
SUBMISSION BY

LAWYERS FOR HUMAN RIGHTS

ON THE SOUTH AFRICAN

CITIZENSHIP AMENDMENT BILL

6 August 2010

This submission has been endorsed by the following organisations:

Centre for Child Law, University of Pretoria
Childline Gauteng & Sunlight Safe House
Sophiatown Counseling Services
Consortium for Refugees and Migrants in South Africa
Refugee Social Services, Durban
Durban Refugee Service Providers Network
Centre for the Study of Violence and Reconciliation
Refugee Rights Centre, Nelson Mandela Metropolitan University
University of Witwatersrand, Forced Migration Studies Programme

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1. Introduction and explanation of the need for insertion of provisions on Stateless persons

Lawyers for Human Rights (LHR) welcomes the opportunity to comment on the South African Citizenship Amendment Bill, 2010 (the Bill). LHR in particular wishes to comment and request further development of provisions for the naturalisation of particular categories of stateless children, especially a provision for the naturalisation of a stateless orphan or abandoned child. Under the Section 1(1) of the Children's Act of 2005 (and as Amended 2007), a child is an orphan if he or she is a "child who has no surviving parent caring for him or her." A child is abandoned if he or she "(a) has obviously been deserted by the parent, guardian or care-giver; or (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months."

Though the Bill appears to make provision for otherwise-stateless children born within South Africa's borders (see the substituted Section 2(3) under "Citizenship by Birth," at footnote 10, *infra*), LHR is concerned that no similar provision exists for the naturalisation of a stateless child who is born *outside* of South Africa and who subsequently find themselves in the country. Stateless unaccompanied, orphaned or abandoned children are doubly vulnerable individuals, as they have neither the protections of a home state nor the care of a responsible adult. The Bill currently does not provide protection for these categories of persons. The resulting situation is that there is no legal framework to regulate the manner in which the state is supposed to treat and regularise the immigration status of these persons.

2. International Law Supporting Legislation against Statelessness

Nationality is the chief underlying necessity for a person to enjoy the rights due all people. Without legal rights in any nation, a stateless person is stripped of the right to even have rights, "there being no foundation from which other rights might reliably flow."¹ Former Chief Justice of the United States "Earl Warren summed up this . . . situation as follows: 'Citizenship is man's basic right for it is nothing less than the right to have rights.' The stateless person is denied the vehicle for access to fundamental rights, access to protection and access to expression as a person under the law."²

It is decided international law that all people have a right to a nationality. Article 15 of the Universal Declaration of Human Rights declares as much outright. Children, in particular, are afforded the right to a nationality under international law, as the UN Covenant on Civil and Political Rights declares that "[e]very child has the right to acquire a nationality."³ International law has begun to create a framework wherein individual nations—once considered entirely sovereign in immigration and naturalisation matters—must now

¹ Batchelor, Carol A., *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232, 235 (1995).

² *Id.*

³ *Id.* at 237, n. 24 (quoting Article 24 of the Covenant on Civil and Political Rights).

conform their legislation and policies “in order to make possible an orderly and peaceful society of nations.”⁴

The 1954 United Nations Convention Relating to the Status of Stateless Persons (1954 Convention) seeks to protect stateless persons by requiring nations to afford them the same rights as other aliens or—in some circumstances—as citizens of that nation. In creating the 1954 Convention, the UN concluded it to be “desirable to regulate and improve the status of stateless persons.” The 1961 Convention on the Reduction of Statelessness (1961 Convention) likewise seeks to prevent statelessness and exhorts contracting states to avoid avenues for naturalisation or citizenship from birth. However, it also goes so far as to recognize in Article 2 that “*foundling[s]* found in the territory of a [party] 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.” This suggests a more forward-looking view toward grants of citizenship, as even a child found within the nation, without proof of its birth therein, is to be afforded citizenship of the host nation.

Though South Africa has not acceded to either of these conventions, the Khartoum Declaration of the OAU Ministerial Meeting on Refugees, Returnees, and Internally Displaced Persons in Africa (Khartoum Declaration) exhorts its members—including South Africa—to accede to both the 1954 Convention and the 1961 convention. Furthermore, South Africa is a party to two League of Nations protocols regarding statelessness that both seek to provide nationalities to otherwise stateless persons.⁵ In all of these ways, international law strongly supports national provisions for the naturalisation of stateless persons to ease their burdens and allow them to participate as full members of societies.

3. National and International Law Regarding Protection of Children

As stated above, LHR is concerned about the absence of protection for stateless unaccompanied, orphaned or abandoned children. In particular, LHR sees the need for protection of foreign children through naturalisation, even when their parents are not South African permanent residents or naturalised citizens. It is of particular concern to LHR that children of irregular and undocumented persons are in particular need of such protection as their countries of origin may no longer be in a position to afford them any protection. By incorporating such provisions in this Bill, South Africa would be acting in line with numerous national and international laws and conventions regarding the rights of the child.

Section 28(2) of South Africa’s Constitution mandates that “[a] child’s best interests are of paramount importance in every matter concerning the child.” Likewise, the Children’s Act states that: “In all matters concerning the care, *protection and well-being* of a child the standard that the child’s best interest is of paramount importance, must be applied.”⁶ The Children’s Act goes on to state that a child who has been “*abandoned or orphaned* and is

⁴ *Id.* at 238 (quoting Córdova, R. *Report on the Elimination or Reduction of Statelessness*: UN doc. A/CN.4/64, (1953)).

⁵ League of Nations, *Special Protocol Concerning Statelessness*, 12 April 1930, C.27.M.16.2931.V, available at: <http://www.unhcr.org/refworld/docid/3ae6b36f1f.html> [last accessed 7 June 2010]; League of Nations, *Protocol Relating to a Certain Case of Statelessness*, 12 April 1930, No. 4138. 179 LNTS 115, available at: <http://www.unhcr.org/refworld/docid/3ae6b39520.html> [last accessed 7 June 2010].

⁶ Children’s Act No. 38 of 2005, Section 9 (emphasis added).

without any visible means of support” is, by definition, a child in need of care and protection.⁷

Internationally, the Convention on the Rights of the Child (the CRC) and the African Charter on the Rights and Welfare of the Child (the ACRWC) both require that the best interests of a child be the primary consideration in *all actions* concerning the child.⁸ South Africa, which has ratified both pieces of international law, is therefore bound to act in the best interests of a child, including specifically with respect to children within their jurisdiction without discrimination of any kind, and *irrespective* of the nationality of the child.⁹ Acting to cure an orphaned or abandoned child of statelessness through amendment to the proposed legislation would certainly satisfy the requirements of these bodies of international law.

4. Statelessness in the Proposed Legislation

South Africa clearly already recognizes the problem of statelessness, as the newly proposed law does give one avenue for citizenship for a stateless person.¹⁰ As subsection (3)(a) makes clear, the Bill makes provision for the stateless child born within the Republic of South Africa. Even if the child would normally be barred from citizenship because neither of the parents were permanent residents or citizens (under subsection (2)), subsection (3)(a) prevents the child from becoming officially stateless by virtue of being born outside of his or her parents’ country of origin. Rather, it confers an additional avenue for citizenship to the domestically born child.

However, the legislation is unreasonably burdensome to stateless children where it proposes new rules for naturalisation.¹¹ Specifically, Section 4(3)(a) requires *inter alia* that a stateless child have been present in South Africa from birth in order to become a naturalised citizen. For many young children who move across borders this is simply impossible. Thus, a child who is born stateless in another nation that does not recognize the child and travels to South Africa unaccompanied or with foreign parents who subsequently either perish in South Africa or abandon the child here has no provision in any legislation for naturalisation. The child is thus condemned to remain stateless, through no fault of her own. South Africa should instead offer a route to naturalisation for such a child, thus acting in accordance with the spirit of international and national law in preventing statelessness, providing nationality for a child, and acting in a child’s best interests.

⁷ *Id.* Section 150 (emphasis added).

⁸ CRC Article 3; ACRWC Article 4.

⁹ CRC Article 2; ACRWC Article 3.

¹⁰ The substituted Section 2(3), at lines 52-58 of page 4 of the Bill, proposes:

“(3) Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (2) shall be a South African citizen by birth, if—

(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).

¹¹ *See generally* substituted Section 4, lines 19-37 of page 5 of the Bill.

LHR recommends that the following provision be inserted into the Bill in order to grant citizenship to an orphaned or abandoned child born outside South Africa as well as to an unaccompanied child who does not have the protection of any other state:

A child born outside of the Republic to parents who are not South African citizens or who have not been admitted into the Republic for permanent residence is eligible to apply for South African citizenship:

-if he or she became orphaned or abandoned within the Republic, provided he or she does not have the citizenship or the right to claim the citizenship of another state;

-if the child is unaccompanied and does not have the protection or the right to claim the protection of another state;

The child will be entitled to remain legally in the country even after the age of majority if an application for citizenship has been lodged until the application for citizenship has been finalised.

“Orphaned” and “abandoned” shall have the meaning given in the Children’s Act of 2005, as Amended in 2007.

“Unaccompanied child” is defined as a child under the age of 18 years who is in South Africa without being in the care of a parent or guardian.

Adding such language to the proposed legislation shall have a salutary effect on the status of significant numbers of children, giving them increased access to necessary care and, in the words of Earl Warren, giving them the “right to have rights.” The right to have rights is surely in the best interests of a child.

The AIDS epidemic in South Africa makes this addition a particularly prudent and timely step to relieve child suffering. In 2007, the United Nations Children’s Fund (UNICEF)ⁱ estimated that 1 400 000 AIDS orphans—children who have lost one or both parents to AIDS—were living in South Africa. AIDS orphans make up 56% of all orphans in the country. The majority of these AIDS orphans are South African and those who are foreign will in all likelihood remain here indefinitely. The number of foreign AIDS orphans is very small but their need for protection from statelessness is of concern. In addition, the highly migratory populations of Sub-Saharan Africa currently includes upwards of 14 million AIDS orphans. With HIV and AIDS continuing to spread, we can expect the number of AIDS orphans to increase. As such, South Africa should do its part to ensure that such children are protected by granting stateless unaccompanied, orphaned and abandoned children within its borders the full enjoyment of its citizenship.

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6. Durban Refugee Service Providers Network, Kwa Zulu Natal
7. Centre for the Study of Violence and Reconciliation (CSVr)
8. Refugee Rights Centre, Nelson Mandela Metropolitan University, Port Elizabeth
9. University of Witwatersrand, Forced Migration Studies Programme, Johannesburg

ⁱ Children and AIDS: A stocktaking report , UNICEF, 2007 http://www.unicef.org/publications/index_38048.html