizenship or refugee status and often repatriation or reunification may not be possible or in their best interests. In this regard, they are left with the final option of applying for section 31(2)(b) of the Immigration Act. Although the Immigration Act is restrictive and caters mostly to children who qualify to claim immigration status as dependent under a dependent. We are of the view that a provision must be made for USMC who at risk of statelessness and cannot be reunified with parents or linked with any nationality. Most of the children meet the requirements as stipulated in the Immigration Act 13 of 2002 and currently there is no other provision in the Act that might favour USMC than section 31(2)(b) of the Immigration Act.

We are of the view that the proposal by the Department to overhaul the immigration system will have a negative impact on USMC who are already vulnerable and have most of their human rights violated. Article 8 of the CRC provides that[48]:

> (1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
> (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Consequently, the Department is aware that there is a proposed Inter-Departmental Protocol on the Multi-disciplinary Management of unaccompanied and separated migrant children in South Africa which similar to the DSD Guidelines highlight the roles and responsibilities of stakeholders including DHA. The purpose of this Inter-departmental Protocol is to clarify and standardize the roles of different stakeholders and how they can collaborate in order to effectively care and protect USMC.

Although this protocol is still awaiting approval for implementation, we strongly recommend that the Department considers what the changing of legislation will do to the rights of these vulnerable children. We therefore recommend the Department to refer to the Guidelines and the Inter-departmental Protocol as a guide in managing and dealing with USMC without possibly depriving them of their right to citizenship and other rights in terms of both national and international law.

[48] See Art 18.1 and 2 of the United Convention on the Rights of the Child, 1989.

5.4 Asylum seeking and refugee children

We acknowledge the Department's concern that some of the decisions made by RSDOs, SCRA and RAA are often set aside on the basis that the persons who are part of the panel are not well versed with international refugee laws or have any legal background. The Department proposes that one of the chairpersons for the panel should be "either a serving judges or retired judges or Senior Council as chairpersons of the appeal bodies".[49] However, the White Paper seem to fall short on the process to be undertaken before one can be appointed, is it the Minister who makes the appointment or who? We further, remind the Department that some of the affected majority are children.

Therefore, the CCL recommends that as part of the panel, there should also be a legal practitioner who has a great background knowledge of child law and human rights. This will ensure that underscore the Department's duty to prevent and resolve statelessness faced by children. We further recommend that children should be involved and heard in the processes as clearly provides in section 28(1)(h) of the Constitution and section 10 of the Children's Act that fosters child participation.[50] This is the a similar position which that Committee holds in General Comment 6, regarding child participation and that in terms of Article 4 (2) of the ACRWC, a child who is capable of communicating their views must be afforded the opportunity to do so during judicial and administrative proceedings where issues relating to name, nationality or identity are at stake.[51] This is thus in line with born national and international principle on the children's rights to participate in order to ensure that outcomes of matters that affect them is truly aligned to what is in best interests of the child.

5.5 Access to education

Undocumented children, who consist of South African nationals, migrant, asylum-seeking and refugee children, continue to face barriers to accessing basic education in South African schools. This includes children without birth certificates, passports or permits. This fact is made evident by the previous Admission Policy for Ordinary Public Schools,[52] which prevented undocumented children from attending and accessing basic education unless they could

[49] See para 122.3 of the DHA White Paper (2023) at page 76.
[50] See section 28(1)(h) of the Constitution and section 10 of the Children's Act.
[51] See para 21 of General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child at page 11.
[52] National Education Policy Act 27 of 1996, Admission Policy for Ordinary Public Schools.

produce proof of valid legal documentation. For South African nationals, a birth certificate was required, for non-nationals a study permit is required. As a result, any children without documentation in the form of birth certificates or study permits would be conditionally admitted into an ordinary public school for three months, if they failed to procure the required documents, they were excluded.

The Department seem to suggest that like other countries who made reservation to both the 1951 Convention and 1976 Protocol, the right to education should be restricted and/or impose conditions of "asylum seekers and refugees". So as to as to say that this right cannot be extended to asylum seekers and refugees as South Africa like other countries "does not have the resource" to provide education.[53]

The above view of the Department is simply a contradiction of South Africa's obligation in so far as the right to education is concerned. This exclusion is a violation of the right to basic education as codified in section 29(1) of the Constitution of the Republic of South Africa, which states that *"everyone has the right to (a) basic education".*[54] It is also a violation of numerous international human rights treaties[55]. The Centre for Child Law and other civil society organisations undertook litigation to challenge the unfair and unjust discrimination that undocumented children faced and continue to face due to a lack of documentation:

***Centre for Child Law, The School Governing Body of Phakamisa High School and 37 Children v Minister of Basic Education and 4 Others* 2020 (3) SA 141 (*Phakamisa case*)**

The Eastern Cape High Court heard a case on the unqualified, unconditional and immediate right to basic education for all children. It was on 12 December 2019 when the judgement was delivered, which reaffirmed every child's right to basic education, irrespective of the child's birth registration status or nationality in accordance with section 29 of the *Constitution*. The Court stated that "the right to education extends to *everyone* within the boundaries of South Africa; the nationality or immigration status is immaterial".

The Court then directed the Eastern Cape Department of Education and the Minister of DHA "to admit all children not in possession of an official birth certificate into public school" and that "where a learner cannot provide a birth certificate the Principal of the relevant school is directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, caregiver or guardian of the wherein the learner is fully identified".

[53] See the DHA White Paper (2023) para 32.10 at page 32.
[54] Section 29(1) (a) of the Constitution of the Republic of South Africa, 1996.
[55] These includes the Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, International Convention on Economic, Social and Cultural Rights (ICESR) CESCR General Comment No.13: The Right to Education (Article 13).

As a result, the Ministry of Education is "interdicted and restrained from, in any manner whatsoever, removing or excluding from schools, children, including illegal foreign children, already admitted purely by reason of the fact that the children have no identity document number, permit or passport, or have not produced any identification documents". In responding to the effect that denying access to education might cause to children, the Court stated that:

> "Disadvantaged children end up without hope of being able torrid themselves of poverty or being allowed to participate meaningfully in the societies of which they are a part; they are denuded of their self-esteem and self-worth, and the potential for human fulfilment. Due to being idle, some of the children end up involved in criminal activity and thus become menace to the social fabric"

The Court further noted that [27] "it is an undeniable fact that the children […] are disadvantaged by their lack of documentation and emanate from the vulnerable, poor black community. If one adds to this fact that this differentiation is based on attributes that have the potential to impair human dignity, the inescapable conclusion is that […] the right to equality as discriminating between children on the basis of their documentation status"

The above confirms that undocumented learners must not be denied access to schools because of a lack of documentation or status in the country. The Department of Education has therefore issued *Circular* 1 of 2020 *Undocumented Learners*[56] which provides that in the view of the judgment that *Circular* 1 of 2016 be withdrawn with immediate effect as it was unconstitutional to the extent that it informed the schools that DBE will not fund schools where children without identity numbers are admitted to those schools. This position deterred schools from admitting undocumented children as no resource allocation would be made to accommodate undocumented learners. The Court further found that the DBE acted unconstitutionally by refusing children the opportunity to receive an education based on a lack of documentation The Admission Policy for Ordinary Public Schools provides in paragraphs 23 and 24 for the admission of undocumented learners in ordinary public schools and that the DHA must assist the schools thereof to ensure that children are issued with the legal documentation.

The CCL, however, notes that even in 2023 some children are still denied access to school due to a lack of documentation which demonstrates the silo approach between the two departments that is DBE and DHA. The CCL continues to assist children who are undocumented to be admitted to schools.

The argument made by the Department that South Africa does not have the resources, which the Department of Basic Education relied on and that Department seems to allude to in the White Paper was dismissed by the Court. This is also made evident at the fact that there is a budget allocation by Treasury to schools, however, the said budget is not been used for its intended purpose and ends up being returned back to Treasury at the end of financial year.

[56] After the judgement, the DBE issued Circular 1 of 2020 in response to the judgement. Circular 1 of 2020 partially altered the Admission Policy as it relates to documentation directs public schools in South Africa to accept alternative forms of identification in the form of the child's clinic card, an affidavit by a parent or caregiver where a birth certificate, passport or permit is not available; See Circular No. 1: Admission of Learners to Public Schools available at https://scalabrini.org.za/wp-content/uploads/2020/11/Department-of-education-circular-1-of-2020 undocumented-learners.pdf

We wish to remind the Department that the withdrawal from the Convention or the exclusion not only has impact on the children that are assumed to be "refugees and asylum seekers" but also impact the many South African children with no documentation. The majority of undocumented children attending public schools are South African citizens and these citizens stand to also be excluded from education with the approach being proposed by the Department in this White Paper.

Furthermore, despite the *Phakamisa* judgment and Circular 1 of 2020, there are still concerning challenges as undocumented children are still denied access to basic education and schools are not receiving funding for admitted undocumented learners, with DBE citing that the details of undocumented learners cannot be captured on the South African Schools Administration Management System ('SA-SAMS') as the SA-SAMS system requires an identity number for each learner to be processed therein. However, an alternative mode of registering undocumented learners onto the SA-SAMS system is to provide their birth date in the sequence 080307, signalling that the child's date of birth is 07 March 2008.

CCL continues to monitor the implementation of this judgement and to pursue individual cases referred to us by parents and/or caregivers, school principals and social workers. CCL takes on these individual cases to ensure that no child without documentation, is excluded and discriminated from access to basic education.

5.5.1 Data collection

The data regarding the number of undocumented learners in the country and those admitted into schools is not made readily available or is non-existent and where it available it is inaccurate.[57] The only data providing the number of undocumented learners in schools emanates from National Assembly engagement or court proceedings.[58] The Minister of Basic Education noted in his official response that there are approximately 11, 9 million (11, 905, 509) learners admitted in schools who are recorded on the Learner Unit Record Information and Tracking System ('LURITS'). Approximately 10, 87 million (10, 873,891) of those learners

[57] Joint Submissions to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the review of the information received from South Africa on follow-up to the concluding observation on the initial report, 14 May 2021 available at https://ci.uct.ac.za/media/435471#:~:text=In%202019%20the%20government%20reported,from%20the%20Eastern%20Cape%20province.

[58] The data from DHA in their replying affidavit to Children's Institute in the case of *PP Mazibuko & 2 Others v Minister of Home Affairs & Another* – High Court, Case No. 14238/21 shows that in 2022 there were 1.1 million undocumented learners.

recorded on the LURITS system have South African birth certificates reflecting a South African ID number that is verified by the Department of Home Affairs. The remaining 465, 826 learners' documents do not have ID numbers.[59] This data is confusing because it is not disaggregated, it thus remains unclear whether these 465, 826 learners are those learners with other forms of documentation in the form of passports and study permits, or whether it includes children with ID numbers that have not been verified by the Department of Home Affairs. There is a need to engage in research to ensure a continuous data stream of information regarding the number of undocumented children in South African schools.

The collection of data would be a welcome and highly helpful tool to curb xenophobic sentiments against undocumented children, the vast majority of whom are South African citizens to ensure that they are afforded the same rights as all children.

We recommend the following:

- That the DBE ensure implementation of the *Phakamisa* judgement and ensure that all schools in South Africa are made aware of this judgement and its subsequent Circular 1 of 2020 which prohibits exclusion of learners based on lack of documentation;
- That the Department together with DBE and other relevant departments, devise a strategic and collaborative approach to ensure that children are not denied access to education due to a lack of documentation and support is afforded to families thereof to register their children and be issued with valid legal documentation.
- That DHA recommends to DBE that proper data must be stored in the school system to be able to determine the number of undocumented learners and assist with documentation.

We further caution the DHA or/and DBE from using education to 'police' migration. Education is an important right that develops and improves the lives of children, so that they may be able to support their families and their future children.

6 Conclusion

"South Africa belongs to all who live in it."- Preamble to the Constitution of South Africa.

[59] Question NW2731 to the Minister of Basic Education, 21 December 2021, in response to Mr AC Roos's question, available at https://pmg.org.za/committee-question/17458/.

The previous dispensation, apartheid, sought to divide people along racial lines and to distinguish between people who are born from different parents, promoting exclusion. The Constitution marks a stark divergence from that approach, steering us toward inclusion. We should follow its guidance if we intend to progress from our past.

Children are not responsible for, nor have they chosen, the place where they are born, where they spend their childhood, whether they are documented, which nationality they are entitled to. It was held in the recent case of *P.P.M and Others v Minister of Home Affairs and Others* that:[60]

> A child's status as citizen, refugee, permanent resident, or illegal foreigner is tied to its parents' status. Since the South African approach regarding attaining citizenship or permanent residence connects the child's status to that of at least one of its parents, it is unavoidable that a child cared for by a single parent whose ID is blocked will inevitably be prejudicially affected by the blocking of that parent's ID. In addition, a child whose birth is not registered in terms of the Births and Deaths Registration Act because there is uncertainty as to whether a birth certificate with an identity number must be issued or a certificate without an identity number because the child's parents sojourn temporarily in the Republic, may face almost insurmountable obstacles if such child, when attaining majority, wants to apply for citizenship in terms of section 4(3) of the South African Citizenship Act

The laws which seek to give them documents, record their identity, and ensure they acquire a nationality in the place where they are home, are children's best chance at a better life than they have been given. The Department should be the custodian of those laws, not the executioner. Therefore, a regression on Constitutional, treaty laws as well as binding precedents from the Constitution Court is disheartening and a sad indictment for the rights of children in South Africa

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[60] *PP Mazibuko & 2 Others v Minister of Home Affairs & Another* – High Court, Case No. 14238/21 available at https://drive.google.com/file/d/14CTYRxdnru0Jy7uaVAAOsS7HEYA04yr8/view.