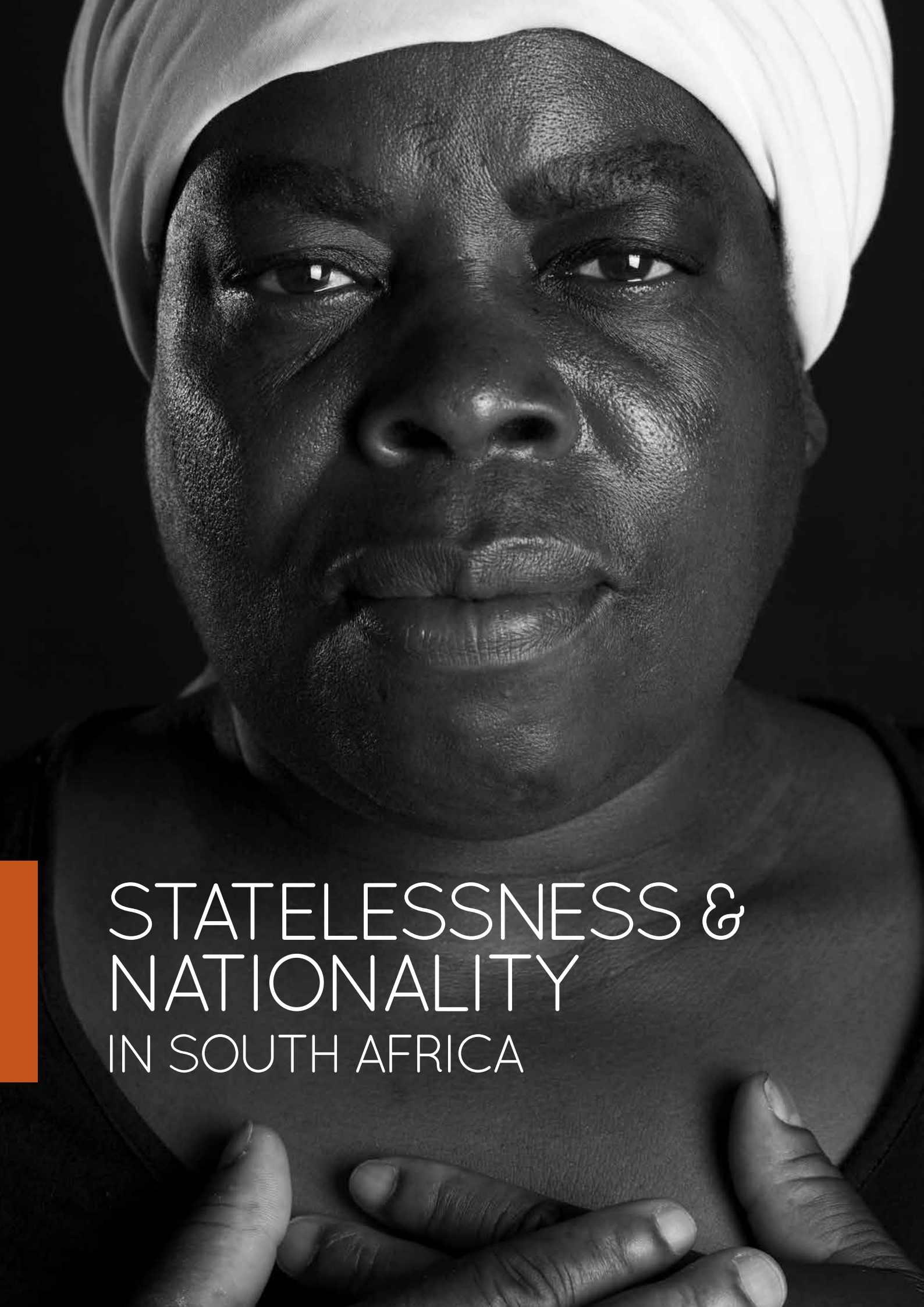

STATELESSNESS & NATIONALITY
IN SOUTH AFRICA

LAWYERS FOR HUMAN RIGHTS

Lawyers for Human Rights is a national non-profit organisation with its head office in Pretoria, South Africa. LHR's principle aims and objectives are to promote, uphold, foster, strengthen and enforce all human rights in South Africa.

One of LHR's specialised human rights programmes is the Refugee and Migrants Rights Programme which operates out of Johannesburg, Pretoria, Musina and Durban. Through this programme, LHR provides direct legal assistance and also supports and engages in litigation on behalf of refugees, asylum seekers and other migrants.

In 2011, LHR launched the Statelessness Project as part of the Refugee and Migrants Rights Programme with support from the United Nations High Commissioner for Refugees (UNHCR). The Statelessness Project has been operating out of Musina which is near the Zimbabwean border and in Pretoria. Community outreach has been conducted in and around Johannesburg and in the farming regions of the Western Cape. Client referrals have also been fielded from LHR and partner organisations in Johannesburg, Durban and Cape Town.

UNHCR
The UN
Refugee Agency

Through a series of resolutions beginning in 1994, the United Nations General Assembly gave the UNHCR the mandate to work with governments to prevent statelessness from occurring, to resolve cases that do occur and to protect the rights of stateless people around the world.

Since March 2011, UNHCR has been funding LHR's statelessness work.

Acknowledgments

This report was written by LHR's Jessica P. George and Rosalind Elphick with important inputs from Kaajal Ramjathan-Keogh and Jacob van Garderen.

LHR extends its sincere gratitude to the UNHCR for its long-standing support of LHR's work in the asylum sector and for supporting LHR's work on the prevention and reduction of statelessness. Photography in this report was taken and edited by Daniel Boshoff, a freelance photographer based in Cape Town.

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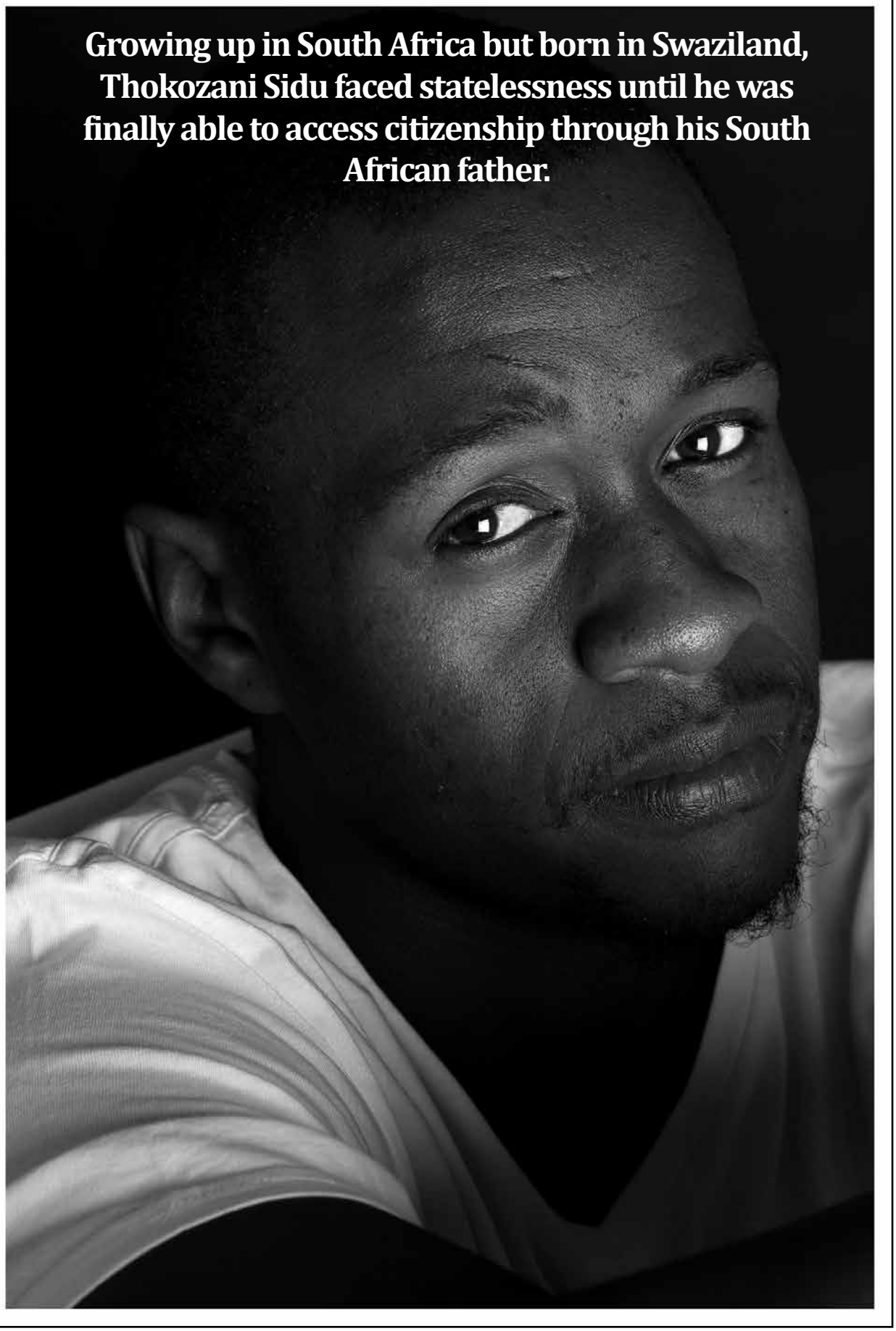
Acronyms

BDRA	Births and Deaths Registration Act 51 of 1992
LHR	Lawyers for Human Rights
LRB	'Late registration of birth' (as per the Births and Deaths Registration Act 51 of 1992)
MDC	Movement for Democratic Change
PAJA	Promotion of Administrative Justice Act 3 of 2000
RSA	Republic of South Africa
SAC	South African citizen (as per the South African Citizenship Act 88 of 1995)
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
ZANU-PF	Zimbabwe African National Union – Patriotic Front



Growing up in South Africa but born in Swaziland, Thokozani Sidu faced statelessness until he was finally able to access citizenship through his South African father.

see page 26

1.
Introduction

> ***"It was like I didn't have life...***
>
> ***If you don't have that citizenship it's like you're nothing to this country. Only the negative will be seen. To everyone around me I was nothing but a foreigner.***
>
> ***I was a nobody ... I really felt I was worthless, to a point where, even if I lose my life, it will be worth it because I was hardly recognised as a human being."***
>
> ***Now that I have citizenship, it's like I've regained life ...***
> ***I can do so many things. Now I am seen and I can do something. Now I can show my abilities to the world."***
>
> Thokozani Sidu, who used to be stateless

A stateless person is someone who is not considered a national by any state under the operation of its laws. This is the definition found at Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons. According to UNHCR estimates, more than 12-million people worldwide suffer from the invisibility and red tape that accompanies life as a stateless person. They face endless and continuous violations of their fundamental rights because human rights are often unenforceable without nationality.

People who are stateless suffer barriers to education, inability to work legally, inability to move freely between and within states, inability to vote or run for political office and a lack of access to social services. It can be impossible for successive generations to escape the cycle of poverty due to the inability to acquire nationality. Statelessness also increases societal tensions and contributes to conflict, population displacement and migration.

Although the issue of statelessness has been recognised by the international community for decades, it remains a human rights challenge that has not been given the attention it deserves. Perhaps this is because the issue cuts to the heart of what makes a nation – its nationals – and has always been surrounded with political, ethnic and cultural controversy.

The refugee movements and state succession in Europe after World War II that led to the adoption of the 1951 Convention relating to the Status of Refugees ("Refugees Convention") also sparked international debate on how to deal with the issue of statelessness. The 1954 Convention relating to the Status of Stateless Persons was originally intended to be a draft protocol to the Refugees Convention but instead was later finalised into a separate treaty. The 1961 Convention on the Reduction of Statelessness followed, although neither treaty has been widely signed or ratified.

Since the UNHCR took on the mandate of statelessness in the 1990s, it has worked to encourage states to sign and ratify statelessness treaties and to domesticate its provisions. In 2011, the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, the UNHCR escalated its efforts to call attention to the issue. A UNHCR ministerial level conference in December 2011 highlighted the plight of stateless people. By the end of 2011, eight more countries acceded to at least one of the conventions and more than 30 national governments, including South Africa, made pledges to accede in the near future.

In the African context, discriminatory citizenship laws created during colonisation combined with economic migration have led to a scramble for power in the post-colonial era and in many instances, a continuation of exclusionary citizenship laws intended to protect the perceived original occupants of the area.[1] This has had a negative impact on many migrant labourers and their descendents who effectively have found themselves without a nationality. As countries continue to develop and access to wealth and social services become ever more dependent on administrative systems and documentation, statelessness in Africa only increases as those on the fringes of society are left outside the citizenry circle. Furthermore, the global economic recession has in many countries resulted in the tightening of borders, xenophobia and restricted access to citizenship, in efforts to protect nations' limited resources.

In South Africa, which had the highest number of new asylum-seekers in the world in 2008, stateless migrants are inevitably present. What is surprising is that many people born on South African territory are also unable to access nationality in any nation.

While South Africa has not yet signed or ratified the two conventions on statelessness, numerous legal instruments protect the right to nationality generally. The Constitution protects the right of each child to a name and nationality from birth as well as the right not to be deprived of one's nationality.[2] The South African Citizenship Act 88 of 1995 provides citizenship by birth to children born on the territory who have no other nationality or no right to another nationality. South Africa has signed and ratified a number of international instruments that protect the right to nationality, namely: the Universal Declaration on Human Rights; 1957 Convention on the Nationality of Married Women; 1965 Convention on the Elimination of all Forms of Racial Discrimination; 1989 Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.

Significantly, in December 2011 South Africa confirmed its commitment to protect the right to nationality by pledging to sign and ratify the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.[3] This is a promising step forward and indicates growing recognition of the right to a nationality and the problem of statelessness. Hopefully signature and ratification will soon follow in 2013.

This report is intended to reveal and draw attention to the plight of stateless persons in South Africa. Section 2 provides a brief background on the definition of "stateless person". Section 3 outlines some overarching causes of statelessness around the African continent. Section 4 describes the main populations of concern identified in South Africa, explaining why they are struggling to access nationality and including the personal stories of a number of stateless persons.

1 Manby, B. (2010). *Citizenship Law in Africa: A Comparative Study*, p.8. New York, Open Society Institute.

2 Sections 28 and 20, respectively.

3 The Deputy Minister, Ms Fatima Chohan, delivered this pledge at the United Nations High Commissioner for Refugees Ministerial Intergovernmental Event on Refugees and Stateless Persons in Geneva. See http://www.unhcr.org/commemorations/Pledges2011-preview-compilation-analysis.pdf.

see page 27

"Nationality is to belong somewhere. For me, I can't identify myself. I don't belong anywhere."

A.S. was born in a refugee camp in Tanzania to Burundian refugees.
Yet he is not recognised as a citizen of Burundi nor of Tanzania.

Section 5 explains the numerous human rights challenges facing stateless persons in South Africa, ranging from lack of documentation, to inability to work to repeated arrest and prolonged detention.

Section 6 briefly outlines the legal obligations and strategies to protect the right to nationality for some of the country's most vulnerable people. Finally the report concludes in Section 7 with recommendations for law reform and policy change to prevent statelessness and promote access to nationality in the South African context.

Lawyers for Human Rights' Statelessness Project: 2011-2013

LHR, in collaboration with the UNHCR, launched the Statelessness Project in March 2011 to promote access to nationality. The goals of the project are to provide direct legal services to stateless persons; to engage government on the need for legal reform to prevent and reduce statelessness; to raise awareness of stateless people and their rights; and to advocate for the ratification of the 1954 and 1961 UN conventions on statelessness.

The project was first contemplated in 2010 when LHR experienced numerous Zimbabwean-born migrants approaching its offices distressed about their nationality. The Department of Home Affairs had extended a special dispensation offering work, study or business permits to Zimbabweans already in the Republic illegally or on asylum permits. Many Zimbabwean-born migrants approached their consulate to apply for a passport so that they could access the dispensation but when presenting their long birth certificates, they were told by consular officials that they are no longer Zimbabwean citizens due to an amendment to Zimbabwe's Citizenship Act in 2001.

Since the project's inception, LHR has reached more than 2 000 persons from over 20 countries of origin. LHR has identified numerous categories of stateless persons in the Republic, both migrants as well as those born in the country.

From 2011 to 2013, the project has provided direct legal services in Johannesburg, Pretoria and Musina and has fielded referrals from Durban and Cape Town. Outreach was conducted on farms in northern Limpopo and the Western Cape, as well as in communities living in and around Johannesburg. Referrals from other organisations as well as direct inquiries from the website provided wide reach for the project.

2.
Unravelling the Statelessness Phenomenon: Who is a Stateless Person?

A common refrain when people first hear about statelessness is: "How is it possible that a person could have NO nationality?"

> ***"Statelessness is a reality for some and a possibility for all."***
>
> -Dr Benyam Dawit Mezmur[3]

People unfamiliar with this field tend to perceive statelessness as a very isolated, infrequent and far-fetched event, like being struck by lightning. It is hard for many people to imagine what set of circumstances could occur to result in a person being stateless and unable to access nationality in any country.

Despite this, statelessness is a reality for over 12-million people around the world, including in South Africa.[5]

Sadly, statelessness is often treated with doubt, suspicion and defensiveness by people who are in a position to prevent and reduce it – government leaders, officials and representatives. Many insist that it is not a problem for people from their country. Further, in the African context, statelessness is often confused with a lack of belonging. Doubts as to whether statelessness can exist in Africa are thus usually centred around notions of the large African family and the importance of roots. How can an African be stateless if she, as all Africans, comes from an identifiable town/village and has an extended family or a chief who can vouch for her? A stateless person may well have an established family and home life and may feel a real sense of belonging in their place of origin. But nationality is not a matter of how much a person feels that he belongs in or comes from any particular place. The crux of the matter is whether or not he is recognised by the State as a national.

For advocates of the stateless, one of the challenges in enforcing the rights of stateless persons is the uncertainty around an international definition of whom or what a "stateless person" is. It is impossible to protect stateless people and provide a path to citizenship if states do not agree on who qualifies as stateless.

4 Research Fellow and Lecturer at University of the Western Cape, Vice Chairperson (2nd) and Member of the African Committee of Experts on the Rights and Welfare of the Child of the African Union

5 United Nations High Commissioner for Refugees, http://www.unhcr.org/pages/49c3646c155.html.w

The 1954 Convention on the Status of Stateless Persons provides the most definitive and widely accepted definition of stateless person in international law at Article 1(1):

A person not recognised as a national by any State under the operation of its laws.

The Convention does not permit reservations to this article; further, according to the International Law Commission, Article 1(1) is part of customary international law.[6]

Historically, disagreement existed as to whether the "operation of law" included state practice or merely the letter of the law. Until recently, it was unclear how to classify persons who met legal requirements for nationality but could not access nationality due to problems such as a lack of evidence or discrimination in the implementation of laws.

Recent (UNHCR) Guidelines on Statelessness No. 1, released in February of 2012, provide clarity on the issue. The guidelines state that "not recognised as a national by any State under the operation of its laws" should include "not just legislation but also ministerial decrees, regulations, orders, judicial case law [in countries with a tradition of precedent] and, where appropriate, customary practice".[7]

Guideline No. 1 goes on to state that the convention's definition of "stateless" requires analysis of how a state applies its nationality laws in an individual's case. Thus, the term "stateless" covers people who may be citizens under the law of a particular country but who are not recognised as such by the State in question, for whatever reason. In practice, this could include a person who qualifies under the law but has been denied recognition due to insufficient proof of citizenship. Also, the guidelines clarify that the Article 1(1) definition includes cases where "the written law is substantially modified when it comes to its implementation in practice". Thus "stateless" can include cases where the state implements its laws in a manner which discriminates against a particular group, leading to the exclusion of this group despite the fact that it qualifies for nationality under the applicable citizenship law.

Also significant is that under Guideline No. 1, a person who has been denied access to nationality even by even a "low level" official of a competent authority qualifies under the Convention as a stateless person. He or she need not first appeal such a decision in order to qualify for protection.[8]

An important point to mention is the distinction between a stateless person and an undocumented person. Someone who is 'undocumented' in the sense that he or she does not hold any form of government-issued identity document (birth certificate, ID or passport) may be at risk of statelessness, particularly if he or she is a migrant. But such person will not be considered stateless until he or she attempts to access nationality and is declined by a competent authority (generally, a home affairs or similar office, or a foreign mission).

6 *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 (hereinafter, "Guidelines No. 1")

7 Guidelines No. 1, section 15.

8 "The mere possibility that the decision of such official can later be overridden by a senior official does not in itself exclude the former from being treated as a competent authority for the purposes of an Article 1(1) analysis."

3.
Statelessness in Africa: An Overview

A variety of forces have resulted in statelessness across the African continent. Some statelessness is merely circumstantial, in the sense that it was not necessarily the result of ill will towards the stateless person but rather a series of unfortunate events that led to no state recognising him/her as a national. Examples would be a person falling through the cracks of various countries' citizenship laws such that one does not qualify as a citizen in any country; losing proof of nationality while migrating; and being orphaned as a child outside one's country of origin.

Citizenship laws in most African countries are based on two concepts: *jus soli,* where citizenship is granted to anyone born on the territory (law of the soil), or *jus sanguinis*, where citizenship is granted to anyone whose parents are, or were, citizens (law of the blood). Most countries also allow spouses of citizens as well as long-term residents to apply for citizenship through naturalisation procedures.[9]

Jus soli and *jus sanguinis* citizenship law inevitably clash and create gaps whereby people become stateless. The simplest example is the case where a person is born in a country that only allows children of citizens to access citizenship, but his or her parents' country does not allow them to pass nationality to a child born abroad. A number of countries, including Lesotho and Malawi, do not allow citizens born abroad to pass nationality to their children, leaving the second generation born abroad stateless if they cannot access citizenship in the country of birth.

Other causes of statelessness originate in a human intention to exclude certain groups from the citizenry of a country. Examples include racial, ethnic and religious discrimination in citizenship law; gender discrimination that limits women's ability to pass nationality to their children; the targeted deprivation of political opponents' citizenship; and expulsion of persons who are no longer welcome as citizens.

Illustrative examples include Liberia and Sierra Leone, founded by freed slaves, which only allow those of "negro descent" to be citizens from birth. Liberia goes so far as to prohibit those who are not of "negro descent" from even naturalising as citizens.[10]

At independence, many countries discriminated against women, limiting their right to pass nationality to their children if the father was not also a citizen, or to pass citizenship to foreign spouses. Much discrimination continues today. For example, children born outside Libya may only obtain citizenship of the country if the father is Libyan. The same is true of Somalia regardless of birthplace.[11]

As for deprivation of citizenship for political reasons, a famous example is the case of Kenneth Kuanda, president of Zambia from 1964 to 1991. In 1999 the High Court declared that he was not a citizen of the state that he had governed for 27 years – a move that was "the culmination of a process of manipulation of citizenship law blatantly aimed precisely at excluding the country's elder statesman from holding office again".[12]

Ethiopia expelled untold numbers of individuals and families of ethnic Eritrean origin during and following the border war with Eritrea from 1998 to 2000. Such persons were expelled en masse as enemy aliens by truck or bus to the border with Eritrea. Their Ethiopian documents were destroyed and confiscated and property rights cancelled.[13]

Thus one can begin to see the complex set of scenarios that have contributed to the creation of statelessness in Africa. The next section will explore a sampling of specific groups of concern identified in South Africa, but is by no means exhaustive of all stateless persons on the territory.

9 Manby, B. (2010). *Citizenship Law in Africa: A Comparative Study,* p. 2. New York, Open Society Institute.

10 Ibid. p. 3.

11 Ibid. p. 5.

12 Manby, B. (2009) *Struggles for Citizenship in Africa,* p. 127 New York, Open Society Institute.

13 Ibid. p. 100

4.
Populations of Concern in South Africa - By Country of Birth

LHR has identified a variety of populations of concern in South Africa, who are either stateless or at risk of becoming stateless. They are grouped below primarily by country of birth.

Multiple Countries: Orphans and Vulnerable Children

Orphans, abandoned children and unaccompanied foreign minors (who come to South Africa from many different countries of origin) are at high risk of statelessness. Many come to South Africa with parents or relatives who later disappear from the situation through death, neglect or abandonment. Others come alone and never return to their home country. Most often they do not have a birth certificate, the primary enabling document towards nationality.

Without guardians and documents to prove their origin, they often grow up to be stateless in South Africa with no immigration status or path to naturalisation. Yet they cannot be deported due to an inability to prove their claims to nationality in their countries of origin.

Children of South African citizens who are orphaned or abandoned and who do not enter the child protection regime are also at risk of statelessness, even though they may have never left the country. A qualified adult must assist them to register; be it a parent, guardian or social worker. Some of these children fall victim to profiteers who claim them as their own children at Home Affairs in order to access social grants. A "colour-coded baby" practice has been reported to LHR by social workers who work in rural areas – a practice whereby multiple family or community members register the same child under different names in order to access a child care grant. Through no fault of their own, the children grow up and find their IDs blocked due to suspected fraud. It is extremely difficult to extricate oneself from such a situation and the result is denial of the right to nationality and all the rights that flow from it.

Children with one South African parent and one foreign parent, whose birth is not registered before the citizen parent's death, face near insurmountable barriers in accessing their birth right to South African citizenship. LHR is assisting in several cases, where blood samples are required from the deceased parent's relatives in order to prove the child's citizenship through DNA testing. DNA testing is an expensive procedure that is out of reach of many would-be South African citizens.

According to United Nations Children's Fund (UNICEF), there are 3.7-million orphaned children in South Africa.[14] Over 2 000 children are abandoned yearly in South Africa, according to Child Welfare.[15]

14 See http://www.unicef.org/southafrica/protection_6633.html

15 See http://www.timeslive.co.za/local/article528163.ece/More-than-2-000-kids-abandoned-annually

No statistics exist regarding numbers of unaccompanied children from other countries but estimates by LHR's partner organisations place the number of children living in both registered and unregistered child and youth care centres in Pretoria alone at 700. Not all of these orphans, abandoned and unaccompanied children are or will become stateless – but statelessness is inevitably a risk due to their situation.

These vulnerable children constitute a shadow population and an untapped resource. Having grown up in South Africa, they have a strong identification with the country and culture. Yet without legal assimilation, they are also hindered from integrating socially. This frustrates nation building and exacerbates xenophobia and division. It also presents a planning and security concern for the state. Without documenting unaccompanied minors, the population register and immigration statistics do not accurately reflect all persons on the territory. The lack of possibilities for the regularisation of foreign unaccompanied minors leads to clandestine residency, poverty and crime for young people undergoing integration.

Case study

LM was born in Ethiopia and came to South Africa at the age of two with her parents. Her parents applied for asylum but within a year she was taken from their care due to extreme neglect. Her parents then abandoned her and left the Republic. She entered court ordered foster care and her asylum application fell away because she was considered a dependent of her parents who left. However, no immigration status was given to her as part of the children's court proceeding. Having grown up in South Africa, she does not speak her parents' language, does not have a birth certificate and has no family or home to return to. Her birth country's embassy has not responded to requests to assist.

LHR made an application to the Minister on her behalf asking that she be granted an exemption for permanent residence.

Multiple Countries: South African Citizens Born Abroad

The Births and Deaths Registration Act requires a "birth certificate or other similar document" from a government body in the country of birth in order for a South African citizen born abroad to register his or her birth in the Republic and access an ID.[17]

In many cases, LHR has been approached by South Africans born abroad who are struggling to meet this requirement due to low rates of birth registration in other African nations. The cases are complicated by death of one or both parents. Yet even when one parent or other relatives are present and able to testify as to the birth details and citizenship status of the individual, local Home Affairs offices and also head office decline to be flexible on this requirement.Given the low rates of birth registration in other African countries, other forms of proof should be accepted in this regard.

Case study

"I hope to get citizenship and to go back to school, to become engaged in the community activities.

I bring worry to my family because they think of my well-being and vulnerability to arrest. They may expect me to get educated and assist but I cannot do this. I hope to eventually assist and provide for my family.

I fear arrest because I am undocumented.

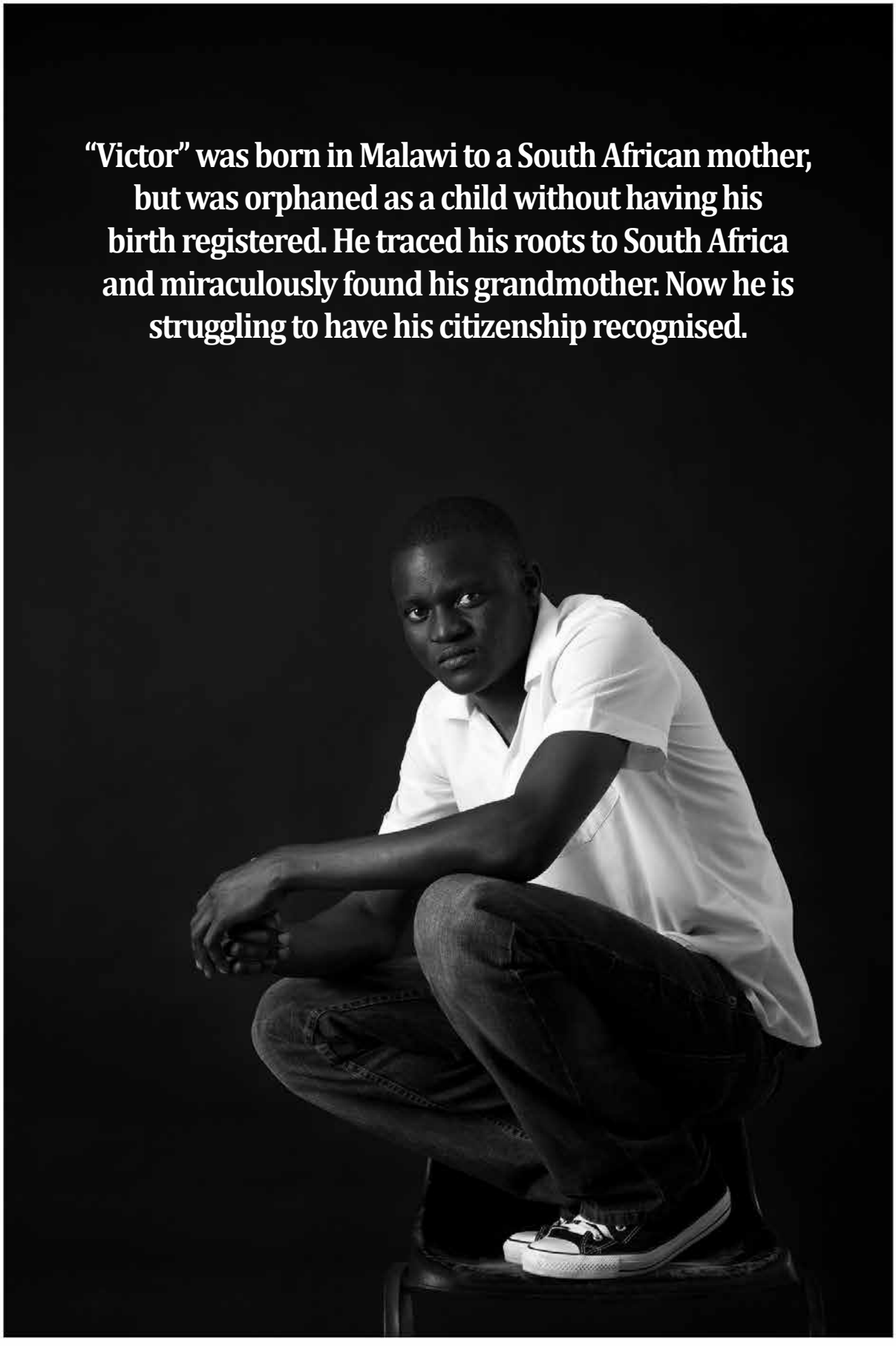
I am not free..."

Y.V.C. ("Victor"[11]) was born in Malawi in 1989 to a South African mother and Malawian father. While he was still a child, both his parents passed away. Victor was then raised by an informal 'uncle' who told him of his South African roots. After his uncle died, Victor came to South Africa in search of his remaining family. Remarkably, he was able to trace his grandmother. However, he was told at Home Affairs that he could not register as South African without a birth certificate from Malawi, which he did not have. Malawi only recently enacted legislation to make birth registration compulsory under the law.

Having travelled to South Africa without a passport, Victor was arrested and detained for the purposes of deportation on the charge of being an illegal foreigner. LHR intervened and was able to assist Victor in proving his maternal connection with his South African grandmother using a blood test. LHR hopes to assist Victor in accessing late birth registration in South Africa.

16 Name changed to protect identity.

17 Regulation to the Births and Deaths Registration Act 51 of 1992.


"Victor" was born in Malawi to a South African mother, but was orphaned as a child without having his birth registered. He traced his roots to South Africa and miraculously found his grandmother. Now he is struggling to have his citizenship recognised.

L.G. ("Lily") was born in South Africa to a citizen father and undocumented foreign mother. Home Affairs refused birth registration, requesting that the mother first produce an ID document. LHR is assisting the father to obtain a paternity order from children's court so that he may register the child under his name.

see page 76

Case study

L.T. was born in Zimbabwe to parents with mixed Malawian and Zimbabwean heritage. Around 2003 he attempted to get an ID and was told that since his father was from Malawi, he was not considered a citizen. He was also told that since he did not have a rural home in Zimbabwe, he could not be Zimbabwean. Only foreigners were "from the cities".

He could only get an Alien ID and was unable to get a passport. He was shocked, as he had lived in Zimbabwe for his entire life and had never been to Malawi. He went to the Malawian Embassy but was told he could not access Malawian citizenship because he missed the deadline established by law: he was over age 22. Those born outside Malawi must claim citizenship by age 22 or it is lost as a matter of law.

Unable to get a passport from Zimbabwe or Malawi, L.T. proceeded to South Africa where he applied for asylum. However, his claim was rejected. In 2010, he tried to take advantage of the Home Affairs special dispensation for Zimbabweans to obtain work permits but could not get a passport from the Zimbabwean Consulate, where he was again told that he is not a citizen. LHR made an application to the Minister on his behalf, which was also rejected.

The Minister stated that the Department was not convinced that he was stateless because he held a Zimbabwean ID. This was in spite of the fact that his ID from Zimbabwe specifically identifies him as an "alien". LHR is appealing this decision in the North Gauteng High Court in Pretoria, arguing that the applicant should have been granted an opportunity to appear in person and address arguments against his claim.

Zimbabwe

Dual citizenship has been prohibited in Zimbabwe since 1984 but was not strictly enforced. In 2001, the citizenship law was amended to require anyone with a claim to foreign citizenship to renounce that citizenship and reapply for Zimbabwean citizenship by registration within a six-month period.[18] Those who failed to comply lost their citizenship by operation of law in January 2002 – and their right to vote. The ruling Zanu-PF enacted this measure prior to the 2002 general elections. The opposition party, the Movement for Democratic Change (MDC), is reportedly seen by Zanu-PF to obtain support from people of foreign descent in Zimbabwe who largely inhabit urban areas.

It is estimated that between 100 000 and 200 000 African migrants and their children born in Zimbabwe were stripped of their citizenship by this amendment, which was advertised only in Harare and only to the white European population.[19] Restoration is permitted but is a discretionary application. It is further complicated by the renunciation requirement and difficulty of applicants to comply with the "administrative procedures". The new Constitution, in draft form at the time of this publication, may assist this population depending on what rights are afforded to persons born to parents originally from other nations.

18 Zimbabwean Citizen Amendment Act of 2001.

19 See http://www.fmreview.org/FMRpdfs/FMR32/73.pdf

Case study

> ***"Citizenship means having rights.***
>
> ***I am not safe because I don't have papers ... I know that if I talk too much I will have problems because I don't have papers, so even when things happen to me which I know are not right ... I'm quiet."***

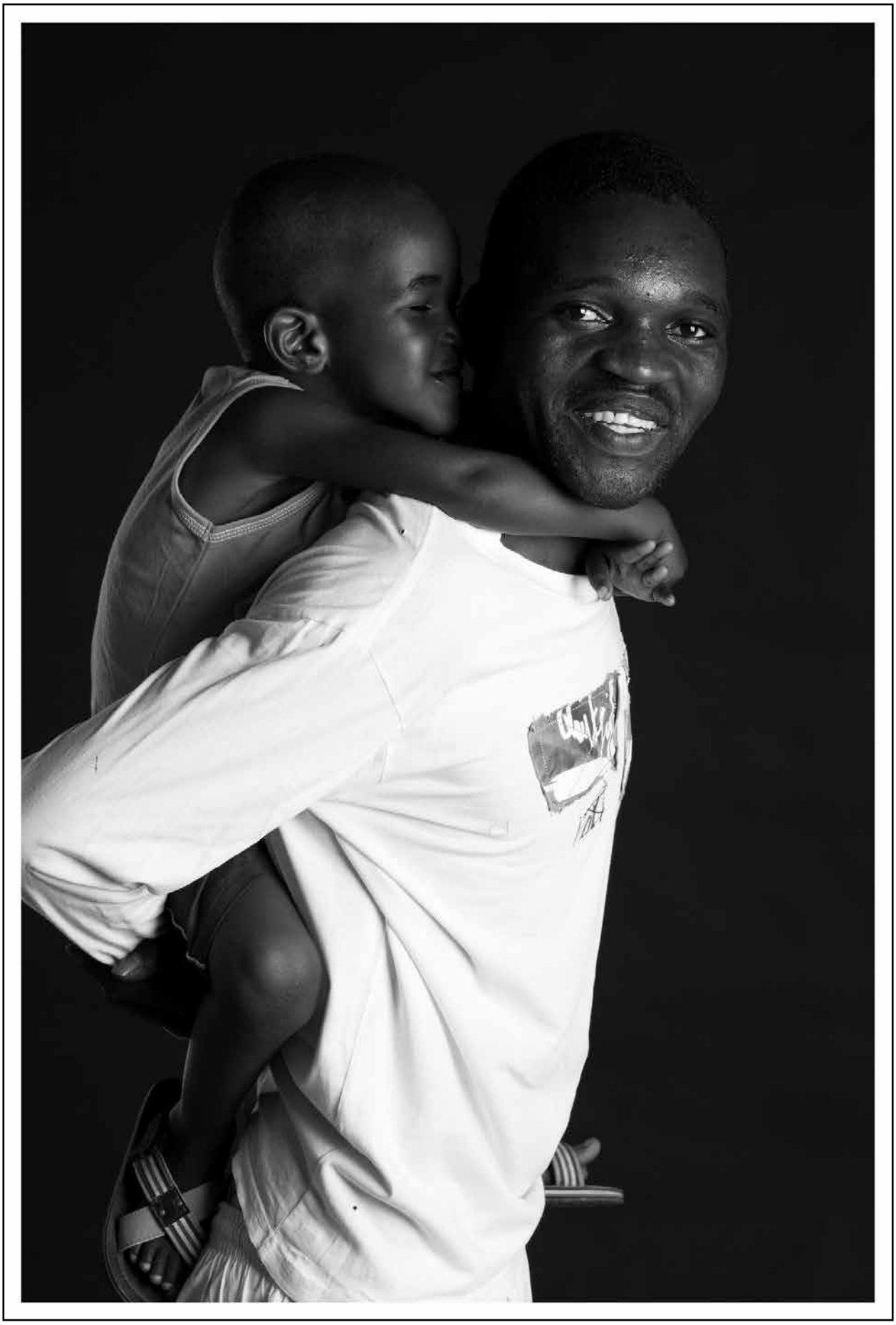
J.S. migrated from Zimbabwe to South Africa with his mother when he was around 10 years old. Due to not having a birth certificate, J.S. was unable to enrol in school in South Africa. As a teenager, his mother abandoned him. J.S. survived through the kindness of friends and eventually learned how to weld. He never knew his father.

> ***"My dream is to have a document so that I can vote.***
>
> ***I want the government to see me and to recognise my problem and to listen."***

Around 2008, J.S. returned to Zimbabwe to try to obtain documentation. However, no record of his birth or identity could be traced. He was further told by government officials that due to his mother having been Malawian, his father being unknown, combined with lack of any relatives and his long absence from Zimbabwe, J.S. would not qualify for Zimbabwean citizenship. Home Affairs in South Africa also turned him away and instructed him to get help from Zimbabwean authorities. J.S. does not qualify for citizenship in Malawi either, given that J.S. has no documentation to show that his mother was Malawian and he is over the legal age limit to apply.

J.S. remains undocumented in South Africa, although he has lived here for nearly twenty years. He is married and has two children, but he cannot register his marriage or his children's births due to his lack of documentation.

> ***"Me, now I'm old, but now I'm looking to the dreams of my child. I want them to have a future."***



▲

J.S. was born in Zimbabwe to a Malawian mother and was abandoned in South Africa as a child. He is not recognised as a citizen in any of the three countries. Now he fears for the future of his children, who are also undocumented.

Ethiopia/Eritrea

Many Ethiopians of Eritrean descent lost their Ethiopian citizenship as a matter of law during and following the succession of Eritrea. Those who voted in the referendum on Eritrean succession were automatically considered non-nationals by Ethiopia, which expelled many ethnic Eritreans to Eritrea without any type of procedural due process.

Those who left during or after the war and later approached a consulate abroad are often turned away, particularly if they do not have Ethiopian IDs or passports. A later law provided that any Ethiopian with a foreign parent who did not declare their option to retain Ethiopian nationality at age of majority automatically lost it as a matter of law. This impacted many ethnic Eritreans born in Ethiopia who are now abroad, including in South Africa.

Case study

M.A. was born in a small town on the border between Ethiopia and Eritrea. When she was 12 years old, Ethiopia expelled her mother, who was ethnic Eritrean, to Eritrea during the conflict between the countries. Shortly thereafter, Eritrean soldiers stormed the town and attacked M.A.'s family store, killing her father and other family members. She survived and was taken to hospital by a cousin who helped her escape Ethiopia.

She eventually entered South Africa where she applied for asylum. Her asylum application was rejected as manifestly unfounded on the grounds that she left her country because there was no one left to take care of her.

LHR is helping her appeal the decision in the High Court. Her claim is based the arbitrary deprivation of her nationality under the law; the likelihood that she would remain stateless if returned to Ethiopia; that she would face persecution as an ethnic Eritrean and former asylum-seeker in Ethiopia and that she would face risk of forced conscription in Eritrea.

Mozambique

Large numbers of Mozambicans came to South Africa as mineworkers or as refugees prior to the 1998 Refugees Act. Many are now undocumented and without immigration status. Prospects for their return to Mozambique are bleak, considering they have no remaining contacts there to stand witness to their origin and often no documents to prove their birthplace. Their children, born in South Africa, are at heightened risk of statelessness because their parents often have no documents allowing their children a path to legal status or citizenship in the country.

The citizenship law also requires children born to Mozambicans abroad to fulfil certain administrative requirements at the age of majority, such as declaring an intention to retain Mozambican citizenship and making a declaration of loyalty – yet it is unclear whether or not these provisions are strictly enforced.

The Mozambican High Commission in Nelspruit has taken on an initiative together with the UNHCR to document former citizens in targeted areas near the border. Applicants need several witnesses from the community to state that they are from Mozambique and they are then registered and given a birth certificate confirming their citizenship. However, at present this initiative reaches a small portion of the population of concern, many of whom live around South Africa and not necessarily near the border.

Swaziland

Swaziland discriminates explicitly against women on passing of nationality in provisions of its recent 2005 Constitution; only male citizens can pass on their nationality to their children without restrictions.

Given the proximity to South Africa and high numbers of mixed marriages/unions, an unknown number inevitably fall through the cracks and grow up stateless in South Africa.

Lesotho

South Africa hosts a large population of undocumented migrants from Lesotho. Many, in fact, have South African parentage but cannot access this right due to their inability to produce a birth certificate from Lesotho (required to register in South Africa). Others are married under customary law to South African citizens but cannot access their right to relatives' permits due to their lack of documentation and inability to register the marriage with Home Affairs (an ID is required).

According to the Constitution of Lesotho, Lesotho citizens born in South Africa cannot pass on their nationality to their children, leaving the second generation born abroad stateless.

▲
Elizabeth Nthunya and her son are both currently stateless, despite having South African fathers.

Case Study

"I was born in Lesotho but I am South African.

That is the only thing I want in my life.

I feel like I'm a mess. There is nothing I can do. I have spent many years sitting at home and doing nothing. When I wanted to write my matric it was a mess – I didn't have an ID. When you go to even computer lessons they still want a document and I felt bad.

There is a lot I want to achieve but I can't because I don't have an ID. In years to come, Neo must go to school but they will want his birth certificate and he doesn't have one."

Elizabeth Nthunya was born in Lesotho in 1982. Her mother was a Lesotho citizen, while her father was South African. When she was three years old, she came to stay with her paternal grandmother in South Africa. Over the years, she struggled to register as South African because she does not have a birth record from Lesotho, which is required in terms of the Births and Deaths Registration Act. Lesotho has very low rates of birth registration. Home Affairs told her to go back to Lesotho and find her mother. Eventually, she returned to Lesotho for her mother's funeral. She discovered that the clinic where she was born does not have records prior to 1985. She returned to South Africa but Home Affairs still refuses to assist her. Her father and grandmother have since passed away, but she has five South African aunts and uncles willing to testify to her identity.

Elizabeth has a son born in South Africa to a South African father, but Home Affairs will not allow them to register the child's birth because Elizabeth does not have an ID. Thus her son is also unable to access his South African citizenship, even though his father has a valid South African ID document.

Elizabeth's case illustrates the generational impact that lack of documentation has on the right to nationality. Such strict requirements – for a foreign birth certificate and for the mother's ID document – result in complete block to citizenship for Elizabeth and her son, with consequences on their economic mobility, right to work and education, and their physical and emotional health.

Case Study

> ***"I couldn't get a job. I couldn't get education. It's like I had no access to anything. If I had to start my own small business, I couldn't open an account. Even if I went to hospital it was like I was nothing because I had no ID.***
>
> ***I was totally sidelined in everything that belongs to a South African.***
>
> ***In the families we have, it's like sometimes you're invading their space because now that they know you don't have anything, they think 'he's going to be around for a while because he has nowhere else to go.' It's hard for them to keep understanding your situation."***

Thokozani Sidu was born in Swaziland in 1989 to a Swazi mother and South African father. As a child he was sent to South Africa to stay with his paternal grandmother. When he turned 18 and wanted to write matric, he realised he would need an ID but his father did not have an ID or birth certificate, so Thokozani struggled to register as South African. He was further told that he would need a birth certificate from Swaziland in order to register his foreign birth. He went back to Swaziland to obtain a birth certificate, which was given to him, but Swazi authorities told him he had been outside the country for too long to qualify for citizenship.

Even after Thokozani got a birth certificate from Swaziland and his father obtained an ID, officials doubted Thokozani's South African citizenship due to the fact that his father only registered as a South African in 2011. He was told he must bring in his father's "dom pass" - a document used in the apartheid era that his father did not have. LHR was eventually able to assist Thokozani in getting his ID and citizenship through correspondence with Home Affairs.

> ***"Now that I have an ID, I wish to further my studies in law. So if I happen to achieve that goal, I will take it with both hands and fight to be that somebody. I would love to be a positive citizen in the law field and help people who were sidelined like me. I would love to help people."***

Tanzania/Kenya

Tanzania and Kenya, respectively, have hosted large populations of refugees from Burundi, Rwanda, Ethiopia and Somalia in the past several decades. There are untold numbers of refugees of a second and third generation who were born in camps in these and other host countries. LHR has received several clients who were born in refugee camps in Tanzania and Kenya and who were later orphaned. They became stateless due to an inability to qualify for the nationality of their country of birth but also because they could not access their parents' nationality once they enter a third country (South Africa). This issue is exacerbated by problems of deceased parents, an inability to speak the language and/or a lack of documentation.

Case study

A.S. was born in a refugee camp in Tanzania. His mother was also born in Tanzania as a child of the 1972 Burundian refugees. He never knew his father, who reportedly was of mixed Rwandan-DRC origin.

When he was 10 years old, A.S.'s mother passed away. He stayed in the camp with a neighbouring family for a year, but they were soon resettled to Australia. He then decided to leave with some other young people when the camps in Tanzania were closing. He headed to Mozambique where he cooked in a restaurant. When the man he was helping passed away, he decided to come to South Africa at the age of 15.

He walked from Maputo to Durban and made his way to Pretoria, where he applied for asylum. However, he lied about his age on his permit because minors could not apply without a guardian.

In trying to access nationality, A.S. has since been interviewed by the Burundian Embassy, which cannot accept him for repatriation because he cannot prove his nationality.

He realised he had a problem with nationality only when he came to South Africa because, he says, "People asked me 'where are you from?' But I try to avoid that question. For me, I can't identify myself. I don't belong anywhere. People will call me a liar, if I say I am from Burundi, but I am not Tanzanian either. I don't know what to call myself."

LHR is making an exemption application to the Minister on his behalf, requesting that he be permitted to stay as a permanent resident, which would allow him a path to nationality.

> ***"I wish I could get nationality or citizenship. A place where I belong, so I could go to school, get work and look after myself.***
>
> ***As long as I can belong in some place, to feel that me, I'm a person like others. I can't say that I'm like others now."***

Democratic Republic of Congo

Given the refugee flows and political crises in the eastern part of the DRC, there are some people who are attacked and targeted specifically because they have a Rwandan sounding name or have married a Rwandan. Many such people are refugees, but they also face challenges with statelessness given a law that required that one belong to an ethnic group present in DRC prior to 1970 in order to qualify as a citizen.

Somalia

The current citizenship act in Somalia contains discrimination against women in their ability to pass on nationality to their children. Only men are able to pass on nationality. Thus, a child whose father passes away or does not acknowledge paternity would not be formally recognised as a Somali national even if the Somali government were capable of acknowledging and processing claims to nationality and issuing identity documents.[20]

Somali migrants generally receive refugee status in South Africa. This is a result of Section 3(b) of the Refugees Act, which provides: "A person qualifies for refugee status … if that person, owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part of 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 elsewhere…"

While the Refugees Act provides temporary protection, if the situation in Somalia changes and its nationality laws were enforced as they stand, many children of Somali descent in South Africa may be stateless as a result of the inability of women to pass on their nationality to their children.

South Africa

Victims of ID Theft and Duplicate IDs

Duplicate IDs occur when one person has more than one ID number assigned to them or when more than one person shares an ID number. They are largely a result of corruption, fraud and administrative mistakes. According to Home Affairs, nearly 700 000 people have been affected. The Department acknowledges that corruption has played a role.

Persons unable to meet Department requirements often have their IDs blocked without being given any reason or option to appeal the decision.

People with blocked IDs are provided a small piece of paper listing the following required documents to submit in order to confirm their South African citizenship: "A handwritten birth certificate, baptismal certificate, primary school letter, clinic card (immunisation card), birth record from the hospital, parents' identity documents, death certificates and letter from the chief."

Local offices exercise discretion concerning the amount and type of evidence that is accepted as proof of one's claim. Some people are turned away repeatedly and asked for more proof despite providing all required documents, while others are told they cannot be helped unless they produce a specific document that they cannot access.

20 LHR has seen refugees with a Somali passport, namely those who work for the transitional government.

Case study

A.M. was born in the Eastern Cape in the 1980s. He never had a birth certificate. He obtained his first ID when he voted in the 1994 election. At that time, birth certificates were not required to obtain an ID.

In 2010, while trying to register his second son's birth at Home Affairs A.M. was told that his ID was blocked. He was not given reasons for the blockage. He was given a list of documents to bring in to confirm his citizenship.

He travelled back to the Eastern Cape to obtain the primary school and chief letter and was met with disdain by local villagers, who could not understand why someone who was living in the big city would need such documents. When he returned to Home Affairs, these documents were still not enough. He was told he must produce an affidavit from his father, whom he had never met. His grandmother who raised him had passed away and never obtained formal guardianship.

A.M. had never left South Africa and had no foreign ties, yet it took him over three years to unblock his ID and regain his South African citizenship.

"To me, nationality means that sense of belongingness and also where you are accepted as part of the community, part of the nation.

Where you feel embraced as a human being, where you enjoy your rights as a person."

-JS, a South African whose ID was blocked due to suspected fraud

Case Study

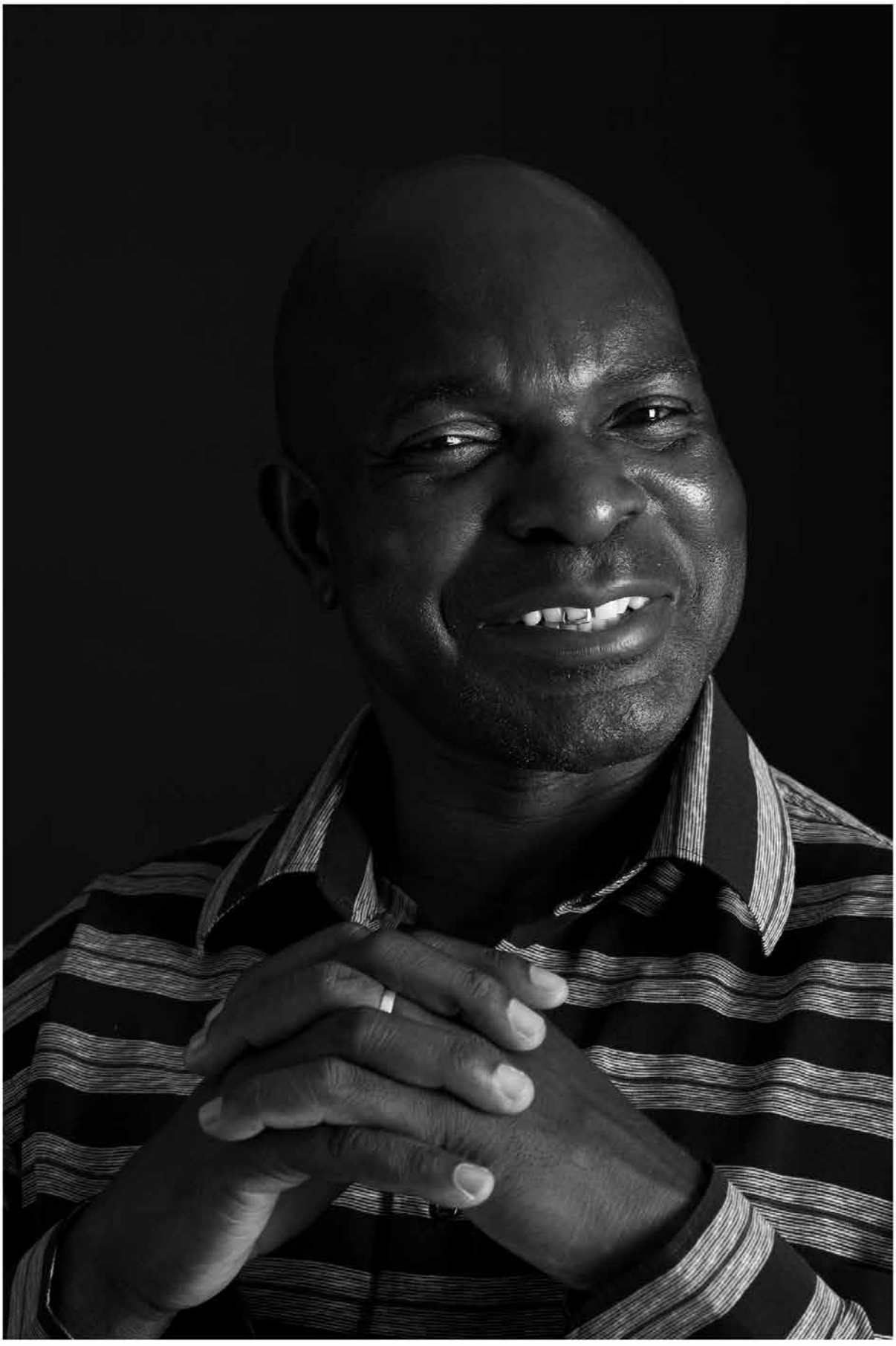
> ***"I felt that sense of rejection, hopelessness. I felt so unworthy in life. I was no longer accepted as a human being...***
>
> ***It was the most depressing situation I have faced in my lifetime.***
>
> ***I was in a situation of non-existence."***

J.S. was born on a farm near Skeerpoort, South Africa. J.S.'s mother was South African. His father was a Zimbabwean who came to work on the mines and later the farms. When he was 15, the family moved to Zimbabwe. J.S. returned to South Africa as an adult.

In 2012, J.S. applied to renew his South African passport but he was told that his ID was blocked. He was not given reasons for the blockage of his ID. Often this occurs if an ID has been duplicated or fraud is suspected. He was told to either apply for permanent residence or go back to Zimbabwe. But years ago he had turned in his Zimbabwean passport to that country, where dual nationality is prohibited. J.S. needed his passport in order to go to Zimbabwe to pay his children's school fees and to take them to school after the holiday. Further, his works as a driver requires a valid passport in order to make cross-border deliveries.

After contacting Home Affairs and providing evidence, Lawyers for Human Rights was successful in getting his ID unblocked.

> ***"On my own, I don't think I would have succeeded. I was already threatened with deportation. I frequented Home Affairs offices and they sent me from pillar to post. They didn't give me the slightest chance to explain my situation. It appeared to me that there was no longer any light at the end of the tunnel.***
>
> ***I was so happy to get my status back. There are quite a large number of people who are in the same situation I was faced with, who are in pain. I know of people who committed suicide because of it."***



▲

J.S. was born in Zimbabwe. He gave up his Zimbabwean citizenship when he moved to South Africa as an adult and applied for citizenship through his mother. He has lived in South Africa as a citizen for many years, but was stateless for a period of time when his South African ID was blocked.

Children Born in South Africa to Foreign Parents

Children born in South Africa to undocumented foreign parents are flatly denied birth certificates at Home Affairs and their parents may be threatened with arrest. Draft regulations to the Births and Deaths Registration Act (BDRA) No. 51 of 1992, if passed, will soon require foreign parents to show proof of lawful immigration status and passports in order to register births.

At present, people who Department officials suspect of being unlawfully present in the territory must be "referred" to immigration services. Under the Regulations to the BDRA[21], the Director-General (and his delegates) may issue a birth certificate to non-South Africans "provided that if the Director-General is in doubt about the identity and status of the person concerned, he or she shall refer the matter to the inspectorate to investigate and deal with it in terms of the provisions of the Immigration Act, 2002 (Act No. 13 of 2002)". The peremptory language used herein leaves no room for discretion; the result is that parents who appear at Home Affairs to register a birth of a child may be sent to immigration and arrested if they do not have proper immigration permits. In effect, this serves as a strong deterrent to undocumented parents or parents unlawfully present on the territory from registering the birth of their child.

Without birth certificates, children born in South Africa to foreign parents risk being unable to access their parents' nationality, particularly if the parents pass away. Yet they do not qualify for any provisions of South African citizenship, including section 2(2), which allows citizenship to pass to children born on the territory who are stateless, provided the birth is registered.[22]

LHR has also documented that recognised refugees and asylum-seekers (who often have only refugee permits and asylum-seeker permits as identity documentation) are denied birth certificates for their children. This is in large part due to a lack of awareness and training at local Home Affairs offices, xenophobia and the misperception that a birth certificate entitles a child to South African citizenship.

Where registration of foreign births does take place, there is no routine procedure to register a child who may be stateless under the Citizenship Act's section 2(2) (providing citizenship to persons born on the territory who do not hold any other nationality). However, it is quite possible that many foreign children are in fact born stateless on the territory. Some parents' countries of origin simply do not allow them to pass on their nationality to their children, particularly if they are born abroad. There are various reasons for this. For example, the nationality of a state may only pass to the first generation born abroad, leaving the second generation reliant on accessing nationality in their country of birth. Women may not be able to pass nationality to their child and a father is not always present to ensure the child accesses nationality.

21 Section 6(8) of the Births and Deaths Registration Act.

22 Section 2(2) of the South African Citizenship Act No. 88 of 1995.

Case Study

> ***"It is painful to see my daughter growing full of dreams and developing every day into a more clever person, knowing deep inside she has an uncertain future."***

In reported efforts to discourage emigration of its nationals, Cuba assigns "permanent immigrant status" to any person who departs the country for over 11 months. Couples are not permitted to travel together without fear of losing their right to residence.

For children of Cuban permanent immigrants to obtain citizenship, they must attain residency in Cuba. Yet their parents are only given visas to enter the country for one month at a time.

In the case of Maria[16], the Cuban Embassy in South Africa issued a letter confirming that she is not recognised as a national due to her parents' status. Her parents presented this letter to Home Affairs in an effort to access South African citizenship for the child under Section 2(2) of the Citizenship Act, which provides citizenship for children born on the territory who are stateless. However, the child was still not recognised as South African and the parents were advised to apply for permanent residence since the mother has permanent residence in South Africa.

The parents discovered this problem when the child's grandmother in Cuba was ill. They could not obtain a travel document for their four-year-old daughter to go meet her grandmother because neither Cuba nor South Africa would recognise her.

LHR is investigating the case and corresponding with Home Affairs in order to help the child realise her right to South African citizenship. Home Affairs is of the view that the child should be given permanent residence, not citizenship. This case is illustrative of the challenges that remain in enforcing the right to nationality for stateless children born in South Africa.

> ***"Sometimes as a mother I try to understand.***
>
> ***Wow, my child, the minute she was born she was brought into this nightmare, that is being a "stateless person".***
>
> ***How is it possible a child can be born and at the same time, the most elemental right that any human being is entitled to is denied?***
>
> ***I have been going through diverse feelings: scared for the future of my child, hopeless when no one seemed to be sensitive about her future, though the law states she is entitled to citizenship.***
>
> ***But bureaucracy is blind and careless. The law does not apply itself, but needs to be put into practice.***

▲
Maria* was born in South Africa, but is unable to acquire the nationality of her parents, who are from Cuba. Thus at the tender age of four, she is stateless. The law in South Africa provides for her to be a citizen since she was born in South Africa and has no other nationality. But Home Affairs refuses to register her as South African.

see page 33

Children of "Single" Fathers or Undocumented Mothers

Confusion exists at local Home Affairs' offices with regard to issuance of birth certificates to children whose mothers are unable or unwilling to consent to acknowledgement of paternity, due to death, mental illness, abandonment or lack of documentation.[23]

Two possible scenarios are envisioned in Births and Deaths Registration Act for the registration of a child born out of wedlock[24]: either the single mother presents herself and registers her child alone, in her own name[25] or the mother presents herself and her child, together with the father[26], and registers the child in her surname or the father's surname. Given the nature of section 10(1)(b) of the Act and the notice of birth form, a child may not be registered in the father's surname without the presence of the mother and her signed consent to the father's acknowledgement of paternity, due to purported concerns over trafficking or stealing of children.

LHR has received reports that numerous hospitals (even those connected to Home Affairs' system and able to issue birth certificates on site) and Home Affairs' offices do not allow mothers to sign consent to paternity unless she can provide proof of her identity through some kind of government-issued ID – another challenge for foreign undocumented women. This is particularly challenging where the father is the holder of South African citizenship – in spite of this, the child can remain unregistered due to the absence or lack of documentation of the foreign mother.

LHR has assisted several male clients to register their children in spite of this provision. However, we suspect that if the mother is absent, deceased, undocumented or unwilling to assist, the child's birth often goes unregistered because the father is not permitted to register the child alone. The Children's Act allows a father to approach a magistrate's court for an order confirming his paternity[27] but Home Affairs does not inform fathers that this is possible. DNA testing is often prohibitively expensive and so children of single fathers or undocumented mothers risk going unregistered and without access to nationality.

Case study

Elizabeth Nthunya, described above, who is unable to access citizenship in South Africa nor in Lesotho, is also suffering as she watches her son Neo grow up undocumented. Neo was born in South Africa and his father is a South African citizen with an ID document and ID number. But Home Affairs will not allow Neo's father to register the child without Elizabeth submitting an ID document. Home Affairs has also stated that Neo cannot be South African, because Elizabeth did not have an immigration permit at the time she gave birth. This statement is not supported by any legal provision.

23 "Undocumented" in this context refers to persons without any form of government-issued identification.

24 Section 10(1)(b)

25 Section (1)(a)

26 Section (1)(b)-(c)

27 Section 45(1)(c), read with section 46(1)(k), of the Children's Act (No. 38 of 2005).

Communities in Border Areas

There is a high level of cross-border movement between South Africa and its neighbouring countries. The closer to the border, the more restrictive the local Home Affairs' offices are in access to documentation. Applicants are often assumed to be migrants from neighbouring countries and yet such persons often are unable to access citizenship in either country. Mixed nationality families face particular difficulty in this area.[28]

Children of Farm Workers

Poverty and the relative insularity of farming communities result in low rates of birth registration and documentation, particularly among migrant farm workers. The problem is exacerbated in the farms around international borders (for example near the Musina/Beitbridge border post between South African and Zimbabwe) due to suspicion around migrants attempting to claim birth in South Africa. Children born on the farms struggle to obtain proof of birth and hence citizenship.

In the Western Cape farm region, lack of birth registration combined with high migration from other parts of South Africa result in many adults who have never had an ID despite having never left South Africa. Within this group of concern are also children born to a South African father and foreign mother. This is a result of the presence of seasonal farm workers from countries such as Lesotho and Zimbabwe. Undocumented foreign mothers are hesitant to approach Home Affairs due to their irregular immigration status and lack of IDs and yet the fathers cannot register the children without the mother's consent and mother's proof of identification.

Case study

"My children are always asked for documents ... whenever documents are needed, they fear going to school. My family is financially challenged.

I belong to South Africa. I am Tsonga. But I feel hopeless."

R.C. was born in South Africa in 1975. Her parents were both undocumented South Africans, who are now deceased. R.C. was born at home on a farm near Musina and never had a clinic card or any other proof of her birthplace. As a result, she has struggled her whole life to access birth registration and consequently, South African citizenship. She does not hold any form of identification.

R.C. has five children born in South Africa, ranging from eight to 18 years old. None were born in hospital, but rather were born on the farm where R.C. works, also close to the border with Zimbabwe. Their father is an undocumented Zimbabwean who is now deceased. All five children remain undocumented. Home Affairs will not register the children because R.C. is undocumented.

R.C.'s case illustrates the challenges facing farm workers and their children, particularly in border regions. Lack of documentation is often passed from one generation to the next, limiting social mobility and economic opportunities for entire families.

28 See "Local Government and Migration Management in Border Areas – Challenges and Opportunities for Public Service Provision," by Tara Poltzer, Forced Migration Studies Programme of University of Witwatersrand, June 2007.

▲
R.C. and her five children were all born on farms in South Africa near the border to Zimbabwe. She and her children remain undocumented.

Late Registration of Birth Applicants

Under previous legislation, "late registration of birth" referred to any birth registered after 15 years of age. Under current legislation, it refers to any birth that is registered over 30 days after birth. Late birth registration is an onerous process that takes place at the discretion of local office managers or the officer responsible for late birth registration. It was created in response to high numbers of individuals who were not properly registered during Apartheid. Due to concern that foreigners were fraudulently accessing citizenship through late registration of birth, scrutiny has increased in recent years to the detriment of true citizens.[29]

Although the accepted evidence under the law is quite flexible, in practice an applicant must be in a position to provide the Department with the requirements outlined in Home Affairs' forms.[30] Form 24E requires the ID numbers or permanent residence permit number of the applicant's parents, which is impossible if the parents were undocumented and/or deceased. This is often the case for elderly persons born in the apartheid era. The applicant is also often required to provide documentary proof such as maternity certificates or clinic cards, school records, baptism certificates and the like. Where the applicant cannot meet this burden of proof, he or she is routinely turned away without even submitting the application and without being offered any alternative solution.

The practice of implementing strict documentary evidence requirements is unlawful. The regulations do not limit late birth registration to persons able to produce a certain level of documentary proof of his or her identity or status. In fact, quite the opposite: the regulations require only that applicants produce all "available" documentary proof of his or her status and identity.[31] Provision is made for people who are unable to provide any documentary proof of life: "in the absence of conclusive documentary proof, the Director-General shall ... verify the information by careful questioning."[32] Thus an interview is intended to allow applicants the chance to provide additional evidence and to respond to questions or concerns of the Department.

29 LexisNexis, *Preliminary Note – Forms and Precedents – Citizenship*, F Venter; AF Katz; Julian Pokroy - University of South Africa, September 2009.

30 Form DHA 24E and DHA form 288.

31 Regulation 6(b)(7) of the Regulations to the Births and Deaths Registration Act, as inserted by GN R956 of 1999.

32 Ibid.

Case study

> ***"It is hurting and you don't even like it when people are talking about IDs. You feel shame.***
>
> ***Even when something goes wrong, they say, 'she doesn't even have an ID, what can she do?'***
>
> ***My situation impacted my family ... even the time I wanted to sell vegetables ... goods are cheaper wholesale, but you need an ID. It was hard because we are all dependent on what I am selling and we are living from hand to mouth."***

Mary Chombo Mwale was born in South Africa in 1962. Mary's mother was South African. Her father was from Malawi and became a South African citizen through marriage. At age 16, her family moved to Malawi. Mary later married a Malawian and started a family.

When her husband passed away, Mary decided to move back to South Africa with her four children. She had never had a birth certificate, so she applied for late registration of birth. She was told by Home Affairs officials to "go back to Malawi". She went to four different offices, often bringing as a witness her elderly neighbour who knew her when she grew up as a child in Soweto. But she was repeatedly turned away and told "we do not assist foreigners". Eventually, Home Affairs told Mary that she must renounce Malawian citizenship in order to be recognised as South African – an unlawful request. She duly renounced her citizenship at the Malawian Embassy.

Finding herself stateless, Mary approached LHR. LHR corresponded with the Department of Home Affairs and Mary's application for late registration of birth and a South African ID were processed and approved.

> ***"Now I'm feeling free. I even showed my friends that now 'I'm just like you'. I'm the happiest. I even thank God for hearing my prayers. I can tell other people they must be open. They have problems that they don't want to speak out about. They just become discouraged. But persistence has helped me a lot. It works."***

see page 39

▲

Mary Chombo Mwale, her four children and grandchild all have claims to South African citizenship, but have been thwarted in accessing their right to nationality due to problems with birth registration. She was unlawfully forced to renounce Malawian citizenship by Home Affairs but was not issued South African citizenship until LHR intervened. Her children and grandchild are still struggling to have their claims recognised.

The Scale of the Problem: Estimated Numbers of Stateless Persons in South Africa

Group of Concern	Estimated Numbers
Zimbabwean-born migrants with foreign parentage	100 000-200 000 in Zimbabwe; thousands may have come to South Africa, given the difficulty this group faces in accessing citizenship in Zimbabwe. (http://www.fmreview.org/FMRpdfs/FMR32/73.pdf)
Orphans and vulnerable children	3.7-million orphans; 150 000 children living in child-headed households (http://www.unicef.org/southafrica/protection_6633.html) Over 2 000 children are abandoned yearly in South Africa, according to Child Welfare (http://www.timeslive.co.za/local/article528163.ece/More-than-2-000-kids-abandoned-annually)
Unaccompanied foreign minors	No statistics exist capturing the number of unaccompanied foreign minors in South Africa but many service providers and non-profits can attest to the significance of this population group.
Children of migrants	Again, there are no statistics for this group in South Africa but there are reports of 1.5-million-3-million foreigners in the country so this group is undeniably large.
Children of single fathers	1.3-million maternal orphans exist in South Africa as of 2011 (http://allafrica.com/stories/201106010510.html)
Victims of ID fraud	Nearly 600 000 cases of duplicate IDs were identified by Home Affairs in March 2011. DHA states that 164 000 cases remain "unresolved".
Communities in border areas	Unknown numbers; conservative estimates may be thousands affected in border towns and regions close to Zimbabwe, Mozambique, Swaziland, Lesotho and Botswana, where migration and cross-border communities are common. This report provides detailed accounts of barriers to citizenship in border regions of South Africa: (http://wits.academia.edu/TaraPolzer/Papers/83823/Local_Government_and_Migration_Management_in_Border_Areas_-_Challenges_and_Opportunities_for_Public_Service_Provision)
Stateless migrants	With estimates ranging from 1.5-million to 3-million foreigners in South Africa, and 200 000 asylum-seekers a year, there are surely many stateless migrants in South Africa. However, broader studies are required to gather accurate statistics on this group.

5.
Human Rights Challenges Facing Stateless Persons in South Africa

Legal Gaps and Challenges

Absence of an Identification and Protection System for the Stateless

The most obvious challenge in the context of assisting stateless persons is that South Africa does not formally recognise nor protect stateless persons who do not qualify for refugee status. The Republic has not yet signed or ratified the statelessness treaties despite a recent pledge to do and has no dedicated domestic legislation in place to deal with statelessness. This means that the stateless are confined to a life of invisibility and are often trapped in poverty over generations.

Difficulty Accessing Asylum for Stateless Persons Who are Refugees

Stateless persons may also be refugees. Indeed, the 1951 Convention relating to the Status of Refugees and the South Africa Refugees Act, No. 130 of 1998 recognise this. Both legal instruments provide refugee status to people who are outside their country of nationality or, if stateless, outside their country of habitual residence who have a fear of persecution on the basis of race, religion, nationality or membership of a particular social group or political opinion.

Under the 1951 Refugee Convention, a stateless refugee should receive protection as a refugee, since the arbitrary denial of citizenship due to one's race, religion, nationality, membership of a particular social group or political opinion can indicate persecution. Refugee status provides more benefits than stateless status generally and thus should be the first port of call, particularly in South Africa where there is no parallel scheme requiring the protection of stateless persons.

Yet there remain challenges for access to refugee status for stateless persons. In part, this stems from the limited space in asylum applications to explain issues of statelessness or complex nationality cases. In part, it stems from the applicants' lack of awareness that deprivation of nationality is relevant in the context of refugee status. Applicants themselves are often not aware that they have in fact lost their nationality at all – particularly when it was the result of an amendment to the citizenship law. Thus it is recommended that Home Affairs officials are trained on nationality issues as they relate to refugee claims, so that they can assist clients with protection needs who may not understand how their experience relates to persecutory nationality law and implementation.

Rejection of stateless refugees' applications is also a result of the lack of awareness on behalf of refugee status determination officers (RSDOs), the Standing Committee of Refugee Affairs (SCRA) and the Refugee Appeal Board (RAB) of complex nationality claims and country of origin situations relating to denial of nationality. LHR has seen stateless people approaching its offices in order to change the nationality listed on their asylum permits, for example Palestinians born

in Iraq whose nationality is recorded as "Iraqi" or people of Burundian descent born in Tanzania whose nationality is recorded as "Tanzanian" and who are in fact not recognised as nationals in either country.

There are scores of asylum-seekers in South Africa from Ethiopia, Eritrea and Zimbabwe who have had their nationality arbitrarily withdrawn – in clear violation of international law – as a result of their perceived race or nationality. This includes those of Eritrean ethnicity in Ethiopia who are presumed by Ethiopia to have acquired Eritrean nationality during that state's succession. Some 15 000 Ethiopians expelled to Eritrea are not accepted as Eritrean nationals.[33] Those of foreign descent who were born in or resided in Zimbabwe, but were stripped of their citizenship in 2001 for political reasons, are now required to comply with sometimes insurmountable administrative procedures in order to "register" or "restore" their citizenship.

People who have been denationalised by their country of birth due to a Convention reason, often race, political opinion or impugned (foreign or dual) nationality, may very well qualify under the law for refugee status. The UK and the US have recognised such claims, specifically those involving denationalised Ethiopians of Eritrean ethnicity and denationalised Estonians of Russian ethnicity.[34] Even in these countries applicants have succeeded only by appealing to the higher courts with the assistance of legal representation.

The complexity of these cases requires more attention and education of Home Affairs officials in South Africa, as well as access to affordable legal services for asylum-seekers with such claims.

No Right to Work, Study or Run a Business

Unable to obtain passports from any country, stateless people cannot apply for the right to work, study or run a business in South Africa. Many born outside South Africa opt to apply for refugee status, although they may not concurrently have a valid refugee claim, in order to attain legal status that allows them to remain in the Republic pending their application and also permits them to work or study. The glaring absence of a parallel protection system for the stateless results in an overburdened asylum system that does not protect the stateless, most of whose claims are ultimately rejected as manifestly unfounded.

Those stateless persons who were born in the Republic (to parents who are not refugees) do not have the option of seeking a temporary permit through the asylum system, since a refugee by definition is someone who is outside their country of nationality or habitual residence (or a dependent of such a person). The result is that these stateless simply remain undocumented and unaccounted for by the South African government. They cannot access an immigration permit or ID and so have no practical access to the formal employment system, cannot write the matric exam and are unable to go on to university.

33 International Committee of the Red Cross annual reports for 2005, 2006 and 2007. Those allowed to stay and register for resident permits are not allowed to work nor are they issued exit visas allowing them to leave. In effect, they are aliens (United Kingdom Border Agency, 'Eritrea – Country of Origin Information Report' (2009), para. 30.05-07. Open Society Justice Initiative.

34 See *Stserba v. Holder*, 646 F.3d 968, in the US Court of Appeals for the 6th Circuit and ST Ethiopia [2011] UKUT 00252 (IAC).

Lack of Protection from Arbitrary Arrest and Detention

Because no documentation is available to stateless persons who are not asylum-seekers or refugees, the stateless in South Africa – particularly those born outside the Republic who appear or sound foreign – are subject to repeated arrest and detention as suspected illegal foreigners. Such detention is inherently arbitrary because stateless people most often cannot be deported. Stateless persons may languish in Lindela repatriation centre in excess of the maximum period of 120 days[35] as a result of the difficulty in finding a country that will issue them an emergency travel document for deportation.

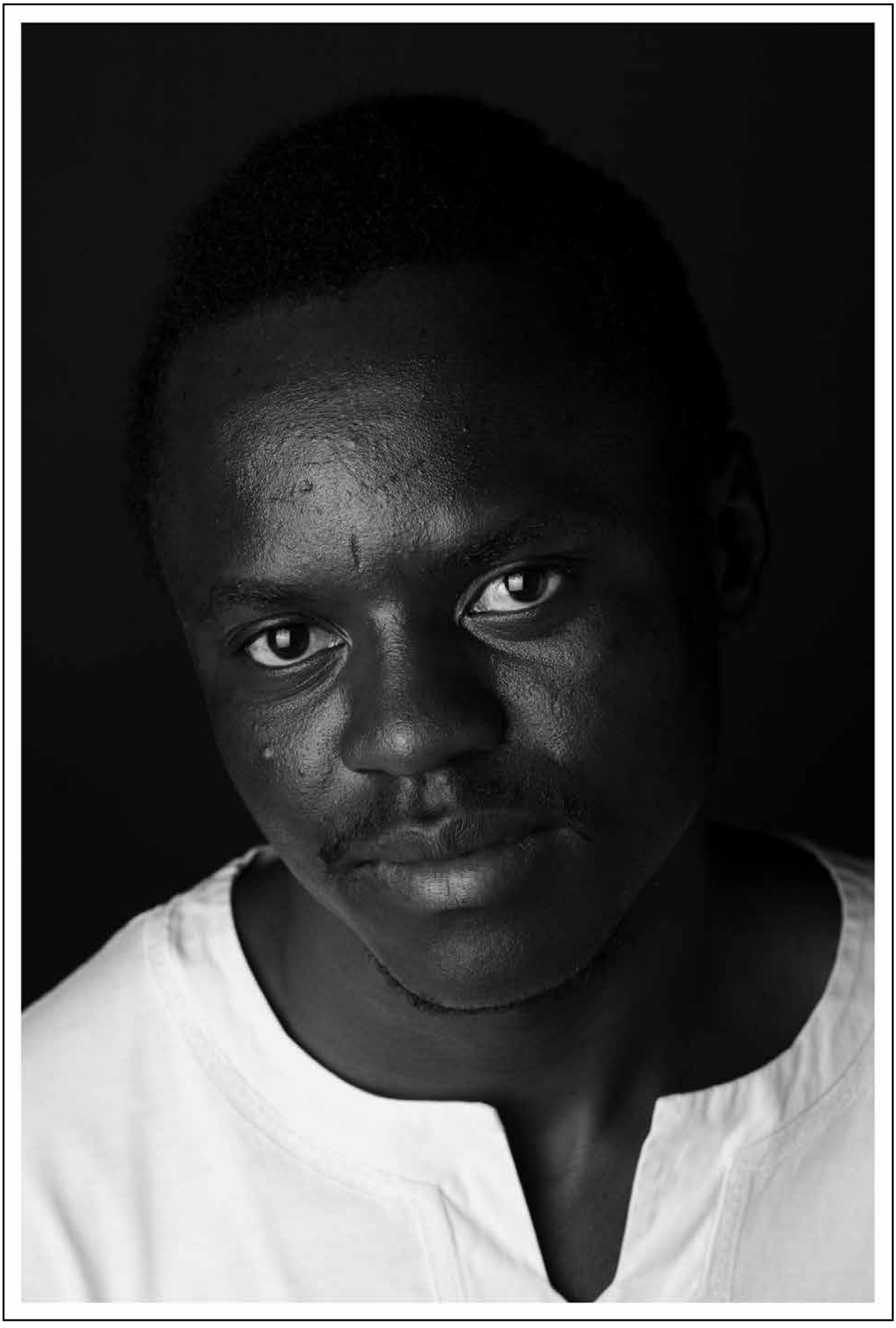
Case study

> ***"I am South African, but I am not recognised in South Africa…***
>
> ***They told me a black person will always know their roots. I said I know my roots. I couldn't explain to them. I told them where I was from and they didn't believe me.***
>
> ***I can't look for a job, I can't go to school. It looks like I'm useless yet I'm not useless. I'm not disabled but I'm more than disabled for not having this citizenship."***

Khumbulani Frederik Ngubane was born in South Africa in 1990 to South African parents – a Zulu father and Xhosa mother. But he has never been recognised as South African due to spending most of his childhood abroad. After his father died, Khumbulani's mother took him to Kenya when he was 3 years old. When he was 10, his mother passed away. He was then taken to Uganda by a family friend. When she too died, Khumbulani decided it was time to trace his South African roots.

He returned to South Africa, showing his birth certificate at the border. But his taxi was hijacked and he and other migrants were taken to a house and told they would not be released until family or friends sent money. He escaped, but never recovered his birth certificate. Home Affairs cannot trace his ID number and he has not found any living relatives who can attest to his identity. Khumbulani spent 3 months in Lindela Repatriation Centre but he could not be deported because he never acquired citizenship or immigration status in Kenya and Uganda. He was released, but remains undocumented. In 2012, Lawyers for Human Rights made an application to the Minister of Home Affairs on his behalf, requesting an exemption for permanent residence to allow him a path to legal status and citizenship. He awaits a decision.

35 Established by section 34(1)9d) of the Immigration Act (No. 13 of 2002)and detention case law.



▲
Khumbulani Frederik Ngubane is a South African who cannot prove his nationality. He spent 3 months in detention for deportation, but was eventually released since no country recognises him as a citizen. He made an application to the Minister, but is repeatedly arrested due to lack of documentation.

Impossibility of Deportation

Consular officials routinely visit Lindela to interview persons and verify whether they are indeed nationals of the country. If the officials can verify nationality, they then provide emergency travel documents so that detainees can be deported. They typically ask questions like: Where were you born? Who were your parents? What languages do you speak? What is our national anthem? Where did you go to school? How does one get from X city to X city in the country (by train, bus, car?). A lack of proficiency in the language or a lack of knowledge about the customs/culture/history/layout of the nation in question can weigh heavily against a detainee.

If a person cannot satisfy consular officials that they are nationals of the country in question, they cannot receive emergency travel documents. LHR has assisted a number of clients who failed to establish nationality in their country of origin, country of habitual residence or their parents' country of origin. Such persons are released from Lindela after prolonged detention without any path to legal immigration status and often with no documentation whatsoever to prove that they already went through immigration proceedings and could not be deported.

Once in Lindela repatriation centre, stateless people with unrecognised claims to South African citizenship are particularly distraught, given that they face lengthy detention in their own country of nationality.

Detainees who cannot be deported from Lindela are eventually released and told to report to local Home Affairs offices or to approach the embassies of the countries where they previously resided. There is no immigration status under current law designed to accommodate stateless people who cannot be deported, are not recognised by any nation and who do not meet administrative requirements for South African citizenship.

> ***"When you hear someone say 'I'm from' so and so country, you can see if someone chases them, they can always go to their country. If South Africa says everyone must go – me, where am I going to go? Nowhere."***
>
> -AS, a stateless man born in Tanzania

The only avenue for status is section 31(2)(b) of the Immigration Act (No. 13 of 2002), an entirely discretionary procedure which we will discuss below. Local Home Affairs offices do not uniformly process 31(2)(b) applications. Stateless persons are often not informed that this is an option until they approach legal organisations, leaving countless persons drifting undocumented in South Africa with no hope of a path to nationality in any nation.

Difficulty of Appeal and Judicial Review

Stateless persons often become aware of the barrier to nationality only upon making an application for an enabling document such as a birth certificate, ID or passport. This often happens when adults who have never had a birth certificate apply for late registration of birth and are rejected due to insufficient evidence or suspicion that they are a foreigner trying to

obtain citizenship fraudulently. South African citizens and permanent residents often discover the problem when they approach Home Affairs or try to access their bank account to find that their ID has been blocked.

When applications for enabling documents are rejected, or IDs are blocked, LHR has observed that individuals are not routinely informed of their administrative right to internal appeal or judicial review. They end up returning to Home Affairs, trying different local offices, resubmitting applications and documents and getting rejected over and over again over the course of years, as a result of the lack of procedural due process in access to enabling documents. Many are unable to afford legal representation and are unaware of their right to an internal appeal or judicial review of such decisions.

> ***"I want to express my gratitude to LHR. On my own, I don't think I would have succeeded. I was already threatened with deportation. I frequented Home Affairs offices and they sent me from pillar to post. They didn't give me the slightest chance to explain my situation.***
>
> ***It appeared to me that there was no longer any light at the end of the tunnel.***
>
> ***I was so happy to get my status back. There are quite a large number of people who are in the same situation I was faced with, who are in pain. I know of people who committed suicide because of it."***
>
> -JS, a South African citizen whose ID was blocked due to suspected fraud

Birth Registration

Birth registration is the critical moment when a person becomes a legal entity with rights before a State, regardless of where he or she is born. A name and nationality is granted, or, as is the case for children born to foreign parents in South Africa, a person is registered as a "foreigner". The parents' nationality is listed, which protects a foreign child's right to their parents' nationality in the future. Generally, the parents may use the South African birth certificate to register the child with their embassy or consulate and to obtain acknowledgement of his or her nationality. Naturally, refugees and stateless parents can only rely on the South African birth registration process given that they are unable or unwilling to approach the country of origin for documentation.

Stateless parents, who often are without an identity document, are unable to register their children's births. Home Affairs requires proof of identity when registering a child's birth, whether it is an ID, passport, asylum or refugee permit. This is an issue even if one parent is South African with an ID. The other parent must also have an ID. The inability of undocumented parents to register a child fuels the fire in terms of the creation and perpetuation of statelessness on South African territory.

South African Citizenship for Those Born Stateless

Children born in South Africa who do not have another nationality or the right to another nationality are entitled to South African citizenship – as long as their birth is registered. Unfortunately, LHR has observed that this provision is not enforced by Home Affairs and is impossible for many qualifying children to access. No assessment is done of their nationality status at birth, nor are they able to register births if one or both parents are undocumented. Even in the case where the parents' country refuses to recognise the child, and has confirmed as much in writing, LHR has seen that a child may not be able to access South African citizenship due to lack of awareness at Home Affairs offices about this law and lack of agreement about when a child would qualify as stateless.

Identity and Travel Documents

Stateless persons cannot access identity documents or travel documents in South Africa unless they qualify for refugee status, are able to work their way towards naturalisation under the Immigration Act or are granted permanent residence (whether through regular procedures or the exemption process of Section 31(2)(b) of the Immigration Act).

Those who apply for a Section 31(2)(b) exemption are given no temporary document to protect them from arrest and detention while they await the outcome of the application, which can take a number of years in LHR's experience. The Immigration Act provides for an Authorisation of Illegal Foreigner to Remain in the Republic Pending an Application for Status;[36] yet in practice Home Affairs does not issue these documents unless a client has legal representation. In any event, this form is not an immigration permit, contains no biometric data and does not prevent harassment and arrest by police.

If a stateless person receives an exemption for permanent residence, or any other legal status, he or she should be able to access a travel document under regulation 8(2)(a) of the South African Passports and Travel Documents Act, No. 4 of 1994, which states,

> A document for travel purposes may be issued to any person who is lawfully resident in the Republic, and who - (a) does not have the citizenship of another country ... or (b) has been granted permanent residence in the Republic and is unable to obtain a passport from the country of which he or she is a citizen."

Fulfilling the requirement of being "lawfully resident" is a big challenge for most stateless people in the Republic.

Political Opinion

Stateless persons in South Africa in reality have no way to exercise their right to a political opinion. They may be free to believe what they choose and to speak openly about their beliefs without fear of reprisal, but this freedom is an empty one when it is not accompanied by the right to vote or to run for public office.

As the formerly stateless scholar Hannah Arendt wrote of stateless people, "their freedom of opinion is a fool's freedom, for nothing they think matters anyhow … they are deprived, not of the right to freedom but of the right to action; not of the right to think whatever they please but of the right to an opinion. Privileges in some cases, injustices in most, blessings and doom are meted out to them according to accident and without any relation whatsoever to what they do, did or may do."[37]

36 Also known as a "form 20."

37 Arendt, H. (1968) *Imperialism: Part Two of the Origins of Totalitarianism*, San Diego, Harvest Book.

She goes on to write, "The fundamental deprivation of human rights is manifest first and above all in the deprivation of a place in the world which makes opinions significant and actions effective."[38] Indeed, there are many examples in the world and specifically in Africa where a national government intentionally denationalised a particular group or person with the specific intention of stripping them of their political rights and their ability to impact the existing political order.

Education

Stateless people are often unable to obtain any form of ID and without a birth certificate, mothers struggle to enrol their children in crèche or primary school. Without an ID, high school learners struggle to write their matric exams; enrolment requires a 13-digit ID number. If a matric certificate does not have an ID number listed, employers and universities suspect fraud and learners are in the same position as if they had never written and passed the matric exam.

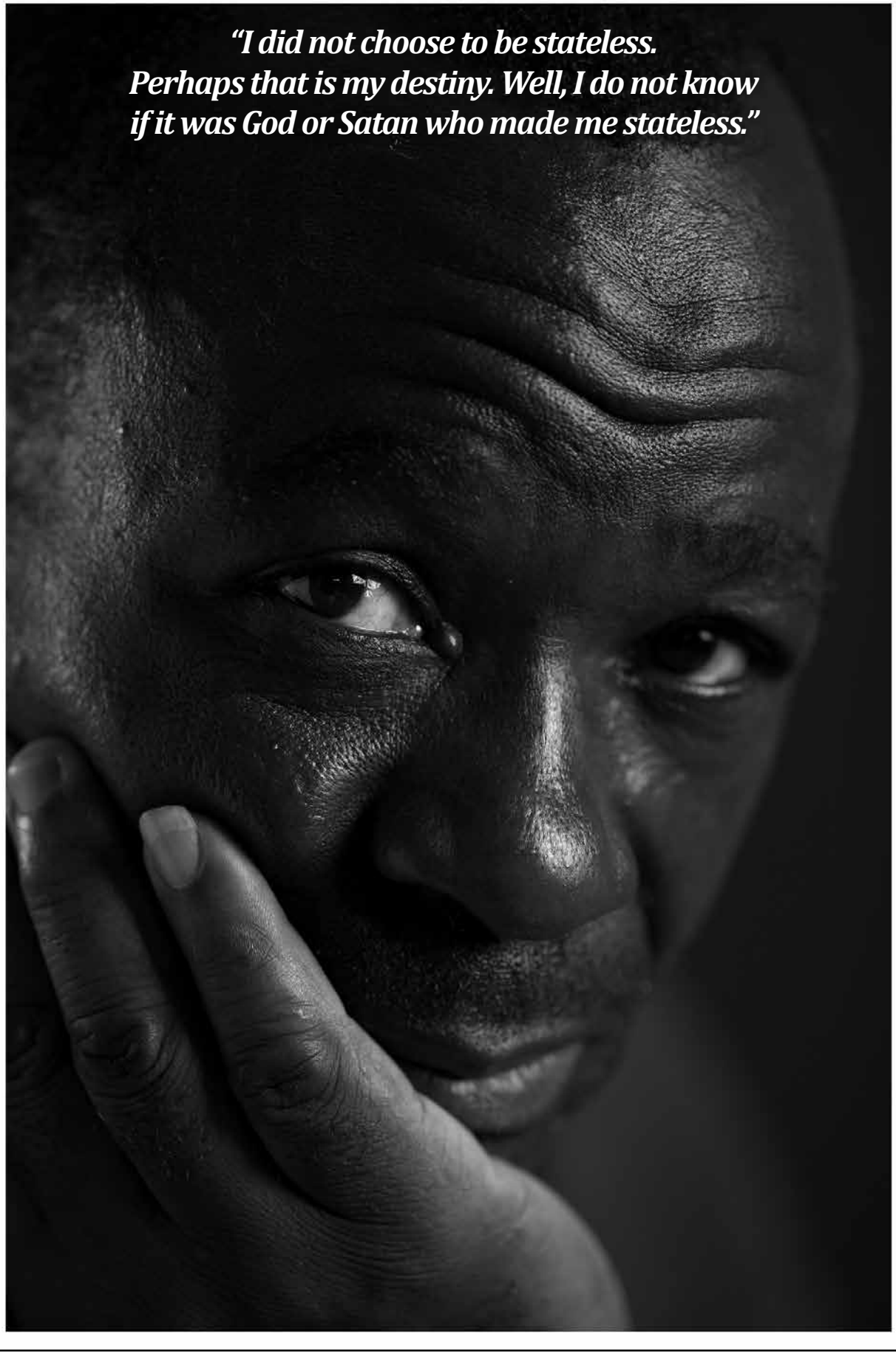
Without an ID or passport, universities do not process applications to enrol for studies and so, for stateless people, higher education and personal advancement are out of reach. Their ability to improve their lives is limited and they often are stuck in a cycle of poverty, reliant on others for charity and goodwill despite their higher aspirations.

Case Study

L.N. ("Luis") was born in Zimbabwe in 1975 to a Zambian father and Malawian mother, who had met and married as migrant workers decades ago. While he was a citizen at birth, he later was told by Zimbabwean authorities in South Africa that he is no longer a Zimbabwean citizen due to changes to the citizenship act in 2001. He had applied for South Africa's Zimbabwe Dispensation Project, which allowed Zimbabweans to obtain work or study permits. But he could not obtain a passport from Zimbabwe as a non-citizen, and remains undocumented in South Africa.

> ***"So who am I? Where do I belong?***
>
> ***Zimbabwe is the only country I have ever known as home. That my parents were from other countries is meaningless because I know of no family in Zambia or Malawi.***
>
> ***My family is destroyed.***
>
> ***I am here in South Africa. My wife is in Harare. My children are in a rural area ... at the moment I'm desperate ... I'm failing to support my kids in Zimbabwe.***
>
> ***With everything I'm failing, because of that citizenship."***

38 Ibid.



see page 49

"Luis" is a stateless man whose Zimbabwean nationality was withdrawn as a matter of law.

6.
Current Solutions in South Africa

Legal Framework

The legal framework outlined hereunder is a summary the laws that impact the right to nationality and the mechanisms to prevent statelessness from arising in South Africa. To summarise the main points, the following laws may be utilised to protect the rights of the stateless and to enforce the right to nationality:

- *Citizenship Act* (No. 88 of 1995) which provides for citizenship by birth, by descent and by naturalisation and allows for appeals to the high court
- *Births and Deaths Registration Act* (No. 51 of 1992) which requires all births to be registered within 30 days and allows for late registration of birth
- *Refugees Act* (No. 130 of 1998) which protects stateless persons who are also refugees
- *Immigration Act* (No. 13 of 2002) which provides in Section 31(2)(b) for the Minister to grant the rights of permanent residence to foreigners with "special circumstances"
- *Promotion of Administrative Justice Act* (No. 3 of 2000)
- *South African Constitution*
- *International law and customary law*

Citizenship Act

The South African Citizenship Act, No. 88 of 1995, provides for citizenship by birth in section 2(1)(b) to people born to a South African citizen, whether born in or outside the Republic;[39] or, in section 2(2) to a person born in the country "who does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality",[40] provided their birth is registered in accordance with the Births and Deaths Registration Act.

The Citizenship Act was recently amended by the South African Citizenship Amendment Act of 2010, which entered into force on 1 January 2013. The Amendment Act of 2010, "elevated" the status of those born abroad to citizens "by birth" (rather than "by descent"). In order to access this right, one's birth must be registered in accordance with the Births and Deaths Registration Act, No. 51 of 1992. For those born abroad, the Births and Deaths Registration Act states that a birth may be registered at the foreign mission in the country of birth or at a Home Affairs office in the Republic. Where the registration of a foreign birth occurs in the Republic, a birth certificate from the country of birth is necessary in order to register the birth in South Africa and to obtain a South African ID number.

39 Section 2(1)(b) of the Citizenship Act No. 88 of 1995.

40 Section 2(2) of the Citizenship Act No. 88 of 1995.

Citizenship by descent is given to persons adopted by South African citizens.

Various provisions of the Citizenship Act allow for naturalisation of individuals who are permanent residents and fulfil certain residency requirements.

Sections 15 and 16 allow applications to be made to the Minister for issuance of a citizenship certificate "in cases of doubt", in order to allow access for persons who have dubious cases.[41]

The Citizenship Amendment Act No. 7 of 2010 alters the status quo in several other ways.

Under the 2010 Amendment Act, children of permanent residents born in the Republic will only qualify for citizenship upon reaching the age of majority, provided they resided in the Republic from birth until that age. Under the previous law, children born in the Republic to permanent residents obtained citizenship at birth. The draft regulations included a provision allowing exceptions for children leaving the country "temporarily for visiting any other country for a particular purpose" but the regulations as enacted do not include this exception.

Notably, the amendment will provide new grounds for naturalisation for children born in the territory to parents who "were not admitted for permanent residence" - who presumably were admitted for other purposes or who were not legally admitted at all - provided the children remain in the Republic until age 18. This provision, if implemented widely to include children of parents who may not have legal immigration status, will make great strides in preventing the creation of statelessness in South Africa.

Section 25 of the Citizenship Act provides that any decision of the Minister or one of her designees under the Act may be reviewed in the high court.

Births and Deaths Registration Act

Birth registration is key to nationality in South Africa. For all those who qualify for citizenship, it is the critical moment when a person is entered into the National Population Register. In order to obtain an ID in South Africa, one must first apply for a birth certificate and be issued with an ID number. Only at this point can a South African citizen apply for an ID and passport and conduct other civil registry activities, such as registering one's children's births, registering marriages and registering deaths.

Home Affairs recently took a decision to cease issuance of abridged birth certificates and for all births after 4 March 2013, only unabridged birth certificates will be issued. Unabridged certificates are also known as "long birth certificates" and include one's parents' details. Abridged certificates are shorter and only include one's name, place of birth, date of birth and ID number.

The Births and Deaths Registration Act provides for birth registration of all children born on the territory, whether to South African or foreign parents. Children born in South Africa who do not qualify for citizenship are entitled to a birth certificate under the Births and Deaths Registration Act. However, these "foreign" birth certificates do not include an ID number and the child is not entered into the National Population Register. Current regulations provide that foreign children receive a handwritten certificate. Draft regulations have removed the provision for handwritten birth certificates and it appears that if these regulations pass all children in the Republic shall receive computer-generated, unabridged birth certificates. This is a positive development since some service providers and foreign authorities are reluctant to accept handwritten birth certificates as authentic.

41 It is unclear if this section is in use, how one would apply and what criteria are applied to applicants.

The Births and Deaths Registration Act (BDRA) requires all births to be registered within 30 days. It has recently been coupled with the National Population Registry Campaign, which has seen an increase in mobile registration clinics, linkage of hospitals to the Home Affairs' birth registration system and efforts to enforce the requirement of a birth certificate for children to enrol in crèche and school, to receive medical treatment, to apply for foster care and social grants and more.

The BDRA also provides for procedures colloquially known as "late registration of birth". This now applies to all births registered after a child is 30 days old. Children from 30 days to one year must be registered with a maternity certificate from the hospital and other supporting documents, such as an affidavit explaining why the birth was not registered within 30 days. Registration of children aged one to 15 years requires even more proof, including but not limited to school letters, baptismal certificates and letters from tribal chiefs.

For people over 15 years of age, in addition to the above, a witness is required who is 10 years older than the applicant and who has known the applicant since childhood.

The draft regulations to the BDRA released in 2012 indicate that screening committees will be created at the regional and national level to assess claims to birth on the territory for those over 15 years. Hopefully, these committees will aid in resolving problem cases and improving the quality of interviews that take place during late registration of birth.

The BDRA provides for registration of children born both in and out of wedlock.[42] However, confusion exists in implementing birth registration where a child was born out of wedlock and the mother is not available at the time of birth registration. As outlined above under section 5, "Populations of Concern in South Africa – by Birth Country", these children often remain undocumented because the father is unable to register the child without the mother's consent to acknowledgement of paternity.

Another concern is the section dealing with orphaned and abandoned children born outside South Africa. The Act states that orphans (and abandoned children as of the Amendment of 2010) shall be registered after the children's court proceeding with the assistance of a social worker. However, LHR has been informed by social workers that this is not consistently implemented. This may be because the Act is not clear that registration shall apply regardless of where the orphaned or abandoned child was born.

Under the Act, births to South African citizens abroad may be registered at South African foreign missions or at Home Affairs in South Africa. However, the BDRA requires a foreign birth certificate in order for a citizen born abroad to be recognised and issued an ID number in South Africa. UNICEF estimates birth registration in Africa to be around 50%; half of births are not registered. As a result, untold numbers of South African citizens struggle to access their citizenship if they return to the Republic to try to register their births at Home Affairs.

42 See sections 9 and 10 of the Births and Deaths Registration Act, respectively.

Refugees Act

The Refugees Act protects refugees who are also stateless.

A refugee is defined in the Act as follows:

> *A person qualifies for refugee status ... if owing to a well founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group; is outside the country of his or her nationality and is unwilling or unable to avail himself or herself of the protection of that country or, not having a nationality and being outside of the country of his or her habitual residence is unable or, owing to such fear, unwilling to return to it.*[35]

Further, a stateless person qualifies as a refugee if he or she *"owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting 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 elsewhere".*[44] Dependents of refugees are also protected in the Act with refugee status.

See section V above, "Challenges Facing Stateless Persons in South Africa", for more information on stateless refugees whose applications are often rejected as manifestly unfounded.

Immigration Act

The Immigration Act provides temporary immigration status to a variety of immigrants, including tourists, students, working professionals, spouses and other immediate relatives of South African citizens, business owners, foreign dignitaries and scholars and cross-border traders, to name a few. Generally, in order to access citizenship in South Africa as a foreigner, one must first obtain a temporary residence status after which one may apply for permanent residence if one meets the requirements. After five years of permanent residence, one may apply to naturalise as a South African citizen (although it should be noted that the application is discretionary).

In order to access any of the above permits, a passport or travel document is generally a prerequisite. Thus there are limited circumstances in which a person can obtain an immigration permit if one does not have a passport or travel document.[45]

Stateless people generally do not possess passports or travel documents and therefore cannot apply for the standard immigration permits listed above. The only avenue for them to regularise their status in the Republic is through Section 31(2)(b) of the Immigration Act, falling under the category of "Exemptions", which grants permanent residence. With an exemption for permanent residence, the stateless person may access a South African non-citizen identity card and a travel document. He or she may then works towards naturalisation.

43 Section 3(a) of the Refugees Act

44 Section 3(b) of the Refugees Act

45 Under the complementary Refugees Act, asylum-seekers are given temporary asylum-seeker permits which are renewable until they receive a final decision on their application. If their application is successful, they receive refugee permits. After five years of refugee status, they may apply for certification if they can prove that they will remain refugees for the foreseeable future. With certification, refugees can obtain permanent residence. Refugees who obtain permanent residence are provided this status without needing a passport, due to the fact that they are unable or unwilling to approach their country for protection due to a fear of persecution.

Section 31(2)(b) of the Immigration Act states as follows:

> *Upon application, the Minister, as he or she deems fit, after consultation with the Board, may under terms and conditions determined by him or her - grant a foreigner or category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision; provided that the Minister may - exclude one or more identified foreigners from such categories; and for good cause, withdraw such right from a foreigner or category of foreigners…*

"Special circumstances" in the case of a stateless person would be the fact that no country recognises them as a citizen. Given that there is no dedicated system for identifying and protecting stateless people in the Republic, the section 31(2)(b) exemption for permanent residence is currently the only avenue available for stateless people to receive immigration status and a path to naturalisation. After five years of permanent residence, exemption holders may apply for South African citizenship.

One of the challenges in the application of this provision to stateless people is the relative obscurity of the procedure. It is not advertised nor is it widely known even by local Home Affairs offices. Most applications are submitted by non-profit organisations, social workers and attorneys on behalf of clients.

Furthermore, it is an entirely discretionary application; the Minister may approve or reject it. There are no regulations accompanying this section of the Act, and thus no forms or guidelines on how to submit, process and review Section 31(2)(b) exemption applications.

Promotion of Administrative Justice Act

The Promotion of Administrative Justice Act gives effect to the right to just administrative action, found in section 33 of the Constitution. Where an administrative action "materially and adversely affects the rights or legitimate expectations of any person", such action must be procedurally fair.

The heart of PAJA lies in section 3(2) which outlines what an administrator must do to give effect to a person's right to procedurally fair administrative action. He or she must provide the person with adequate notice of the nature and purpose of the action, a reasonable opportunity to make representations, a clear statement of the administrative action, adequate notice of the right to review or internal appeal and notice of the right to request reasons for the action. For complex cases, legal representation, in-person interviews and the chance to present and dispute arguments and information may be necessary in order to protect a person's rights.

PAJA is a critical legal protection for people wishing to challenge administrative decisions relating to: nationality; enabling documents such as birth certificates, IDs and passports; and forms of protection available to stateless persons through the Refugees Act and the Immigration Act (primarily through section 31(2)(b) exemptions). It allows individuals to request written reasons for administrative decisions; where reasons are not provided within 90 days of a request, it is presumed in any judicial review that the decision was taken without good reason.

Given the lengthy wait times for many administrative applications, PAJA allows a court to judicially review both an administrative decision as well as the failure to take a decision.

Constitution

The South African Constitution states in Section 28(a): "Every child has the right to a name and nationality from birth." This right begins at birth but does not end when a person reaches adulthood; on the contrary, when a person reaches adulthood, the importance of nationality only increases. An ID becomes necessary to do just about anything to improve one's position in life, such as furthering one's education, getting a job, opening a bank account, applying for financing, buying a car and a house and much more.

The Constitution also prohibits deprivation of nationality, in section 20 where it states clearly: "No citizen may be deprived of citizenship." There are various sections of the Citizenship Act regarding deprivation of citizenship that violate this constitutional provision.

The Bill of Rights protects all the fundamental rights that flow from nationality, such as the right to equality, freedom of movement, freedom and security of person, and importantly, the right to human dignity.

International Law

The 1954 Convention relating to the Status of Stateless Persons provides for the identification, documentation and protection of the rights of stateless persons. The 1961 Convention on the Reduction of Statelessness focuses on avoiding statelessness from birth and preventing the creation of statelessness as a result of loss, deprivation or renunciation.

The 1954 Convention is similar to the Refugees Convention of 1951 and contains many parallel provisions. Both statelessness conventions are detailed below in great length, including what South Africa would need to do to comply.

Although South Africa has not yet signed or ratified the statelessness conventions, the right to nationality is protected in numerous other international law instruments to which South Africa is bound:

- Universal Declaration of Human Rights
  - "*Everyone has the right to nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*"
- 1957 Convention on the Nationality of Married Women
  - *"Neither the celebration nor dissolution of marriage between one of its nationals and an alien, nor the change of nationality by the husband during the marriage, shall automatically affect the nationality of the wife."*
  - *"Neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national."*
  - *"The alien wife of one of [the Contracting State's] nationals may, at her request, acquire the nationality of her husband through specially privileged naturalisation* procedures."
- 1965 Convention on the Elimination of all Forms of Racial Discrimination
  - States must *"guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law",* particularly in the enjoyment of fundamental human rights, including the right to nationality.
- 1979 Convention on Elimination of all Forms of Discrimination Against Women
  - *"States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of*

the wife, render her stateless or force upon her the nationality of the husband."

- *"States parties shall grant women equal rights with men with respect to the nationality of their children."*

- 1989 Convention on the Rights of the Child
  - *"States parties shall respect and ensure the rights … of each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his parents' of legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."*
  - *"The child shall be registered immediately after birth and shall have the right from birth to a name and the right to acquire a nationality…"*
- 1966 International Covenant on Civil and Political Rights
  - *"Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth the right to such measures of protection as are required by his status as a minor, on the part of his family, society and State."*
  - *"Every child shall be registered immediately after birth and shall have a name."*
  - *"Every child has the right to acquire nationality."*
- 1999 African Charter on the Rights and Welfare of the Child
  - *"Every child shall have the right from birth to his name; every child shall be registered immediately after birth; every child has the right to acquire nationality."*
  - States parties shall *"ensure that their constitutional legislation recognises the principles according to which a child shall acquire nationality of the State in the territory in which he was born if, at the time of birth, he is not granted nationality by any other State in accordance with its laws."*

see page 58

"Annie", at right, is a stateless woman married to a South African.

Case Study

"There are no words to describe the feeling, if you are not recognised as a citizen and become stateless of TWO countries.

The frustration of your situation and no one wants to understand. The anger at being denied a simple basic right.

The anxiety and worry of doors being shut and deportation always at your back. The helplessness of not knowing which way to turn. Mainly confusion, as a simple matter gains more and more politics." I do not want to carry this burden anymore."

A.T. ("Annie")(previous page) was born in Zimbabwe in 1969 to a South African mother and Zimbabwean father. Her mother and father met while travelling and settled down and married in Zimbabwe. Annie grew up in Zimbabwe and had an ID card as a citizen, issued when she was sixteen years old. Later when Annie married and tried to register her marriage in Zimbabwe, she was told she is no longer a citizen (as a result of amendments to the citizenship law). Annie was told to renounce citizenship of South Africa and reapply for Zimbabwean citizenship, but she had never registered as a citizen in South Africa. Being unable to get Zimbabwean nationality, she moved to South Africa with her husband hoping to access citizenship of her mother. But given that she did not have any passport or other documents from her mother, who was then deceased, she could not establish her claim to South African citizenship.

"My whole existence in this country has been a problem because of not having citizenship and documents. Simple tasks like signing a cell phone contract cannot be done. Or getting a valid South African driver's license. I can't even sign my daughter's school application forms. Or open a bank account.

I pray every day for a proper status to be given to me."

I do not want to carry this burden anymore."

LHR's Strategies to Identify and Assist Stateless Persons

In the provision of direct assistance for problems around birth registration, IDs or passports, or concerns regarding citizenship, LHR recommends a basic screening process to determine if a person is stateless.

It is important to note that an "undocumented person" is not the same as a "stateless person". In the nationality context, "undocumented person" refers to a person who has never had any form of government-issued identity document, such as a birth certificate, driver's licence, voting card,[46] ID card or passport.[47] While an undocumented person may also be stateless, such person would not be considered stateless until he or she made an effort to access nationality and is informed by a competent authority (foreign mission or civic services department) that he or she is not currently regarded as a national. Persons who are undocumented may be considered at risk of statelessness, particularly if they show another risk factor like living close to an international border, having mixed nationality parents or being orphaned abroad as a child.

The following is a recommended line of enquiry to assess someone's nationality status:

1. Where was the client born?
2. Where were the client's parents born?
3. What nationality do the client's parents hold?
4. Does the client qualify for citizenship under the law of the country of birth, country of habitual residence or long term residence? Does he or she qualify for citizenship in the parents' countries of nationality?
5. Does the client possess a birth certificate, ID or passport?
6. Has the client ever had a problem getting a birth certificate, ID or passport?
7. Why did the client have this problem?

The first port of call is to review the applicable legislation in the countries in which 1) the client was born, 2) lived for a long time or 3) where the client's parents have nationality. If the client appears to qualify under the law for nationality in one of these countries, the question then is why the client has failed to access that nationality. One must then review the state practice in relation to the nationality law in question. Does the country implement the letter of the law, or do officials alter the law when it is implemented at the local level? Are people of a specific group or ethnicity treated differently than the rest of the population? Did the client fail to access citizenship because he cannot meet the administrative requirements?

Whatever the reason, if the client does not qualify for nationality under the law, or was turned away by a competent authority (such as the Home Affairs or civil registry office, or a foreign mission of the country) despite a genuine effort to meet requirements for nationality, then that client may very well be stateless.

46 Note that a driver's license or voting card may not necessarily be proof of nationality.

47 In addition, an "undocumented person" is to be distinguished here from an "undocumented immigrant." An "undocumented immigrant" refers to someone who does not have a legal immigration status in a country, regardless of whether or not they have identity documents from their home country.

Case Study

> ***"I grew up and lived in more than one country – Rwanda, Uganda, DRC, Zambia, Zimbabwe and South Africa. Based on my nomadic life, I do not have culture..."***

C.O. ("Cary") was born in Rwanda in 1969. Her parents were Tutsi. When she was a child, her father was killed in Rwanda. Cary's mother fled with her to Uganda. They lived in a refugee camp in Uganda for several years until Cary was sent to school in Kampala (at age six).

Soon after she left the camp, her mother died. Her sister eventually sent her to boarding school close to the Congolese border. A number of years later, she was cut off from her sister due to a war being fought in northern Uganda making it unsafe to travel to Kampala. Seeking safety, Caroline fled by foot to Democratic Republic of Congo, but there she faced persecution as a Tutsi. She was advised to go to Zambia, yet when she arrived she was told the refugee camps were full. Eventually she went to Zimbabwe. After a number of years she could not access proper medical attention and due to her medical conditions, she came to South Africa where she hoped to get proper treatment.

Cary has been interviewed by Rwandan foreign mission officials but could not be confirmed as Rwandan. Rwandan officials are researching her case. She has also does not qualify under the law for Ugandan citizenship, despite numerous years living in that country. If Rwanda confirms that Cary is not recognised as a national, Lawyers for Human Rights will assist her with an application for an exemption to the Minister of Home Affairs, requesting that she be permitted to remain due to her exceptional circumstances.

> ***"Citizenship – I have never known what it is as I have never been granted one in my life."***

“Cary” has lived in six countries but has
not known citizenship in one.

If the client is not a refugee, and wishes to access nationality, then the first step may be to try to attain nationality for that client if there is any indication that this is possible. This may involve writing to the foreign mission in question, or arranging an interview for the client at the foreign mission, if the person was born abroad. It may include writing to hospitals with a Power of Attorney to request the record of birth or maternity certificate, to enable that client to prove his or her claim to nationality. It may include drafting affidavits of witnesses to the client's birth and family history.

If the client has a claim to South African citizenship, then LHR will assist with pursuing that claim. Generally this will involve requesting that Home Affairs review or reprocess applications for late registration of birth or foreign birth registration (for citizens born abroad), since birth registration is the critical moment when a person is assigned an ID number. LHR also works to obtain and contest the record in cases where a client's ID has been blocked as a result of duplication or suspected fraud.

DNA testing for clients and their South African relatives has been employed in extreme cases to satisfy Home Affairs that a client is South African. Litigation is always an option to enforce clients' rights to nationality, should they have a claim to South African citizenship and any type of proof thereof. Section 25 of the Citizenship Act provides that any decision of the Minister or her designees under the Act may be reviewed in the High Court.

For clients who do not qualify for nationality under the law of any country, LHR will nonetheless approach the foreign missions of the birth country, country of former residence or country of the parents' nationality, at clients' instructions. The purpose of this is to exhaust all options for nationality by finding out whether the client, although not currently recognised as a citizen, may qualify for restoration of citizenship, naturalisation or some kind of immigration status.

Where a client has come to the end of the road in terms of accessing nationality, LHR will submit an application to the Minister for a permanent residence exemption under Section 31(2)(b) of the Immigration Act, as outlined in section 7 of this report. This application is based on the "special circumstances", namely the client's statelessness, bolstered by other extenuating circumstances (for example, the client came to South Africa as a minor, is an asset to the country due to special talents, has children born in the country, married a citizen, etc.) The application will outline the client's entire family history in terms of nationality and migration, attempts to access nationality, applicable nationality legislation and any other relevant information, as well as all supporting documents he or she may have. LHR welcomes opportunities for clients to be interviewed by Home Affairs officials as part of the processing and assessment of their claims.

In addition to direct legal services, advocacy is required by all relevant organisations in order to improve the legal and policy framework, with the goal of preventing the creation of statelessness and finding solutions for individuals who are currently stateless on the territory of South Africa.

7.
Recommendations for the South African Context

LHR's first recommendation is that South Africa take the critical step towards protecting stateless persons and preventing the creation of statelessness by signing and ratifying the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These treaties will allow South Africa a framework within which to protect the right to nationality.

Ratification of the 1954 Convention relating to the Status of Stateless Persons

The 1954 Convention establishes the international legal status of "stateless persons" and directly addresses the practical concerns of the stateless. It requires state parties to identify stateless people on their territories and to issue them with identity and travel documents and a facilitated path to nationality through naturalisation. It prohibits the expulsion of stateless people lawfully on the territory and requires due process protection for any decision to expel a stateless person. The Convention also provides minimum standards of treatment to protect the rights of the stateless on the same level as citizens with respect to freedom of religion, education of their children, access to the courts, public relief, industrial property, labour legislation and social security. It provides stateless people the same treatment as other foreigners in relation to a number of other rights, such as the right of association, self-employment, employment and housing.

The 1954 Convention allows states to exclude individuals from protection when there are serious reasons to believe that they have committed a crime against peace, a war crime, a crime against humanity or other serious non-political crime abroad.

In December 2011, South Africa made a pledge at a United Nations ministerial-level conference in Geneva to sign and ratify both stateless treaties. The most critical adjustments South Africa should make to comply with the Convention are as follows:

- Creation of an **identification and protection mechanism** for the stateless (expounded upon below, Development of a Dedicated Identification and Protection Mechanism);
- Provision of **legal immigration status** to the stateless to protect the right to freedom of movement and the right not to be expelled;
- A facilitated **path to nationality** for the stateless;
- Issuance of **identity and travel documents** to the stateless;
- **Provision of administrative services** to stateless that would normally be afforded by foreigners' own authorities (in relation to documents and certifications, i.e. birth registration and other civic registration services).

Section 31(2)(b) of the Immigration Act could be expanded to accommodate issuance of permanent residence exemptions to people identified as stateless. This would fulfil the Convention requirement of issuance of an ID and travel document, since permanent residents receive South African IDs and those who cannot approach their home countries (i.e. refugees) are able to get travel documents. However, there are limitations in this approach that are expounded upon below.

Alternatively, a new section could be added to the Immigration Act to provide protected stateless status to individuals who meet certain requirements. In the long run, LHR recommends new legislation to mirror the 1954 Convention and to provide a framework for identifying and protecting stateless persons.

Development of a Dedicated Identification and Protection Mechanism

In line with the statelessness conventions and the international obligation to protect the right to nationality, South Africa needs to develop a dedicated identification and protection procedure for stateless people on the territory.

The 1954 Convention does not detail a procedure for how state parties must identify stateless people and it is in the interests of the states, and stateless persons, that states adopt legislation regarding the manner in which a stateless person is identified.

Some states have implemented legislation that designates existing agencies within government, such as offices that deal with asylum-seekers and refugees, to examine and adjudicate claims of statelessness. Other states do not have specific legislation in place but have tasked an administrative or judicial authority to determine if a person is stateless.

Several states have amended their citizenship acts to allow stateless people who have resided on the territory for long periods to register as citizens.

Where no procedure or legislation is in place, statelessness usually comes to light during applications for refugee status. Stateless people may then be processed within that framework, which in some countries includes humanitarian and subsidiary protection. Given that South Africa's asylum system only provides refugee status, and is already so overburdened that applications can take years to process, adjudicating stateless claims within that system is not ideal.

Kenya: The Kenya Citizenship and Immigration Act of 2011 provides that stateless people and their descendants who meet certain requirements may be eligible to register as a citizen of Kenya.

Malawi: The Malawi Citizenship Act also provides that stateless people who meet certain requirements may be registered as citizens of Malawi.

France: Stateless people may apply directly to the French Office for the Protection of Refugees and Stateless Persons (OFPRA), which is mandated to provide judicial and administrative protection to stateless people.

Spain: The Aliens Law provides that the ministry of the interior will recognise the status of stateless persons in a procedure regulated by Royal Decree. Stateless people may approach police stations or the Office for Asylum and Refugees. OAR investigates the claim and then forwards its assessment to the ministry of the interior.

Italy: In Italy, the 1993 implementing decrees of the amendments to the Nationality Law adopted the previous year provides the ministry of the interior the authority to recognise stateless status.

Weaknesses of Section 31(2)(b) of the Immigration Act

As it stands, the section 31(2)(b) exemption, which allows the Minister the discretion to grant permanent residence to foreigners with "special circumstances", offers the only hope for stateless people who cannot acquire any other immigration status in South Africa. The current exemption procedure has significant flaws in its ability to provide a viable solution for the stateless. Exemption applications can take upwards of three years to process. There is no temporary immigration status available to applicants, who are often repeatedly arrested, harassed and detained by authorities due to the absence of an immigration permit. Currently, there is no explicit obligation on the Minister to approve applications of stateless people given that the procedure is entirely discretionary. And there appear to be no guidelines for assessing or interviewing applicants who may be stateless, to verify and investigate their claims.

Further, people who do make applications for exemptions do so in a haphazard manner through various social work and non-profit organisations. As outlined above, there is not a structured referral system between Lindela, police stations and Home Affairs offices for stateless persons to be referred for exemptions.

At a Minimum: Amendment of Section 31(2)(b) and Addition of a Regulation

At a minimum, Section 31(2)(b) of the Immigration Act should be amended and a regulation should be added to explicitly state that stateless persons qualify for exemptions, to detail who is a stateless person and to lay out how such applications should be submitted. Screening committees for late registration of birth applicants are envisaged in draft regulations to the Births and Deaths Registration Act. These committees sound promising and could submit exemption applications on behalf of individuals who cannot establish birth details but who have no other nationality. Lindela could refer stateless people who cannot be deported to these committees. In such a case, people released from Lindela should be given a Notice to Appear or other similar document to take to Home Affairs. Department officials should be trained on how to deal with people who appear with such a document (referral to screening committee).

Furthermore, to comply with the 1954 Convention, Section 31(2)(b) must be amended to provide that the provision of status to stateless persons is not discretionary. Applicants should only be rejected if they fall under one of the excluded groups in Article 1 of the 1954 Convention, namely: they are already receiving protection from an organ or agency of the UN other than the UNHCR; they are recognised by competent authorities in which they have taken residence as having the rights and obligations which are attached to possession of nationality of that country; or they have committed a crime against peace, a war crime, crime against humanity, serious non-political crime, or acts contrary to the purposes and principles of the UN.

Better Yet: New Section in Immigration Act to Afford Stateless Status

A separate section could be added to the Immigration Act to provide for a "stateless status" that would be accompanied by all of the rights protected in the 1954 Convention. Such a section and/or its regulations would detail the internationally accepted definition of "stateless person", procedures to attain stateless status and basic rights that accompany stateless status, in addition to the exclusion clauses of Article 1.

Ideally: New Legislation regarding the Identification and Protection of the Stateless

What is ideally needed in South Africa is the drafting of new legislation specific to the identification and protection of stateless persons, even while interim amendments are made to provide the bare minimum protections for the stateless.

Such legislation should mirror the protections of the 1954 Convention Relating to the Status of Stateless Persons and any relevant provisions of the 1961 Convention on the Reduction of Statelessness. Stateless legislation should include due process protections for applicants, including but not limited to: the right to an individual examination; an interview; the right to objective treatment of the claim; a time limit on the length of the procedure, ideally to six months; access to information about the procedure in a language the applicant can understand; access to legal advice and an interpreter; the right to confidentiality and data protection; delivery of both a decision and the written reasons for the decision; and the right to challenge the legality of that decision to an independent body and/or court.

Expedited Naturalisation or Registration of Stateless Persons as Citizens

Regardless of how stateless status is ascertained, South Africa should consider amending the Citizenship Act to provide for expedited naturalisation for persons whose stateless status has been recognised, or to allow certain stateless persons to register as citizens, as in Kenya and Malawi. Such status could be extended to stateless persons who have resided in South Africa for over 10 or 15 years and who can show that no other country recognises them as nationals.

Ensuring an Efficient Process and Verifying Claims

Ensuring an efficient process that will not result in unfounded claims of statelessness is critical to the success of a statelessness protection procedure. Fortunately, statelessness is a legal status that is not easily susceptible to fraud and that can be verified through thorough assessment of the individual case, analysis of nationality law, research on implementation of nationality law by states and collaboration with foreign missions and governments.

During LHR's November 2012 parliamentary presentation on statelessness, one member mentioned concern over the possibility of an "explosion of statelessness" on the territory should South Africa sign and ratify the two statelessness conventions. Another expressed fears that people would destroy their own documents to become stateless. However, it is important

to note that destruction of documents does not in itself render a person stateless. Foreign governments regularly issue emergency travel documents to undocumented persons in Lindela after confirming their country of origin through thorough questioning. Questions include: whether they speak the language, know the country's president, flag and national anthem, whether they know how one would travel between two cities in the country (by car, bus, plane), whether they know details of a village, district or area, what their parents' nationalities are, etc.

Officials have also expressed concern that some detainees avoid deportation by being evasive or lying about where they are from. This can lead to prolonged detention and eventual release from detention without legal status. Such cases should be dealt with by close collaboration between Home Affairs and foreign missions (only in cases where the individual has not claimed asylum and does not indicate a fear of persecution if returned to their country of origin). LHR also strongly recommends the creation of a forum or working group that would comprise of Home Affairs officials and foreign mission officials in order to resolve cases of detainees' whose nationality cannot be determined. In some cases, these individuals will indeed be stateless. Stateless people in detention should immediately be released and provided a path to legal status in South Africa, as outlined above in this report, if no country of origin or previous residence will open its doors.

Ratification of the 1961 Convention on the Reduction of Statelessness

The articles of the 1961 Convention aim to avoid statelessness at birth and to provide safeguards against statelessness in any provisions for loss, deprivation or renunciation of nationality. It also contains prohibitions against: deprivation of nationality on the basis of race, ethnicity, religious or political grounds; and loss of nationality (of citizens born in the contracting States) that would result in statelessness due to "departure, residence abroad, failure to register or on any other similar ground".

Currently there are a number of provisions of South African law that should be adjusted to comply with the 1961 Convention, namely:

Citizenship for any person born in South Africa who is otherwise stateless

(Section 2(2) of the Citizenship Act)

Current: Currently the Citizenship Act provides citizenship by birth to any person born on the territory who does not have the citizenship or nationality of another country or who does not have the right to such citizenship or nationality, provided that the birth is registered.

Section 2(2) notably complies with Article 1 of the 1961 Convention which requires that "a contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless". However, South Africa has a long way to go in terms of making this provision practically accessible to those who need it the most.

The Convention states in Article 7(3) that a national (other than those born abroad) shall not lose his nationality so as to become stateless due to a "failure to register". South Africa needs to either remove the requirement of birth registration or review its birth registration requirements in order to achieve universal birth registration. A significant barrier to qualifying stateless children is the fact that their parents are often undocumented, but according to LHR's sources, Home Affairs does not permit birth registration of children where the parent, particularly the mother, is undocumented. Proof of birth such as maternity certificates, clinic cards, affidavits and other witness testimony could be accepted where a child has been unable to register its

birth due to the parents being undocumented, deceased, absent or unwilling to assist. Ideally, all hospitals and health clinics will eventually be connected to Home Affairs and be able to issue birth certificates immediately after birth. This will allay concerns about fraudulent entry into the population register.

Recommendations: Given that birth registration is a prerequisite for this provision of citizenship, universal birth registration must be achieved in order to make it a real protection against statelessness. Birth registration procedures must allow for a child's birth to be registered even where the mother/father is undocumented, unable or unwilling to assist. New regulations should be drafted on how to access this procedure and what is required to establish "no other citizenship or nationality". Affidavits of individuals and parents in their attempts to access nationality can be provided, along with any letters from foreign missions acknowledging that the person in question is not recognised as a national of that State. Finally, a policy directive should be circulated to local Home Affairs offices regarding implementation of this provision.

Citizens born abroad and their registration process

(Section 2(b) of the Citizenship Act; Section 13 and regulation 10 of the Births and Deaths Registration Act)

Current: Citizenship acquired through birth to a citizen outside the Republic is dependent upon birth registration; BDRA regulation 10 requires a foreign birth certificate or "other similar document" if registering a foreign birth in South Africa. In practice, only the foreign birth certificate is accepted and must be accompanied by a letter of authenticity from the country of birth.

Article 1(4) of the 1961 Convention provides that a contracting State shall provide nationality to the children of its nationals born abroad who cannot acquire the nationality of the birth country. South Africa appears to comply with this provision by granting citizenship to children born to nationals abroad. Article 1(4) provides that such application "shall not be refused".

Given that 50% of births on the African continent go unregistered, and many countries are only recently developing civil registration systems that make birth registration compulsory, requiring a foreign birth certificate is an unreasonable requirement that makes would-be South African citizens stateless.

Recommendation: Remove the strict requirement of foreign birth certificate and process foreign birth registration applications in the same fashion as late registration of birth applications, through conducting interviews and accepting other documentary proof such hospital records, primary school documents, affidavits, baptismal records, etc.

Deprivation of nationality

(Sections 8(2)(b) and 10 of the Citizenship Act)

Current: Section 8(2)(b) gives Minister wide discretion to deprive nationality of a citizen who "also has nationality of any other country" if it is "in the public interest".

Recommendation: Due process must be protected and the person concerned must be afforded the right to a fair hearing by a court or independent body prior to such deprivation.

Current: Section 10 allows the Minister to deprive a child of citizenship if the parent has lost his/hers.

Recommendation: This section should be amended to include a safeguard against statelessness, i.e. "unless such deprivation would result in the child becoming stateless".

Article 6 of the Convention provides that loss of nationality shall be conditional upon the person's possession or acquisition of another nationality. Article 8(4) requires that where deprivations are permitted, the person must be allowed the right to a hearing by a court or independent body.

Section 8(4)(b) of the Citizenship Act is problematic in practice given that states often misunderstand or misinterpret the law of other states to assume that an individual has nationality, when in fact that is not the case. Furthermore, the clause that permits deprivation of nationality when it is "in the public interest" is overly broad and has been abused by other countries to denationalise political opponents. Due process will protect the individual's right to contest the information against him prior to deprivation of South African citizenship and will also ensure that such deprivation is not in violation of Article 9 prohibition on discriminatory deprivation.

Section 10 violates Article 6 because children may be rendered stateless if the parent(s) lose their South African nationality. Adding a clause to protect against statelessness will resolve this problem.

Deprivation of nationality due to participation in a war

(Section 6 of the Citizenship Amendment Act of 2010)

Current: Naturalised citizens "shall" cease to be citizens if they engage in a "war the Republic does not support".

Section 6 is problematic in that it applies automatically, does not detail how it would be determined that a war is not one that the Republic supports and has no safeguard to prevent statelessness. Article 8(3)(a)(ii) of the Convention provides that a grounds for deprivation of nationality on the basis of disloyalty must involve either i) "an express prohibition by the contracting state" or ii) conduct "seriously prejudicial to the vital interests of the state" - neither of which are properly detailed in Section 6 of the 2010 Amendment Act. This can be resolved by removal of this provision or through a detailed regulation.

Recommendation: Ideally this provision should be removed. If this section is retained, it should provide due process protections and should include an accompanying regulation to explain what is meant by "a war the Republic does not support".

Renunciation of citizenship

(Sections 7(1),7(3) and 5(d) of the Citizenship Act)

Current: Section 7(1) allows a South African citizen to renounce South African citizenship before securing another. Section 7(3) prescribes that a minor child will lose citizenship if the parent renounces their own. Section 5(d) provides that applicants for naturalisation who come from countries that prohibit dual nationality must renounce their original nationality as part of the naturalisation application.

Article 7 of the Convention provides that laws for renunciation of nationality must be conditional upon the person's acquisition or possession of another nationality. This is a safeguard to ensure that should a person renounce their citizenship to comply with requirements to naturalise in another State, they will not become stateless should their naturalisation application be refused. South Africa's recent updates to the regulations of the Citizenship Act do indeed provide that naturalisation applicants from countries that prohibit dual nationality only need to renounce their current nationality upon receiving a letter of conditional approval of their South African naturalisation application.

Article 7(1)(b) of the 1961 Convention provides that requiring renunciation of nationality as part of naturalisation procedures should not be permitted "where their application would be inconsistent with the principles stated in articles 13 and 14 of the Universal Declaration of Human Rights…", namely the right to freedom of movement or the right to seek asylum. Stateless people and refugees cannot reasonably be expected to produce proof that they have renounced nationality in a country where they are not recognised as nationals and/or where they fear persecution if they approach authorities.

Recommendation: Renunciation must be conditional upon acquisition or possession of another nationality; children should not lose citizenship if it would render them stateless; and stateless persons and refugees should be exempt from the requirement to renounce nationality of their country of origin in order to naturalise.

Foundling Provision[48]

Current: No provision to provide South African citizenship to "a foundling found in the territory of the Contracting State".

Article 2 of the 1961 Convention provides 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".

The Union of South Africa signed and ratified the 1930 Hague Convention on Certain Questions Relating to Conflict of Nationality Law, which is binding on the Republic of South Africa as well. It provides: *"A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known. A foundling is, until the contrary is proven, presumed to have been born on the territory of the State in which it was found."*

While partner organisations report to LHR that children with unknown background are registered as South African (if they are generally too young to attest to their background) this practice must be formalised in the law and must adhere to the above-mentioned international standards.

Recommendation: Add to Section 2 of the Citizenship Act to provide citizenship by birth to a child found on the territory whose parents and/or birthplace are unknown.

Additional Recommendations

Just administrative action in blocking and releasing South African ID documents[49]

Currently, the Promotion of Administrative Justice Act and Identification Act speak to this issue. The Constitution provides that no citizen may be deprived of his citizenship. However, the procedurally unfair blockage of IDs is in effect depriving many citizens of their rights and leaving them effectively stateless if they hold no other nationality.

As noted above under populations of concern, administrative rights are not adequately protected during and after blockage of IDs. Affected persons are not given proper and written reasons for the blockage of their IDs, nor notice of the right to appeal or review the decision, nor notice of

48 Section 2 of the Citizenship Act

49 Promotion of Administrative Justice Act; Identification Act 68 of 1997

the procedure for resolving the blockage. The short list of documents given to individuals to verify their citizenship or permanent residence status is not sufficient to protect their administrative rights, particularly given that their citizenship and legal status as a person before the State is in question. Local officials haphazardly reject an individual's proof of identity without sending it to Head Office to be reviewed.

PAJA provides excellent guidelines in section 3 on how to protect administrative rights in this context in a concrete way. Each person whose ID has been identified as a duplicate or otherwise marked should receive a letter stating in writing the reasons for the blockage. This letter should be mailed to any address on record, but should also be provided to the person when they appear at Home Affairs; many only discover that their ID has been blocked when they go to register a birth, apply for a new ID or try to renew a passport.

People should be given a reasonable opportunity to make representations and should receive notice of the right to contest the allegations against them through an appeal or review in court. Legal representation, in-person interviews and the chance to present and dispute arguments and information may be necessary in order to protect a person's rights.

Critically, individuals attempting to prove their identity should not be turned away due to failure to produce a specific document. Their cases should be reviewed based on the entirety of the evidence they are able to present. If necessary, they should be afforded the opportunity to present witnesses in an administrative hearing.

Just administrative action in processing late registration of birth applications[50]

Similarly, administrative rights are not being protected in the late registration of birth process. For many people who did not receive birth certificates during apartheid and who left the country only to return as adults, late registration of birth is the only avenue to access their citizenship.

A person must first have their birth registered before an ID and passport will be issued confirming citizenship.

As noted above, LHR has been approached by numerous individuals since beginning the Statelessness Project who have been turned away at local Home Affairs offices if they are suspected of being foreigners trying to use late registration to fraudulently access citizenship. Clients have approached LHR to state that they are turned away without even being permitted to submit applications for consideration. Some have made multiple attempts over the course of years at various Home Affairs offices before they seek legal assistance.

As with the blockage of IDs, just administrative action must be ensured in the late registration of birth process. Applications must be accepted and regulations to the Births and Deaths Act must be followed – including an interview of the applicant and an informant if there is doubt as to the authenticity of the application. Given that citizenship is the end result of a positive decision, and statelessness may be the result of a negative decision, it is paramount that written reasons be provided if an application is rejected. Applicants must be afforded notice of their right to appeal or review the decision in court.

The screening committees outlined in the 2012 draft regulations to the Births and Deaths Registration Act may be an excellent tool in ensuring the right to just administrative action in late registration of birth applications.

50 Births and Deaths Registration Act; Promotion of Administrative Justice Act

Case Study

"I feel hopeless ... in my heart it's very painful.

I can't access land or a social grant. I do hard labour, working for people, but some don't pay me because they are aware that I'm undocumented and I won't report them to the police. My mother stresses about my situation. She has tried several times to register me with Home Affairs.

My children are undocumented and it is difficult for them to register at school, since they need guardian documents and birth certificates."

Merriam Lesemba was born at home in Musina, South Africa in 1966. Her father was an undocumented Zimbabwean and her mother is South African. At age three, Merriam moved to Zimbabwe with her family. She only returned to South Africa in 2003 when her father passed away. Since Merriam's birth in South Africa was never registered, she needed to comply with late registration of birth in order to get her ID. Her and her mother, who has an ID, have approached Home Affairs over four times over the course of 7 years in attempts to access her citizenship.

Merriam was repeatedly turned away due to lack of documentation to show that she was born on the territory. This is despite the fact that her mother and a close friend of her mother are both alive and present to testify to Merriam's birthplace. Merriam was also turned down when trying to register as Zimbabwean through her father, due to her father's lack of documentation of his nationality. Merriam has been stateless despite claims to nationality in two countries.

Regardless of birthplace, Merriam is entitled to South African citizenship because her mother is South African. Yet without a hospital birth record, she has been refused assistance.

Lawyers for Human Rights has assisted Merriam in obtaining an interview at Home Affairs for late registration of birth, so that her and her mother's testimony can be considered and she can access her South African citizenship.

Merriam Lesemba has applied for late registration of birth more than four times over the course of 7 years, but was turned away due to lack of birth record.

Temporary immigration permit to protect stateless people from arrest and detention[51]

Although the stateless conventions do not speak of provision of a temporary document to applicants for stateless status, the right to freedom of movement and constitutional rights of the stateless to freedom and security of person require that they be issued a document while they await a decision on their exemption/stateless application.

Any amendments or new legislation should provide for a temporary permit similar to an asylum-seeker permit for stateless applicants. This permit should include biometric data - photographs, fingerprints and identifying data of its holder.

Exemptions or other status for unaccompanied foreign minors

One of the most glaring challenges in the creation of statelessness on South African territory is that of unaccompanied foreign minors. As described under section 5 above, "Populations of Concern in South Africa – by Country of Birth", this is a large group that is hard to estimate. Unaccompanied foreign minors are at high risk of becoming stateless in South Africa due to lack of enabling documents from their home country, absence of parents and legal guardians and loss of memories over time including the ability to speak the lan[52]guage of the country of origin. By the time this group reaches adulthood, they often no longer have any discernable ties to the country of origin and may not be recognised as citizens.

The Immigration Act should provide for an immigration status for unaccompanied foreign minors who do not qualify for refugee status but whose best interest is not served by returning to their countries of origin. Section 31(2)(b) allows the Minister to grant a foreigner or "category of foreigners" the rights of permanent residence; the Minister could provide exemptions to unaccompanied foreign minors who are determined to be in need of care and protection in terms of the Children's Act. In the alternative, a separate section could be added to the Immigration Act to provide for status for these vulnerable minors.

Resumption of South African citizenship[53]

Currently, the Citizenship Act allows for resumption of citizenship at discretion of Minister.

Applications for resumption should not be discretionary where the individual is stateless. Should a former South African citizen lose their second nationality and end up stateless, they must be able to resume their South African nationality and such applications should not be discretionary (unless for exclusions as provided in the convention).

Citizenship in cases of doubt[54]

A little known fact is that the Citizenship Act allows applications to be made to the Minister for the issuance of a citizenship certificate "in cases of doubt". It is unclear if this section is in use, how one would apply and what criteria are applied to applicants. LHR recommends that an accompanying regulation be drafted for this section, to provide information on how applicants can apply and including a standard application form. This provision is critical in cases where a person fails in late registration of birth.

51 Immigration Act 13 of 2002

52 Immigration Act 13 of 2002

53 Section 13 of the Citizenship Act

54 Section 15 of the Citizenship Act

"Lily's" birth is unregistered, even though her father is a documented South African, because her mother is an undocumented foreigner.

see page 76

Case Study

> ***"As a father, with an undocumented wife, I am not recognised. I am unable to apply for my children's documentation. My children cannot access grants and other services.***
>
> ***Even when I show my ID to apply, officials say they need my wife's documents and she is not documented.***
>
> ***About two years ago social workers said they would assist me, but they never came back. I have no hope in them anymore and my family suffers a lot..."***

L.G. ("Lily") was born in South Africa to a South African father and an undocumented foreign mother. Home Affairs refuses to register her because her mother has no form of identification. This is in spite of the fact that her father is present, willing to register his child and has a South African ID document.

The Births and Deaths Registration Act allows either parent to register a child's birth. However, when a child is born out of wedlock, in order to register the child in the father's surname – for example, in the case where the mother has no identity documents and thus cannot register the child in her own surname – the mother must be present and willing to sign consent to acknowledgement of paternity. But in practice, mothers are not permitted to sign such consent if they are not themselves documented. As a result, their children remain undocumented regardless of whether the father is a South African citizen. Such children are effectively in the same position as if both parents were foreigners.

The Children's Act allows fathers to obtain court orders confirming paternity in such cases, but this is not well known or advertised.

Lawyers for Human Rights is assisting L.G.'s father is obtaining such a court order so that he may register his children.

Birth registration where one or both parents are undocumented[55]

As noted above, a significant challenge in protecting the right to nationality in South Africa is the inability of parents to register the births of children where one or both parents are undocumented (do not have any form of government-issued identity documents). The BDRA should be amended to provide for registration in these cases. Proof of birth such as maternity certificates, clinic cards, affidavits and other witness testimony could be accepted where a child has been unable to register its birth due to the parents being undocumented, deceased, absent or unwilling to assist. Ideally, all hospitals and health clinics will eventually be connected to Home Affairs and be able to issue birth certificates immediately after birth. This will allay concerns about fraudulent entry into the population register.

Birth registration for children born out of wedlock [56]

The BDRA should be amended to provide equal rights to fathers to register the births of children where the mother is not present, not willing, not documented herself (no ID) or not able to sign acknowledgement of paternity. In the alternative, fathers should be informed as a matter of procedure that they may approach the magistrate's court for an order of paternity, as provided in the Children's Act.

Complex nationality scenarios in asylum applications[57]

The asylum application (form BI-1590) should allow space for listing ties to multiple nations or dual/multiple nationality. Refugee status determination officers should be trained on nationality and statelessness and their relationship with asylum claims. Ideally, failed asylum-seekers could be screened for a risk of statelessness prior to receiving their notice to leave the Republic. People who are potentially stateless could be referred for exemptions.

Renunciation of former nationality for naturalisation[58]

Section 5(d) of the Citizenship Amendment Act of 2010 provides that in applications for naturalisation "in the case where dual citizenship is not allowed by [the applicant's] country, such person renounces the citizenship of that country and furnishes the Minister with the prescribed proof of such renunciation". The regulations provide that the renunciation letter is only required after written conditional approval of the naturalisation application is given to the applicant. This is an important protection against statelessness; applicants only need to renounce their former nationality once South Africa has stated that it will approve the application for naturalisation upon submission of the renunciation letter.

However, a renunciation requirement causes a problem when the client is a refugee who is unwilling or unable to approach the authorities of the country of origin due to fear of persecution; or where the client does not hold nationality in the country of origin and hence cannot renounce that nationality.

Renunciation should not be required for refugees or stateless persons.

55 Births and Deaths Registration Act 51 of 1992

56 Section 10 of the Births and Deaths Registration Act 51 of 1992

57 Refugees Act 130 of 1998

58 Citizenship Amendment Act of 2010 –5(d) amending Section 5

Requirement of legal status and passport for foreign parent to register child's birth[59]

LHR made a lengthy written submission on the draft regulations on the Registration of Births and Deaths in 2012, available at: http://www.lhr.org.za/publications/submission-draft-regulations-births-and-deaths-registration-act-no-51-1992-submission-d.

LHR would like to highlight its concern about these draft regulations. Draft regulation 4(4) of the Births and Deaths Registration Act states: "A notice of birth of a child born of parents who are not South African citizens, shall, in addition to the requirements set out in subregulations (2) and (3), be accompanied by (a) proof of lawful sojourn in the Republic and (b) a copy of passport of the informant."

This draft regulation is certainly unconstitutional given that when implemented it will deny children birth registration and consequently the right to a name and nationality from birth (Section 28(a) of the Constitution) if their parent(s) does not have legal status in South Africa and/or does not hold a passport. It is this population that needs birth registration the most, given the high risk of statelessness through conflict and gaps in foreign nationality laws.

LHR recommends that this regulation be removed. It works directly against the goal of universal birth registration. LHR recommends regulations that, instead of requiring more identity documentation from parents, allow undocumented parents to register births on equal grounds as documented parents. Hospitals that are connected to Home Affairs and can issue certificates of birth on site should do so even if the parent(s) cannot provide identity documents. Where a South African parent tries to register a child but does not yet have an ID themselves, a birth certificate should still be issued with as much information as possible – for example, the names of the parent(s) and birthplace and birth date of the child. The birth register may be amended at a later stage when the parent is able to get an ID document.

59 Draft Regulations on Registration of Births and Deaths, 2012 – regulation 4(4)

8.
Conclusion

As has been recorded by LHR and captured in this report, statelessness occurs for numerous reasons across Africa and within South Africa. South Africa can no longer overlook this issue which impacts both citizens and migrants alike. Given its strong human rights record, progressive Constitution and high numbers of migrants, South Africa must take the lead on the issue of statelessness.

By adopting the statelessness treaties, South Africa will draw attention to the issue, will affirm its commitment to human rights and will join the minority of forward-thinking states worldwide that recognise the importance of addressing statelessness.

South Africa has human rights obligations to all people present on the territory, irrespective of their legal status. These obligations are thwarted by the lack of direct attention which the legislative and administrative frameworks give to statelessness. Even without ratification of the statelessness conventions, South Africa is bound to find solutions to the predicament of stateless people.

These solutions must take a two-pronged approach, addressing issues of statelessness arising among those born in South Africa as well as those born abroad. For South Africans who are not accessing their nationality, procedures must be strengthened to deal with difficult cases. For foreign stateless persons, it is of utmost importance that the Department acknowledge and provide for their predicament as a matter of urgency. A dedicated mechanism for the assisted identification and documentation of stateless persons should be at the core of this development.

Until such time, attorneys, advocates and social workers must continue to work with the legal framework as it stands. This report has highlighted some of the problems and the possibilities for their resolution. It is LHR's hope that, by shedding light on these invisible people, and by articulating the difficulties they face in accessing the most basic of human rights, we will contribute to a more conscientious legal future in South Africa.

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9. Annexure: Summary of Issues and Recommendations

International Law	RSA Law	Issue	Recommendations
1954 and 1961 Stateless Conventions	Immigration Act Citizenship Act Births and Deaths Registration Act	• No legal framework dedicated to stateless people in RSA • No signature and ratification of the statelessness treaties • SA pledged in December 2011 to sign and ratify, subject to internal consultative process	• RSA should create domestic legislation to provide identification, protection, ID and path to nationality for stateless on territory in line with 1954 Convention • Department must begin internal consulting process • RSA should sign and ratify treaties within 2013
1954 Convention Requires that states provide stateless an ID document and path to nationality	Section 31(2)(b) Immigration Act	• Only application for stateless (non-refugee) – Section 31(2)(b) – is 100% discretionary with no regulations or guidelines. • Decisions can take upwards of three years • Applicants have no document to prevent arrest and no right to work or study • No interviews appear to take place of applicants as a matter of routine • Applicants not informed of right to appeal - only appeal is to high court, too expensive for many people to access	Minimum: • Amendment of Section 31(2)(b) of Immigration Act to remove state discretion in cases of statelessness • Development of regulations to underpin the use of Section 31(2)(b) to allow for: • A standard form application process in cases of statelessness • Applications to be made with assistance of local Home Affairs officers • Strengthening of referral system for 31(2)(b) stateless applications between Lindela, local Home Affairs and Minister's office • Temporary permit needed for applicants with biometric data • Training and increase of capacity within the Department of Home Affairs Better: • Addition of new section to Immigration Act providing stateless status Ideally: • New legislation governing identification and protection of stateless • Expedited naturalisation or citizenship by registration for stateless • Due process protections: right of interview if negative decision is contemplated • Right of appeal to independent body

1961 Convention Requires citizenship to persons born on territory otherwise stateless	Section 2(2) Citizenship Act Births and Deaths Registration Act (BDRA)	• Only provision to prevent statelessness in RSA – grant of nationality to those born in RSA who are stateless – is not being accessed by those who need it • No regulation accompanies this section of the Citizenship Act • Undocumented parents cannot register children so their children cannot meet legal requirement of birth registration to qualify • Local Home Affairs offices are not aware of this provision • The public is not aware of this provision • Requirement of birth registration goes beyond 1961 Convention	• RSA must create regulations to this section of the Citizenship Act • Department must develop policy circular on how to implement this provision and must train local Home Affairs offices • Amendment of BDRA to allow undocumented parents to register births, using witness affidavits, children's court orders of paternity/maternity, etc. • Alternatively, remove requirement of birth registration to qualify under Citizenship Act's s. 2(2); birth records and affidavits of birth should suffice as evidence of birth on territory • Hospitals connected to the Home Affairs system should be able to issue birth certificates on site, regardless of whether parents are documented. • Public must be made aware of this legal provision otherwise it will remain untapped and will result in statelessness.
1954 Convention Requires identification procedure Article 26, Freedom of Movement Article 31, Expulsion	BRDA – late registration of birth (LRB) Immigration Act - release after 120 days	• Would-be applicants for late registration of birth are frequently turned away multiple times for lack of documentary evidence of their birth on the territory • No referral system from local offices (i.e. failed LRB) and Lindela to 31(2)(b) process • No reporting mechanism for released Lindela detainees, to allow the Department to investigate and resolve their status • Result is stateless persons are left to roam the country indefinitely with no resolution to their status • They have children and it becomes a generational issue, confining the family to poverty, impacting social cohesion and national unity	• All applications for late birth registration must be received and processed regardless of lack of documentary evidence/witnesses • Screening committees envisaged in draft regulations to BDRA are promising. They should include automatic and compulsory referral by local Home Affairs offices to screening committee when a person cannot qualify for LRB or when a person released from Lindela reports to local DHA after release. • Local office managers and officials should be trained on when to refer a case for an exemption under Section 31(2)(b) • Rural areas and border areas should be targeted and should have screening committees easily accessible, perhaps through use of mobile units. • People released from Lindela should be given Notice to Appear or other document and local Home Affairs offices should be trained on what to do with people who appear with such document from Lindela

	Section 15 of the Citizenship Act ("citizenship in cases of doubt")	• No regulations underpinning the application of this section • No committee established under the law to consider or review applications (as with Section 31(2)(b)); unclear how these applications are processed • Provision is little known and not processed at a local level • Persons who are rejected for late birth registration are not informed of the possibility of making this application • Result is it is rarely accessed without legal assistance • No interim form of documentation issued to applicants pending the outcome of the Section 15 application	• Amendment of Section 15 of citizenship Act to provide for a committee which will advise the Minister upon receipt of such application • Development of regulations to underpin the use of Section 15 to allow for: • A standard form application process in cases where late birth registration is not accessible • Applications to be made with assistance of local Home Affairs officers • Training and increase of capacity within Home Affairs • Due process protections: right of interview if negative decision is contemplated • Right of appeal to independent body
Article 1(4) and Article 4 of 1954 Convention States must provide nationality to people otherwise stateless born abroad to State citizens	BDRA Section 13 and regulation 10 Registration of foreign birth	• South African citizens (SACs) born abroad are unable to register in RSA without foreign birth certificate • RSA has citizenship by birth for any person born abroad to SAC – provided birth is registered • Persons born abroad to SACs who do not register at RSA Consulate must register in RSA – but must have birth certificate from birth country • Too many African countries have low rates of birth registration. 50% of children born in Africa are not registered • Requirement of a foreign birth certificate results in absolute barrier to SACs who cannot access one • Result is statelessness, in contravention of Convention	• Birth records, clinic cards and/or affidavits etc. should be accepted where no birth certificate is available • LRB process should be followed for this group - witness, interview, etc • BDRA regulations should be amended to remove the absolute requirement of a foreign birth certificate to allow more flexible standard
Convention on the Rights of the Child (right to acquire nationality; non-discrim) CCPR (right to acquire nationality) ACRWC (right to acquire nationality)	Children's Act, Immigration Act	• Unaccompanied foreign minors who go through Children's Court proceedings remain illegal in the country until age 18, when they are subject to deportation • Shadow population in RSA • No immigration status is given unless the child is an asylum-seeker/refugee • Gap remains for children whose best interest is to remain in RSA and who need valid immigration status – at high risk of statelessness when they become adults and currently given no path to nationality	• Section 31(2)(b) – Minister can grant PR to this category of children, who have gone through children's court and whose best interest is to remain in RSA • Amend Immigration Act regulations to provide regulation to 31(2)(b) on how to apply for children with "special circumstances"

Convention on the Rights of the Child African CRWC	BDRA	• Inconsistent registration of children born to foreign parents • Asylum-seekers, refugees and other foreigners are turned away or it takes months to a year to get birth certificate issued	• Policy directive should be issued regarding birth registration and parental document requirements - to clarify that all births must be registered, regardless of parents' immigration status
	Section 10(1)(b) BDRA	• Single fathers cannot register "out of wedlock" births • Mother must be present and documented in order to consent to acknowledge paternity • They are not informed of option to obtain magistrate's court order of paternity • In many cases the father is married but the customary marriage is not registered because the mother is undocumented	• Single fathers should be able to register children on equal grounds as mothers • In alternative, they should be notified of magistrate's court option
	Refugees Act No sister act for statelessness	• Asylum application does not accommodate dual nationality, deprivation of nationality or complex nationality situations • Asylum system does not screen for nationality/ stateless issues • Issue often comes up when clients want to "change nationality" on their permits, which officials are reluctant to do • Failed asylum-seekers are given notice to leave without assessment as to whether they can access nationality in country of origin	• Application for asylum (form BI-1590) should allow space for listing multiple nationality claims or persons to list themselves as stateless applicants • RSDOs should be trained on nationality and statelessness and their relationship with asylum claims • Home Affairs should be sensitive to clients' concerns when wanting to change nationality • Failed asylum-seekers should be screened for statelessness risk – should be referred to local Home Affairs or Department screening committee if seen to be at risk, before getting notice to leave RSA (before they remain in RSA and end up in Lindela). Section 31(2)(b) applications should be made for those people who qualify
1954 Convention relating to Status of Refugees	Refugees Act	• Individuals arbitrarily deprived of nationality often have claims rejected as manifestly unfounded • Such people often have valid refugee claims but are unaware of implications of nationality laws	• Training of RSDOs to identify such issues and to assist clients with such claims • Training of SCRA and RAB to identify such issues • Training of service providers in the legal field on how to assist such clients

Article 7 of 1961 Renunciation must be conditional upon person's acquisition or possession of another nationality	Section 7(1) / 5(d) Citizenship Act Naturalisation for those from countries where dual nationality prohibited, Citizenship Act	• Applicants must renounce foreign nationality if dual nationality prohibited • Refugees are not meant to approach foreign mission for any purpose even renunciation • Stateless person born in country that prohibits dual nationality is put in position of needing to renounce citizenship that he does not hold	• Renunciation should not be required where it would impact a person's freedom of movement or right to seek asylum • Asylum-seekers/refugees and stateless people seeking to naturalise should not need to renounce
Same	Section 13 Citizenship Act	• Resumption applications are at discretion of Minister • SACs who voluntarily obtain another nationality after age 18 without first getting permission lose their SAC • No protection against statelessness	• Resumption should not be discretionary where the person has no other nationality, unless to protect national security
1961 Convention	Loss or deprivation of nationality, Citizenship Act	• No due process for loss/deprivation of nationality • Loss/deprivation is either automatic or at discretion of Minister • Chance to appeal in high court - only after citizenship is lost or withdrawn - not everyone can afford	• Amend act to provide for a court hearing or independent body review prior to deprivation
1961 Convention	Section 8(2)(b) Citizenship Act	• Minister has wide discretion to deprive nationality of citizen who "also has citizenship or nationality of any other country" if it's "in public interest" • Complicated by interpretation of "having" another nationality • No due process protection	• Amend act to provide individual: • Notice • Written reasons • Right to protest before deprivation • Automatic internal appeal
1961 Convention	Section 7(3) Citizenship Act	• If parent renounces SAC, minor child loses citizenship	• Amend section to provide a safeguard against child's statelessness

1961 Convention	Section 10 Citizenship Act	• Allows Minister to deprive a child of nationality in case of parent losing his/hers • Child becomes stateless if other parent cannot pass nationality	• Should not apply to children born in RSA • Amend section to provide safeguard against statelessness • If later child is stateless, should be able to get back citizenship
1961 Convention	Amendment to Section 6 Citizenship Act Article 8(3)(a)(ii) of 1961 provides that deprivation due to disloyalty must involve "express prohibition by contracting State" or "conduct seriously prejudicial to vital interests of the State"	• Citizen by naturalisation shall lose citizenship if engages in war RSA does not support • Does not explain how to determine if RSA does not support a war • Applies automatically • No safeguard to prevent statelessness	• Removal of this provision or adding of safeguards and regulation
Article 2, 1961 Convention 1930 Convention on certain aspects of statelessness	Foundlings	• No domestic foundling provision • RSA has ratified 1930 Convention on certain aspects of statelessness - which has foundling provision • Although Section 12 of the Births and Deaths Registration Act does provide for birth registration for orphaned and abandoned children, it does not explicitly require them to be registered as South Africans in cases where the parentage and/or birthplace of the child is unknown	• Citizenship Act should include a foundling provision in line with current practice and international law obligations

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