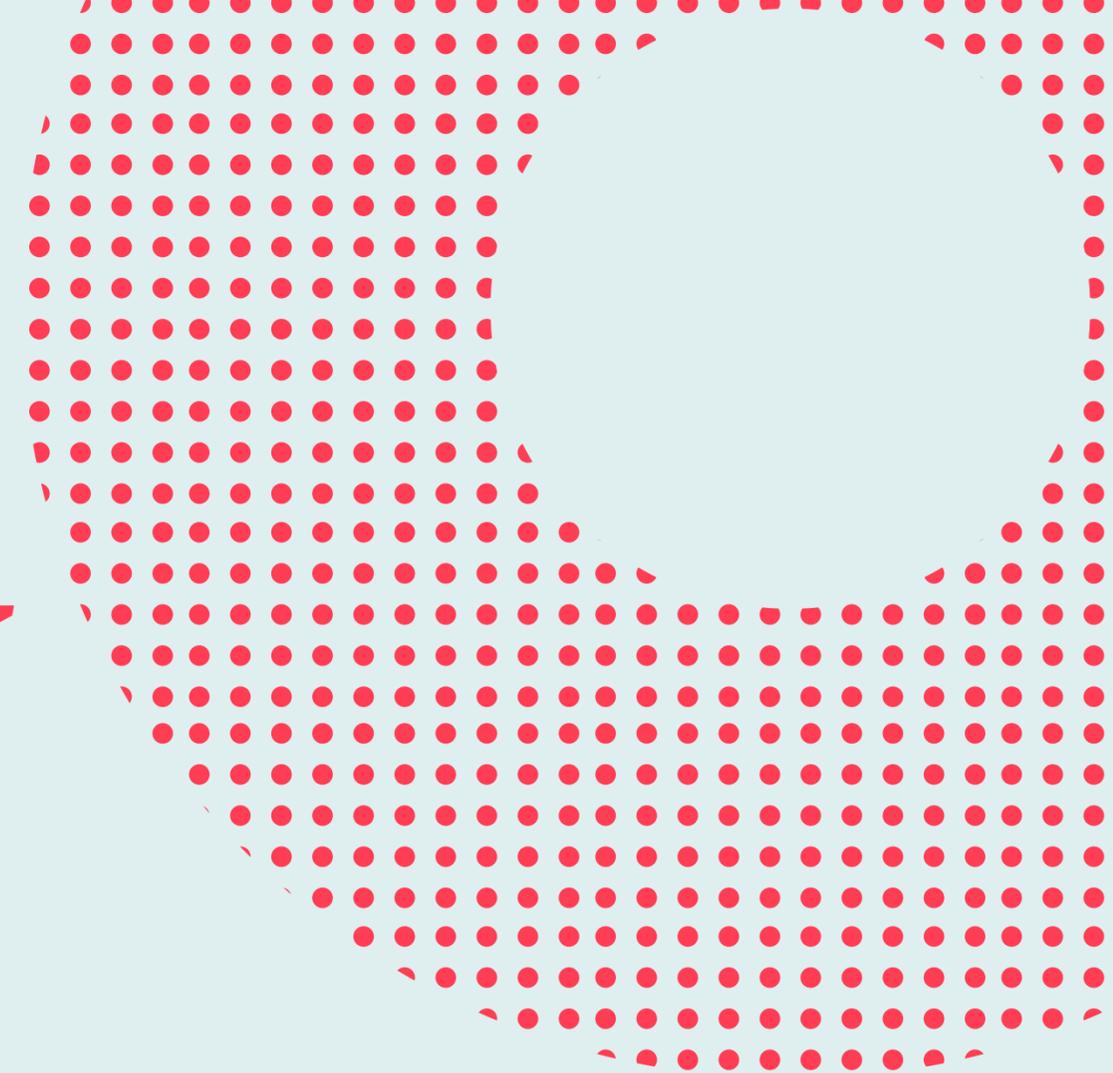


Statelessness and Nationality in South Africa



Presentation to the Department of Home Affairs Portfolio Committee
9 March 2021.



LAWYERS FOR
HUMAN RIGHTS

Presentation Highlights

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Key Definitions

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Implementation of Court Orders

A mechanism for the Identification of Stateless People

The #IBelong Campaign

Key Recommendations

42 years

LHR's experience in human rights activism and public interest litigation in South Africa.

10 years

Since LHR launched its specialist Statelessness Project, in partnership with UNHCR

Key Definitions

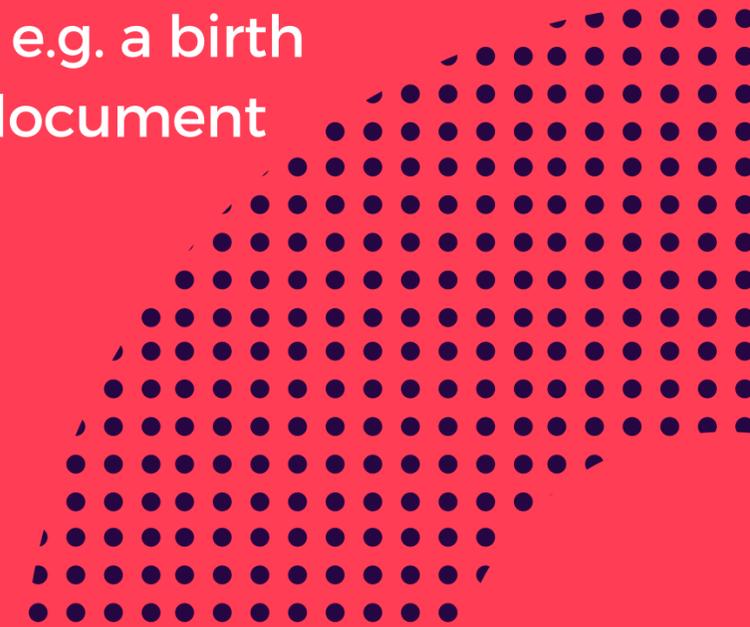
"**Nationality**" and "**citizenship**" are used in international law interchangeably. Neither term has any connotation of ethnic or racial content but is simply the status that gives a person certain rights and obligations in relation to a particular state.

A "**stateless person**" is defined under international law as:

"...a person who is not considered as a national by any State under the operation of its law". Although stateless people may also be refugees, most stateless persons have never crossed a border.

An "**undocumented person**" is someone with no government issued proof of identity e.g. a birth certificate, an ID or a passport (either because no attempt was made to apply or the document was lost but can be reapplied for).

An "**irregular migrant**" is a someone who has crossed a border and who does not have lawful immigration status in the country of entry or who entered the country without proper immigration procedures being followed.



It is difficult to quantify the issue, both in South Africa and globally.

The exact number of stateless people is not known, but **4.2 million people** are known to be stateless as of **2019**. Globally, numbers of stateless people are not well documented and less than half of all countries (76) have reported data to UNHCR. Actual numbers of stateless populations are likely to be **much higher**.



The Extent of Statelessness



There are no statistics available on statelessness in South Africa due to a lack of established procedures to capture data on the issue. Nonetheless, there are indicative estimations of the prevalence of stateless persons or persons at risk of statelessness in the country.



Just over 15 million unregistered or undocumented people in South Africa, of which almost 3 million are under the age of 18. While being unregistered or undocumented is not synonymous with being stateless, being unable to prove nationality due to a lack of documentation can place an individual at an elevated risk of statelessness.

The History of Nationality Law in South Africa

Impact of Imperialism

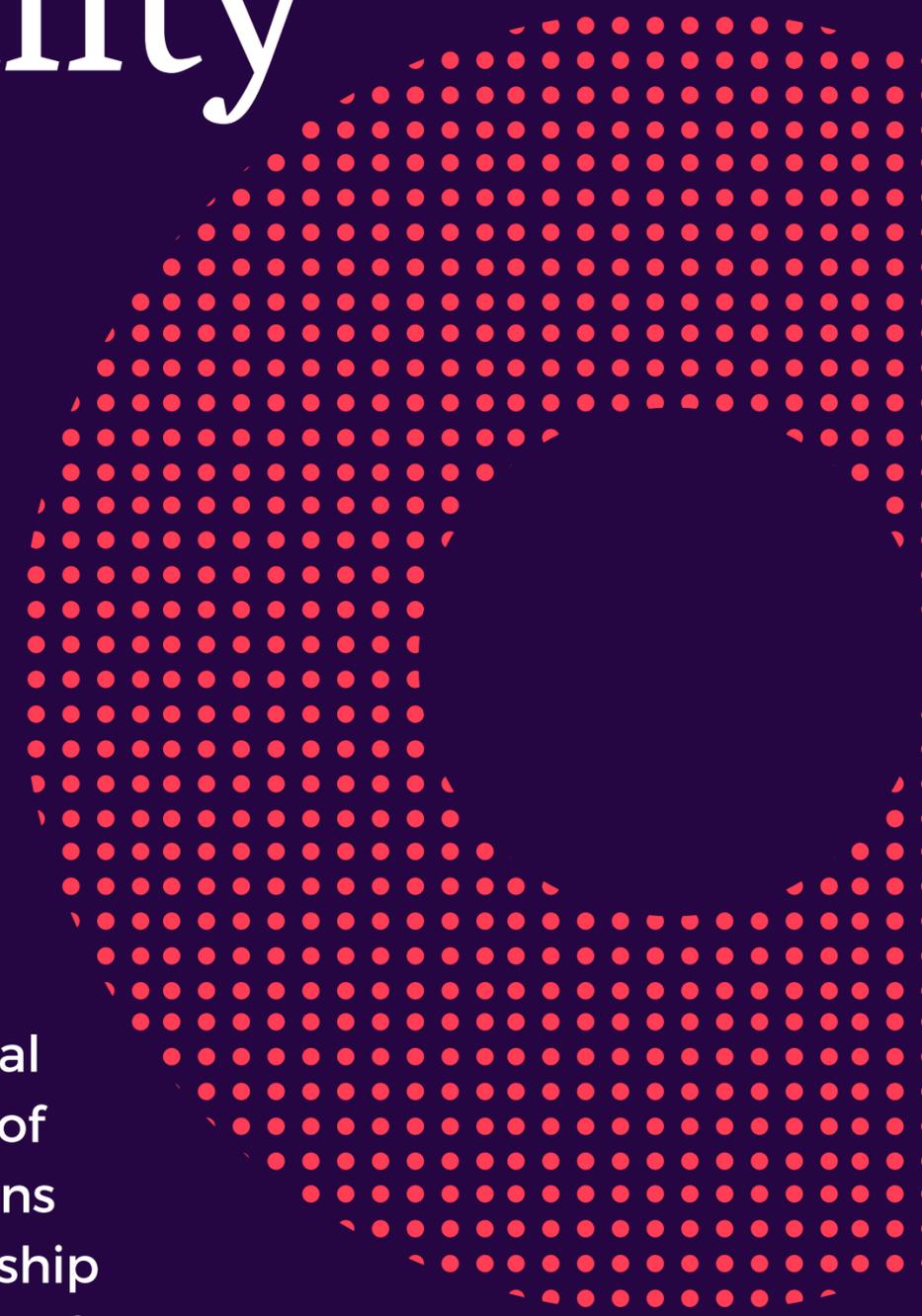
Colonial powers established political borders that cut through communities which in the past had formed single social-political units.

Impact of system of migrant labour

Systematically organised and coerced labour migration within Southern Africa caused mass migration without long-term consideration of legal status or nationality.

Impact of Apartheid

The policy implemented by the National Party government under the doctrine of Apartheid was that black South Africans should lose their South African citizenship and should instead be allocated to one of the ten homelands.



Citizenship is the legal link an individual has with a State and is a fundamental human right.

The Constitutional Court in the 2020 judgment of *Chisuse v Director-General Department of Home Affairs* made the following remarks:

“Citizenship is not just a legal status. It goes to the core of a person’s identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person.

Deprivation of, or interference with, a person’s citizenship status affects their private life and family life, their choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement. [1]”

[1] *Chisuse v Director-General Department of Home Affairs* CCT 155/19

The Causes of Statelessness

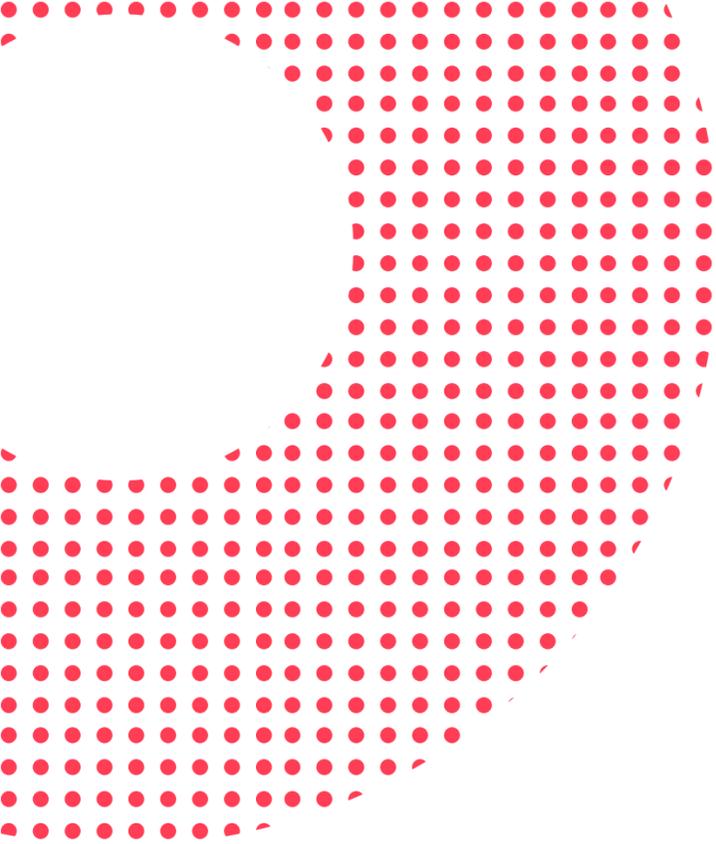
Statelessness can be caused by a number of factors such as:

- Discrimination on the basis of race, ethnicity, religion, language or gender;
- conflict or gaps in nationality laws;
- loss, deprivation or renunciation of nationality; or
- procedural barriers in civil registration systems.

Statelessness is a man-made problem and occurs because of a wide range of causes. Entire swathes of a population may become stateless overnight due to political or legal directives or the redrawing of state boundaries.

Families endure generations of statelessness despite having deep-rooted and longstanding ties to their communities and countries.





Illustrative Scenarios

1

In South Africa, **unmarried fathers** cannot register the births of their children in the absence of or without the consent of the mother. This can place the child at risk of statelessness if the mother is undocumented, missing or deceased. LHR, representing the Centre for Child Law, launched a constitutional challenge to this provision in the Births and Deaths Registration Act after Mr. Naki (a South African citizen) could not register the birth of his new daughter because the mother (a DRC citizen) was unable to renew her expired visa close to the time she was due to give birth.

2

LHR assists an increasing number of South African citizens with **blocked / duplicate identity documents**. These clients only realise their IDs are blocked after trying to apply for a travel document or to access their bank accounts and do not receive any prior notice or an opportunity to challenge the decision to block their IDs. This constitutes an arbitrary deprivation of nationality as the Constitution stipulates that all administrative action must be procedurally fair, lawful and reasonable. It can take the Department of Home Affairs years to resolve the situation while the affected person's life is in limbo.

Without an ID, one cannot register for school, register a birth, get a job, access a bank account or a social support grant.

3

In most African states, nationality laws are based on the concepts of **jus soli** ('right of soil') and **jus sanguinis** ('right of blood'). Under the former, a person can obtain citizenship if they are born in the country, while the latter bases a person's nationality on the origin of their parents.

LHR client "Daniella" was born in Cape Town and was stateless for the first 8 years of her life. Her parents assumed she would automatically be Cuban because they are Cuban. However, her parents were deemed "permanent emigrants" as a result of not returning to Cuba for an extended period and the Cuban embassy refused to recognise Daniella as a citizen. Since 1994, the South African Citizenship Act has made provision for stateless children to obtain citizenship in South Africa but the Department of Home Affairs is required to draft regulations to guide this process. LHR obtained a court order in 2016 declaring "Daniella" a citizen of South Africa and ordering the Department of Home Affairs to publish the regulations that permit children like "Daniella" to access citizenship in South Africa, but to date there are still no regulations.

4

One of the most common causes of statelessness in Africa is lack of birth registration and while birth registration does not necessarily confer citizenship, it is the first official acknowledgement of a child's existence by a state. **It is estimated that only 45% of children under the age of five are registered in Africa and the rate of birth registration in South Africa is comparatively higher in the region at 89%.** However, there are certain rules and policies that are an obstacle to universal birth registration. In 2019, LHR represented ABBA Specialist Adoption Services to obtain birth certificates for 33 abandoned babies who had been waiting for registration for 18 months. The Department of Home Affairs said this backlog was because its policy only allowed two babies to be registered by the social workers each month. The birth certificates were not only crucial to the adoption process, but also to prevent the babies from becoming stateless.⁵ Where birth registration cannot take place

Groups at risk of Statelessness

Some groups of people are particularly at risk of statelessness. These include:

- **Orphaned and abandoned infants and other vulnerable children;**
- People of mixed parentage;
- Adults who's birth's have never been registered;
- Undocumented long-term migrants and their children; and
- Border populations.

There is an increasing number of **unaccompanied or separated migrant children (USMCs)** in South Africa who are placed in the care system through a Children's Court order and invariably based on the court's finding that it is in the child's best interest to remain in South Africa. These children are often undocumented and/or stateless or at risk of statelessness, but there is no legal safeguard for them to obtain citizenship or immigration status in South Africa.



The Consequences of Statelessness



Statelessness and discrimination in access to citizenship and identity documents has a strong negative impact on the ability of individuals and groups to **enjoy respect for their other human rights**, and to participate fully in the economic, social and political life of a country.

Nationality is an entry point to access other rights and is described as “**the right to have rights**”. Without a nationality, a stateless person is vulnerable to exploitation and discrimination, and cannot exercise their rights to health care, to education, to freedom of movement, to work or to vote. Even opening a bank account, signing a lease agreement, obtaining social assistance or being able to get married can prove impossible for a stateless person.

1954 Convention

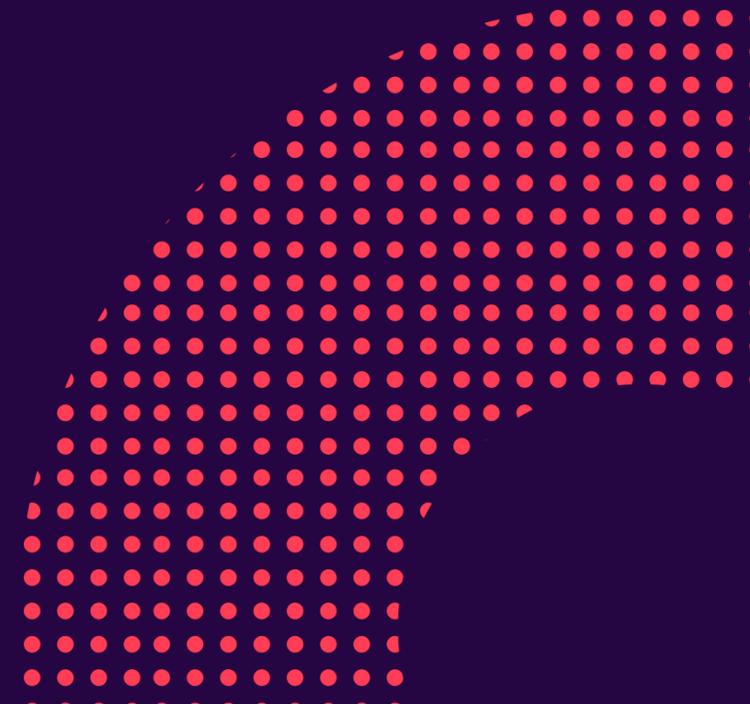
Establishes **minimum standards of treatment for stateless people** in respect to a number of rights. These include, but are not limited to, the right to education, employment and housing. Importantly, the 1954 Convention also guarantees stateless people a right to identity, travel documents and administrative assistance.

1961 Convention

Establishes an international **framework to ensure the right of every person to a nationality**. It requires that states establish safeguards in their nationality laws to prevent statelessness at birth and later in life. Establishes that children are to acquire the nationality of the country in which they are born if they do not acquire any other nationality.

International Standards and Mechanisms

SA has not acceded to either UN Statelessness Conventions but is bound by other international and regional human rights instruments that protect the right to a nationality, in addition to the Constitution which guarantees that every child has the right to a name and nationality (s28) and that no citizen may be deprived of citizenship (s20).



South Africa's Pledges to Address Statelessness

2011

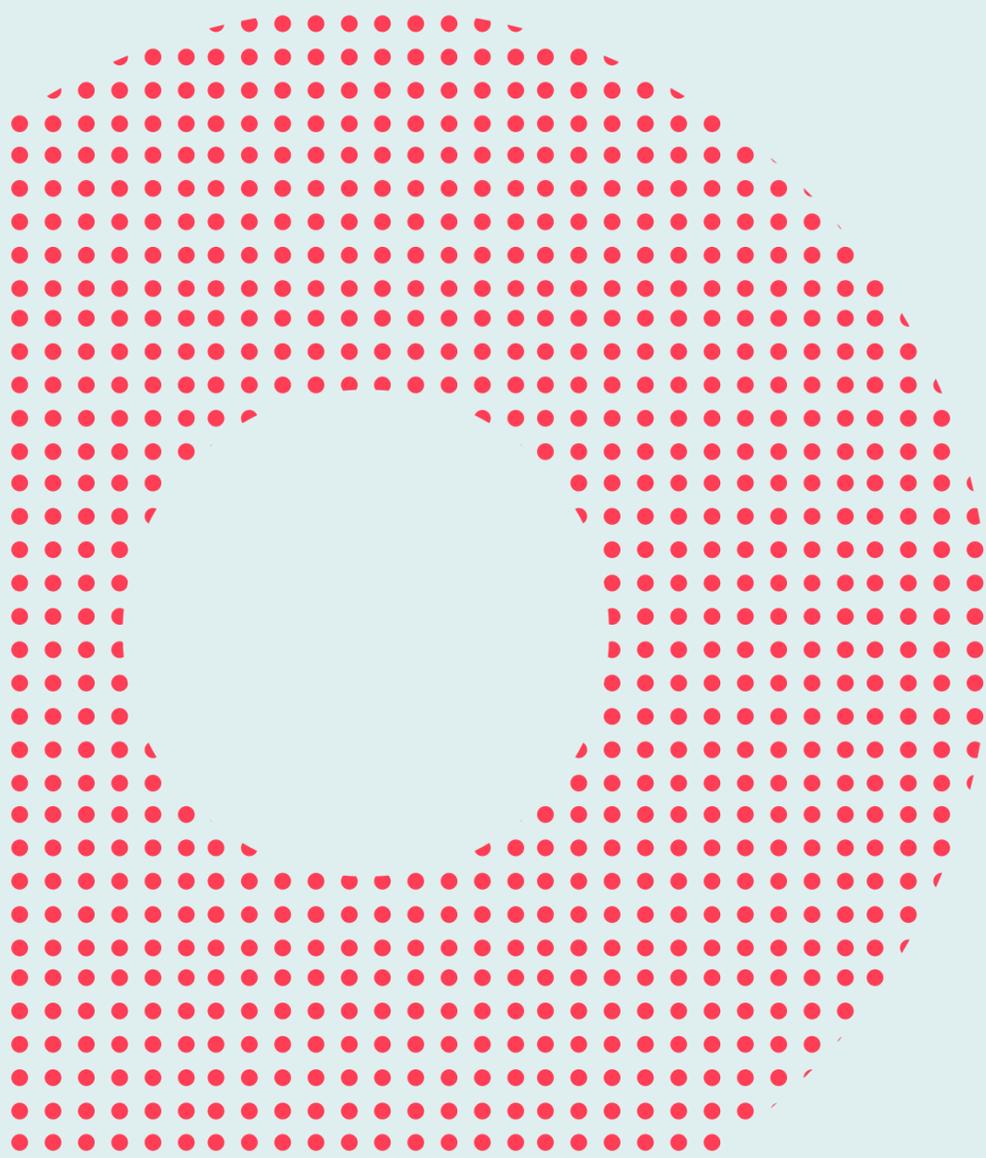
South Africa pledged to become party to the 1954 and 1961 UN conventions on statelessness.

Although accession to these conventions has not yet taken place, **South Africa remains committed to do so. South Africa has also appointed a focal on statelessness in the Department of Home Affairs.**

2019

South Africa's pledge to Global Refugee Forum in 2019 also signals political will to resolve and prevent statelessness:

“Promoting Civil Registration and related documentation in order to ensure that the South African nationals and refugees in the territory of South Africa are properly documented. In addition, South Africa also pledges to promote civil registration and related documentation across the SADC region to ensure that regional citizens are properly documented to eradicate possibilities of statelessness in the region”



Universal Birth Registration

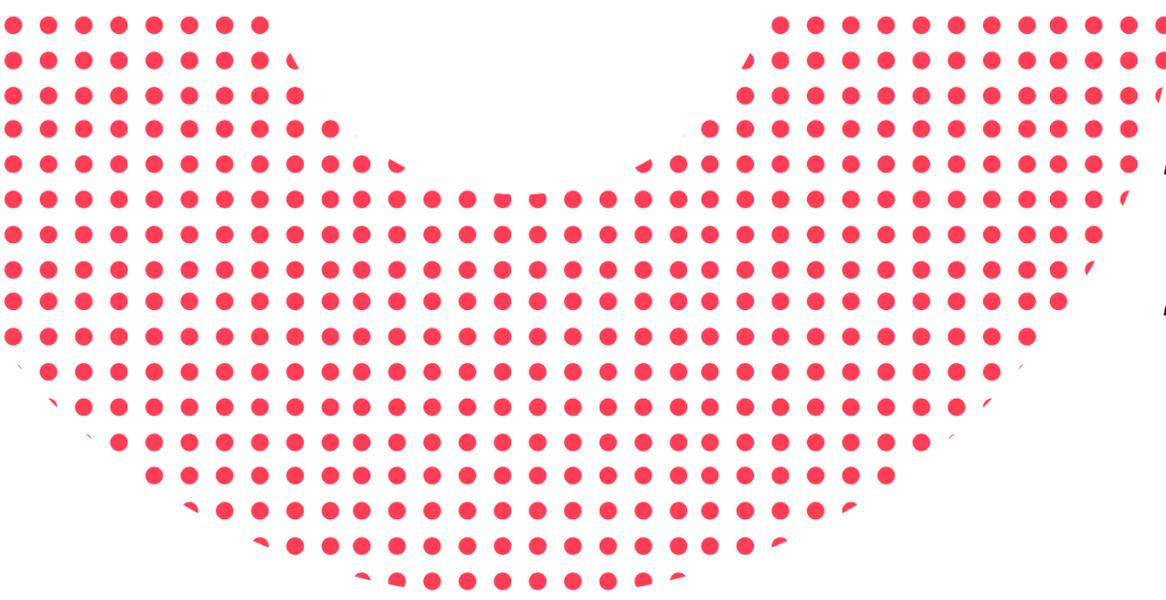


Birth registration is fundamental for acquiring nationality because it documents where a person was born and who a person's parents are.

It is also essential that a birth certificate is issued upon registration because, in practical terms, it enables the child to access other fundamental children's rights and child protection services:

Birth registration is a fundamental human right in itself and was first acknowledged at an international level in the 1948 Universal Declaration of Human Rights. The 1989 United Nations Convention on the Rights of the Child and the 1990 African Charter on the Rights and Welfare of the Child, which have both been ratified by South Africa, also specify that every child is entitled to immediate birth registration.

On a domestic level, birth registration is enshrined in the Constitution. Section 28 is a dedicated section on children's rights and states that: **“Every child has a right to a name and a nationality from birth”**. This right applies to all children born in South Africa, irrespective of the child's legal status or that of the parents.



Birth Registration in South Africa



Although South Africa's birth registration rate is **comparatively higher** than other countries in Southern Africa, it **still falls short** of the standard of universal birth registration.[1]



South Africa's birth registration rate has **remained stagnant** for nearly a decade, leaving thousands of children unregistered.[2]



In a 2019 court case concerning the rights of undocumented children to basic education revealed that there were more than **900 000 undocumented children** enrolled in public schools in South Africa, of whom more than 800 000 were South African citizens.[3]

[1]United Nations Children's Fund, A Statistical Profile of Birth Registration in Africa, UNICEF, New York, 2020

[2]Statistics South Africa, Statistical release P0305, Recorded Live Births (2018 report): 2007 – 2011 = 89,2%; 2011 – 2016 = 88,6%, 2017 – 2018 = 89,2%.

[3]Centre for Child Law v Minister of Basic Education and others



The LHR Statelessness project has received

2000
queries

related to birth registration in the last five years.

The trends indicate that the lack of birth registration is most prevalent amongst the following categories of children:

- children of refugees, asylum seekers or stateless parents;
- children of irregular migrants;
- children of undocumented South Africans;
- children who have been abandoned or orphaned;
- children who are unaccompanied or separated (including migrant children); and
- children living in border populations or remote areas.

Barriers to Birth Registration

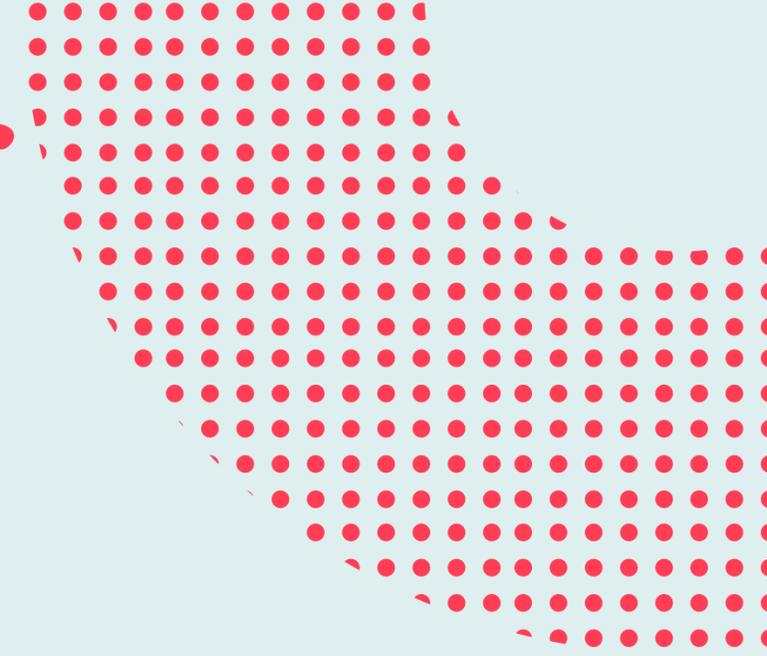
In a recent report launched by Statistics South Africa, South Africa's birth registration rate for children under five years old is over 80%, but estimates are that over 100 000 children born a year are not registered at birth or by the age of five years old.[1]

WHY?

1. The regulations require that the parents of the child submit valid identity documentation when they give notice of birth.
2. The BDRA and regulations stipulate that birth registration must be done within 30 days of birth. While late registration of birth is permitted after the 30 days, it is subject to additional costs (i.e. DNA tests) and stringent requirements including a panel interview.
3. The BDRA and regulations state that the parents of the child must give notice of birth, or where the children are orphaned or abandoned, a social worker must give notice of birth. There is no scope for a caregiver/guardian to give notice of birth.
4. Section 10 of the BDRA and regulation 12 establish a distinct procedure for birth registration of children born to unmarried parents vs children born to married parents.
5. There is no explicit regulation for the registration of foundlings.

[1] See: <http://www.statssa.gov.za/publications/P0305/P03052018.pdf> - it is estimated that about a million children are born in a year in South Africa and the birth registration rate for children under the age of five is 86.4%.

Arbitrary Deprivation of Citizenship



The practice of ID "blocking"

A growing number of South Africans have their IDs blocked either because the Department of Home Affairs suspects them of being “illegal immigrants”, or because the ID number has been marked in fraudulent activity or duplicated.

In December 2020, in a response to a parliamentary question raised by EFF MP Lorato Tito., Minister Motsoaledi revealed that DHA is investigating close to a million blocked identity documents. [1]

An ID is critical in that enables a person to prove their nationality and to access other important rights e.g. the right to education, the right to work, the right to social assistance and the right to vote. Once an ID is blocked it can take the Department of Home Affairs an indefinite time to resolve the issue, leaving the affected person in limbo.

To have the ID ‘unblocked’ substantive proof of citizenship must be submitted including birth certificate, DNA test etc. Children whose parents’ IDs have been blocked by the DHA are at risk of statelessness as they will not be able to access birth registration or obtain their own IDs once they turn 16 years old without their parents’ documentation.

Parliamentary Question NW2763 to the Minister of Home Affairs, available at: <https://pmg.org.za/committee-question/15119/>

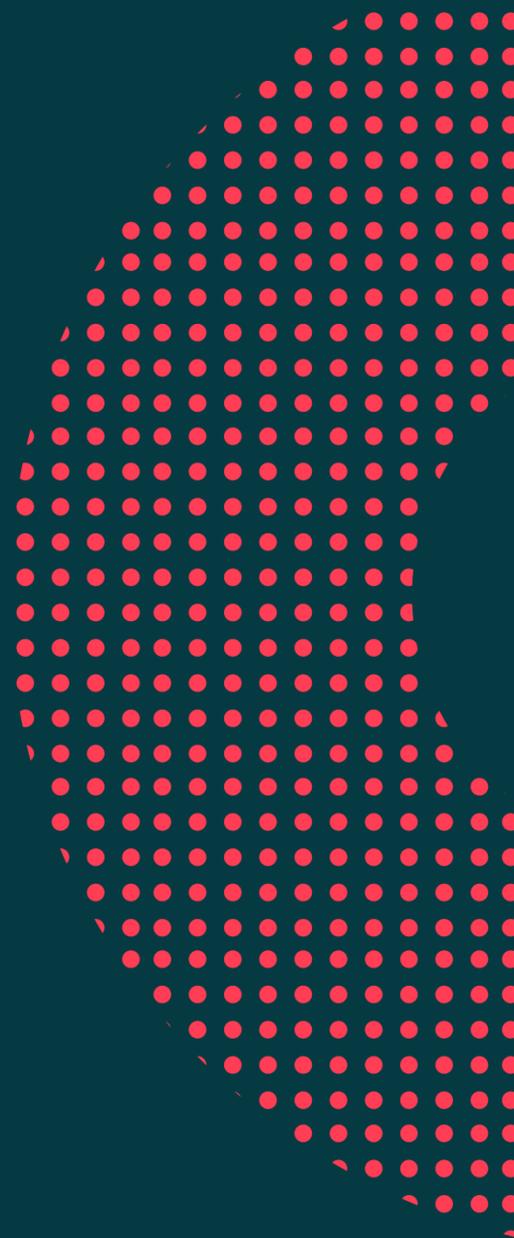
Lack of Access to Naturalisation

Lack of access to naturalisation does not create statelessness if the person concerned has another nationality and this nationality is documented. But it does create exclusion, if naturalisation is impossible to access for those who have lost any connection to their country of origin; and it greatly increases the risk of statelessness for later generations.

The Citizenship Act governs the acquisition of South African citizenship and sets out the various pathways to obtaining citizenship by birth, by descent or by naturalisation.⁸ However, various obstacles impede access to nationality through the Citizenship Act.

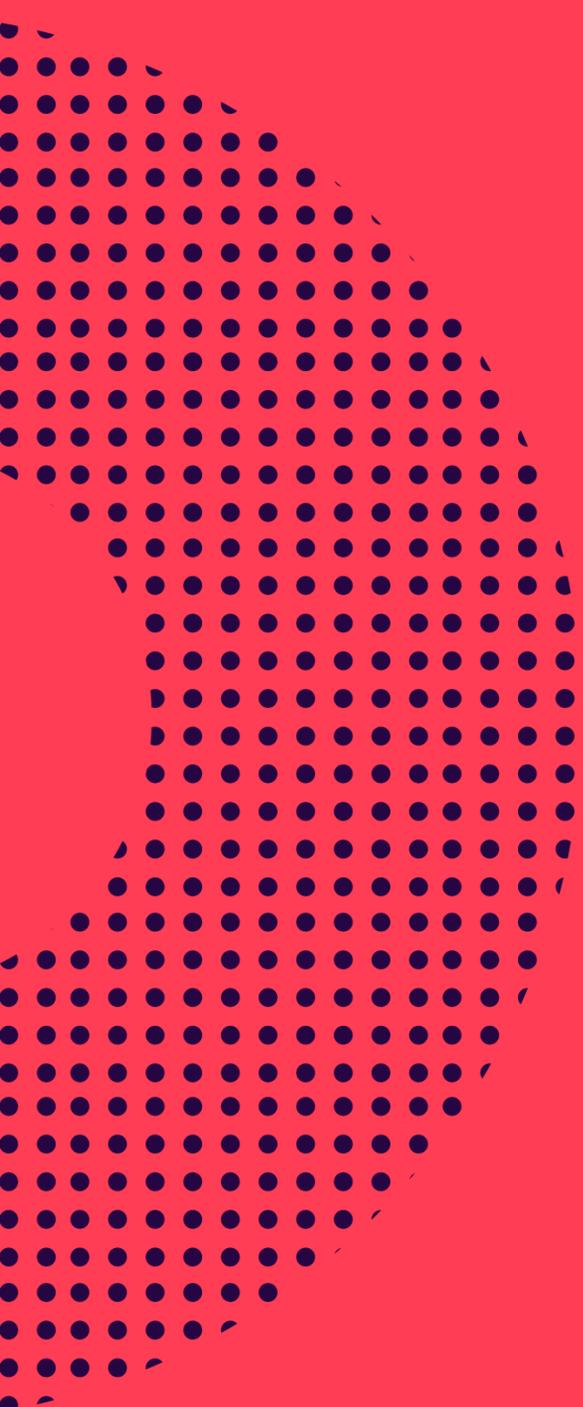


Legal Impediments to Citizenship in South Africa



Various obstacles impede access to nationality through the Citizenship Act. These include:

- Birth registration is a prerequisite to obtaining citizenship but there is birth registration is not universal in South Africa, and in some cases proves to be impossible
- Section 2(2) and Section 4(3) of the Citizenship Act provide important safeguards against statelessness for children who are born stateless or born to migrant parents in South Africa. However, there are no regulations in place on how to implement these provisions.
- Section 6 - 8 of the Citizenship Act provide for the loss, renunciation and deprivation of citizenship in various circumstances. Some of these provisions are problematic in that they do not provide any safeguards against statelessness for the implicated individuals



Further Impediments to Citizenship in South Africa

- Section 10 of the Act allows for the deprivation of a child's nationality on the basis of their parents' loss of nationality, which is not only unconstitutional but also contrary to the principle of the best interests of the child.
- The Citizenship Act only confers citizenship on children born in South Africa (unless they are born to South African parents), but does not offer any protection to unaccompanied or separated migrant children (USMCS) who are not born in South Africa. This category of children requires a special dispensation or exemption permit to be established by the Department of Home Affairs.

Lack of implementation of Court Orders

There have been a number of significant wins towards the right to Nationality in South African courts in recent years. However it can take years for Department of Home Affairs to implement court orders, if ever.

Chombo v Minister of Home Affairs (28 November 2018)

LHR received a court order declaring Mary a citizen by birth and that the blockage of her ID must be lifted. Further, the court ordered that her 4 children must be registered and issued with IDs. Only Daniel, the eldest received his ID in 2020. Two years following the court order, his 3 siblings remain without ID documents

DGLR v Minister of Home Affairs (2015)

DHA was ordered to publish draft Regulations for section 2(2) applications. This has not been done to date .



Lumka Nzama v Minister of Home Affairs (7 March 2018)

Mr Nzama was declared a citizen by birth in terms of section 15 of the Citizenship Act. DHA was ordered to lift the blockage on his ID. LHR spent the remainder of 2018 and 2019 pushing for the implementation of this order. His ID remains blocked today.

Chisuse v Minister of Home Affairs (23 July 2020)

Declared client a citizen by birth in terms of section 2(1) (b) of the Citizenship Act. DHA was ordered to register and issue applicants with IDs by the Constitutional Court. Numerous follow ups had to be made with DHA by legal representatives for the three applicants. The third applicant received her ID in February 2021. The first applicant was told re-apply again this year following intervention by LHR. He has yet to hear from DHA.

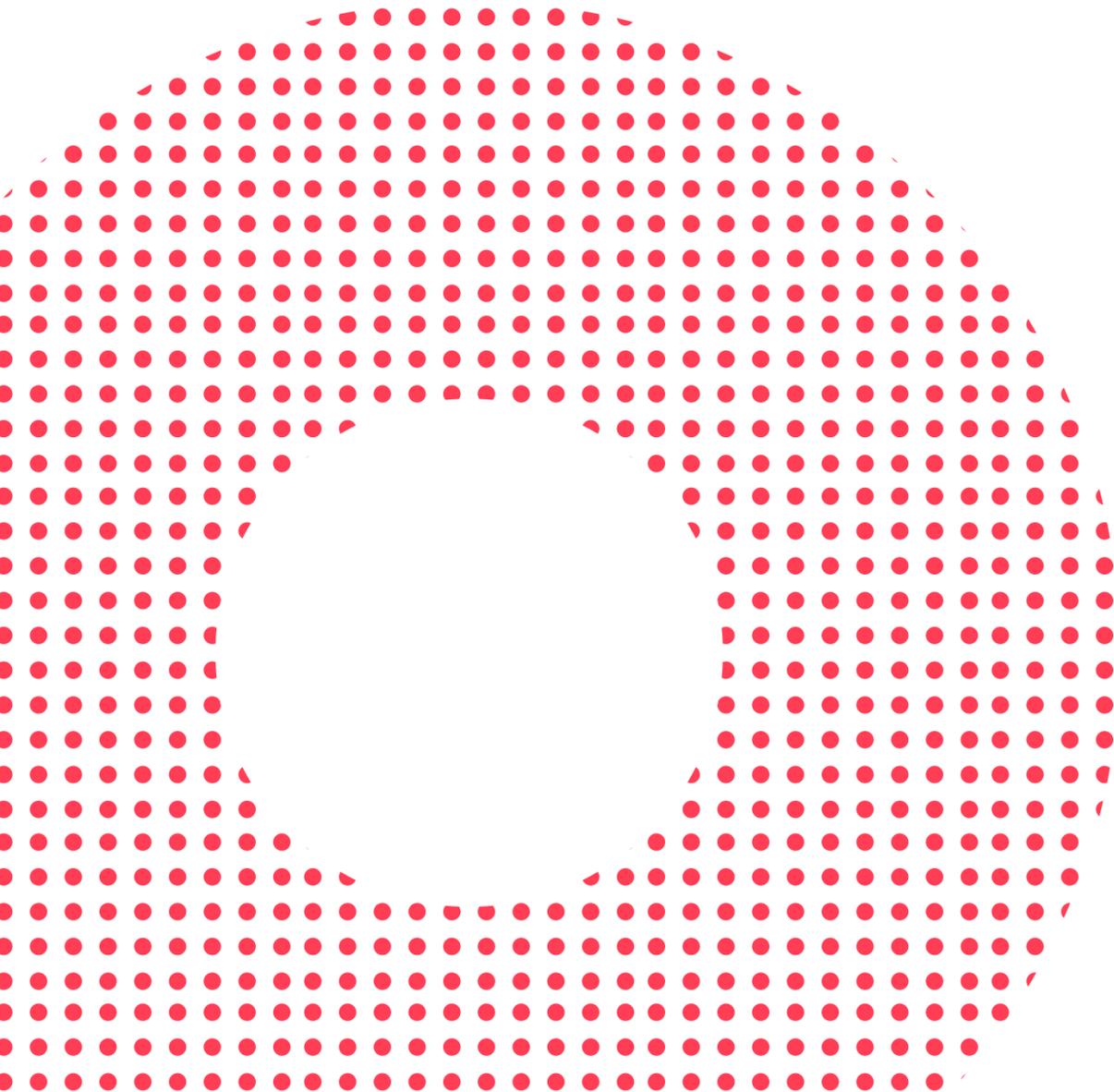


No Mechanism to Identify and Document Stateless Persons

South Africa does not have a dedicated mechanism to identify statelessness.

The identification of stateless persons is however of utmost importance in guaranteeing the rights of stateless persons and children living in the country.

Without accurate identification there is also a lack of insight into the extent of statelessness in South Africa. This makes it impossible to respond to the phenomenon at a policy level and in order to protect individual human rights.

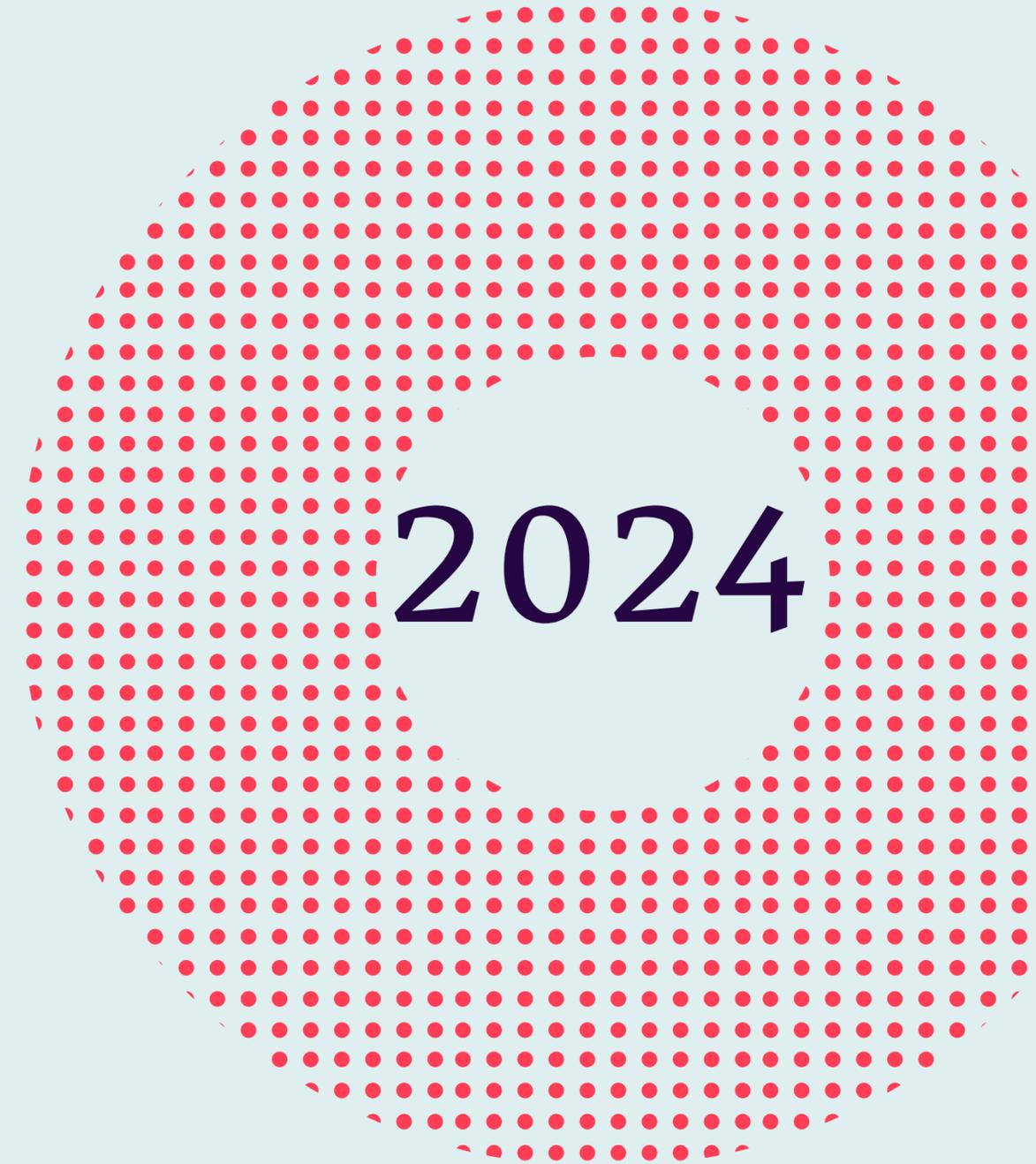


Ending Statelessness

The United Nations General Assembly has mandated the UNHCR to support states in their responsibilities to identify and protect stateless persons, and to prevent and resolve situations of statelessness. In 2014, the UNHCR launched a global campaign to end statelessness by 2024 known as the #IBelong Campaign.

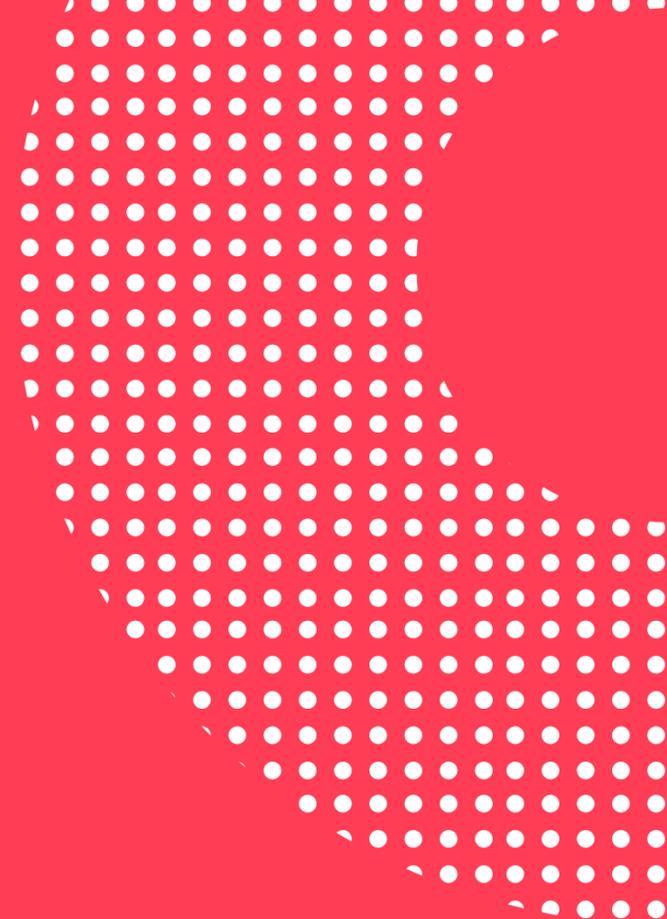
To this end, the UNHCR has also established the Global Action Plan to End Statelessness: 2014 – 2024, which is a guiding framework comprising 10 Actions to be undertaken by Governments, with the support of UNHCR and other stakeholders to:

- resolve existing major situations of statelessness;
- prevent new cases of statelessness from emerging; and
- better identify and protect stateless persons.



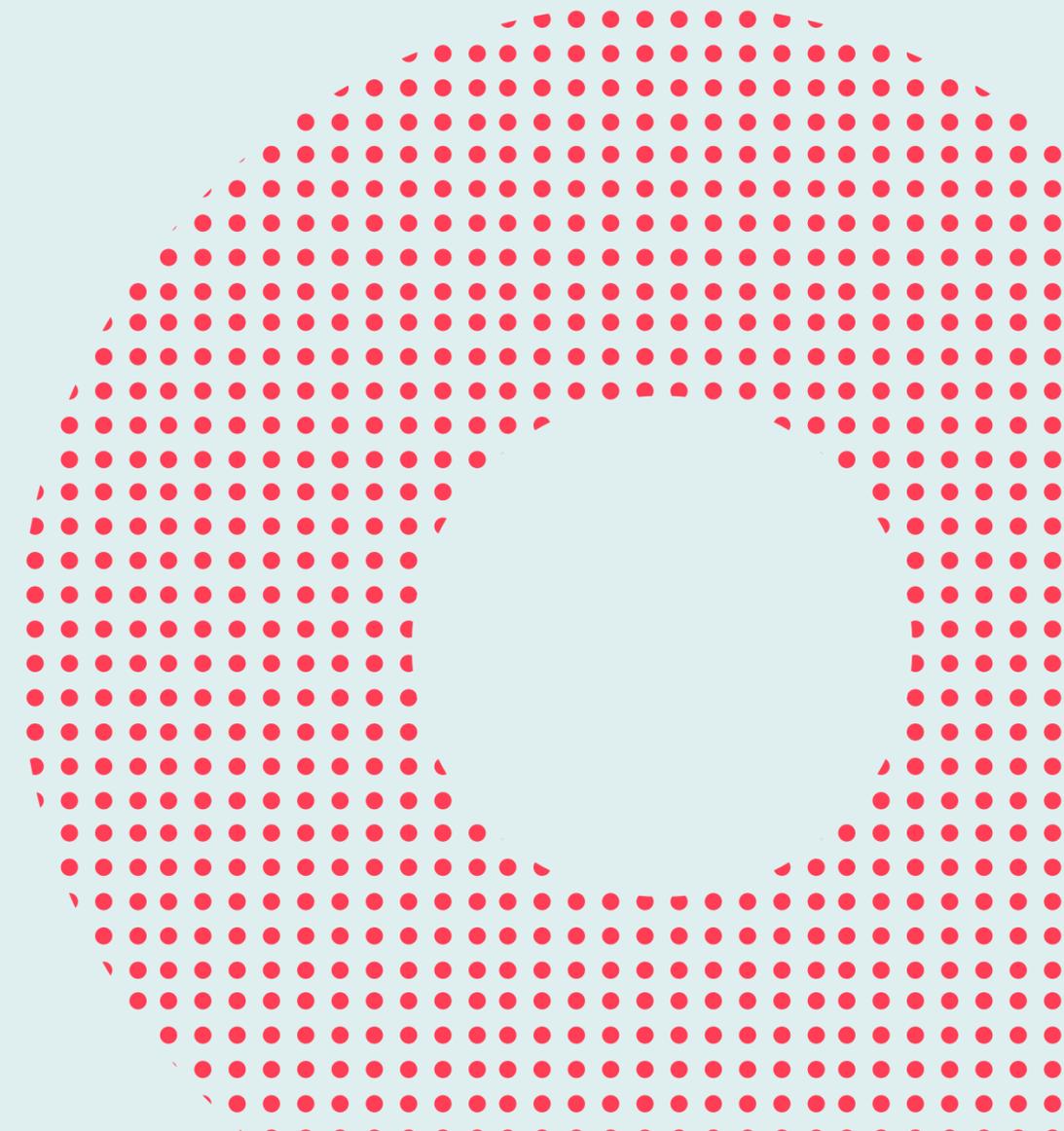
Key Recommendations

1. Accede to the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961).
2. Establish a National Action Plan (NAP) to end statelessness in South Africa.
3. Review and amend all legislation, regulations and policies relevant to access to citizenship and birth registration to ensure their full conformity with the Constitution and relevant international human rights law.
4. Publish and/or finalise regulations to give effect to section 2(2) of the Citizenship Act which provides access to citizenship for stateless children and section 4(3) for children born in South Africa to non-citizen parents.
5. Take further measures to reduce and ultimately eradicate existing cases of statelessness, particularly among children, including through retroactive implementation of safeguards to provide a nationality to stateless children born on the territory, and through ensuring that the loss, deprivation or renunciation of the parent's nationality does not result in the deprivation of the child's nationality.



Further Recommendations

6. Provide that children found abandoned in the territory of South Africa (foundlings) acquire the South African nationality.
7. Put in place policies, programmes, strategies and plans of action for dissemination of information on the importance of birth registration countrywide.
8. Identify all undocumented USMCs in the care system and establish a special dispensation or exemption permit for USMCs in South Africa, as well as for those who were USMC's placed in a CYCCs but have since reached the age of majority.
9. Establish a statelessness determination mechanism and documentation procedure.
6. Take measures to remove barriers to a well managed, resourced, integrated, universal, free and accessible birth registration system.
7. Establish an inter-agency coordination unit in charge of the oversight of the whole integrated civil registration system.
8. Keep open lines of communication with civil society including LHR.



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